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

Written by Seung Chan Rhee and Alan Zheng

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

A cruise goes wrong. Passengers, Australian and non-Australian, want relief under the *Australian Consumer Law* (*ACL*). They commence representative proceedings alleging breaches of consumer law, and negligence in the Federal Court of Australia. The Australian court must first resolve the conflict of laws problems posed – problems as sustained as they have been complex in the history of private international law.

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

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

Background

The Ruby Princess' passengers contracted on different sets of terms and conditions (US, UK and AU). The US and UK terms and conditions contained

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

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

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

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

the extent to which the law of the forum is applicable in resolving the rights and liabilities of the parties is a material consideration … the selected forum should not be seen as an inappropriate forum if it is fairly arguable that the substantive law of the forum is applicable in the determination of the rights and liabilities of the parties.

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

First Instance

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

As noted in *Voth* and *Oceanic Sun Line*, simply because the contract selected the

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

Carnival appealed.

Full Court

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

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

The passengers appealed to the High Court.

The Interaction between a Mandatory Law and an Exclusive Jurisdiction Clause

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

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

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

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

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

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

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

Interpretation (*both* in the choice of law sense and statutory interpretation) invites reasonable arguments that cut in both directions requiring judicial adjudication. Take, for example, Carnival's response to the passengers' argument that the *ACL's* consumer protection policy weighs against the use of choice of law clauses to evade liability. Carnival contended any evasion can be controlled by a

two-step approach: firstly, applying the *ACL's* unfair contract provisions to the choice of law clause itself and, if it the clause is void, *only then* secondly applying the provisions to the contract as a whole. However, this only shifts the application of statutory interpretation to an anterior stage, namely how and when a given choice of law clause, on its face, might be considered unfair. To the extent any determination of unfairness could be made, this turns on the consequences of the clause *per se* than any particular manner of wording. Such an outcome equally produces unpredictability as to the anticipated effect and application of the forum law.

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

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

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

through the modern focus on text, context and purpose, is not disciplined by facts or pleadings. Instead, it is shaped by submissions and argumentation actuated by the connotative ambiguity found in statute.

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

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

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

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

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

No doubt there is some truth to Carnival's submission that Parliament did not intend to render Australian courts the global arbiters of consumer contracts.

However, subject to a pronouncement to the contrary from the High Court, the judgments to date in *Karpik v Carnival plc* suggest a statutist analysis, however uncertain, difficult or comity-ablating, will be a necessary precondition to determining the weight given to the wording of a choice of law clause. This is ultimately a consequence of the premium placed on a purposive construction to mandatory laws arising out of the home forum. For better or worse (and a strong case has been made for worse – see Maria Hook, 'The "Statutist Trap" and Subject-Matter Jurisdiction' (2017) 13(2) *Journal of Private International Law* 435), '[i]f the purposive approach to statutory interpretation gives rise to forum shopping in favour of Australian courts, so be it' (see Douglas and Loadsman, 20).

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

It is important to recall that the presumption was always couched in the language of construction. In *Wanganui-Rangitiei Electric Power Board v Australian Mutual Provident Society,* Dixon J stated (at 601):

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

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

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

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

Most recently in *BHP Group Ltd v Impiombato*, Kiefel CJ and Gageler J (at [23]) considered the common law presumption resembled a 'presumption *in favour of* international comity' rather than one *against* extraterritorial operation – although

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

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

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

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

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

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

Judgment is reserved in the High Court.

Seung Chan Rhee is a solicitor at Herbert Smith Freehills. Alan Zheng is an Australian-qualified lawyer at Linklaters LLP. The views in this note are the views of the authors alone. The usual disclaimers apply.

German Federal Court of Justice: Article 26 Brussels Ia Regulation Applies to Non-EU Defendants

By Moses Wiepen, Legal Trainee at the Higher Regional Court of Hamm, Germany

In its decision of 21 July 2023 (V ZR 112/22), the German Federal Court of Justice

confirmed that Art. 26 Brussels Ia Regulation applies regardless of the defendant's domicile. The case in question involved an art collector filing suit against a Canadian trust that manages the estate of a Jew who was persecuted by the German Nazi regime. The defendant published a wanted notice in an online Lost Art database for a painting that the plaintiff bought in 1999. The plaintiff considers this as a violation of his property right.

In general, following the procedural law principle of *actor sequitur forum rei*, the Canadian trust should be brought to court in Canadian courts. Special rules are required for jurisdictions that deviate from this principle. The lower German court confirmed its authority based on national rules on jurisdiction. Under sec. 32 German Civil Procedure Code, tort claims can be brought to the court where the harmful act happened regardless of the defendant's domicile. The German Federal Court of Justice established its jurisdiction on Art. 26 Brussels Ia Regulation as the *lex specialis*.

This may appear surprising as the scope of the Brussels Ia Regulations is generally limited to defendants domiciled in a member state of the EU, Artt. 4, 6 Brussels Ia Regulation. Exceptions to this rule are stated in Art. 6 Brussels Ia Regulation and – relying on its wording – limited to the Artt. 18 I, 21 II, 24 and 25 Brussels Ia Regulation. Nevertheless, due to the common element of party autonomy in Art. 25 and Art. 26 Brussels Ia Regulation, some parts of the literature – and now the German Federal Court of Justice – apply Art. 26 Brussels Ia Regulation to non-EU-domiciled defendants as well. The German Federal Court of Justice even considers this interpretation of Art. 26 Brussels Ia Regulation as *acte clair* and thus, it sees no need for a preliminary ruling of the CJEU under Art. 267 TFEU.

