Measure twice, cut once: Dutch case Presta v VLEP on choice of law in employment contracts

Presta v VLEP (23 june 2023) illustrates the application of the CEJU's Gruber Logistics (Case C-152/20, 15 July 2021) by the Dutch Supreme Court. In order to determine the law applicable to an individual employment contract under article 8 Rome I, one must compare the level of protection that would have existed in the absence of a choice of law (in this case, Dutch law) with the level of protection offered by the law chosen by the parties in the contract (in this case, the laws of Luxembourg), thereafter, the law of the country offering the highest level of employee protection should be applied.

Facts

Presta is a Luxembourg based company. It employs workers of different nationalities who carry out cross-border work in various EU countries. Their employment contracts contain a choice of Luxembourg law.

From 2012 to 2017, Presta provided employees to Dutch companies working in the meat processing industry. This industry has a compulsory (Dutch) pension fund VLEP. Membership in VLEP and payments to the fund are compulsory for the meat processing industry companies, even for the companies, which are not bound by the collective labour agreement.

According to VLEP, Presta falls within the scope of the compulsory membership in the pension fund. Based on this assertion, VLEP sent payment notices to Presta for the period from 2012 to 2017, but Presta left the invoices unpaid.

Proceedings

In 2016, VLEP obtained a writ of execution against Presta for the payment of €1,779,649.86 for outstanding pension premiums, interest, a fine, and costs. Presta objected, filing a claim before a Dutch court. The first instance court dismissed its claim. Presta appealed, but the appellate court has also dismissed its claims, reasoning as follows.

On the one hand, the employment contracts between Presta and the employees contained a choice of Luxembourg law as referred to in Article 8(1) Rome I. On the other hand, the employees 'habitually' carried out work in the sense of Article 8(2) Rome I Regulation in the Netherlands. Although some factors assessed pointed to Luxembourg, the court considered that these factors carried insufficient weight to apply Article 8(4) Rome I. Therefore, Dutch law would apply if the parties had not made a choice of law.

Based on this, the court held that since the Dutch law would apply if the parties had not made a choice of law, the employees should not lose the protection of mandatory Dutch law, including the rules which oblige Presta to pay the pension premiums. The court went on to apply the said Dutch rules and confirmed Presta's obligations to pay VLEP.

EU freedom of services?

On a side note: noteworthy is that one of Presta's arguments relied on article 56 Treaty on the Functioning of the European Union (TFEU) on freedom of services. According to Presta, the rules that oblige to participate in VLEP's pension scheme constituted a restriction on the freedom to provide services, violating article 56 TFEU. The argument was rejected: as the relevant legal provisions cover all employees working in the meat industry in the Netherlands, excluding workers employed by foreign employers would result in an unjustified difference in their treatment.

Cassation based on *Gruber Logistics*

Back to Presta's main argument in cassation: Presta filed a cassation claim, invoking the CJEU ruling of 15 July 2021, C-152/20 *Gruber Logistics*. In that case, the CJEU has ruled that under Article 8 Rome I Regulation, the court must compare the level of protection that would have existed in the absence of a choice of law with the level of protection offered by the law chosen by the parties in an employment contract. The CJEU has thereby dismissed an interpretation of article 8 Rome I, according to which courts need not to compare the two relevant legal systems, but have to apply, next to chosen law, mandatory law of the country where the employee habitually carries out work. According to Presta, lower courts had to compare the level of employees' protection provided by the Dutch law to the level of protection under the Luxembourg law.

As the lower courts made no such comparison, the Dutch Supreme Court has followed *Gruber Logistics*, Presta's cassation claim has been honoured, and the dispute is referred back to a lower court. It shall have to determine whether the Dutch law or the law of Luxembourg offers a higher level of protection and thereafter apply the law to the dispute.

Presta v *VLEP* offers an illustration of a dispute in which a national court has followed CJEU's reasoning in *Gruber Logistics*. Article 8 Rome I, as interpreted by the CJEU, charges national judges or anyone who needs to define applicable law, with a complex task. To identify applicable law, one should engage with two legal systems, identify the relevant sets of rules, define the parameters of comparison, and make the actual comparison, before drawing the conclusion on the applicable law. This is a proper comparative law exercise. For example, in this case, may the comparison be limited to specific pension payments? May it be extended to a broader range of issues forming in their entirety high level of protection? Answering such questions requires a rigorous method, and given the various existing methods and diverging views on the proper way(s) to conduct a comparative law study, can imply new uncertainties. Meanwhile, the task reconfirms the relevance of comparative law for private international law, and has the potential to offer the highest possible tailor-made solutions.

U.S. Supreme Court Renders Personal Jurisdiction Decision

This post is by Maggie Gardner, a professor of law at Cornell Law School. It is cross-posted at Transnational Litigation Blog.

The U.S. Supreme Court yesterday upheld the constitutionality of Pennsylvania's corporate registration statute, even though it requires out-of-state corporations registering to do business within the state to consent to all-purpose (general) personal jurisdiction. The result in *Mallory v. Norfolk Southern Railway Co.* re-opens the door to suing foreign companies in U.S. courts over disputes that arise

in other countries. It may also have significant repercussions for personal jurisdiction doctrine more broadly.

The Case

Robert Mallory worked for Norfolk Southern for nearly twenty years in Ohio and Virginia. He has since been diagnosed with cancer, which he alleges was caused by the hazardous materials to which he was exposed while in Norfolk Southern's employ. Although he currently lives in Virginia, he sued Norfolk Southern (a company then incorporated and based in Virginia) in state court in Pennsylvania, asserting claims under the Federal Employers' Liability Act (FELA).

Norfolk Southern contested personal jurisdiction. But Mallory argued that by registering to do business in Pennsylvania, it had agreed to appear in Pennsylvania courts on any cause of action. While the Pennsylvania Supreme Court agreed with that interpretation of Pennsylvania's corporate registration statute, it held that the statute violated the Due Process Clause of the Fourteenth Amendment in light of the Supreme Court's caselaw since *International Shoe Co. v. Washington* (1945).

The Holding

A majority of the Supreme Court disagreed. Justice Alito joined Justice Gorsuch's plurality (with Justices Thomas, Sotomayor, and Jackson) to hold that the question was controlled by a pre-*International Shoe* decision, *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.* (1917). *Pennsylvania Fire* approved a Missouri statute that required out-of-state insurance companies to appoint a state official as an agent for service of process for any suit. In *Pennsylvania Fire*, that Missouri statute was invoked to establish jurisdiction over a Pennsylvania insurance company regarding a contract formed in Colorado to insure a Colorado facility owned by an Arizona company. The five Justices agreed that the Supreme Court has never overruled *Pennsylvania Fire* and that it thus controls this case.

There is another, broader point on which the five Justices also seem to agree: *Pennsylvania Fire* does not conflict with *International Shoe* because *International Shoe* only addressed jurisdiction over *non-consenting* defendants. As Alito put it, "Consent is a separate basis for personal jurisdiction"—or as Gorsuch put it,

"*International Shoe* simply provided a 'novel' way to secure personal jurisdiction that did nothing to displace other 'traditional ones.'" An entirely separate avenue for establishing personal jurisdiction exists outside of *International Shoe*'s framework, which includes (according to the plurality) "[f]ailing to comply with certain pre-trial court orders, signing a contract with a forum selection clause, accepting an in-state benefit with jurisdictional strings attached," or making a general appearance. And in this consent-based track, the five Justices also seem to agree that federalism concerns are no longer applicable.

Points of Disagreement

Alito wrote separately, however, to argue that Pennsylvania's statute runs afoul of the dormant Commerce Clause. Even if the statute didn't discriminate against out-of-state businesses, Alito explained, it significantly burdens interstate commerce, and it does so without any legitimate local interest. While a state "certainly has a legitimate interest in regulating activities conducted within its borders," and while it "also may have an interest 'in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors,'" a state "generally does *not* have a legitimate local interest in vindicating the rights of non-residents harmed by out-of-state actors through conduct outside the State."

It is not particularly surprising that Alito was alone in elaborating this dormant Commerce Clause concern, given the split opinions earlier this Term in *National Pork Producers Council v. Ross*. As I discussed in a preview of the *Mallory* decision, Gorsuch and Thomas in that case found the balancing approach required by the dormant Commerce Clause jurisprudence to simply be infeasible. (Perhaps Alito hoped he might win them over if he could establish a *complete* lack of legitimate local interest, which would obviate the need for balancing). And if Sotomayor was unconvinced by the plaintiffs' showing of a substantial burden on interstate commerce in *National Pork Producers*, she was unlikely to sign onto Alito's rather vague paragraph about how statutes like Pennsylvania's could burden small companies.

