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

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

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

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

To solve this problem, China, after seeking the views of Hong Kong SAR

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

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

The issue of whether international treaties ratified by China 'automatically' applies to the territory of the Hong Kong and Macau SARs was once hotly debated in the investor-State arbitration cases of *Tza Yap Shum v. Peru* [5] and *Sanum v. Laos-I* [6]. Contrary to international tribunals and the Court of Appeal of Singapore's confirmative and liberal stances, Chinese government and commentators said no. [7] They all insist that China has made its intentions clear in the Diplomatic Notes that the treaty to which China is or will become a party applies to Hong Kong and Macau only after China has decided so and carried out separately the formalities for such application. [8] Moreover, the extension of territorial application to Hong Kong and Macau must be in line with the "One Country, Two Systems" policy and the Basic Laws of Hong Kong and Macau. [9] Accordingly, the PRC Central People's Government in Beijing has the final say over whether the international treaty to which China is or will be a party applies to Hong Kong and Macau after consulting with the two SARs' governments.

The same problem stays with the applicability of CISG in the Hong Kong and Macau SARs. On the one hand, no mention of CISG in the Diplomatic Notes submitted by China, at least on the side of Hong Kong, demonstrates China's true intentions in public international law that the CISG shall not apply in the SAR. [10] In this view embraced by some French and US courts, China's Diplomatic Notes not mentioning CISG qualify as Article 93(1) CISG reservation indicating

that CISG does not apply to Hong Kong and Macau. [11] On the other hand, some other foreign courts considered the Diplomatic Notes did not constitute an Article 93(1) CISG reservation and therefore the default rule in Article 93(4) applies, saying that CISG 'automatically' applies to all territorial unites of China. [12] This interpretive approach is similar to the confirmative and liberal approach adopted by the tribunals in *Tza Yap Shum v. Peru* and *Sanum v. Laos-I* on the issue whether Chinese investment treaty absent in the Diplomatic Notes extends to territory of the Hong Kong and Macau SARs. However, such approach was often criticized as contrary to China's expressed intentions. [13]

What Does It Mean for Hong Kong?

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

Firstly, and most obviously, on and after 1 December 2022 it would be correct for any foreign court or international tribunal to hold that CISG applies to Hong Kong. This will wipe out the "confusion and conflict as to whether or not China's diplomatic notes for Hong Kong and Macao, deposited in 1997 and 1999 respectively, are sufficient to exclude the application of the CISG" to Hong Kong and Macau under Article 93 CISG. [14] Indeed, they are sufficient; but China has now decided to reverse its previous intention.

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

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

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

Conclusion: Shall Macau Follow Suit?

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

Hence, whether CISG or Chinese investment treaty extends to Macau is likewise

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

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Endnotes

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

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

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

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

[5] See *Tza Yap Shum v. Peru,* ICSID Case No. ARB/07/6, Award, 7 July 2011,

where a Hong Kong resident having Chinese nationality relied upon the Peru-China BIT 1994 to bring the ICSID arbitration against Peru.

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

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

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

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

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

[11] See *ibid*, at para. 3.38. The Consultation Paper cited the following cases: *Telecommunications Products* Case, Cour de Cassation, Case No. 04-117726, 2 April 2008 (France); *Innotex Precision Ltd v Horei Image Products*, 679 F. Supp. 2d 1356 (2009) (US); *America's Collectibles Network Inc. v Timlly (HK) Ltd*., 746 F. Supp. 2d 914 (2010) (US); *Wuhan Yinfeng Data Network Co. Ltd. v Xu Ming* (19 March 2003), Hubei High People's Court (China).

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

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

Republic' (2018) 30 *Singapore Academy of Law Journal* 384.

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

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

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

Sierd J. Schaafsma, Intellectual Property in the Conflict of Laws; The Hidden Conflict-of-law Rule in the Principle of National Treatment

This book presents a new explanation as to the conflict-of-law rule in the field of intellectual property. In addition, it also provides new insights into the history of the conflict-of-laws, aliens law and their relationship.

The book focusses on the difficult question whether the Berne Convention (on copyright) and the Paris Convention (on industrial property) contain a conflict-of-law rule. Opinions differ widely on this matter today. However, in the past, for the nineteenth-century authors of these treaties, it was perfectly self-evident that these treaties contain a conflict-of-law rule, namely in the 'principle of national treatment' as it is called. How is that possible? These are the fundamental questions at the heart of this book: does the principle of national treatment in the Berne Convention (article 5(1)) and the Paris Convention (Article 2(1)) contain a conflict-of-law rule? And if so, why do we no longer understand this conflict-of-law rule today?

The study reveals a ground-breaking new explanation why the principle of

national treatment in these treaties contains a conflict-of-law rule: the *lex loci protectionis*.

Key to understanding is a paradigm shift. The principle of national treatment was developed as a doctrine-of-statute solution addressing a doctrine-of-statute problem. In that way of thinking, it is self-evident that the principle of national treatment contains a conflict-of-law rule. However, today we have started to think differently, i.e. within the paradigm of Von Savigny. This causes a problem: we look at an old, statutist solution through Savignian glasses, and as a result the conflict-of-law rule in the principle of national treatment is out of the picture. Meanwhile, we are not even aware that we are looking through Savignian glasses and that these glasses narrow our field of vision – and as a result, this conflict-of-law rule is beyond our reach. The explanation in this book results in a comprehensive and consistent interpretation of the respective provisions in these treaties, and it explains why we no longer understand this conflict-of-law rule today (see especially paragraph 5.1.2).