However, the Court's argumentation is not completely persuasive. Firstly, the wording of Art. 26 Brussels Ia Regulation is open to other – even opposing – interpretations. Secondly, although it contains a party-autonomous element, Art. 26 Brussels Ia Regulation does not depend on the defendant's choice of court. In fact, courts are not required to verify defendant's awareness of jurisdictional risks in order to proceed in a court lacking jurisdiction. And unlike Art. 25 Brussels Ia Regulation, Art. 26 Brussels Ia Regulation can be part of a litigation strategy detrimental to the defendant

A detailed analysis on the court's ruling in German is available here.

This week begins the Special Commission on the 1980 Child Abduction Convention and the 1996 Child Protection Convention

Written by Mayela Celis

The eighth meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention will be held from 10 to 17 October 2023 in The Hague, the Netherlands. For more information, click here.

One of the key documents prepared for the meeting is the Global Report – Statistical study of applications made in 2021 under the 1980 Child Abduction Convention, where crucial information has been gathered about the application of this Convention during the year 2021. However, these figures were perhaps affected by the Covid-19 pandemic as indicated in the Addendum of the document (see paragraphs 157-167, pp. 33-34). Because it refers to a time period in the midst of lockdowns and travel restrictions, it is not unrealistic to say that the figures of the year 2021 should be taken with a grain of salt. For example, the overall return rate was the lowest ever recorded at 39% (it was 45% in 2015). The percentage of the combined sole and multiple reasons for judicial refusals in 2021 was 46% as regards the grave risk exception (it was 25% in 2015). The overall average time taken to reach a final outcome from the receipt of the application by the Central Authority in 2021 was 207 days (it was 164 days in 2015). While statistics are always useful to understand a social phenomenon, one may only wonder why a statistical study was conducted with regard to applications during such an unusual year – apart from the fact that a Special Commission meeting is taking place and needs recent statistics -, as it will unlikely reflect realistic trends

(but it can certainly satisfy a curious mind).

Other documents that are also worth noting are the following (both Preliminary Documents and Information Documents):

Child abduction and asylum claims

- Prel. Doc. No 16 of August 2023 – Discussion paper on international child abduction return applications where the taking parent lodged a parallel asylum claim. This document submits the following for discussion and includes a useful annex with decisions rendered in the UK, Canada and USA about this issue (SC stands for Special Commission):

43. The SC may wish to discuss how the issue of delays in processing the asylum claims could be addressed when a return application is presented, and what the solutions could be to avoid such delays ultimately pre-empting a return application under the 1980 Child Abduction Convention, in particular:

a. Bearing in mind the confidentiality rules that apply to asylum proceedings, consideration can be given to whether general information can be shared, where possible and appropriate, (between authorities of the requested State/country of asylum only) for example, regarding timeframes and average duration periods, steps or stages of such proceedings.

b. Where possible and appropriate, consideration can be given to whether asylum claims can be treated and assessed on a priority basis when a return application is presented under the 1980 Child Abduction Convention.

c. Consideration can be given to whether stays of return proceedings can be avoided in order to prevent that allegations are made concerning the settlement of the child in the new environment, and whether an eventual stay can only be considered regarding the implementation and enforcement of the return order.

44. The SC may wish to discuss to what extent it is possible to have some level of coordination or basic exchange of information between the different spheres of the government and competent authorities that process the different proceedings, when/if allowed by the relevant domestic laws and procedures and respectful of confidentiality and judicial independence principles. Where

possible and appropriate, such coordination could:

a. Encompass, for example, that the competent authority responsible for the return application informs the competent authority responsible for the asylum claim of the return application.

b. Include establishing procedures, guidelines or protocols to ensure that both proceedings are dealt with expeditiously.

This is a sensitive topic that deserves attention, as disclosing that a child is present in a specific State can have a great impact on the safety of the person seeking asylum (usually, the parent).

Transfer of jurisdiction under 1996 Child Protection Convention

- Prel. Doc. No 17 of August 2023 – Transfer of jurisdiction under the 1996 Child Protection Convention (Arts 8 and 9). It is submitted the following:

55. The SC may wish to consider adopting the following Conclusions and Recommendations:

a. The SC invited Contracting States, which have not done so already, to consider designating, in accordance with the Emerging Guidance regarding the Development of the IHNJ, one or more members of the judiciary for the purpose of direct judicial communications within the context of the IHNJ.

b. Recalling Article 44 of the 1996 Convention, the SC encouraged Contracting States to designate the authorities to which requests under Articles 8 and 9 are to be addressed, as such a designation could greatly assist in improving the processing times of requests for a transfer of jurisdiction. Depending on domestic policies and requirements relating to the judiciary, Contracting States may choose to designate a member of the IHNJ (if applicable) and / or the Central Authority to receive requests for transfers of jurisdiction.

c. The SC encouraged authorities requesting a transfer of jurisdiction to, in the first place, informally consult their counterparts in the requested State, to ensure that their requests are as complete as possible and that all necessary information and documentation is furnished from outset to meet the requirements of the requested State.

d. Recalling Principle 9 of the Emerging Guidance regarding the Development of the IHNJ,139 the SC encouraged Central Authorities that are involved in a transfer of jurisdiction request and judges engaging in direct judicial communications pertaining to a request for a transfer of jurisdiction to keep one another informed regarding the progress and outcome of such a request. Doing so could further assist in addressing delays and enhance the efficiency of processing requests under Article 8 or 9 of the 1996 Convention.

e. The SC invited the PB to circulate the questionnaire annexed to Prel. Doc. No 17 of August 2023 to all Contracting States to the 1996 Convention, with a view collecting information from judges and Central Authorities regarding requests under Article 8 or 9. The SC further invited the PB to review Prel. Doc. No 17, in the light of the responses from Contracting States, and to submit the revised version of Prel. Doc. No 17 to the Council on General Affairs and Policy (CGAP). The SC noted that it will be for CGAP to determine the next steps in this area (e.g., whether there is a need to form a Working Group consisting of judges and representatives from Central Authorities to identify good practices pertaining to requests for a transfer of jurisdiction under the 1996 Convention).