But why did Alito not join more of the plurality opinion? The plurality embraced a framing of the case that emphasized Norfolk Southern's significant and permanent presence in Pennsylvania, including its 5,000 employees, 2,400 miles of track, and three locomotive shops (including the largest in North America).

That framing is reminiscent of Sotomayor's emphasis on fairness in her prior personal jurisdiction writings, as well as her questions at oral argument last fall. The plurality opinion also begins by contrasting this case with Mallory's ability to "tag" an individual employee of Norfolk Southern in Pennsylvania, asking why Mallory shouldn't be able to assert personal jurisdiction as easily over Norfolk Southern itself. That framing recapitulates a key point in Gorsuch's concurrence in *Ford Motor Co. v. Montana Eighth Judicial District Court* (2021).

But neither of those framings resonates with Alito's prior writings, to say the least. He tends to be more skeptical of litigation and court access policies, and he notably did not join Gorsuch's concurrence in *Ford*. Further, both framings would have undermined Alito's argument that Pennsylvania lacked any legitimate local interest in this case.

Jackson also wrote a brief concurrence that emphasized that personal jurisdiction is a waivable right, focusing on the Court's opinion in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee* (1982). Her invocation of "waiver" rather than "consent" was clearly purposeful (and a distinction that Robin Effron and John Coyle have recently explored).

The Dissent

Justice Barrett's dissent (joined by Chief Justice Roberts and Justices Kagan and Kavanaugh) staunchly defended the *International Shoe* paradigm. "For 75 years," it begins, "we have held that the Due Process Clause does not allow state courts to assert general jurisdiction over [out-of-state] defendants merely because they do business in the State." The Court's decision in *Mallory*, Barrett explains, invites states to evade *International Shoe*'s limits on personal jurisdiction by simply rewording their long-arm statutes to include implied consent. Indeed (she notes), this case is remarkably like *BNSF Railway Co. v. Tyrrell* (2017), another FELA suit involving out-of-state parties and a cause of action that arose out of state as well. In *Tyrell*, the Court rejected the state's assertion of personal jurisdiction in light of the Court's recent decisions in *Daimler AG v. Bauman* (2014) and *Goodyear Dunlop Tires Operations, S.A. v. Brown* (2011). Approving Pennsylvania's statute effectively robs all three of those precedents of meaning.

Foreign Defendants in U.S. Courts

The dissent is at least right about the practical implications of the Court's holding: states that are inclined to do so now have a roadmap for evading the limits on general personal jurisdiction that the Court staked out in *Goodyear*, *Daimler*, and *BNSF*. While the mere fact of doing business is still not enough to subject a "non-consenting" business to jurisdiction in a forum, the mere fact of doing business plus a broadly worded statute might be. Indeed, it's possible that Sotomayor joined the majority precisely because of her consistent concern that the Roberts Court has gone too far in paring back both general and specific jurisdiction under *International Shoe*. As the lone justice who refused to join the Court's opinion in *Daimler*, she has now helped reclaim some of that state power.

Daimler, itself a case involving a foreign defendant, made it much harder for plaintiffs to hale non-U.S. companies into U.S. courts. After *Daimler*, plaintiffs have had to establish specific jurisdiction over foreign defendants, which can be hard to do even when the plaintiff resides in the U.S. forum and was injured there, as in *J. McIntyre Machinery, Ltd. v. Nicastro* (2011). *Mallory* gives states a different avenue for protecting their citizens' ability to sue foreign defendants. As the plurality asserts, "all *International Shoe* did was stake out an *additional* road to jurisdiction over out-of-state corporations," separate from the consent-based road upon which states can now rely.

It will be interesting to see how many states take up this invitation. My prediction is that we will see few open-ended statutes like Pennsylvania's, but that we will see some more tailored statutes, for example asserting all-purpose jurisdiction over any claims brought by in-state residents against companies doing business in the state.

Broader Implications for Personal Jurisdiction Doctrine

It will also be interesting to see how much of a sea change *Mallory* makes in personal jurisdiction doctrine more broadly. While the holding may appear narrow, five Justices have agreed to limit the ambit of *International Shoe*'s paradigm to *non-consenting* defendants—a rather significant restriction. And

given how broadly the Court construes "consent" in the age of forum selection clauses and compelled arbitration (and now corporate registration statutes), that could render *International Shoe* largely obsolete.

The approach of the plurality may also signal that there is more to come. Gorsuch's opinion focuses on history and tradition and encourages reliance on pre-*International Shoe* cases. He has found a way to wind back the clock without having to directly overrule *International Shoe*—but would a future case encourage these Justices to wind back the clock even further?

I do worry that Gorsuch and his like-minded colleagues are too sanguine about the challenges that a return to broad general jurisdiction would entail. As I have written with others, there are real systemic costs to a paradigm of general jurisdiction—precisely the costs that *International Shoe* was written to address. A fundamental flaw in the plurality's approach is its syllogism that because the Court approved tag jurisdiction over individuals in *Burnham v. Superior Court* (1990), it should also continue to recognize broad general jurisdiction over corporations. First, *Burnham* was a splintered decision, and a majority of the Justices did *not* agree that tag jurisdiction was completely unmoored from *International Shoe*'s framework. But second, why isn't *Burnham* itself the mistake? Why not level up the protections for individual defendants, requiring some connection between the forum, the dispute, and the defendant greater than the defendant's fleeting physical presence?

Conclusion

I have started wondering if the binary distinction between general and specific jurisdiction might have outlived its usefulness as a legal construct. Perhaps registration statutes and tag jurisdiction (and some modified forum of doing business jurisdiction?) belong in an intermediate category—but one that must still satisfy *International Shoe*'s overarching command that the defendant have minimum contacts with the forum such that notions of fair play and substantial justice will not be offended.

The New Saudi Civil Transaction Act and its Potential Impact on Private International Law in Saudi Arabia

The Kingdom of Saudi Arabia (KSA) has recently enacted a new Civil Transactions Law (Royal Decree No. M/199, dated June 16, 2023). The law will enter into force on December 16, 2023, 180 days after its enactment (hereinafter referred to as "the new law"). This law has been rightly described as "groundbreaking" because, prior to the enactment of the new law, there has been no codification of civil law in the Kingdom, and civil law issues have traditionally been governed by the classical rules of Islamic Sharia according to the teachings of the prevailing school of *fiqh* (religio-legal jurisprudence) in the Kingdom (Hanbali School). Like most of the civil law codifications in the region, the new law focuses mainly on the so-called "patrimonial law," i.e., property rights and obligations (contractual and non-contractual). Family relations and successions are dealt with in a separate law, which was previously enacted in 2022 and entered into force the same year (Personal Status Act, Royal Decree No. M/73 of 9 March 2022, entered into force on June 18, 2022).

From a private international law perspective, one particular aspect of the new law compared to other civil law codifications in the region is that, unlike most of the Arab civil law codifications, the new law does not contain rules on the choice of the applicable law. In other neighboring countries (namely Egypt, Jordan, Syria, Iraq, Qatar, Oman, and Yemen) as well as in other Arab jurisdictions (including Libya and Algeria), the civil law codifications include at the beginning of their respective Civil Code/Civil Transactions Act a chapter dealing with the "application of the law in space". These choice-of-law codifications generally contain provisions on characterization, choice of law in family law and succession, property, contractual and non-contractual obligations, and some general rules such as *renvoi* (or its prohibition) and public policy, etc. Only a few Arab states have chosen to codify choice-of-law rules outside of their Civil Code (Kuwait and Bahrain) or Code of Obligations and Contracts (Morocco and Tunisia). Lebanon is

the only country where choice-of-law principles have been developed mainly through case law. Thus, Saudi Arabia remains the only Arab jurisdiction where conflict of laws rules are *almost* non-existent and where the courts have not been able to develop a body of principles dealing with choice-of-law issues. This is because, in general, Saudi courts apply Saudi law when they assume jurisdiction, regardless of whether or not the dispute has a connection with another legal system or not. Whether there will be a codification of choice-of-law rules in the same way that rules on international jurisdiction and enforcement of foreign judgments have been codified remains to be seen.