The search for this new explanation has, in addition, generated several new insights into the history of the conflict of laws in general (see especially paragraph 5.2.3), aliens law, and the relationship between these two fields of law.

Finally, the book is also detailed and authoritative explanation of the intersection of the conflicts of law and intellectual property law, providing a full and detailed analysis of the current state of affairs of the intersection of these fields of law. It also deals with less common themes such as material reciprocity (Chapter 6).

This book is an English translation of Sierd J. Schaafsma’s book, which appeared in Dutch in 2009, and is now updated with the most significant case law and legislation.

Elgar, 2022; see Elgar website.

Bitcoin and public policy in the field of international commercial arbitration

Is a foreign arbitral award granting damages in bitcoin compatible with substantive public policy? The Western Continental Greece Court of Appeal was recently confronted with this question. Within the framework of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, it ruled that the recognition of a US award runs contrary to Greek public order. Cryptocurrency, such as bitcoin, favors tax evasion and facilitates economic crime, causing insecurity in commercial transactions to the detriment of the national economy.

FACTS

The applicant, a German national, was a member of a website, governed by a US company. The website was a platform through which members could conclude credit contracts in cryptocurrency (bitcoin). The applicant agreed with a resident of Greece to finance his enterprise by providing a credit of 1.13662301 bitcoin. The Greek debtor failed to fulfill his obligations, and he refused to return the bitcoin received. On the grounds of an arbitration agreement, an award was issued by an online arbitration court, located in the USA. The debtor appeared in the proceedings and was given the right to challenge the claim of the applicant. The court of first instance decided that the arbitral award may not be recognized in Greece for reasons of substantive public policy (CFI Agrinio 23.10.2018, unreported). The applicant lodged an appeal.

THE JUDGMENT OF THE COURT APPEAL

The appellate court began with a short description on the nature of bitcoin. It then mentioned the position of the European Central Bank with respect to the same matter. It concluded that the use of bitcoins endangers transactions both for the parties involved and the state. This comes from the fact that any income resulting from the use of cryptocurrency is tax-free, given that this kind of transactions are not regulated in Greece. Hence, importing capital in bitcoins and generally any kind of cryptocurrency, irrespective of the type of legal matter,

infringes the domestic legal order, because it favors tax evasion and facilitates economic crime, causing insecurity in commercial transactions to the detriment of the national economy.

As a result of the above, the recognition of an award which recognizes bitcoin as a decentralized currency unit (peer to peer), and orders the payment of a certain debt in bitcoins, runs contrary to public policy, i.e., to fundamental rules and principles of Greek legal order in present times, reflecting predominant social, financial, and political values.

Finally, by enhancing transactions in bitcoin and promoting its equalization to legal currency, the recognition of such an award in Greece would essentially disturb prevailing standards of the country, given bitcoin's sudden and unpredictable fluctuations [Western Continental Greece Court of Appeal 27.09.2021, unreported].

COMMENT

Unlike the profound analysis of the first instance court, the appellate court confirmed the judgment mechanically, with zero references to legal scholarship and case law. The developments in the subject matter between 2018 (publication of the first court's ruling) and 2021 (publication of the appellate court's judgment) were not taken into account. The Hellenic Republic has transposed crucial directives related to cryptocurrency (see DIRECTIVE (EU) 2019/713 of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA). New income tax rules and regulations focusing on cryptocurrency are prepared by state authorities. Even now, i.e., without a special law on cryptocurrencies, bitcoin profits must be declared for taxation purposes. Bitcoin exchange offices are active in the country. To conclude, the judgment seems to be alienated from contemporary times.

Referring to the judgment of the CJEU in the case Skatteverket / David Hedqvist (C-264/14), the first instance ruling underlined that the decision focused on the Swedish economic environment, which may not be compared to the situation in Greece. Therefore, and in light of recent developments in the country, we may hope that the courts will soon shift course towards a more pragmatic approach.

[Many thanks to Professor Euripides Rizos, Aristotle University of Thessaloniki, for his valuable insight into the field of cryptocurrencies]

EFFORTS Questionnaire on Digitalization of Civil Procedures Relating to Cross-Border Enforcement

In the framework of the EFFORTS Project, a questionnaire has been drawn up on the digitalization of civil procedures relating to cross-border enforcement.

The questionnaire aims at collecting quantitative and qualitative data on the digitalization of enforcement procedures at the national and European level, with a view to identifying technical solutions and legislative amendments to implement such digitalization.

The questionnaire, together with information on the EFFORTS Project, may be accessed here

The EFFORTS project partners thank you in advance for your time and contribution!

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Ranking the Portability of ASEAN Judgments within ASEAN

Written by Catherine Shen, ABLI

The Asian Business Law Institute (ABLI) has recently released a free publication titled Enforcement of Foreign Judgments in ASEAN: Ranking the Portability of ASEAN Judgments within ASEAN, a derivative publication under its Foreign Judgments Project.