The transfer of jurisdiction (as foreseen in those articles) is sometimes little known in some civil law States (in particular, Latin America) so these suggestions are very much welcome.

Placement or provision of care of a child (incl. kafala) under the 1996 Child Protection Convention

- Prel. Doc. No 20 of September 2023 – Placement or provision of care of the child in another Contracting State under the 1996 Child Protection Convention (Art. 33). Interestingly, this document includes as annex Working Document No 10 Proposal from the delegation of Morocco about "The Kafala procedure as established by the law of 10 September 1993 on abandoned children" of 30 September 1996. This Prel. Doc. suggests the following:

64. The SC may want to discuss what clearly falls within the scope of application of Article 33 of the 1996 Convention and what clearly falls out of the scope of application of Article 33.

65. The SC may want to consider discussing the use of the term "approved" in C&R No 42 of the 2017 SC as it does not appear in Article 33 of the 1996 Convention.

66. The SC may want to consider whether additional information should be provided in the Country Profile for the 1996 Convention in addition to what appears under Sections 16 to 19 and 36 of the draft Country Profile to assist with the implementation of Article 33.

67. The SC may want to consider developing a Guide, illustrated by examples, to assist Contracting States with the implementation and operation of Article 33. In addition to covering issues relating to the scope of application of Article 33, the Guide could cover the different issues of procedure relating to Article 33 as presented in this Prel. Doc. Such a Guide would raise awareness as to the mandatory nature of Article 33. The SC may wish to recommend that such a Guide be developed by a Working Group.

68. The SC may want to consider the need to develop a model recommended form for the purpose of requests under Article 33.

The conclusions suggested in this document are very much needed, in particular given that the operation of Article 33 of the 1996 Convention in the Contracting States is far from ideal (the FAMIMOVE project is studying this Article in the context of kafala).

The Guide to Good Practice on the grave risk exception (art. 13(1)(b)) under the Child Abduction Convention – pointing to a mistake in the Guide

- Info. Doc. No 6 of October 2023 – "A mistake waiting to happen: the failure to correct the Guide to Good Practice on Article 13(1)(b)" – Article by Professor Rhona Schuz and Professor Merle Weiner. I fully endorse the position adopted by Professors Schuz and Weiner and have included my views on this issue in a previous post see here and have discussed this at length in my recent book on international child abduction.

The Note of the International Social Service (ISS) where it highlights (perhaps rightfully), among other things, that the Malta Process and the

Central Contact Points are underutilized

- Info. Doc. No 1 of February 2023 – ISS – General information & Response to Prel. Doc. No 2 of October 2022

The Note of the International Association of Child Law Researchers showcases the new publication *Research Handbook on International Child Abduction: The 1980 Hague Convention* (Cheltenham: Edward Elgar Publishing, 2023) – We will be preparing a book review, which will be posted on CoL – stay tuned!

- Info. Doc. No 4 of September 2023 – International Association of Child Law Researchers (IACLaR) – Observer Note

---

Judicial Application of the 1980 HCCH Convention in Morocco

The question of the accession (or reluctance to accede) of Muslim countries to the 1980 HCCH Convention has attracted the interest of scholars from Muslim countries and abroad. Scholars who have addressed this issue have come to different (sometimes contradictory) conclusions, especially when it comes to the influence of classical Islamic rules and principles on the attitudes and policies of Muslim states. Unfortunately, it is not uncommon that the available studies on this subject do not take into account the actual judicial practice of Muslim jurisdictions and focus more on the (theoretical) compatibility (or not) of Islamic rules and principles underlying the 1980 HCCH Convention. This post briefly presents some decisions dealing with the issue of cross-border child abduction under the 1980 HCCH Convention in a Muslim state, **Morocco**, but without going into too much into details or assessment, as this deserves to be done properly in a dedicated article.

Morocco became a member state of the HCCH in 1993 and a party to the 1980 HCCH Convention in 2010. It is often presented in literature as the first Islamic country to ratify the 1980 HCCH Convention. The Convention effectively entered into force in Morocco on March 1, 2012, with the publication of the text of the Convention in the Official Gazette (No. 6026). Since then, and for more than a decade, Moroccan courts have been dealing with cross-border abduction cases under the Convention. To my knowledge, there are so far ***seven*** Supreme Court decisions on the application of the 1980 HCCH Convention. Surprisingly, these cases have not been included in the database maintained by the HCCH (INCADAT), nor (apparently) have they been reported or commented on elsewhere, although they provide extremely valuable material for the study of the operation of the 1980 HCCH Convention in an Islamic context.

The seven cases are summarized in the following tables:

Case 1	**Ruling No. 283 of 2 June 2015 (Case No. 443/2/1/2014)**
Taking Parent	Mother (M), Moroccan national
Left behind Parent	Father (F), Moroccan national, domiciled in France
Child(ren)	1 (son) Moroccan national born in France
Age (at the time of the return order application as deduced from the facts)	4
Return requested to	France
Cited Articles	Art. 3, Art. 12, Art. 13
Legal Issue(s)	Whether there was a wrongful removal of the child and whether the 1980 HCCH Convention should apply

Ruling (loose summary)	M and F had their habitual residence in France with their child before M returned to Morocco with the child. According to Frech law (Art. 371-1 and 2 Civil Code), which is the law of the child's place of habitual residence prior to its removal to Morocco, custody (*hadhana*) is a right jointly shared by the parents during their marriage Morocco has ratified the 1980 HCCH Convention, thus its application should take precedence over national law upon its publication. The court of the appealed decision which failed to apply the HCCH Convention violated the Constitution and the provisions of the Convention
Outcome	Appeal admitted. The appealed decision rejecting the return of the child overturned

