RCD Holdings Ltd v LT Game International (Australia) Ltd: Foreign jurisdiction clauses and COVID-19

By Jie (Jeanne) Huang, Associate Professor, University of Sydney Law School Australia

In 2013, the plaintiffs, ePayment Solutions Pty Ltd (EPS) and RCD Holdings Ltd (RCD) concluded a written contract with the defendant, LT Game International (Australia) Ltd (LT) about the development and installation of a computer betting game. LT is a company incorporated in the Virgin Islands and registered in Australia as a foreign company. The contract was signed in Australia. Its Clause 10 provides.

"**10. Governing Law**

Any dispute or issue arising hereunder, including any alleged breach by any party, shall be heard, determined and resolved by an action commenced in Macau. The English language will be used in all documents."

When a dispute arose, the plaintiffs commenced the proceedings at the Supreme Court of Queensland in Australia ([2020] QSC 318). The defendant entered a conditional appearance and applied to strike out the claim, or alternatively, to have it stayed as being commenced in this court contrary to the contract. This case shed useful light on how an Australian court may address the impacts of COVID-19 on foreign jurisdiction clauses.

The parties did not dispute that Clause 10 was an exclusive jurisdiction clause choosing courts in Macau China. However, an exclusive foreign jurisdiction clause does not exclude Australian courts' jurisdiction. The plaintiffs alleged that the Supreme Court of Queensland should not enforce the exclusive jurisdiction clause due to the COVID?19 pandemic for two reasons.

First, the pandemic currently prevents the plaintiffs from commencing proceedings in Macau. The court rejected this argument because no evidence suggested that representatives of the plaintiffs had to be present in Macau for lawyers retained by them to commence proceedings.

Second, plaintiffs also alleged that their witnesses could not travel from Australia to Macau because of the pandemic. The court also rejected this argument because of insufficient evidence. According to the court, the plaintiffs did not provide any evidence of the impact of COVID?19 in Macau, for example, what restrictions were being experienced now, what restrictions were likely to be experienced in the future and how long those restrictions may persist. There was also no evidence showing when a trial of proceedings commenced now in Macau might be heard. Although Australian witnesses might be called in the Macau proceedings, the plaintiffs did not identify any specific persons who would be called were residents in Australia. It was also unclear whether overseas witnesses might be called if the proceedings were conducted in Australia as Australia also imposed strict travel restrictions.

Finally, the court ruled for the defendant and dismissed the plaintiffs' claim. Nevertheless, the court indicated that the plaintiffs could recommence the proceedings in Queensland if the circumstances of the COVID-19 pandemic changed materially in Macao in the future.

Comments:

It is well established that an exclusive foreign jurisdiction clause does not operate to exclude Australian courts' jurisdiction; however, the courts will hold the parties to their bargain and grant a stay of proceedings, unless the party who seeks that the proceedings be heard in Australia can show that there are strong reasons against litigating in the foreign jurisdiction.[1] In exercising its discretion, the court should take into account all the circumstances of the particular case. However, doubts have been cast as to whether courts should consider financial or forensic inconvenience attaching to the nominated foreign jurisdiction, at least when these factors should have been known to the parties at the time the exclusive jurisdiction clause was agreed by them.[2]

In *RCD*, the court correctly held that Clause 10 should be interpreted as manifesting an intention that disputes would be determined in Macau by applying

the law of Macau. Although the application of Macau law might bring financial benefits to the defendant because it is more difficult to prove liability for damages under the Macau law than the law in Australia. However, this is insufficient to convince the court to exercise jurisdiction because the potential financial benefits for the defendant are what the parties have bargained for.

Regarding the location of witnesses, the court is also correct that parties should expect that breaches may occur in Australia as the contract would be partially performed there, and consequently, witnesses in Australia may need to be called for proceedings in Macao. Therefore, the location and travel of witnesses are not a strong reason for Australian courts to exercise jurisdiction.