The Association of Southeast Asian Nations (ASEAN) comprises of Brunei Darussalam, Cambodia, Indonesia, Lao, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. These jurisdictions are of different legal traditions of civil law (Cambodia, Indonesia, Lao, Thailand and Vietnam), common law (Brunei Darussalam, Malaysia, Myanmar and Singapore) and hybrid law (Philippines) tradition. There are two primary hurdles for increasing the portability of ASEAN judgments within the bloc. First, some ASEAN jurisdictions, such as Indonesia and Thailand, have no law that allows foreign judgments to be recognised and enforced. Second, most civil law jurisdictions in ASEAN still have rather rigid requirements on reciprocity. These two hurdles are the main influencers of the ranking.

Three key takeaways can be gleaned from the ranking.

First, Vietnamese judgments claim the crown of being the most portable of ASEAN judgments within ASEAN. They can be enforced in seven out of the other nine ASEAN countries, provided, of course, that the requirements for enforcement under the laws of those countries are satisfied. This is a portability rate of close to 78%. Compared to other ASEAN jurisdictions, Vietnam has the benefit of having bilateral agreements with Cambodia and Lao which allow its judgments to be enforced in the latter two jurisdictions. Cambodia requires a guarantee of reciprocity while Lao PDR requires a bilateral treaty with the relevant country covering the enforcement of each other’s judgments before reciprocity is satisfied.

Second, judgments rendered by the other civil law countries of ASEAN come in second place. They can be enforced in six out of nine ASEAN countries.

Third, judgments from the common law countries of ASEAN and the hybrid law jurisdiction of the Philippines are jointly in third place. They can be enforced in five out of nine ASEAN countries, namely in the other common law and hybrid law jurisdictions, as well as Vietnam. Although Vietnam, being a civil law jurisdiction, imposes a condition of reciprocity, it appears relatively easy to satisfy this requirement.

This result may be surprising or even perverse since most civil law jurisdictions, i.e., Cambodia, Indonesia, Lao and Thailand, have comparatively illiberal regimes for the enforcement of foreign judgments (whether due to the rigid requirement of reciprocity or the lack of relevant laws), while the common law and hybrid law jurisdictions in ASEAN have comparatively liberal rules for foreign judgments enforcement. This "asymmetry" is mainly due to the inability of those civil law jurisdictions to return the favour of the more liberal rules of the common law and hybrid law jurisdictions in ASEAN given the state of their laws, namely, the requirement that there be reciprocity between the two countries.

The *Enforcement of Foreign Judgments in ASEAN: Ranking the Portability of ASEAN Judgments within* ASEAN is available for free and can be downloaded here. ABLI regularly publishes latest developments in the field of recognition and enforcement of foreign judgments in Asia on its website and LinkedIn.

A few thoughts on Golan v. Saada – this week at the US Supreme Court

Written by Mayela Celis, UNED

The oral arguments of the case Golan v. Saada (20-1034) will take place tomorrow (Tuesday 22 March 2022) at 10 am Washington DC time before the US Supreme Court. For the argument transcripts and audio, click here. The live audio will be

available here.

We have previously reported on this case here and here.

> ***"QUESTION PRESENTED***
>
> *The Hague Convention on the Civil Aspects of International Child Abduction requires return of a child to his or her country of habitual residence unless, inter alia, there is a grave risk that his or her return would expose the child to physical or psychological harm. The question presented is:*
>
> *Whether, upon finding that return to the country of habitual residence places a child at grave risk, a district court is required to consider ameliorative measures that would facilitate the return of the child notwithstanding the grave risk finding." (our emphasis)*

Please note that US courts often use the terms "ameliorative measures" and "undertakings" interchangeably (as stated in the petition). Also referred to as protective measures in other regions.

This case stems from the fact that there is a split in the US circuits (as well as state courts).

There were several amicus curiae briefs filed, three of which are worthy of note: the amicus brief of the United States, the amicus brief of Hague Conventions delegates Jamison Selby Borek & James Hergen and finally, the amicus brief filed by Linda J. Silberman, Robert G. Spector and Louise Ellen Teitz.

The amicus brief of the United States stated:

> *"Neither the Hague Convention on the Civil Aspects of International Child Abduction nor its implementing legislation requires a court to consider possible ameliorative measures upon finding under Article 13(b) that there is a grave risk that returning a child to his country of habitual residence would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. Rather, the Convention and ICARA leave consideration of possible ameliorative measures to a court's discretion."*

The amicus brief of the Hague Delegates coincide with this statement of the

United States, while the brief of professors Silberman, Spector and Teitz holds the opposite view.

As is well known, the US Executive Branch's interpretation of a treaty is entitled to great weight. See Abbott vs. Abbott 560 U. S. _ (2010); Sumitomo Shoji America, Inc. v. Avagliano, 457 U. S. 176.

In my personal opinion, the position taken by the United States is the correct one.

The fact is that the Hague Abduction Convention is silent on the adoption of ameliorative measures. Article 13 indicates: "the judicial or administrative authority of the requested State *is not bound to order* the return of the child if the person, institution or other body which opposes its return establishes that […]" (our emphasis). The discretion of the court is thus key. Besides, and as we all aware, the Child Abduction Convention is not a treaty on recognition and enforcement of protective measures.