Case 2	**Ruling No. 90 of 26 January 2016 (Case No. 286/2/1/2015)**
Taking Parent	Father (F), Moroccan national, domiciled in Morocco
Left behind Parent	Mother (M), German national, domiciled in Germany
Child(ren)	4 (3 sons and 1 daughter). All Moroccan nationals
Age (At the time of the return order application as deduced from the facts)	13, 11, 9, and 6
Return requested to	Germany

Cited Articles	Art. 2, art. 3
Legal Issue(s)	Whether there was child abduction in the meaning of the 1980 HCCH Convention
Ruling (loose summary)	The children's habitual residence is in Morocco (as they have been living there with their father since M decided to return to Germany). Therefore, the conditions for the application of the Convention are not met.
Outcome	Appeal admitted. The appealed decision ordering the return of the children overturned

Case 3	**Ruling No. 196 of 27 March 2018 (Case No. 660/2/1/2016)**
Taking Parent	Mother (M), Muslim Moroccan
Left behind Parent	Father (F), non-Muslim Italian
Child(ren)	2 (sons) born out of wedlock in Italy
Age (at the time of the return order application as deduced from the facts)	One has 7, the age of the other is not unclear due to confusing details in the judgment
Return requested to	Italy
Cited Articles	Art. 3, Art. 12, Art. 14
Legal Issue(s)	Whether the application of the 1980 HCCH Convention depends on the existent of a legitimate filiation between the children and their father

Ruling (loose summary)	It was established that the two children had been removed from their habitual residence in Italy to Morocco in violation of the provisions of the 1980 HCCH Convention, which does not require the existence of legitimate bond (filiation) between the parents and the child.
Outcome	Appeal rejected. The appealed decision ordering the return of the children affirmed

Case 4	**Ruling No. 303 of 28 July 2020 (Case No. 629/2/2/2018)**
Taking Parent	Mother (M), Moroccan
Left behind Parent	Father (F), Moroccan, domiciled in Belgium
Child(ren)	1 (daughter)
Age (at the time of the return order application as deduced from the facts)	unclear
Return requested to	Belgium
Cited Articles	Art. 3, Art. 5, Art. 16
Legal Issue(s)	Whether the mother’s action for custody can be admitted despite the ongoing proceedings for the return of the child return under the 1980 HCCH Convention
Ruling (loose summary)	By rendering a decision on the custody despite the ongoing proceedings to order the return of the child, the court of the appealed decision violated the provisions of the Convention

Outcome	Appeal admitted. The appealed decision conferring custody to the mother overturned

Case 5	**Ruling No. 38 of 2 February 2021 (Case No. 1226/2/1/2019)**
Taking Parent	Father (seems to be Moroccan)
Left behind Parent	Mother (seems to be Canadian)
Child(ren)	2 (daughters)
Age (at the time of the return order application as deduced from the facts)	11, 5
Return requested to	Canada (Ontario)
Cited Articles	Art. 13(4)
Legal Issue	Whether the opinion of the children who refused to return with their mother should be heard and taken into account
Ruling (loose summary)	The court of the appealed decision which disregarded the father’s arguments according to which his daughters refuse to return to Canada and that they suffer from their mother’s mistreatment and refused to accept his request to initiate an investigation in order to find the truth violated the provisions the Convention
Outcome	Appeal admitted. The appealed decision ordering the return of the children overturned with remand

Case 6	**Case 6: Ruling No. 297 of 8 June 2021 (Case No. 61/2/1/2020)**

Taking Parent	Mother (M) (nationality unclear, but seems to be Moroccan)
Left behind Parent	Father (F) (nationality unclear, but seems to be Moroccan) domiciled in Belgium
Child(ren)	1 (son). The child in this case had a brother
Age (at the time of the return order application as deduced from the facts)	8
Return requested to	Belgium
Cited Articles	Art. 3, Art. 17
Legal Issue	Whether the judgment conferring custody to the taking parent in the State where the child was wrongfully retained could justify the refusal to order the return of the child to the State of its habitual residence
Ruling (loose summary)	The judgment rendered in the State where the child was retained attributing custody of the child should not be taken into account. The court of the appealed decision which considered that the M's refusal to return the child constituted a wrongful retention within the meaning of article 3, overturned the first instance decision of the CFI and ordered the return of the child to Belgium, exercised its discretion in assessing the facts and correctly took into account the best interests of the child
Outcome	Appeal dismissed. The appealed decision ordering the return of the child affirmed

Case 7	**Ruling No. 421 of 26 July 2022 (Case No. 200/2/1/2019)**
Taking Parent	Father (F) (nationality unclear but seems to be Moroccan)
Left behind Parent	Mother (M) (nationality unclear but seems to be Moroccan) domiciled in Belgium
Child(ren)	3 (1 daughter and 2 sons)
Age (at the time of the return order application as deduced from the facts)	10 and 8 for the sons, 3 for the daughter
Return requested to	Belgium
Cited Articles	Art. 13 [(1)(b)]
Legal Issue	Whether there was grave risk that could justify the refusal to return the children to their place of habitual residence
Ruling (loose summary)	The evidence and testimony presented to the court show that the mother, who was prosecuted for adultery, verbally and physically abused the children and lacked moral integrity and rectitude (as she used to invite a stranger into the home and cheated on the father in front of the children); therefore, returning the children to their mother would expose the children to grave risks.
Outcome	Appeal admitted. The appealed decision which ordered the return of the children overturned

Overview of the 2023 Amendments to Chinese Civil Procedure Law

Written by NIE Yuxin, Wuhan University Institute of International Law

1. Background

China's Civil Procedure Law was enacted in April 1991 by the Fourth Session of the Seventh National People's Congress. Since then, it had undergone four revisions in 2007, 2012, 2017, and 2021. However, no substantial revisions were made to the provisions concerning foreign-related civil litigation. The latest amendments to the Civil Procedure Law in 2023, referred to as the new CPL, involve 26 amendments, including 14 modified articles and 15 new additions. Notably, 19 changes deal with the special provisions on cross-border procedures.