Interestingly, however, the new law may affect the assessment of public policy in the context of the enforcement of foreign judgments. Indeed, based on the traditional Sharia rules and principles recognized in the Kingdom, Saudi courts have often relied on public policy and inconsistency with Sharia to refuse enforcement of foreign judgments. For example, in a case decided in 1996, the Saudi court refused to enforce a Dubai judgment on the ground that the said judgment allowed for compensation for lost profits and payment of moral damages (*Board of Grievances, Case No. 1783/1/Q of 30/12/1417 Hegira [November 12, 1996]*). The court cited Sharia rules and principles on compensation, according to which only real and quantifiable losses can be compensated. The new law departed from this traditional principle by clearly allowing compensation for both lost profits (article 137) and moral damages (article 138). Therefore, the traditional position of the Saudi court is no longer tenable under the new rules, as compensation for lost profits and moral damages are now available under the newly adopted rules.

Another important issue concerns interest. It is well known that the payment of interest is prohibited under Sharia rules and principles. Saudi courts have been particularly eager to refuse enforcement of those parts of the foreign judgments that order the payment of interest, including legal interest available under the laws of other Arab and Islamic states (see, for example, *Board of Grievances, Case No. 2114/Q of 21/8/1436 Hegira [June 9, 2015]* refusing enforcement of legal interests ordered by Bahraini courts but allowed partial enforcement of the main award). However, unlike lost of profits and moral damages, the new law's position

on interest is less clear. Several indicators in the new law suggest that the legislature did not wish to depart from the traditionally prevailing position. For example, the prohibition on agreeing to repay amounts that "exceed" the capital in loan agreements, either at the time of the conclusion of the agreement or at the time of the deferment of payment, is clearly stated in article 385 of the new law. Moreover, article 1 of the new law clearly refers to the "rules [*al-ahkam*] derived from the Islamic Sharia which are most consistent with the present law" as the source of law in the absence of an applicable provision of the new law or a rule of general principles contained in its last chapter. Accordingly, it can be expected that Saudi courts will continue to refuse to enforce the portion of the foreign judgments awarding interests on the ground of public policy and the inconsistency of interests with the principles of the Sharia as understood in the Kingdom.

Book Review: The UN Guiding Principles on Business & Human Rights

This book review was written by Begüm Kilimcioglu, PhD researcher, Research Groups Law & Development and Personal Rights & Property Rights, University of Antwerp

Barnali Choudbury, *The UN Guiding Principles on Business & Human Rights- A Commentary,* Edward Elgar Publishing, 2023

The endorsement of the United Nations Guiding Principles (UNGPs) in 2011 represents a milestone for business and human rights as the principles successfully achieved to put the duties of different actors involved in (possible) human rights abuses on the international agenda. The UNGPs provide a non-binding yet authoritative framework for a three-pillared scheme to identify and

contextualize the responsibilities with regard to business and human rights: the State's responsibility to protect, businesses' responsibility to respect, and facilitating access to remedy. However, although the impact of the principles can be described as ground-breaking, they have also been criticized for their vague and generic language which provides for a leeway for certain actors to circumvent their responsibilities (see Andreas Rasche & Sandra Waddock, Surya Deva, Florian Wettstein).Therefore, it is important to determine and clarify the content of the principles to increase their efficiency and effectiveness. In this light, this commentary on the UNGPs which examines all the principles one-by-one through the inputs of various prominent scholars, academics, experts and practitioners is indeed a reference guide to when working on corporate social responsibility.

The UNGPs and private international law are inherently linked. UNGPs aim to address issues regarding human rights abuses and environmental degradation which are ultimately transnational. Therefore, every time we talk about the extraterritorial obligations of the States, or the private remedies attached to cross-border human rights violations, we have to talk within the framework of private international law. For instance, in a case where a multinational company headquartered in the Global North causes damage through its subsidiaries or suppliers located in the Global North, the contractual clauses regarding their respective obligations or the private remedies in their contracts brings the questions of which law is applicable or how to enforce such mechanisms. Furthermore, in cases where the violations are brought before a court, it is inevitable that the court will have to decide on which law to be applied to the conflict at hand. In this regard, although the commentary does not go into detail about conflict of laws/ private international law issues, we know that the implementation of the UNGPs requires the consideration of private international law rules.

The commentary consists of two parts; the first part is dedicated to the UNGPs, and the second part focuses on the Principles for Responsible Contracts (PRCs) which is an integral addition to the UNGPs.

The first part starts with the UNGPs' first pillar, the State's duty to protect in context. The authors Larry Cata Backer and Humberto Cantu Rivera (UNGPs 4&5) emphasize the centrality of the State as an actor in many interactions when

it engages in various commercial transactions and the privatization of essential services. Such instances pose a unique opportunity for the State to exercise its influence over businesses, service providers, or investors to facilitate respect for human rights and to fulfill its duty to protect human rights. Furthermore, as Olga Martin-Ortega and Fatimazahra Dehbi highlights (UNGP 7) when a company is operating in a conflict zone, the States that are involved must engage effectively with the situation to protect human rights considering the heightened vulnerability. Overall, actions of privatization or other commercial transactions do not exempt the State from its own duties. On the contrary, the State has heightened duties to ensure and support respect for human rights through various means such as its legislation, policies, agencies or through (effective) membership of multilateral institutions or its contracts.

Moving onto the second pillar, the business' responsibility to respect, Sara L. Seck
emphasizes

that this responsibility is not framed as a duty—like the State duty to protect but rather is a more flexible term—and is independent of the State. However, more regard could have been given to common situations such as where the lines between the States and the businesses are blurred. I do not mean here the situations where the business enterprises are fully or partially owned by the State but rather – *de facto*—the businesses have more power (both in economic and political terms) on the ground. More examples could have been given such as how the revenues of Shell exceed the GDP's of

Malaysia, Nigeria, South Africa and Mexico. In the increasingly globalized and competitive world of today, the (possible) role of businesses changes rapidly. Conversely, the disconnect between the policies, statements, and pledges businesses make with respect to human rights and their actual performance has been identified and highlighted quite accurately. The analysis of the lack of incentives for businesses to respect and engage with human rights by Kishanthi Parella (UNGP 13) provides an excellent mirror to the situation on the ground. It is rightfully identified that although the pressure from the consumers, investors, and/or other stakeholders can incentivize companies to do better, it may be insufficient. For instance, although Shell has been criticized by civil society, affected stakeholders, and the public for over a decade, and has faced several high-profile cases, the change beyond its corporate policies and documents remains highly contested.

Naturally, this brings to the fore the importance of having legally binding, national, regional, and international, rules putting concrete obligations with strong enforcement mechanisms to force companies to do better and create a level playing field for the ones who already are genuinely engaged in human rights issues. Maddelena Neglia discusses the different mandatory legislations initiatives from different countries regarding the implementation of the UNGPs, and Claire Bright and Celine Graca da Pires examine the same initiatives through the lens of Human Rights Due Diligence processes.

However, as the analysis of the current transparency frameworks within the framework of UNGP 13, considering that there are already legally binding rules on non-financial information disclosure, foreshadows the possible outcomes of future legally binding rules, such as the Corporate Sustainability Due Diligence Directive (See also the last documents, the Council position and the Parliament position.) The commentary does not discuss the positions adopted by the Council and the Parliament as they were not yet adopted at the time the commentary was written). The current transparency laws show that unless such rules have teeth, they are bound to be ineffective.

Of course, the efforts of the States and businesses must be accompanied by strong and effective both State-based and non-State based and judicial and non-judicial remedies for the victims of corporate harm. On this matter, the commentary highlights the mechanisms that we are more prone to forgetting, such as the national human rights institutions (NHRIs) or multistakeholder

initiatives (MSIs). It is usually the case that when thinking about remedies, the first thing that comes to mind are State-based judicial remedies. However, as Jennifer A. Zerk and Martijn Scheltema remind us there are several different types of remedies which can even be more effective depending on the context. Furthermore, on an academic level, we tend to focus more on Platon's 'theory on forms/ideas' rather than how things work in practice. As a result of this disconnection between the academics and the victims, we also tend to forget to discuss whether the 'form/idea' complies with the reality on the ground. Therefore, the emphasis in the commentary on the (obvious) link between the remedies and the persons for whom these remedies are intended reminds us that remedies must be stakeholder centric.