In some legal systems, this void has been supplemented with additional legislative measures such as the Brussels II ter Regulation (2019/1111) in the European Union. Importantly, this instrument provides for the seamless enforcement of provisional – including protective – measures, which makes it a much more cogent system (see, for example, recitals 30, 45 and 46, and articles 2(1)(b), 15 – on jurisdiction-, 27(5), 35(2) and 36(1)). And not to mention the abolition of the declaration of enforceability or the registration for enforcement, which speeds up the process even more.

Furthermore, and particularly in the context of the United States, the onus that ameliorative measures exist or could be made available should be placed mainly on the parties requesting the return, and not on the court. See the amicus brief filed by former US judges where they stressed that "mandating judicial analysis of ameliorative measures forces US courts beyond their traditional jurisdiction and interactions with foreign law / civil law judges perform investigatory functions; common law judges do not."

Arguably, the 13(1)(b) Guide to Good Practice may be read as supporting both views. See in particular:

> ***See paragraph 36****: "The examination of the grave risk exception should then also include, if considered necessary and appropriate, consideration of the*

availability of adequate and effective measures of protection in the State of habitual residence." (our emphasis).}

***See paragraph 44**: "Protective measures may be available and readily accessible in the State of habitual residence of the child or, in some cases, may need to be put in place in advance of the return of the child. In the latter case, specific protective measures should only be put in place where necessary strictly and directly to address the grave risk. They are not to be imposed as a matter of course and should be of a time-limited nature that ends when the State of habitual residence of the child is able to determine what, if any, protective measures are appropriate for the child. In certain circumstances, while available and accessible in the State of habitual residence, measures of protection may not be sufficient to address effectively the grave risk. An example may be where the left-behind parent has repeatedly violated protection orders." (our emphasis)*

But see in contrast paragraph 41 of the Guide, which was mentioned in the amicus brief of Child Abduction Lawyers Association (CALA).

Putting this legal argument aside, and in the context of the United States, there are several reasons why US courts should not be *required* to consider ameliorative measures (but may do so on a discretionary basis):

- The United States is not a Contracting Party to any global treaty that would allow the recognition and enforcement of protective measures (such as the 1996 Hague Protection of Children Convention – USA is only a signatory State);
- A great number of child abductions occur to and from the United States and Mexico. The Mexican legal system is not familiar with the recognition and enforcement of undertakings or with adopting mirror orders in the context of child abduction (or in any other context for that matter);
- Requiring courts to look into ameliorative measures in every single case would unduly delay abduction proceedings;
- Social studies have revealed that undertakings are very often breached once the child has been returned (usually with the primary carer, the mother), which has the direct result of leaving children and women in complete vulnerability. See Lindhorst, Taryn, and Jeffrey L Edleson.

Battered Women, Their Children, and International Law : The Unintended Consequences of the Hague Child Abduction Convention. Northeastern Series on Gender, Crime, and Law. Boston, MA: Northeastern University Press, 2012. See also amicus brief of domestic violence survivors.

In conclusion, I believe that we all agree that ameliorative measures (or undertakings) are important. But they must be adequate *and effective* and should not be adopted just for the sake of adopting them without any teeth, as this would not be in the best interests of the child (*in concreto*).

New York's Appellate Division Holds that Chinese Judgment Should Not Be Denied Enforcement on Systemic Due Process Grounds

Written by William S. Dodge (Professor, University of California, Davis, School of Law)

Should courts in the United States refuse to recognize and enforcement Chinese court judgments on the ground that China does not provide impartial tribunals or procedures compatible with the requirements of due process of law? Last April, a New York trial court said yes in *Shanghai Yongrun Investment Management Co. v. Kashi Galaxy Venture Capital Co.*, relying on State Department Country Reports as conclusive evidence that Chinese courts lacked judicial independence and suffered from corruption. As Professor Wenliang Zhang and I pointed out on this blog, the implications of this decision were broad. Under the trial court's reasoning, no Chinese judgment would ever be entitled to recognition in New York or any of the other U.S. states that have adopted Uniform Acts governing foreign judgments. Moreover, U.S. judgments would become unenforceable in

China because China enforces foreign judgments based on reciprocity. But on March 10, just three weeks after oral argument, New York's Appellate Division answered that question no, reversing the trial court's decision.

As background, it is important to note that the recognition and enforcement of foreign country judgments in the United States is generally governed by state law. Twenty-eight states and the District of Columbia have enacted the 2005 Uniform Foreign-Country Money Judgments Recognition Act. In nine additional states, its predecessor, the 1962 Uniform Foreign Money-Judgments Recognition Act, remains in effect. At the time of the trial court's decision, the 1962 Uniform Act governed in New York, but it was superseded by the 2005 Uniform Act on June 11, 2021. Both Uniform Acts provide for the nonrecognition of a foreign judgment if "the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law."

This systemic lack of due process ground for nonrecognition comes from the U.S. Supreme Court's 1895 decision in *Hilton v. Guyot*, issued at a time when lawyers routinely distinguished between civilized and uncivilized nations. It was incorporated in the 1962 Uniform Act at the height of the Cold War, and included in the 2005 Uniform Act without discussion, apparently to maintain continuity with the 1962 Act. Despite its codification for nearly sixty years, fewer than five cases have refused recognition on this ground. The leading case is *Bridgeway Corp. v. Citibank*, involving a Liberian judgment issued during its civil war, when the judicial system had almost completely broken down.