The outbreak of the COVID-19 pandemic is a factor that parties could not reasonably expect when they concluded their foreign jurisdiction clause. If a plaintiff wants to convince an Australian court to exercise jurisdiction in spite of an exclusive foreign jurisdiction clause, this plaintiff must provide solid evidence of the impacts of the COVID-19 pandemic on foreign proceedings. If the plaintiff can show that the pandemic developed so as to effectively prevent, or unduly frustrate the plaintiff in litigating in the foreign jurisdiction, then that might be a discretionary consideration, with any other relevant considerations, in favor of allowing the plaintiffs to litigate in Australia.

[1] High Court of Australia decisions such as *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 at 445, *Oceanic Sunline Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 259, *Huddart Parker Ltd v The Ship Mill Hill* (1950) 81 CLR 502 at 508-509.

Decisions of intermediate courts of appeal such as *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq) & Ors* (2010) 79 ACSR 383 at 402-403, [88]-[89], *Australian Health & Nutrition Association Ltd & Anor v Hive Marketing Group Pty Ltd & Anor* (2019) 99 NSWLR 419 at 438, [78], *Venter v Ilona MY Ltd* [2012] NSWSC 1029.

[2] *Incitec Ltd v Alkimos Shipping Corp* (2004) 138 FCR 496 at 506 and *Australian Health & Nutrition Association Ltd & Anor v Hive Marketing Group Pty Ltd & Anor* (2019) 99 NSWLR 419.

UK Supreme Court in Okpabi v Royal Dutch Shell (2021 UKSC 3): Jurisdiction, duty of care, and the new German "Lieferkettengesetz"

by Professor Dr Eva-Maria Kieninger, Chair for German and European Private Law and Private International Law, University of Würzburg, Germany

The Supreme Court's decision in Okpabi v Royal Dutch Shell (2021 UKSC 3) concerns the preliminary question whether English courts have jurisdiction over a joint claim brought by two Nigerian communities against Royal Dutch Shell (RSD), a UK parent company, as anchor defendant, and a Nigerian oil company (SPDC) in which RSD held 30 % of the shares. The jurisdictional decision depended (among other issues that still need to be resolved) on a question of substantive law: Was it "reasonably arguable" that RSD owed a common law duty of care to the Nigerian inhabitants whose health and property was damaged by the operations of the subsidiary in Nigeria?

In the lower instance, the Court of Appeal had not clearly differentiated between jurisdiction over the parent company and the Nigerian sub and had treated the "arguable case"-requirement as a prerequisite both for jurisdiction over the Nigerian sub (under English autonomous law) and for jurisdiction over RSD, although clearly, under Art. 4 (1) Brussels Ia Reg., there can be no such additional requirement pursuant to the CJEU's jurisprudence in *Owusu*. In *Vedanta*, a case with large similarities to the present one, *Lord Briggs*, handing down the judgment for the Supreme Court, had unhesitatingly acknowledged the unlimited jurisdiction of the courts at the domicile of the defendant company under the Brussels Regulation. In *Okpabi, Lord Hamblen*, with whom the other Justices concurred, did not come back to this issue. However, given that from a UK point of view, the Brussels model will soon become practically obsolete (unless the UK

will still be able to join the Lugano Convention), this may be a pardonable omission. It is to be expected that the English courts will return to the traditional common law restrictions on jurisdiction such as the "arguable case"-criterion and "forum non conveniens".

Although the Supreme Court's decision relates to jurisdiction, its importance lies in the potential consequences for a parent company's liability on the level of substantive law: The Supreme Court affirms its previous considerations in *Vedanta* (2019) and rejects the majority opinion of the CoA which in 2018 still flatly ruled out the possibility of RDS owing a duty of care towards the Nigerian inhabitants. Following the appellants' submissions, *Lord Hamblen* minutely sets out where the approach of the CoA deviated from *Vedanta* and therefore "erred in law". The majority in the CoA started from the assumption that a duty of care can only arise where the parent company effectively "controls" the material operations of the sub, and furthermore, that the issuance of group wide policies or standards could never in itself give rise to a duty of care. These propositions have now been clearly rejected by the Supreme Court as not being a reliable limiting principle (para 145). In the present judgment, the SC affirms its view that "control" is not in itself a meaningful test, since in practice, it can take many different forms: *Lord Hamblen* cites with approval *Lord Briggs's* statement in *Vedanta*, that "there is no limit to the models of management and control which may be put in place within a multinational group of companies" (para 150). He equally approves of *Lord Briggs*'s considerations according to which "the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if in fact it does not do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken" (para 148).