2. Jurisdiction

2.1 Jurisdiction grounds

Special jurisdiction: The new CPL expands the scope of jurisdiction by introducing additional connecting factors and fall-back provisions. The new law widens the category of disputes previously covered from "contractual disputes or other property rights disputes" to "litigation other than disputes involving personal relationships" (Art. 276, para. 1). Compared to the previous CPL, this expansion encompasses non-property rights disputes involving personal relationships, such as foreign-related marriage, adoption, maintenance, and guardianship disputes, thereby addressing the previous omission of non-property rights disputes. Further, the new CPL introduces "the place of torts committed within the territory of China" as a new connecting factor for jurisdiction. Additionally, a new fall-back provision of "other appropriate connections" is included, granting

Chinese courts greater flexibility over foreign-related cases. Article 276 stipulates that the Chinese court may have jurisdiction if the dispute is of other appropriate connections with China (Art. 276, para. 2).

It is worth noting that the "other appropriate connections" provision has a certain degree of openness. What constitutes an appropriate connection is ambiguous. Previously, the Supreme People's Court established judicial guidance on this issue regarding standard-essential patents cases. For instance, in Godo Kaisha IP Bridge 1 v. Huawei, the Supreme People's Court found an appropriate connection between the city of Dongguan and the dispute, citing evidence that Huawei Terminal Co., Ltd. – being primarily responsible for manufacturing and selling Huawei's smart terminal products – was domiciled there. Dongguan would also be a key location for implementing the essential patents at issue following any agreement between the parties. On this basis, the Supreme People's Court deemed Dongguan to have an appropriate connection to the case. By incorporating the principle of appropriate connection into the new CPL, its application scope expands beyond intellectual property cases to other foreign-related cases. However, determining the standards for appropriate connection in practice will undoubtedly pose a significant challenge going forward.
To some extent, this provision allows Chinese courts the flexibility to exercise jurisdiction in appropriate circumstances, providing a channel for Chinese enterprises and citizens to seek remedies from domestic courts when their interests are harmed abroad. In practice, courts should take caution when assessing jurisdiction based on the appropriate connection. From a systematic perspective, the appropriate connection should bear some resemblance to the jurisdictional connecting factors listed in this article, such as the place of contract, place of performance, location of the subject matter of the litigation, location of attachable assets, place of the tort, and the domicile of the defendant's representative. In addition, China could consider deriving insights from the indirect jurisdiction grounds established in the Hague Judgement Convention 2019. These grounds represent a consensus and are accepted by the majority of countries. If China were to refer to the Convention's standards when considering appropriate connection, it would gain greater predictability and reciprocity. This could facilitate the recognition and enforcement of Chinese judgments abroad, especially among Convention contracting states.

Choice of court agreement: Prior to this amendment, except for disputes related

to foreign maritime matters, choice of court agreements designating Chinese court were subject to the prerequisite that the case has a practical connection with China. While China established two international commercial courts to specially hear international commercial cases, the cases they can accept are still limited by the requirement of actual connection under the legal framework of previous CPL. This overly conservative jurisdiction regime hampered the international commercial courts from taking jurisdiction over offshore cases without connection to China.

The newly introduced Article 277 of the CPL breaks this constraint. It allows the parties to choose Chinese courts by writing even if Chinese courts do not have any connection with the dispute. This legislative change provides a clear legal basis for Chinese courts to exercise jurisdiction over offshore cases, expands both the types of cases they can accept and their geographical reach. Moving forward, this change will benefit Chinese courts by enabling them to actively exercise jurisdiction and provide judicial support for the Belt and Road Initiative, positioning China as a preferred location for international litigation. Ultimately, it will enhance the international competitiveness and influence of Chinese judiciary.

However, the amendment does not specify whether parties can choose foreign courts without any connections with the dispute. To align with international common practice and promote reciprocity, it is recommended to clearly state that parties have the freedom to choose any courts, Chinese or foreign, to hear cross-border disputes even if the courts lack practical connections with the dispute.

The amendment does not address some matters that remain unclear in Chinese law. For example, which law applies to determine the substantive validity of jurisdiction agreements? In practice, courts may apply either the law of the forum or the law governing the main contract to this matter, leading to uncertainty.

Responding jurisdiction: Article 278 of the new CPL introduces the rule of responding jurisdiction. It stipulates that if a party does not raise an objection to the jurisdiction and participates in the proceedings by submitting a defence or filing a counterclaim, the Chinese court shall be deemed to have jurisdiction (Art. 278). Further, in contrast to the previous draft amendment, the new CPL expands the scope of jurisdiction by appearance from the defendant to all parties involved.

Exclusive jurisdiction: Under the previous CPL, exclusive jurisdiction covered l disputes related to immovable property, port operations, succession, and contracts involving Sino-foreign joint ventures, Sino-foreign cooperative business

enterprises, and Sino-foreign cooperative exploration and development of natural resources. The new CPL adds two additional categories of cases under exclusive jurisdiction: disputes arising from the establishment, dissolution, liquidation of legal persons or other organizations established within China's territory, and disputes related to the validity of intellectual property rights granted through examination within China's territory (Art. 279). These amendments are consistent with international common practice.