Shanghai Yongrun involved a business dispute between two Chinese parties, which was submitted to a court in Beijing under a choice-of-forum clause in the parties' agreement. The defendant was represented by counsel, presented its case, and appealed unsuccessfully. Nevertheless, the New York trial court held that the Chinese judgment was not enforceable because China lacks impartial tribunals and procedures compatible with due process. The court relied "conclusively" on China Country Reports prepared by the State Department identifying problems with judicial independence and corruption in China.

In a brief order, the Appellate Division reversed. It concluded that the trial court should not have dismissed the action based on the Country Reports. These Reports did not constitute "documentary evidence" under New York's Civil

Practice Law and Rules. But more fundamentally, reliance on the Country Reports was inappropriate because they "primarily discuss the lack of judicial independence in proceedings involving politically sensitive matters" and "do not utterly refute plaintiff's allegation that the civil law system governing this breach of contract business dispute was fair."

On this, the Appellate Division was clearly correct. The State Department prepares Country Reports to administer provisions of the Foreign Assistance Act denying assistance to countries that consistently engage in gross violations of human rights, not to evaluate judicial systems for other purposes. See 22 U.S.C. §§ 2151n & 2304. The Reports themselves warn that they "they do not state or reach legal conclusions with respect to domestic or international law." Moreover, if these Reports were used to determine the enforceability of foreign judgments, China would not be the only country affected. An amicus brief that I wrote and fourteen other professors of transnational litigation joined noted that State Department Country Reports expressed similar concerns about judicial independence, corruption, or both with respect to 141 other countries, including Argentina, Brazil, Italy, Japan, Mexico, South Korea, and Spain.

The Appellate Division concluded that "[t]he allegations that defendants had an opportunity to be heard, were represented by counsel, and had a right to appeal in the underlying proceeding in the People's Republic of China (PRC) sufficiently pleaded that the basic requisites of due process were met." By focusing on the facts of the specific case, the Appellate Division appears to have taken a case-by-case, rather than a systemic, approach to due process. Such a case-by-case approach is expressly permitted under the 2005 Uniform Act, which adds as a new ground for nonrecognition that "the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law." Such a case-specific approach avoids the overinclusiveness of denying recognition on systemic grounds when there are no defects in the judgment before the court.

The Appellate Division's decision in *Shanghai Youngrun* continues the growing trend that Professor Zhang and I have noted of U.S. decisions recognizing and enforcing Chinese judgments. Just two months before this decision, in *Yancheng Shanda Yuanfeng Equity Investment Partnership v. Wan*, a U.S. district court in Illinois recognized and enforced a Chinese judgment in another business dispute. The court expressly rejected the New York trial court's holding in *Shanghai*

Yongrun, noting "the multiple federal cases … where American courts enforced Chinese court judgments and/or acknowledged the adequacy of due process in the Chinese judicial system." One hopes that this trend will continue.

A few takeaways from the 2022 meeting of the HCCH governing body (CGAP): publications and future meetings

On 7 March 2022, the Conclusions & Decisions of the governing body of the Hague Conference on Private International Law (HCCH), *i.e.* the Council on General Affairs and Policy (CGAP), were released. Click here for the English version and here for the French version.

For official information on the ceremony of signatures and ratifications of instruments, click here (HCCH news item). For our previous post on the signature of the USA of the 2019 Judgments Convention, click here.

Although a wide range of topics was discussed, I would like to focus on two: publications and future meetings.

1) Publications

This meeting was very fruitful in getting the necessary approval for HCCH publications. There were three publications approved, ranging from family law to access to justice for international tourists.

Family law

The Council adopted the following decision: "12. CGAP approved the

Practitioners' Tool: Cross-Border Recognition and Enforcement of Agreements Reached in the Course of Family Matters Involving Children, subject to editorial amendments, for publication."

The Report of the Experts' Group on Cross-Border Recognition and Enforcement of Agreements in Family Matters Involving Children (meetings of 14-15 September and 29-30 November 2021) is available here. The Chair of the Experts' Group is *Professor Paul Beaumont*. The work of this Expert's Group has ended.

The draft of the Practitioners' Tool: Cross-Border Recognition and Enforcement of Agreements Reached in the Course of Family Matters Involving Children has been made available. For French, click here.

As some of you may be aware, this tool is an alternative to the drafting of a binding instrument in this area. In 2017, the Experts' Group drafted the following Conclusion and Recommendation for the attention of the Council on General Affairs and Policy of March 2018:

> *"Therefore the Experts' Group recommends to the Council to develop a new Hague Convention that would build on, and add value to, the 1980, 1996 and 2007 Hague Conventions, and be developed with a view to attracting as many States as possible."*

The reasoning of the Experts' Group was the following:

> *While the existing Hague Family Conventions encourage the amicable resolution of disputes involving children, they do not contemplate the use of "package agreements" (i.e., family agreements related to custody, access, relocation and/or child support and which may include spousal support and other financial matters, such as property issues) and do not provide a simple, certain or efficient means for their enforcement. From the Group's experience it is recognised that such agreements are increasingly frequently used. Very often the matters covered require the simultaneous application of more than one Hague Family Convention while some elements of those package agreements are not within the scope of any of the existing Hague Family Conventions. This creates difficulties for the enforcement of package agreements.*

Unfortunately (or fortunately depending on how people may view this), this initiative was not taken on board by Council in 2018. See here.