Overall, the commentary points out several important issues about the UNGPs:

- The uncertainty surrounding the UNGPs is real—although this was an intentional choice by Professor Ruggie, considering the current frameworks and how far we have come in the business & human rights world, we should not religiously hold onto the UNGPs but rather search for ways to improve and build upon them. UNGPs indeed were a marvelous achievement at the time, in 2011, when it was even unthinkable for most people that businesses could have any kind of responsibility regarding human rights; yet a worldwide consensus was reached. However, now, there is an enormous momentum to genuinely address corporate disasters through better regulation and enforcement.
- Another important prong in this process still is the international treaty. The commentary does not go into much detail about the Legally Binding Instrument on Business and Human Rights (Penelope Simmons discusses the international treaty within the framework of UNGP 26 as a way to strengthen access to remedy and Barnali Choudhury proposes the international treaty as a way to tackle the remaining problems with the implementation of the UNGPS and the PRCs), however I do believe that the international treaty must also be discussed as an option to better implement the UNGPs. The drafting process of the treaty is evidence of one of many problems with the implementation of the UNGPs. As Daniel Augenstein (UNGP 1), Gamze Erdem Turkelli (UNGP 10) and Dalia Palombo (UNGP 25) point out, international cooperation is very important to effectively address the multi-faceted and transnational problem of

respecting and protecting human rights and facilitating remedy when human rights abuses occur within the context of corporate harm. They show that no sole State can fix such a problem, and cooperation between States is essential. This cooperation can be done through could be done by engaging with other States in cases of corporate harm and exchanging information (or making it easy to exchange information) between authorities and courts, or information, as we increasingly see in private international law instruments. However, when we look at the process of drafting such a treaty which would provide common frameworks and rules to do so, it is clear that there is reluctance of the Global North countries whereas the recipient countries of damage are naturally much more enthusiastic.

- The second part of the commentary concerns the Principles for Responsible Contracts which provide guidance for the preparation, management and monitoring of Investor-State (investment) contracts, together with options for access to remedy for the (possible) victims. The PRCs reflect the same principles as the UNGPs and they are supposed to be read in conjunction.

The focus on the PRCs is valuable because historically international investment law and international human rights law were seen as two separate fields of law with no intersection. However, today, as the understanding of human rights is significantly evolving, the link between investments and human rights is becoming all the more evident. Investments – in all sectors but especially the extractive sector- can adversely impact to a significant extend, environmental degradation and human rights, lives of local and indigenous communities and marginalized and vulnerable groups. Rightly so, as the first part of the commentary on UNGPs, the second part, especially within the scope of PRC 7, Tehtena Mebratu-Tsegaye and Solina Kennedy highlight the importance of meaningful stakeholder engagement with the (potentially) affected stakeholders and the ways to design more inclusive community involvement strategies.

Secondly, PRCs is a great opportunity to provide guidance to increase the effectiveness and efficiency of the contractual clauses used in investment contracts. Contractual clauses are the most widely used tools among businesses to pledge and ensure human rights compliance in their activities (see p 63). However, the effectiveness of these clauses is rather limited. Therefore, this wide

use must be seen as an advantage and be built upon. In other words, the clauses must be structured in such a way that they do not leave unnecessary wiggle room for the companies and successfully cover the governance gaps.

Lastly, the importance of human rights impact assessments by investors before, during and after a project is a common narrative through the part on the PRCs. This emphasis is important as we are on the verge of adopting hard laws on human rights due diligence that may successfully enforce companies to be more engaging, robust and effective when they address human rights concerns. It has to be borne in mind that investors are also businesses enterprises, and they also must conduct their own Human Rights Due Diligence regarding their projects. In this regard, it is sometimes even the case that investors have more adverse impacts than other types of business actors because of their indirect impact via the projects they finance. Thus, the engagement of the investors with human rights is crucial for effective human rights protection.

Overall, the commentary is a must-have for everyone who is working on business and human rights. The UNGPs constitute the base of all the work that has been done over the years in the field. Thus, to be able to comprehend what business and human rights mean and to build on them, it is essential to examine the UNGPs in detail, which is what the commentary provides.

The Visible College of International Lawyers and the HCCH 2019 Judgments Convention – Conference in Bonn

The HCCH 2019 Judgments Convention has been the subject of an ever-growing body of academic research and discussion ever since it was signed; but due to the pandemic, almost all of it had to happen in writing. Just in time for its entry into

force, though, and thus perfectly timed, the first international conference on the HCCH 2019 Judgments Convention Cornerstones – Prospects – Outlook took place a week ago at the University of Bonn, hosted by **Matthias Weller** together with **Moritz Brinkmann** and **Nina Dethloff**, in cooperation with the Permanent Bureau of the HCCH, and with the support of the German Federal Ministry of Justice.

The conference brought together much of the aforementioned discussion between a range of academics, practitioners and policymakers, including the contributors to the book of the same title, edited by **Matthias Weller**, **João Ribeiro-Bidaoui**, **Moritz Brinkmann**, and **Nina Dethloff**, for which the conference doubled as a launch event. It accordingly followed the same structure, organized into seven panels overall that were split into three larger blocks.



The first of those ("Cornerstones") focused on some of the core concepts underpinning the Convention. **Wolfgang Hau** (LMU Munich) discussed the meaning of 'judgments', 'recognition', and 'enforcement'; **Pietro Franzina** (Catholic University of Milan) focused on the jurisdictional filters (with an emphasis on contractual obligations, i.e. Art. 5(1)(g)); and **Marcos Dotta Salgueiro** (University of the Republic of Montevideo) discussed the grounds for

refusal. After some lively discussion, the block continued with papers on the Convention's much-discussed Art. 29 (**Cristina Mariottini** (Luxembourg)) and on its interplay with the 2005 Choice of Court Convention (**Paul Beaumont** (University of Stirling)).

Also in light of some less nuanced recent interventions, Cristina Mariottini's paper was particularly welcome to dispel some myths surrounding Art. 29. The speaker rightly pointed out that the mechanism is not only very different from the much-criticized bilateralization requirement of the 1971 Convention but can also be found, in one form or another, in a range of other instruments, including the rather successful 1970 Evidence and 1980 Child Abduction Conventions.

A much wider angle was then taken in the second block ("Prospects for the World"), which brought together perspectives from the European Union (**Andreas Stein** (European Commission)), the US (**Linda Silberman** (NYU)), Canada (**Geneviève Saumier** (McGill University)), the Balkan Peninsula (**Ilja Rumenov** (Skopje University)), Arab countries (Béligh Elbalti (University of Osaka)), Africa (**Abubakri Yekini** (University of Manchester) and **Chukwuma Okoli** (University of Birmingham)), the MERCOSUR Region (**Verónica Ruiz Abou-Nigm** (University of Edinburgh)), the ASEAN countries (**Adeline Chong** (SMU)), and China (**Zheng (Sophia) Tang** (Wuhan University)) in four consecutive panels. While the first block had already highlighted some of the compromises that had to be made during the drafting of the Convention and at the diplomatic conference, it became even clearer that the Convention (or, more precisely, the prospect of its ratification) may be subject to vastly different obstacles and objections in different parts of the globe. While some countries may not consider the Convention to be ambitious enough, others may consider it too much of an intrusion into their right to refuse the recognition and enforcement of foreign judgments – or raise even more fundamental concerns regarding the implementation of the Convention, its interplay with existing bilateral treaties (seemingly a particularly pertinent problem for Arab countries), or with multilateralism in recognition and enforcement more generally. The conference gave room to all of those concerns and provided important context through some truly impressive comparative research, e.g. on the complex landscape of bilateral agreements in and between most Arab states.

The different threads of discussion that had been started throughout the event

were finally put together in a closing panel ("Outlook"). **Ning Zhao** (HCCH) recounted the complicated genesis of the Convention and reflected on the lessons that could be learned from them, emphasizing the need for bridging differences through narrowing down the scope of projects and offering opt-out mechanisms, and for enhancing mutual trust, including through post-convention work. She also provided an update on the ongoing jurisdiction project; **José Angelo Estrella Faria** (UNIDROIT) advocated a holistic approach to judicial cooperation and international commercial arbitration; and **Hans van Loon** (HCCH) finally summarized the conference as a whole, putting the emphasis both on the significant achievement that the convention constitutes and the need to put further work into its promotion.

The conference had set out to identify the cornerstones of the 2019 Convention, to discuss its prospects, and to provide an outlook into the future of the Convention. It has clearly achieved all three of these goals. It included a wide range of perspectives on the Convention, highlighted its achievements without shying away from discussing its present and future obstacles, and thus provided ample food for thought and discussion for both the proponents and the critics of the Convention.

At the end of the first day, **Burkhard Hess** (MPI Luxembourg) gave a dinner speech and reflected on the current shape of the notorious 'invisible college of international lawyers' in private international law. As evidenced by the picture above, the college certainly was rather visible in Bonn.