2.2 Conflict of jurisdiction, Lis pendens and Forum Non Conveniens

Parallel proceedings: The new CPL formally adopts the rule for parallel proceedings. First of all, the law accepts parallel proceedings. Article 280 explicitly provides that: "For the same dispute arises between the parties involved, if one party initiates a lawsuit in a foreign court and the other party initiates a lawsuit in a Chinese court, or if one party files lawsuits in both a foreign court and a Chinese court, the Chinese court may accept the case if it has jurisdiction according to this law." However, if the parties have entered into an exclusive jurisdiction agreement selecting a foreign court, provided it does not violate the provisions of the CPL regarding exclusive jurisdiction and does not involve China's sovereignty, security, or public interests, the Chinese court may decide not to accept the case; if the case has already been accepted, the court shall dismiss the lawsuit (Art. 280). This amendment reflects the respect for the parties' autonomy in cases where it does not violate the principle of exclusive jurisdiction and demonstrates China's active implementation of international judicial cooperation through legislation.

First-in-time rule: Article 281 of the new CPL adopts the first-in-time rule to address jurisdictional conflicts arising from international parallel litigation. After a Chinese court accepts a case under Article 280, Article 281 then permits the Chinese court to suspend its proceedings if a party applies in writing on the grounds that proceedings involving the same parties and subject matter have already commenced earlier before a foreign court. However, if the first-seized court fails to exercise jurisdiction, the Chinese court may resume the proceedings to protect the parties' legitimate right to litigation. According to this provision, the parties have significant discretion in requesting the suspension or resumption of litigation.

The first-in-time rule includes two exceptions: (1) when the parties agree to the jurisdiction of the Chinese courts, or the dispute falls under the exclusive

jurisdiction of the Chinese courts, and (2) when it is clearly more convenient for the case to be heard by the Chinese courts. The issue here is that it is not clear whether the choice of Chinese courts by the parties includes non-exclusive selection. In addition, the determination of whether the Chinese courts are clearly more convenient requires the court to exercise discretionary judgment, which introduces uncertainty.

Forum Non Conveniens: The 2023 amendments formally accept forum non conveniens and relaxed the conditions for its application in compared to previous judicial interpretation. In order to apply forum non conveniens the defendant must raise an objection to jurisdiction, and the court will not assess forum non conveniens by its own motion. Article 282 listed five factors for the court to exercise discretion: (1) The underlying facts of the dispute did not occur within China's territory, and it is significantly inconvenient for the Chinese court to hear the case and for the parties to participate in the proceedings; (2) There is no agreement between the parties to submit to the jurisdiction of the Chinese court; (3) The case does not fall under the exclusive jurisdiction of the Chinese court; (4) The case does not involve China's sovereignty, security, or public interests; (5) It is more convenient for a foreign court to hear the case. The standard to apply forum non conveniens is thus more relaxed than China's previous practice. The difference between the CPL 2023 and the Judicial Interpretation of CPL 2022 can be found in this table.

Article 530 of the Judicial Interpretation of CPL 2022	Article 282(1) of the CPL 2023
When a foreign-related civil case meets the following conditions simultaneously, the Chinese court may render a ruling to dismiss the plaintiff's lawsuit and inform them to file a lawsuit with a more convenient foreign court:	For foreign-related civil case accepted by the Chinese court, **where the defendant raises an objection to jurisdiction**, and simultaneously meets the following conditions, the court may render a ruling to dismiss the lawsuit and inform the plaintiff to file a lawsuit with a more convenient foreign court:

	(1) The underlying facts of the dispute did not occur within China's territory, and it is significantly inconvenient for the Chinese court to hear the case and for the parties to participate in the proceedings; ("*added*")
(1) The defendant requests that a more convenient foreign court has jurisdiction over the case or raises an objection to jurisdiction;	*"deleted"*
(2) There is no agreement between the parties to submit to the jurisdiction of the Chinese court;	(2) There is no agreement between the parties to submit to the jurisdiction of the Chinese court;
(3) The case does not fall under the exclusive jurisdiction of the Chinese court;	(3) The case does not fall under the exclusive jurisdiction of the Chinese court;
(4) The case does not involve the interests of China, its citizens, legal persons or other organizations;	(4) The case does not involve **China's sovereignty, security, or public interests**;
(5) The main facts in dispute did not occur within China's territory and Chinese law does not apply to the case, creating significant difficulties for the Chinese court in ascertaining facts and applying the law;	*"deleted"*
(6) The foreign court has jurisdiction over the case and it is more convenient for it to hear the case.	(5) It is more convenient for a foreign court to hear the case.

In practice, Chinese courts often refuse to apply the doctrine of forum non conveniens due to the criterion that the case does not involve the interests of China, its citizens, legal persons, or other organizations. Courts often assess whether a case involves Chinese interests or parties based on nationality or habitual residence. The removal of this criterion reduces the obstacles to the judicial application of the forum non conveniens doctrine.
Finally, to better safeguard parties' interests, Art. 282 (2) provides: if the foreign court refuses jurisdiction after the plaintiff's claim is dismissed, or fails to take necessary actions or render judgement within a reasonable period, and the plaintiff sues again in China, the Chinese court shall accept it. It aims to protect the claimant's effective access to justice.

3. Judicial assistance

Service of process abroad: Compared to domestic service of process, the process of serving documents in cross-border cases involves more complex procedures, longer duration and lower efficiency. This significantly affects the progress of cross-border judicial procedures. The new CPL enriches the means of cross-border service of process. While retaining the existing methods of service through treaties, diplomatic channels, and embassy channels, the CPL 2023 improves other methods of services and add additional modes of services. See the table below.