Apostille

The Council adopted the following decision: "31. CGAP approved the second edition of the Practical Handbook on the Operation of the Apostille Convention, subject to editorial amendments, for publication." This draft is not yet publically available.

The first edition of the Apostille Handbook is available here.

Access to Justice for international tourists and visitors

The Council adopted the following decision: "3. CGAP approved the Practical Guide to Access to Justice for International Tourists and Visitors, subject to editorial amendments, for publication on the HCCH website."

The draft of the Practical Guide to Access to Justice for International Tourists and Visitors is available here.

As with the recognition and enforcement of agreements reached in the course of family matters, the initial proposal was the developing of a new instrument.

At its meeting in 2013, the CGAP took note of the suggestion by Brazil to undertake work on co-operation in respect of protection of tourists and visitors abroad. See in particular Prel. Doc. No 3 of February 2018 – Final report concerning a possible future Convention on Co-operation and Access to Justice for International Tourists drafted by *Professor Emmanuelle Guinchard*.

2) Meetings

With regard to future meetings, there are a few meetings in the pipeline:

Special Commission meetings (SC) in 2022 (basically, a global meeting of experts):

- Special Commission on the practical operation of the 2007 Child Support Convention and its Protocol – to be held from 17 to 19 May (in-person meeting) – This will be the first meeting ever of the SC on this topic

- Special Commission on the practical operation of the 1993 Adoption Convention – to be held from 4 to 8 July (online meeting)
- Special Commission on the practical operation of the 2000 Protecion of Adults Convention – to be held from 9 to 11 November – Tnis will be the first meeting ever of the SC on this topic

And finally, the Working Group on matters related to jurisdiction in transnational civil or commercial litigation – to hold "two further meetings before the 2023 meeting of CGAP, with intersessional work as required".

Declaration of the Institute of International Law on aggression in Ukraine

Yesterday (1 March 2022) the Institute of International Law approved a declaration on the aggression in Ukraine. The declaration is available by clicking the following links:

Declaration of the Institute of International Law on Aggression in Ukraine – 1 March 2022 (EN)-1

Déclaration de l'Institut de Droit international sur l'agression en Ukraine – 1 mars 2022 (FR)

The current developments in Ukraine and the measures and sanctions currently in place have undoubtedly an impact across all areas, including private international law. See for example the measures adopted by the European Union here.

I include an excerpt of the declaration below:

> *The Institute recalls that the ongoing military operations call ipso facto for the*

application of international humanitarian law, including the rules relating to occupation, as well as all the other rules applicable in times of armed conflict. It recalls also that persons responsible for international crimes as defined by international law may be prosecuted and sentenced in accordance with the law in force.

Faithful to its mission, the Institute remains convinced that, while international law alone cannot prevent the outbreak of violence, it must remain the compass by which States are guided, and it is more than ever determined to strengthen its work to promote "the progress of international law". The Institute adds its voice to that of other actors in the international community, including the learned societies acting in defense of the rule of law, who call for an end to the war in Ukraine and the settlement in good faith of disputes between the States concerned through all appropriate means of peaceful settlement.

The Characterization and Applicable Law of Cultural Objects in Conflicts of Laws: Is a Mummy a Person or a Property?

Willem 1, Buddhist mummy. Statue (L), CT scan (R). (Photos: Drents Museum)

by Zhen Chen, PhD researcher in the Department of Private International Law, University of Groningen, the Netherlands (ORCID ID: https://orcid.org/0000-0001-5323-4271)[1]

In *Buddha Mummy Statue* case, the Chinese village committees sued the Dutch defendants for the return of a stolen golden statue which contains a 1000-year old mummified buddhist. The parties had different opinions on the legal nature of the mummy contained in the statue. The Chinese court classified the statue as a cultural property and applied the choice of law over movable properties provided in Article 37 of Chinese Private International Law (*lex rei sitae)*. Based on a comparative study, this article argues that a mummy does not fall within the traditional dichotomy between a person and a property. Instead, a mummy should be classified as a transitional existence between a person and a property. If the classification of a mummy has to be confined to the traditional dichotomy, a mummy can be regarded as a quasi-person, or a special kind of property. Following this new classification, a new choice of law rule should be established. In this regard, the Belgian Private International Law Act, which adopts the *lex originis* rule supplement by the *lex rei sitae*, is a forerunner. This article advocates that the adoption of the *lex originis* rule may help to stop the vicious circle of illegal possession and to facilitate the return of stolen cultural objects,

especially those containing human remains, to their country of origin.

1. Gold or God?

As to the legal nature of the Buddha Mummy Statue in dispute, from the Chinese villagers' perspective, the mummy contained in the golden statute is a person or God, instead of a property. Specifically, the mummified buddhist Master Zhanggong was their ancestor, who used to live in their village and has been worshipped as their spiritual and religious God for over 1000 years. Master Zhanggong was preserved in a statue moulded with gold to prevent decomposition and to maintain his immortality. The villagers celebrated Master Zhanggong's birthday every year with feast, music and dance performance, which has become their collective memory and shared belief.

In contrast, from the Dutch art collector' perspective, the golden statute containing a mummy is a property not a person. It is merely a cultural property with great economic value and worthy of collection or investment. Thus, it is not surprising that the Dutch collector asked for a compensation of 20 million Euro, of which the Chinese villagers whose annual income was around 1000 Euro could not afford it.