Review of Choice of Law in

International Commercial Contracts

While doing research on a choice of law article, I found it necessary to consult a book generally co-edited by Professors Daniel Girsberger, Thomas Graziano, Jan Neels on *Choice of Law in International Commercial Contracts* ('Girsberger et al'). The book was officially published on 22 March 2021. I began reading sections of the book related to tacit choice of law sometime in December 2022 and found the work truly global and compelling. At the beginning of June this year, I decided to read the whole book and finished reading it today. It is 1376 pages long!

To cut the whole story short, the book is the bible on choice of law in international commercial contracts. It covers over 60 countries, including regional and supranational bodies' rules on choice of law. Professor Symoen Symeonides had previously written a single authored award winning book on *Codifying Choice of Law Around the World,* but that work did not cover as much as Girsberger et al's book in terms of the number of countries, and regional and supranational instruments (or principles) covered.

The book arose from the drafting of the Hague Principles on Choice of Law in International Commercial Contracts, headed by Professor Girsberger and commissioned by Professor Marta Partegas. The central aim of the Hague Principles is to promote party autonomy, as the Hague Principles does not touch on the law applicable in the absence of choice.

The book starts with a general comparative outline of choice of law around the world and its comparison to the Hague Principles. This outline is derived from the works of many other scholars that contributed to the book. In other preliminary chapters, there are discussions devoted to party autonomy, provenance of the Hague Principles, roadmap to promoting the Hague Principles, international commercial arbitration, and perspectives from UNIDROIT and UNCITRAL.

The essential part of the book focuses on regional and national reports of countries around the world, with a focus on comparison to the Hague Principles. The format used is consistent, and easy to follow for all the reports in this order: introduction and preamble, scope of the principles, freedom of choice, rules of

law, express and tacit choice of law, formal validity of the choice of law, agreement on the choice of law and battle of forms, severability, exclusion of renvoi, scope of the chosen law, assignment, overriding mandatory rules and public policy, establishment, law applicable in the absence of choice, and international commercial arbitration.

The Hague Principles has been successful so far given the regional or supranational bodies such as Asia,[1] and Latin America[2] that have endorsed it.

From 31st May to 3 June 2023, the Research Centre for Private International Law in Emerging Countries in University of Johannesburg held a truly Pan-African Conference on the African Principles on Choice of Law in International Commercial Contracts.[3] Many African scholars (including myself) and some South African government officials were present and spoke in this very successful conference. The African Principles also draws some inspiration from the Hague Principles, which involved the participation of African scholars like Professors Jan Neels and Richard Frimpong Oppong.

Girsberger et al's book and the Hague Principles success so far may be due to the more inclusive approach it took, rather than other Hague Conventions that are not fully representative of countries around the world, especially African stakeholders.

More please.

[1] Asian Principles on Private International Law 2018.

[2] Guide of the Organization of American States on the Applicable Law to International Commercial Contracts 2019

[3] See generally JL Neels and EA Fredericks, "An Introduction to the African Principles of Commercial Private International Law"(2018) 29 Stellenbosch Law Review 347; JL Neels, 'The African Principles on the Law Applicable to International Commercial Contracts – A First Drafting Experiment' (2021) 25 Uniform Law Review 426, 431; JL Neels and EA Fredericks, 'The African Principles of Commercial Private International Law and the Hague Principles' in Girsberger et al paras 8.09-8.11.

Denial of Natural Justice as a Defence to Enforcement of a Chinese Judgment in Australia

In *Yin v Wu* [2023] VSCA 130, the Court of Appeal of the Supreme Court of Victoria set aside a judgment[1] which had affirmed the enforcement a Chinese judgment by an Associate Justice of the Supreme Court.[2] This was a rare instance of an Australian court considering the defence to enforcement of a foreign judgment on the basis that the judgment debtor was denied natural justice—or procedural fairness—before the foreign court.

Background

The dispute concerned a payment made by a Chinese national living in China, Di Wu, to a Chinese national living in Australia, Ke Yin. The payment was made pursuant to a foreign exchange agreement: Yin had promised to pay Wu a sum of US Dollars in exchange for Wu's Chinese RMB.

The arrangement was made unusually through a series of Telegram and WhatsApp messages, from accounts with different numbers and aliases. (In Australia, we would say that the arrangement sounded 'suss'.) The agreement was seemingly contrary to Chinese law, which may have contributed to the clandestine character of communications underlying the agreement; see [30].

After Wu transferred the funds—RMB ¥3,966,000—Yin denied that the full sum was received and did not transfer any sum of US Dollars to Wu. Yin eventually returned RMB ¥496,005 but not the balance of what Wu had paid. Wu went to the police on the basis he had been 'defrauded'; they refused to act. Meanwhile, while broadcasting video under a pseudonym on Twitter, Yin suggested that his accounts had been frozen at the instigation of Wu's cousin and with the participation of 'communists'.

On 13 October 2017, Wu commenced a proceeding against Yin in the Ningbo People's Court. The Court characterised the foreign exchange agreement as 'invalidated and unenforceable', but nonetheless provided judgment and costs to Wu for RMB ¥3,510,015 ('Chinese Judgment').

The Chinese Judgment recorded that: *'[t]he defendant [Yin] failed to attend despite having been legally summoned to attend. As such, the court shall enter default judgment according to the law. … Any party dissatisfied with this judgment may, within 15 days from the date of service of the written judgment, file an appeal …'*: [27].

Wu commenced enforcement proceedings in China. An affidavit in those proceedings recounted that Yin's whereabouts were then unknown, but Yin had been served according to relevant procedure of the Chinese forum, which allowed service 'by way of public announcement': [31]. The 'Public Notice' provided as follows (see [32]):

> *'In relation to the private loan dispute between the plaintiff Wu Di and defendant Yin Ke, you are now, by way of public notice, served with the Complaint and a copy of the evidence, notice to attend, notice to adduce evidence, risk reminder, summons to attend court, notice of change of procedure, civil ruling and the letter of notice. You are deemed to have been served with the said documents after sixty days from the date of this public notice.'*

Recognition and enforcement sought in Australia

Wu filed an originating motion in the Supreme Court of Victoria, seeking an order for enforcement of the Chinese Judgment, or alternatively, reimbursement of the sum paid to Yin.

The latter and alternative order may be understood in terms of an order seeking the *recognition* of the obligation created by the Chinese Judgment, to be given effect through the remedial powers of the Australian forum: see *Kingdom of Spain*

v Infrasructure Services Luxembourg S.À.R.L. (2023) 97 ALJR 276; [2023] HCA 11, [43]–[46]; *Schibsby v Westenholz* (1870) LR 6 QB 155, 159.

Australia has a fragmented regime for recognition and enforcement of foreign judgments; see generally Michael Douglas, Mary Keyes, Sarah McKibbin and Reid Mortensen, 'The HCCH Judgments Convention in Australian Law' (2019) 47(3) *Federal Law Review* 420. New Zealand judgments are treated with deference under the *Trans-Tasman Proceedings Act 2010* (Cth); judgments of various other jurisdictions are easily registered under the *Foreign Judgments Act 1991* (Cth), where the relevant court is identified in the *Foreign Judgments Regulations 1992* (Cth) on the basis of reciprocal treatment of Australian judgments in the relevant foreign jurisdiction. For other *in personam* money judgments, recognition and enforcement may occur pursuant to common law principles.

At common law, a foreign judgment may be recognised and enforced if four conditions are satisfied—subject to defences:

'(a) the foreign court must have exercised jurisdiction that Australian courts will recognise;

(b) the foreign judgment must be final and conclusive;

(c) there must be an identity of the parties; and

(d) the judgment must be for a fixed sum or debt': *Doe v Howard* [2015] VSC 75, [56].

Here, the Chinese Judgment was assessed according to the common law principles.

In his defence, Yin pleaded (among other things) that he was not served with the documents commencing the foreign proceeding which produced the Chinese Judgment, or any other documents relevant to the foreign proceeding while it was on foot. He also pleaded that he was unaware of the existence of the Chinese Judgment until the Australian proceeding was commenced. As an extension of that plea, Yin said that enforcement of the Chinese Judgment should be refused on the basis of public policy, or because there was a failure by the Chinese court to accord Yin natural justice: [6].

Wu sought summary judgment on the basis that Yin's defence had no prospects of

success. On 22 October 2021, summary judgment was entered in favour of Wu by an Associate Justice of the Supreme Court: *Wu v Yin* (Supreme Court of Victoria, Efthrim AsJ, 22 October 2021); see *Wu v Yin* [2022] VSC 729, [5].