Article 274 of the CPL 2022	Article 283 of the CPL 2023
A court may serve process on a party which has no domicile within China's territory in the following manners:	A court may serve process on a party which has no domicile within China's territory in the following manners:
(1) in accordance with the provisions of an international treaty concluded or acceded to by the home country of the party to be served and China;	(1) in accordance with the provisions of an international treaty concluded or acceded to by the home country of the party to be served and China;

(2) through diplomatic channels;	(2) through diplomatic channels;
(3) by entrusting the service to Chinese embassy or consulate in the country where the party is domiciled, if the party is a Chinese national;	(3) by entrusting the service to Chinese embassy or consulate in the country where the party is domiciled, if the party is a Chinese national;
(4) by entrusting the service to the litigation agent authorized by the party to be served to receive service of process;	(4) by entrusting the service to the litigation agent **appointed by the party in this case**;
(5) by delivering the document to the representative office or a branch office or business agent authorized to receive service of process established by the party to be served within China's territory;	(5) by delivering the documents to the **solely funded enterprise**, representative office, branch office or authorized business agent established by the party to be served within China's territory;
	(6) where the party is a foreigner or stateless person who acts as the legal representative or main person in charge of a legal person or any other organization established within China's territory, and is a co-defendant with such legal person or other organization, by delivering the documents to such legal person or other organization; ("*added*")

	(7) where the legal representative or main person in charge of a foreign legal person or any other organization is within China's territory, by delivering the documents to such legal representative or main person in charge; ("*added*")
(6) by mail, if the law of the country where the party is domiciled permits service of process by mail and a receipt showing the date of delivery has not been returned within three months after the date of mailing, provided that other circumstances sufficiently show the document has been served;	(8) by mail, if the law of the country where the party is domiciled permits service of process by mail and a receipt showing the date of delivery has not been returned within three months after the date of mailing, provided that other circumstances sufficiently show the document has been served;
(7) by fax, email or any other means capable of confirming receipt by the party to be served;	(9) by **electronic means** capable of confirming the receipt of the documents by the recipient, **unless prohibited by the law of the country where the party is domiciled;**
	(10) by any other means agreed by the party, unless prohibited by the law of the country where the party is domiciled. ("*added*")

(8) by public announcement if none of the above means is feasible, in which case the document shall be deemed to have been served after six months from the date of the public announcement.	If none of the above means is feasible, public announcement shall be made, and the documents shall be deemed to have been served after **60 days** from the date of announcement.

Obtaining evidence abroad: Article 284 of the new CPL introduces provisions for obtaining evidence from abroad. In addition to the traditional methods of obtaining evidence through treaties or bilateral agreements with the country where the evidence is located, as well as through diplomatic channels, the new provision authorises other means to take evidence abroad, including entrusting Chinese embassy or consulate in the country where the party or witness is located to obtain evidence, obtaining evidence through real-time communication tools with the consent of both parties, and by other means agreed upon by both parties.

4. Recognition and enforcement of foreign judgments and arbitral awards

Requirement for the recognition and enforcement of foreign judgments: Articles 297 and 298 of the new CPL retain the principle of reciprocity as a prerequisite of recognition and enforcement of foreign judgement. They state that foreign judgments should be recognized and enforced in accordance with international treaties that China has concluded or based on the principle of reciprocity. However, the reciprocity principle raises the following issues.

Firstly, the term “reciprocity” is ambiguous, and China’s judicial practice of using the de facto reciprocity has made it difficult for many foreign court judgments to be recognized and enforced in Chinese courts. Secondly, although the “presumed reciprocity” standard has been suggested in the “Opinions of the Supreme People’s Court on Providing Judicial Services and Safeguards for the Belt and Road Initiative” and the “Nanning Declaration” adopted at the Second China-ASEAN Chief Justices’ Roundtable, these documents are not binding and this new standard has limited impact on judicial practice. Further, even if presumed reciprocity is adopted, there may still be arbitrary situations. For example, a foreign court may refuse to recognize a Chinese judgment because that the domestic judgment has already become res judicata, but this does not mean that

the foreign court will not recognize the Chinese judgment. Nevertheless, the existence of negative precedence may be enough to deny presumed reciprocity. Notably, Article 49 of the Minutes of the National Symposium on the Foreign-related Commercial and Maritime Trials 2021 establishes a reporting and notification mechanism for recognizing and enforcing foreign court judgments. It requires that in cases where the court needs to examine the application of the reciprocity principle, it should submit the proposed decision to the higher court in its jurisdiction for review. If the higher court agrees with the proposed handling, it should submit its review opinion to the Supreme People's Court for verification. Only after receiving a response from the Supreme People's Court can a ruling be made. In March 2022, the Shanghai Maritime Court, after seeking instructions from the Supreme People's Court, applied the standard of de jure reciprocity to determine the existence of reciprocity between China and the United Kingdom in the recognition and enforcement of civil and commercial judgments in the case of SPAR Shipping Co., Ltd. v. Dalian Xin Hua Logistics Holdings (Group) Co., Ltd. (2018) Hu 72 Xie Wai Ren 1. This was the first precedent case of reciprocity recognition by Chinese courts. Subsequently, on December 19, 2022, the High Court of England and Wales issued a summary judgment in the case of Hangzhou J Asset Management Co Ltd & Anor v Kei [2022] EWHC 3265 (Comm), recognizing and enforcing two Chinese judgments. This was the first time that Chinese court judgments were recognized and enforced in the UK. It opens up new possibilities for mutual recognition and enforcement of civil and commercial judgments between China and the UK.

Grounds for refusing to recognize and enforce foreign court judgments: Article 300 of the new CPL stipulates five grounds for refusing to recognize and enforce foreign court judgments. These include: (1) When the foreign court lacks jurisdiction over the case pursuant to Article 301 of the CPL; (2) When the defendant has not been properly served or, even if properly served, has not had a reasonable opportunity to present its case, or when a party lacking litigation capacity has not been adequately represented; (3) When the judgment or ruling was obtained through fraudulent means; (4) When a Chinese court has already rendered a judgment or ruling on the same dispute, or has recognized a judgment or ruling on the same dispute rendered by a court of a third country; (5) When it violates the basic principles of Chinese laws or undermines China's national sovereignty, security, or public interests. The prerequisite for recognizing and enforcing foreign court judgments is that the court rendering the judgment must

have jurisdiction over the case.