The Chinese village committees sued the Dutch art collector both in China and in the Netherlands. The Chinese village committees asserted that the mummified Master Zhanggong contained in the statue was a corpse within the meaning of the Dutch Liability Decree, and the ownership thereof was excluded under the Dutch law.[2] The claimants as the trustees or the agents had the right of disposal.[3] The Dutch art collector argued that the mummified monk contained in the golden statue was not a corpse, as the organs of the monk were missing. The Dutch court did not touch upon the issue of classification of the Buddha Mummy Statue, as the case was dismissed on the basis that the Chinese village committees had no legal standing nor legal personality in the legal proceedings.[4]

2. The *lex situs* under Article 37 Chinese Private International Law Act

The Chinese court classified the Buddha Mummy Statue as a cultural property

and applied the law of the country where the theft occurred, namely Chinese law, by virtue of Article 37 Chinese Private International Law Act. Such classification is not satisfactory, as the mummy in dispute was essentially considered as a property. Chinese law was applied because the place of theft was in China and the *lex situs* was construed by the Chinese court as the *lex furti*. However, what if the mummy was stolen in a third country during the transportation or an exhibition? The *lex furti* does not necessarily happen to be the *lex originis* in all cases involving stolen cultural objects.

Moreover, cultural objects containing human remains are special in comparison with other cultural objects without, as human remains contain biological information of a person. The application of the traditional *lex rei sitae* rule to all cultural objects, including those containing human remains, is far from satisfactory. In general, the law on dead human bodies precedes over the sale of corpses, and no person, including a good faith purchaser can own somebody else's corpse both in civil law and common law systems.[5] A corpse must not be downgraded to the status of a property.[6] The characterization of human remains as properties objectifies human remains and thus may violate human dignity.[7] Therefore, it is necessary to distinguish cultural objects containing human remains from other types of cultural objects. The question is how to draw a distinction and what is the legal nature of a cultural object containing human remains, such as a mummy. If a mummy does not fall within the scope of traditional category of a person nor a property, does it mean a new category need to be created? In this regard, the classification of the legal nature of a fertilized embryo in *Shen v. Liu* may be relevant,[8] since the judge addressed the issue by thinking out of the box and provided a new solution.

3. Is a Fertilized Embryo a Property or a Person?

Shen v. Liu was the first case in China that involved the ownership of frozen embryos. Specifically, Shen and Liu, who got married in 2010 and died in 2013 in a car accident, left four frozen fertilized embryos in a local hospital. The parents of Shen (Mr and Mrs Shen), sued the parents of Liu (Mr and Mrs Liu), who also lost their only child, claiming the inheritance of the four frozen fertilized embryos

of the deceased young couple.[9] The local hospital where the embryos were preserved was a third party in this case.

3.1 A property, a special property, or 'a transitional existence between person and property'?

The third party Gulou Hospital argued that the frozen embryos do not have the nature of a property. Since Mr. and Mrs. Shen had passed away, the expired embryos should be discarded. Neither the plaintiffs nor the defendants should inherit the embryos.[10] The first-instance court held that fertilized embryos had the potential to develop into life, and thus are special properties that contain biological characteristics of a future life. Unlike normal properties, fertilized embryos can not be the subject of succession, nor be bought or sold.[11]

Nevertheless, the appellate court took the view that embryos were 'a transitional existence between people and properties'. Therefore, embryos have a higher moral status than non-living properties and deserve special respect and protection. The embryo ethically contains the genetic information of the two families and is closely related to the parents of the deceased couple. Emotionally speaking, the embryo carries personal rights and interests, such as the grief and spiritual comfort for the elderly. The court held that the supervision and disposal of the embryos by the parents from these two families was in line with human ethics and can also relieve the pain of bereavement for both parties.[12] Clearly, the court did not classify the fertilized embryos as people or properties. Instead, the embargo was considered as 'a transitional existence between a person and a property', since it is not biotic nor abiotic but a third type in-between.

3.2 A mummy as 'a continuum between a person and a property'

With regard to the distinction between a person and a property, the judgment of *Shen v. Liu* shows that the Chinese court was not confined to the traditional dichotomy between a person and a property. The same should be applicable to mummies. Embryos and mummies have something in common, as they are two different kinds of life forms. Whereas the embryo in *Shen v. Liu* is the form of life

which exists before the birth of a human being, the mummy in *Buddha Mummy Statue* case is another form of life which exists after the death of a human being.

Embryos and mummies, as the pre-birth transition and after-death extension of life forms of a human being, involve morality and 'human dignity'.[13] Such transitional existence or continuum of life forms contains personal rights and interests for related parties, which may justify the adoption of a new classification. As a special form of life, embryos and mummies should not be considered as merely a property nor a person. The strict distinction between people and properties does not apply well in embryos and mummies. Instead, they should be regarded as 'a transitional existence between a person and a property' or 'a continuum between a person and a property'. If it is not plausible to create a third type for the purpose of classification, they should be regarded, at least, as a quasi-person, or a special property with personal rights and interests. An embryo and a mummy cannot be owned by someone as a property. Rather, a person can be a custodian of an embryo and a mummy. This is also the reason why cultural objects containing human remains should be treated differently.