The Associate Justice referred (at [33]) to *Boele v Norsemeter Holding AS* [2002] NSWCA 363, [28], where Giles JA of the New South Wales Court of Appeal held as follows:

> *'In determining whether due notice has been given regard will be had to the notice provisions of the foreign court: for example, notification not by personal service but in accordance with the rules of the foreign court may be held to be consistent with affording natural justice even if not in accord with notice provisions of the forum (see Jeannot v Fuerst (1909) 25 TLR 424; Igra v Igra (1951) P 404; Terrell v Terrell (1971) VR 155).'*

Efthrim AsJ considered that the statement in the Chinese Judgment that Yin had 'been legally summoned to attend' was enough to defeat the natural justice defence: [2022] VSC 729, [74]–[79]. Although the 'public notice' service underlying the Chinese Judgment would generally be insufficient for service within Australia under Australian law, it was considered sufficient for the purposes of overcoming the defence.

Yin appealed to the Supreme Court's trial division on the ground (among others) that Efthrim AsJ erred in holding that Yin's defence that he was not accorded natural justice in the Chinese proceeding had no prospect of success. Tsalamandris J rejected this ground, and Yin's appeal: [2022] VSC 729, [124], [133]. Yin applied for leave to appeal the decision of Tsalamandris J to the Court of Appeal.

Before the Court of Appeal

The Court of Appeal overturned the decision of Tsalamandris J, granting leave to appeal and allowing the appeal on the following ground (see [79]):

> *Ground 1: the judge erred in upholding the associate justice's conclusion that the defence to the enforcement claim had no real prospect of success, and in doing so erred by imposing an onus on Yin to adduce evidence about applicable*

> *Chinese law relating to service by public announcement and why that method of service had not been properly invoked in this case. Further, the judge erred by relying on the Wang affidavit [the affidavit in the Chinese enforcement proceeding, mentioned above] which was not in evidence, or not relied on by Wu, on the hearings before either the associate justice or the judge.*

The Court of Appeal's decision turned on the available evidence. Yin deposed that he was not served with any documents in connection with the Chinese proceedings. That evidence was uncontradicted: [90]. In these circumstances, 'the associate justice and the judge erred in placing the onus on Yin to establish that there was no valid service on him by alternative means permitted by Chinese law': [84]. Yin's evidence raised a prima facie case that he had been denied natural justice in the Chinese proceedings: [91].

In *obiter*, the Court of Appeal also considered that even if it were assumed 'that the evidence was sufficient to establish that Yin had been "legally summoned", the evidence as a whole [did] not establish that the public notice procedure apparently adopted complied with the requirements of natural justice in the circumstances of the case': [84]; [95].

The Court of Appeal cited (at [96]–[99])) *Terrell v Terrell* [1971] VR 155, which was also cited in *Boele*, [28]. *Terrell* was about a petition for divorce by an American husband who had left his wife in Australia and returned to the US. The husband obtained a decree of divorce in the US. The Australian court considered a forum statute that would give effect to foreign decrees if they would be recognised under the law of the domicile. But the statute provided that a foreign decree would not be recognised 'where, under the common law rules of private international law, recognition of it[s] validity would be refused on the ground that a party to the marriage had been denied natural justice'; see [96].

Barber J considered that 'natural justice' was 'not a term of great exactitude, but in this context probably refers to the need for the defending party to have notice of the proceedings and the opportunity to be heard': *Terrell*, 157. A foreign judgment produced in circumstances where the respondent to the foreign proceedings had no notice of them or an opportunity to be heard would be amenable to a natural justice defence. Barber J considered an exception to that position, which was inapplicable in the circumstances as the husband had

withheld the wife's address from the foreign court (see *Terrell*, 157):

> *'To this basic rule there is an exception, that where the foreign court has power to order substituted service or to dispense with service, and that power has been properly exercised upon proper material, even where the respondent was not in fact made aware of the proceedings, such proceedings cannot be held to be unjust, as similar powers are available to our courts. However, there must have been some attempt to effect personal service: Grissom v Grissom, [1949] QWN 52. Moreover, if the order for substituted service is based on a false statement that the petitioner did not know the respondent's whereabouts, or where a false statement is made as to the respondent's address for service, the decree will not be recognized as valid: Norman v Norman (No2) (1968) 12 FLR 39; Grissom v Grissom, supra; Macalpine v Macalpine, [1958] P35; [1957] 3 All ER 134; Brown v Brown (1963) 4 FLR 94; [1963] ALR 817;Middleton v Middleton, [1967] P 62; [1966] 1 All ER 168.*

After considering *Terrell* and other authorities, the Court of Appeal concluded as follows (at [107]):

> *… even if Wu had established by admissible evidence that service of the Chinese proceeding was legally effected on Yin by some form of public notice — albeit one which did not come to Yin's attention — the Court should not have recognised the Chinese judgment on a summary basis. This is because at the time Wu commenced the Chinese proceeding he well knew of a number of alternate means of giving notice of the proceeding to Yin, namely, by Twitter, WhatsApp and Telegram. Indeed, Wu's case in the Chinese proceeding and in this Court was based on money paid under an alleged contract made by these means. In these circumstances, there is a case to be investigated at trial as to whether Wu informed the Chinese court of these alternative means of giving notice of the Chinese proceeding to Yin.*

The Court then provided (at [108]) some helpful dicta on the future application of the natural justice defence to enforcement of foreign judgments, considering the following proposition in *Nygh's Conflict of Laws* (LexisNexis, 10th ed, 2020) at 990 [40.84]:

> *It matters not that the forum would not have dispensed with notice in the same*

> *situation, although a line would have to be drawn somewhere as in the case where the rules of a foreign court dispensed with the need of giving a foreign defendant any form of personal notification even in peacetime.*

The Court opined (at [109]):

> *In our view, in considering whether natural justice has been provided, modern courts should move with the times in their assessment of the sufficiency of foreign modes of service which do not aim to give defendants personal notification by the many electronic means now commonly available. Courts should draw the line and look unfavourably on modes of service by foreign courts which do not attempt to give notice by such means where a defendant's physical whereabouts are unknown but electronic notice in some form is possible.*

Yin failed on his other grounds of appeal. As the underlying decision also provided summary judgment for Wu's restitution claim, the Court of Appeal characterised the restitution claim as separate to the enforcement claim: [111]. The Court of Appeal affirmed the decision that Yin's defence that he did not know Wu went 'nowhere': [118]. Wu ultimately succeeded: he obtained summary judgment for the restitution claim, together with interest: [158].

Some takeaways

Yin v Wu provides a few insights for the natural justice defence to recognition and enforcement of foreign judgments in common law courts.

The first concerns the onus of proof. The onus of making out a defence to recognition of a foreign judgment would ordinarily fall on a defendant: *Stern v National Australia Bank* [1999] FCA 1421, [133]. The Court of Appeal's decision demonstrates how burdens may shift in the practical operation of private international law in the context of litigation. (On the difference between legal and evidentiary burdens, and how they may shift, see *Berry v CCL Secure Pty Ltd* (2020) 271 CLR 151; [2020] HCA 27.) Once Yin had produced evidence he was not served, it was up to Wu to contradict that evidence. The omission may be understood on the basis that the underlying decision was one for summary judgment.

Second, the decision is notable for framing enforceability in terms of a natural justice defence rather than in terms of the first criterion for recognition or enforcement: 'the foreign court must have exercised jurisdiction that Australian courts will recognise'. This element is often framed as a requirement of 'international jurisdiction'. Yin was not within the territorial jurisdiction of the Chinese court at any relevant time, and nor did he submit to the foreign court. International jurisdiction was seemingly predicated on Yin's nationality. Arguably, this is insufficient for recognition and enforcement at common law in Australia (but see *Independent Trustee Services Ltd v Morris* (2010) 79 NSWLR 425, cf *Liu v Ma* (2017) 55 VR 104, [7]). The focus on natural justice defence rather than international jurisdiction would be a product of how the parties ran their cases.

Third, although the Court of Appeal allowed the appeal as regards the natural justice defence, the judgment supports the orthodox view that this defence should have a narrow scope of operation. As Kirby P opined in *Bouton v Labiche* (1994) 33 NSWLR 225, 234 (quoted at [73]), courts should not be 'too eager to criticise the standards of the courts and tribunals of another jurisdiction or too reluctant to recognise their orders which are, and remain, valid by the law of the domicile'. Australian courts provide for substituted service in a variety of circumstances; it would be odd if a foreign court's equivalent procedure was held to engage the natural justice defence.