Article 301 clarifies the three circumstances for determining foreign courts' lack of jurisdiction over a case, namely: (1) the foreign court has no jurisdiction over the case according to its laws, or has jurisdiction according to its laws but lacks an appropriate connection to the dispute; (2) violation of the provisions of the CPL on exclusive jurisdiction; (3) violation of the parties' exclusive choice of court agreement. Among them, the "appropriate connection" requirement in the first provision also echoes the rules for determining special jurisdiction over foreign-related cases under Article 276. Determining appropriate connection will likely be a focus in future foreign civil and commercial litigation disputes.

Article 302 further elucidates the fourth ground for refusing to recognize and enforce judgments. This ground mainly applies to parallel proceedings. According to this provision, the court should review the previously rendered effective foreign court judgment and suspend domestic proceedings. If the foreign judgment meets the requirements for recognition and enforcement, it should be recognized and enforced, and the domestic proceedings should be dismissed. If it does not meet the requirements for recognition and enforcement, the domestic proceedings should resume. This provision aligns with Article 7(1)(5) and (6) of the HCCH Judgment Convention 2019, which China signed and joined on 2019, but has not yet ratified.

Recognition and enforcement of foreign arbitral awards: A significant change pertaining to arbitration decisions in the new law is that it clearly establishes the "place of arbitration" as the standard for determining the nationality of an arbitration decision. See the table below.

Article 287(2) of the CPL 2022	Article 297(2) of the CPL 2023

Where a party applies for enforcement of an effective arbitration award of an international arbitral institution of China, if the party against whom enforcement is sought or the property thereof is not within China's territory, the applicant shall apply directly to the foreign court having jurisdiction for recognition and enforcement.	Where a party applies for enforcement of an effective arbitration award **which is made within China's territory**, if the party against whom enforcement is requested or its property is not within China's territory, the applicant may apply directly to the foreign court having jurisdiction for recognition and enforcement.
Article 290 of the CPL 2022	Article 304 of the CPL 2023
Where an arbitration award of a foreign arbitral institution requires recognition and enforcement by a Chinese court, a party shall apply directly to China's intermediate court at the place of domicile of the party against whom enforcement is sought or at the place where the property thereof is located, and the Chinese court shall process the application in accordance with an international treaty concluded or acceded to by China or under the principle of reciprocity.	Where **a legally effective arbitral award which is made outside China's territory** requires recognition and enforcement by a Chinese court, a party may apply directly to China's intermediate court at the place of domicile of the party against whom enforcement is sought or at the place where the property thereof is located.

	If the domicile of the party against whom the application is made or its property is not within China's territory, the party may apply to the intermediate court of the place where the applicant is domiciled or that has appropriate connection with the dispute adjudicated in the award. (*"added"*)
	The Chinese court shall process the application in accordance with an international treaty concluded or acceded to by China or under the principle of reciprocity.

Chinese judicial practice on the nationality of arbitral awards has shifted from the "the location of the arbitral institution" standard to the "place of arbitration" standard. Several landmark cases reflect this change. The new CPL further cements the seat of arbitration standard, aligning with international practices. When parties apply to Chinese courts for recognition and enforcement of arbitration rulings made by foreign arbitration institutions within China, it facilitates their recognition and enforcement. This change not only encourages foreign arbitration institutions to conduct arbitration within China, but is also better enables Chinese courts to exercise judicial supervision.

5. Foreign immunity

In this revision of the CPL, a specific provision is added to clarify that in civil litigation involving foreign states, the relevant laws on immunity of foreign states in China shall apply; if no provisions are specified, the CPL shall apply (Art. 305). It is worth noting that the Law on Immunity of Foreign States was promulgated

on September 1, 2023, and will be implemented from January 1, 2024. The Law on Immunity of Foreign States primarily stipulates the conditions under which a foreign state can become a defendant in a legal proceeding in China, hence providing a legal basis for when a foreign state cannot claim immunity from the jurisdiction of Chinese courts. On the other hand, the CPL provides the general procedural framework for all civil cases, and determines jurisdictional rules. This includes when and which court in China has the power to hear a case. So, essentially, the CPL determines which specific court has jurisdiction over the case, while the Law on Immunity of Foreign States regulates the separate substantive issue of whether the foreign state defendant is immune from such jurisdiction.

6. Conclusion

The 2023 amendments to the CPL have brought about significant improvements to the special provisions governing procedures for foreign-related civil litigation. The new amendment not only takes into account China's domestic situations but also keeps up with the latest international legislative developments in the field, drawing on the latest achievements in international legislation. Some provisions have learnt from the latest international framework, such as the HCCH Choice of Court Convention 2005 and HCCH Judgment Convention 2019.

Of course, some new challenges emerge. First, how to define the concept of appropriate connection as a new jurisdiction ground. Second, the asymmetric approach that allows the parties to choose unrelated Chinese courts but requires the chosen foreign court to have practical connection is controversial. Thirdly, the principle of reciprocity as a prerequisite remains a barrier to enforce foreign judgments in China. When the refusal grounds are adopted, which are enough to protect Chinese interests, the requirement of reciprocity becomes unnecessary and redundant. Nonetheless, more clarification will be introduced in practice which hopefully will address some of the above problems.

China Adopts Restrictive Theory of Foreign State Immunity

Written by Bill Dodge, the John D. Ayer Chair in Business Law and Martin Luther King Jr. Professor of Law at UC Davis School of Law.

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.