4. A New Classification Requires a New Choice of Law Rule

In order to distinguish cultural objects containing human remains from other cultural objects, or more generally to distinguish cultural properties from other properties in the field of private international law, a new choice of law rule needs to be established. In this regard, the 2004 Belgian Private International Law Act might be the forerunner and serve as a model for not only other EU countries but also non-EU countries.[14]

4.1 The *lex originis* overrides the *lex situs*

The traditional *lex situs* rule is based on the location of a property and does not take cultural property protection into consideration. Courts resolving cultural object disputes consistently fail to swiftly and fairly administer justice, and much of the blame can be put on the predominant *lex situs* rule.[15] The *lex situs* rule allows parties to choose more favorable countries and strongly weakens attempts

to protect cultural objects.[16]

In Belgium, as a general rule, the restitution of illicitly-exported cultural objects is subject to the *lex originis,* rather than the *lex rei sitae*. Article 90 of 2004 Belgian Private International Law Act stipulated that if one object that has been recorded in a national list of cultural heritage is delivered outside this country in a way that against its law, the lawsuit filed in this country for the return of that particular object shall apply the law of the requesting country. This provision designates the law of the country of origin, also known as the *lex originis* rule. In comparison with the *lex rei sitae* or the *lex furti* rule*,* the *lex originis* rule is more favorable to the original owners

4.2 Facilitating the return of human remains to their country of origin

The establishment of a new choice of law rule for cultural relics containing human remains or cultural objects in general is in line with the national and international efforts of facilitating the return of stolen or illicitly cultural objects to their country of origin. Mummies exist not only in China, but also in many other countries, such as as Japan, Egypt, Germany, Hungary, USA, Russia, and Italy. The adoption of the *lex originis* rule could facilitate the return of stolen or illicitly exported cultural objects which contain human remains to their country of origin or culturally-affiliated place. This objective is shared in many international conventions and national legislations.

5. Concluding remarks

The mummy Master Zhanggong has not been returned to the Chinese village committees yet, since the Dutch defendants have lodged an appeal. This article argues that, in the light of the classification of frozen embryos in *Shen v. Liu,* mummies should be classified as ‘a transitional existence between a person and a property’. A new classification calls for a new choice of law rule. In this regard, the 2004 Belgian Private International Law Act might serve as a model, according to which the *lex originis* rule prevails over the traditional *lex situs* rule, unless the original owner chooses the application of the traditional *lex situs* or the *lex originis* rule does not provide protection to the good faith purchaser. The Chinese

Private International Law should embrace such approach, since the application of the *lex originis* may facilitate the return of cultural relics, including but not limited to those containing human remains such as mummies, to their culturally affiliated community, ethnic or religious groups.

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[1] This is a shortened version of the article published in the Chinese Journal of Comparative Law with open access https://doi.org/10.1093/cjcl/cxac006. Related blogposts are Buddha Mummy Statue case and Conflict of Laws of Cultural Property.

[2] *Chinese Village Committees v. Oscar Van Overeem*, ECLI:NL:RBAMS:2018:8919, point 3.1.

[3] *Ibid.*

[4] *Ibid.*, point 4.2.5.

[5] J. Huang, 'Protecting Non-indigenous Human Remains under Cultural Heritage Law', 14 *Chinese Journal of International Law* 2015, p. 724.

[6] E.H. Ayau and H. Keeler, Injustice, Human Rights, and Intellectual Savagery, in Human Remains in Museums and Collections, DOI: https://doi.org/10.18452/19383, p. 91.

[7] Ibid.

[8] *Mr and Mrs Shen v. Mr and Mrs Liu*, Jiangsu Province Yixing Municipality People's Court, (2013) Yi Min Chu Zi No 2729; Jiangsu Province Wuxi Municipality Intermediate People's Court, (2014) Xi Min Zhong Zi No 01235.

[9] *Ibid*.

[10] *Ibid*. The third party also stated that after the embryos are taken out, the only way to keep the embryos alive is surrogacy, which is illegal in China, thus both parties have no right to dispose the embryos.

[11] *Ibid*. Since the first-instance court held that embryos cannot be transferred or inherited, the case was dismissed in accordance with Article 5 of the General Principle of Civil Law and Article 3 of the Inheritance Law of the PRC.

[12] *Ibid*. The appellate court analyzed that after the death of Shen and Liu, their parents were the only subjects and most-related parties that care about the fate of embryos. Thus, it was appropriate to rule that the parents of Shen and Liu have the right to supervise and dispose the embryos. However, such supervision and disposal should abide by the law, and must not violate public order and good morals nor infringe the interests of other people.

[13] While birth means a definite initiation into human society, death indicates a final termination of a natural person, which both involve the dignity of an individual human or even humankind. H.G. Koch, 'The Legal Status of the Human Embryo', in E. Hildt and D. Mieth (eds.), *Vitro Fertilisation in the 1990s,* Routledge 1998, p. 3.

[14] T. Szabados, 'In Search of the Holy Grail of the Conflict of Laws of Cultural Property: Recent Trends in European Private International Law Codifications', 27 *International Journal of Cultural Property* 2020, p. 335.

[15] D. Fincham, 'How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property', 32 *Columbia Journal of Law & the Arts* 2008, p.116.

[16] Ibid, p.130.