Finally, the case serves as a warning for litigants seeking to enforce a judgment of a Chinese court in Australia: relying purely on the 'public notice' mechanism of the Chinese forum, without taking further steps to bring the proceeding to the attention of the defendant, may present problems for enforcement. The same can be said for transnational litigation in any jurisdiction that does not require 'personal service' in the sense understood by common law courts.

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[1] *Wu v Yin* [2022] VSC 729 (Tsalamandris J).

[2] *Wu v Yin* (Supreme Court of Victoria, Efthrim AsJ, 22 October 2021).

Change of gender in private international law: a problem arises between Scotland and England

Written by Professor Eric Clive

The Secretary of State for Scotland, a Minister of the United Kingdom government, has made an order under section 35 of the Scotland Act 1998 blocking Royal Assent to the Gender Recognition Reform (Scotland) Bill 2022, a Bill passed by the Scottish Parliament by a large majority. The Scottish government has challenged the order by means of a petition for judicial review. The case is constitutionally important and may well go to the United Kingdom Supreme court. It also raises interesting questions of private international law.

At present the rules on obtaining a gender recognition certificate, which has the effect of changing the applicant's legal gender, are more or less the same in England and Wales, Scotland and Northern Ireland. The Scottish Bill would replace the rules for Scotland by less restrictive, de-medicalised rules. An unfortunate side effect is that Scottish certificates would no longer have automatic effect by statute in other parts of the United Kingdom. The United Kingdom government could remedy this by legislation but there is no indication that it intends to do so. Its position is that it does not like the Scottish Bill.

One of the reasons given by the Secretary of State for making the order is that having two different systems for issuing gender recognition certificates within the United Kingdom would cause serious problems. A person, he assumes, might be legally of one gender in England and another in Scotland. There would therefore be difficulties for some organisations operating at United Kingdom level – for example, in the fields of tax, benefits and pensions. This immediately strikes a private lawyer as odd. Scotland and England have had different systems in the law of persons for centuries – in the laws on marriage, divorce, legitimacy, incapacity and other matters of personal status – and they have not given rise to

serious problems. This is because the rules of private international law, even in the absence of statutory provision, did not allow them to.

In a paper on *Recognition in England of change of gender in Scotland: a note on private international law aspects*[1] I suggest that gender is a personal status, that there is authority for a general rule that a personal status validly acquired in one country will, subject to a few qualifications, be recognised in others and that there is no reason why this rule should not apply to a change of gender under the new Scottish rules.

The general rule is referred to at international level. In article 10 of its Resolution of September 2021 on *Human Rights and Private International Law*, the Institute of International Law says that:

> *Respect for the rights to family and private life requires the recognition of personal status established in a foreign State, provided that the person concerned has had a sufficient connection with the State of origin … as well as with the State whose law has been applied, and that there is no manifest violation of the international public policy of the requested State ….*

So far as the laws of England and Scotland are concerned, there are authoritative decisions and dicta which clearly support such a general rule. Cases can be found in relation to marriage, divorce, nullity of marriage, legitimacy and legitimation. A significant feature is that the judges have often reasoned from status to particular rules. It cannot be said that there are just isolated rules for particular life events. And the rules were developed at common law, before there were any statutory provisions on the subject.

Possible exceptions to the general rule – public policy, no sufficient connection, contrary statutory provision, impediment going to a matter of substance rather than procedure – are likely to be of little if any practical importance in relation to the recognition in England of changes of gender established under the proposed new Scottish rules.

If the above arguments are sound then a major part of the Secretary of State's reasons for blocking the Scottish Bill falls away. There would be no significant problem of people being legally male in Scotland but legally female in England,

just as there is no significant problem of people being legally married in Scotland but unmarried in England. Private international law would handle the dual system, as it has handled other dual systems in the past. Whether the Supreme Court will get an opportunity to consider the private international law aspects of the case remains to be seen: both sides have other arguments. It would be extremely interesting if it did.

From the point of view of private international law, it would be a pity if the Secretary of State's blocking order were allowed to stand. The rules in the Scottish Bill are more principled than those in the Gender Recognition Act 2004, which contains the existing law. The Scottish Bill has rational rules on sufficient connection (essentially birth registered in Scotland or ordinary residence in Scotland). The 2004 Act has none. The Scottish Bill has a provision on the recognition of changes of gender under the laws of other parts of the United Kingdom which is drafted in readily understandable form. The corresponding provisions in the 2004 Act are over-specific and opaque. The Scottish Bill has a rule on the recognition of overseas changes of gender which is in accordance with internationally recognised principles.

The 2004 Act has the reverse. It provides in section 21 that: A person's gender is not to be regarded as having changed by reason only that it has changed under the law of a country or territory outside the United Kingdom. This is alleviated by provisions which allow those who have changed gender under the law of an *approved overseas country* to use a simpler procedure for obtaining a certificate under the Act but still seems, quite apart from any human rights aspects, to be unfriendly, insular and likely to produce avoidable difficulties for individuals.

[1] Clive, Eric, Recognition in England of change of gender in Scotland: A note on private international law aspects (May 30, 2023). Edinburgh School of Law Research Paper No. 2023/06, Available at SSRN: https://ssrn.com/abstract=4463935 or http://dx.doi.org/10.2139/ssrn.4463935

Judgments Convention – No Thanks?

On September 1st, 2023, the 2019 Hague Judgments Convention will enter into force for the Member States of the EU and Ukraine. According to the HCCH, the Convention is "a true gamechanger in international dispute resolution", which will "reduce transactional and litigation costs, facilitate rule-based multilateral trade and investment, increase certainty and predictability" and "promote effective justice for all". The international conference taking place in Bonn later this week will likely strike an equally celebratory tone.

This sentiment is not shared universally, though. In a scathing article just published in *Zeitschrift für Europäisches Privatrecht (ZEuP)* entitled 'Judgments Convention: No Thanks!', Haimo Schack (University of Kiel) labels the Convention as "evidently worthless".



Schack comes to this damning conclusion in three steps. First, he argues that the 2005 Choice of Court Convention, the first outcome of the decades-long HCCH Jurisdiction Project, has been of minimal use for the EU and only benefited Singapore and London. Second, he points out the limited scope of the 2019 Convention, which is not only (inherently) unable to limit the exorbitant exercise of jurisdiction or avoid, let alone coordinate parallel proceedings, but also contains a long list of excluded areas of law in its Art. 2 (including, most significantly, the entire field of intellectual property: Art. 2(1)(m)). Schack argues that combined with the equally long list of bases for recognition and enforcement

in Art. 5, the Convention will make recognition and enforcement of foreign judgments significantly more complicated. This effect is exacerbated, third, by a range of options for contracting states to further reduce the scope of application of the Convention, of which Art. 29 is particularly "deadly", according to Schack. The provision allows contracting states to opt out of the effect of the Convention vis-à-vis specific other contracting states, which Schack fears will lead to a 'bilateralisation' similar to what prevented the 1971 Convention from ever getting off the ground, which will reduce the 2019 Convention to a mere model law. All in all, Schack considers the Convention to do more harm than good for the EU, which he fears to also lose an important bargaining chip in view of a potential bilateral agreement with the US.

Leaving his additional criticism of the HCCH's ongoing efforts to address the problem of parallel proceedings aside, Schack certainly has a point in that the 2019 Convention will not be easy to apply for the national courts. Whether it will be more complicated than a myriad of rarely applied bilateral conventions may be subject to debate, though. It also seems worth pointing out that the 1971 Convention contained a significantly more cumbersome mechanism of bilateralisation that required all contracting states to conclude additional (!) bilateral agreements to enter into force between any given pair of them, which is quite different from the opt-out mechanism of Art. 29. In fact, it seems at least arguable that the different ways in which contracting states can tailor their accession to the Convention to their specific needs and concerns, up to the exclusion of any treaty relations with a specific other contracting state, may not be the proverbial nail in the coffin as much as it might be a key to the Convention's success. While it is true that these mechanisms appear to undermine the internationally binding nature of the Convention, bringing it closer to a model law than a binding treaty, they also make it possible to accommodate different degrees of mutual trust within a single legal framework. The fact that the 2005 Convention has preserved some degree of judicial cooperation between the EU Member States and the UK in an area now otherwise devoid of it may be testimony to the important purpose still served by international conventions in the area of international civil procedure despite – but maybe also as a result of – their increasingly limited, tailor-made scope(s).

Postscript: A more sophisticated reaction to the article (written by Holger Jacobs and myself) is forthcoming in ZEuP 1/2024.

Towards an EU Regulation on the International Protection of Adults

On 31 May 2023, the European Commission presented a proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults (in the following: EU Adult Protection Regulation – EUAPR). This proposal is a response to significant demographic and social changes in the EU: Many Member States face enormous challenges posed by an increasingly aging population. Due to considerable improvements in medical care in recent decades, people grow much older than they used to, and this lengthening of the average lifespan in turn leads to an increase in age-related illnesses such as Alzheimer's disease. This demographic change creates problems for private international law, because the mobility of natural persons has increased within the EU where borders may, in principle, be crossed without restrictions. Many people who have left their state of origin in search for work elsewhere in their youth or middle age do not return to their home state after retirement, but rather spend the last part of their lives where they have established a new habitual residence. Besides, more and more people decide to leave their home state once they have reached the age of retirement. Such processes of migration at a late stage in life may have different reasons: Some old-age movers may want to avoid a heavy taxation of their estates that would put a burden on their heirs, some may wish to circumvent other restrictions of domestic inheritance laws (e.g. the right to a compulsory portion), others may simply wish to spend the remaining parts of their lives in milder climates, e.g. the Mediterranean, or look for a place to stay where the cost of living is lower, e.g. in some parts of Eastern Europe. When these persons begin to suffer from an impairment or an insufficiency of their personal faculties which no longer allows them to protect their interests themselves, however, intricate conflict of laws problems may arise: The authorities or courts of which state shall have jurisdiction to take protective measures concerning vulnerable adults or their property? Which law is to be applied to such measures? Under which conditions may protective measures taken in one state be recognised and

enforced in other states?

The EUAPR is meant to solve these problems. It is in many parts based on proposals made by two working groups set up by the European Law Institute and the European Association of Private International Law, respectively. The Regulation will partially supersede and complement the Hague Convention on the International Protection of Adults (in the following: Hague Adult Protection Convention – HAPC), a derogation which is permitted by Art. 49(2) and (3) HAPC. The Hague Convention was concluded on 13 January 2000 and entered into force on 1 January 2009 between France, Germany and the United Kingdom (restricted to Scotland, however). Today, the Convention is in force as well in Switzerland, Finland, Estonia, the Czech Republic, Austria, Monaco, Latvia, Portugal, Cyprus, Belgium, Greece, and Malta. The Netherlands, Ireland, Italy, Luxembourg, and Poland have signed the Convention, but have not ratified it yet. In the Netherlands, however, the Convention is already applied by the courts as a part of Dutch autonomous law (see Hoge Raad 2 February 2018, ECLI:NL:HR:2018:147). Thus, more than 23 years after the HAPC was concluded, the status of ratifications is rather unsatisfactory, as only 12 EU Member States have ratified the Convention so far. In order to speed up this process, the Regulation shall be accompanied by a Council Decision authorising Member States to become or remain parties, in the interest of the EU, to the HAPC.

For a long time, it was controversial whether the EUAPR could be based on the EU's general competence in PIL matters (Art. 81(2) TFEU) or whether such a measure ought to be classified as concerning family law within the meaning of Art. 81(3) TFEU. On the one hand, adult protection is traditionally codified in the family law sections of many Member States' civil codes (e.g. in Germany), and people will frequently benefit from the protection of family members (see COM(2023) 280 final, p. 4). On the other hand, a guardian, curator or a person endowed with a power of representation does not necessarily have to be a relative of the vulnerable adult. Following the example set by the EU Succession Regulation, the Commission eschews the cumbersome special procedure envisioned for family law matters and bases its proposal on Art. 81(2) TFEU instead.

As far as the spatial scope of the EUAPR is concerned, Art. 59 EUAPR contains detailed rules on the relation between the Regulation and the HAPC. The basic factor that triggers the application of the EUAPR is the vulnerable adult's habitual

residence in the territory of a Member State (Art. 59(1)(a) EUAPR). There are some exceptions to this rule, however, in order to ensure a smooth coordination with the Contracting States of the HAPC which are not Member States of the EUAPR (see Art. 59(1)(b) and (2) EUAPR). The substantive scope of the EUAPR is broadly similar to that of the HAPC, although it should be noted that Art. 2(2) EUAPR speaks of "matters" to which the Regulation shall apply, whereas Art. 3 HAPC uses the narrower term "measures". This may allow the inclusion of ex-lege powers of representation which are not directly covered by the HAPC. The Regulation's personal scope is defined in Art. 3(1), which states that, for the purposes of the EUAPR, an adult is a person who has reached the age of 18 years. Although the Regulation is largely a response to problems created by an aging population, it must be borne in mind that its scope is not restricted to elderly people, but encompasses all adults above the age of 18, and, if the exceptional condition of Art. 2(2) EUAPR is met, even younger people.

With regard to the rules on jurisdiction, the Regulation largely refers to the HAPC, with one significant divergence, though. The Convention does not permit a direct prorogation of jurisdiction, because it was feared that an uncontrolled freedom of prorogating the authorities of another state could be abused to the detriment of the adult concerned. Art. 8(2)(d) HAPC merely gives the authorities of a Contracting State having jurisdiction under Art. 5 or 6 HAPC the possibility of requesting the authorities of another Contracting State designated by the adult concerned to take protective measures. Contrary to this restrictive approach, Art. 6(1) EUAPR provides that the authorities of a Member State other than the Member State in which the adult is habitually resident shall have jurisdiction where all of the following conditions are met:

- the adult chose the authorities of that Member State, when he or she was still in a position to protect his or her interest;
- the exercise of jurisdiction is in the interest of the adult;
- the authorities of a Member State having jurisdiction under Art. 5 to 8 HAPC have not exercised their jurisdiction.

The following paragraphs 2 to 3 of Art. 6 EUAPR concern formal requirements and the integration of the adult's choice of court into the HAPC's jurisdictional framework. The possibility of choosing the competent authorities is a welcome addition to the choice-of-law provision on powers of representation in Art. 15 HAPC.

In order to determine the applicable law, Art. 8 EUAPR refers to Chapter III of the HAPC. As in the HAPC, there are no specific conflicts rules for ex-lege powers of representation. Moreover, advance medical directives that are not combined with a power of representation (Art. 15 HAPC) are neither covered by the HAPC nor the EUAPR. Since the authorities exercising their jurisdiction under the HAPC usually apply their own law pursuant to Art. 13(1) HAPC, the spatial scope of the Convention's jurisdictional rules also indirectly determines the reach of its conflicts rules. This will lead to a new round of the debate that we are familiar with in the context of the relationship between the Hague Child Protection Convention and the Brussels IIb Regulation, i.e. whether the intended parallelism only works if at least a hypothetical jurisdiction under the respective Convention's rules can be established, or whether it suffices that jurisdiction is established according to a provision that is only found in the respective Regulation. Within the framework of the EUAPR, this problem will arise with regard to a choice of court pursuant to Art. 6 EUAPR, an option that is not provided for by the HAPC. Applying Art. 13(1) HAPC in this context as well seems to be the preferable solution, which leads to an indirect choice of law by the vulnerable adult even in cases where no voluntary power of representation is established under Art. 15 HAPC.

The recognition of measures taken in other Member States is governed by Art. 9 and 10 EUAPR. Notwithstanding mutual trust – and, in this particular area of law, with good reason – , the Regulation still contains a public policy clause (Art. 10(b) EUAPR). For the purpose of enforcement, Art. 11 EUAPR abolishes the declaration of enforceability (exequatur) that is still required under Art. 25 HAPC, thus allowing for simplified enforcement procedures within the EU.

A major innovation is found in Chapter VII. The Regulation will introduce a European Certificate of Representation (Art. 34 EUAPR) which will supersede the certificate under Art. 38 HAPC. The Certificate shall be issued for use by representatives, who, in another Member State, need to invoke their powers to represent a vulnerable adult (Art. 35(1) EUAPR). The Certificate may be used to demonstrate that the representative is authorised, on the basis of a measure or confirmed power of representation, to represent the adult in various matters defined in Art. 35(2) EUAPR.

Apart from those substantive achievements, the Regulation contains necessary rules on rather procedural and technical subjects, such as the cooperation

between the competent authorities (Chapter VI EUAPR), the establishment and interconnection of protection registers (Chapter VIII EUAPR), digital communication (Chapter IX EUAPR), and data protection (Chapter X EUAPR). These rules will also lead to a major modernisation compared with the older rules of the HAPC.

In sum, the proposal of the EUAPR will considerably strengthen the international protection of vulnerable adults within the EU.