Whether or not the English courts will ultimately find a duty of care to have existed in either or both of the *Vedanta* and *Okpabi* sets of facts remains to be seen when the law suits have been moved to the trial of the substantive issues. Much will depend on the degree of influence that was either really exercised on the sub or publicly pretended to be exercised.

On the same day on which the SC's judgment was given (12 February 2021), the German Federal Government publicly announced the key features of a future piece of legislation on corporate social resonsibility in supply chains

(*Sorgfaltspflichtengesetz*) that is soon to be enacted. The government wants to pass legislation before the summer break and the general elections in September 2021, not the least because three years ago, it promised binding legislation if voluntary self-regulation according to the National Action Plan should fail. Yet, contrary to claims from civil society (see foremost the German "*Initiative Lieferkettengesetz*") the government no longer plans to sanction infringements by tortious liability towards victims. Given the applicability of the law at the place where the damage occurred under Art. 4 (1) Rome II Regulation, and the fact that the UK Supreme Court in *Vedanta* and *Okpabi* held the law of Sambia and Nigeria to be identical with that of England, this could have the surprising effect that the German act, which the government proudly announced as being the strictest and most far-reaching supply chain legislation in Europe and the world (!!), would risk to fall behind the law in anglophone Africa or on the Indian sub-continent. This example demonstrates that an addition to the Rome II Regulation, as proposed by the European Parliament, which would give victims of human rights' violations a choice between the law at the place of injury and that at the place of action, is in fact badly needed.

Webb v Webb (PC) – the role of a foreign tax debt in the allocation of matrimonial property

By Maria Hook (University of Otago, New Zealand) and Jack Wass (Stout Street Chambers, New Zealand)

When a couple divorce or separate, and the court is tasked with identifying what property is to be allocated between the parties, calculation of the net pool of assets usually takes into account certain debts. This includes matrimonial debts that that are in the sole name of one spouse, and even certain personal debts, ensuring that the debtor spouse receives credit for that liability in the division of matrimonial property. However, where a spouse owes a liability that may not, in

practice, be repaid, deduction of the debt from the pool of the couple's property may result in the other spouse receiving a lower share of the property than would be fair in the circumstances. For example, a spouse owes a debt to the Inland Revenue that is, in principle, deductible from the value of that spouse's assets to be allocated between the parties. But the debtor spouse has no intention of repaying the debt and has rendered themselves judgment-proof. In such a case, deduction of the debt from the debtor spouse's matrimonial property would leave the other spouse sharing the burden of a debt that will not be repaid.

This result is patently unfair, and courts have found a way to avoid it by concluding that, in order to be deductible, the debt must be one that is likely to be paid or recovered (see, eg, *Livingstone v Livingstone* (1980) 4 MPC 129 (NZHC)). This enquiry can give rise to conflict of laws issues: for example, there may be questions about the enforceability of a foreign judgment debt or the actionability of a foreign claim. Ultimately, the focus of the inquiry should be on the creditor's practical chances of recovery.

In the relatively recent Cook Islands case of *Webb v Webb*, the Privy Council ([2020] UKPC 22) considered the relevance of a New Zealand tax debt to matrimonial property proceedings in the Cook Islands. The Board adopted a surprisingly narrow approach to this task. It concluded that the term "debts" only included debts that were enforceable *against matrimonial property* (which in this case was located in the Cook Islands), and that the debts in question were not so enforceable because they would be barred by the "foreign tax principle". Lord Wilson dissented on both points.

Background

The parties – Mr and Mrs Webb – lived in the Cook Islands when they separated. Upon separation, Mr Webb returned to New Zealand. Mrs Webb commenced proceedings against Mr Webb in the Cook Islands under the Matrimonial Property Act 1976 (a New Zealand statute incorporated into Cook Islands law), claiming her share of the couple's matrimonial property that was located in the Cook Islands.

Mr Webb, however, owed a judgment debt of NZ$ 26m to the New Zealand Inland Revenue. He argued that, under s 20(5) of the Act, this debt had to be deducted from any matrimonial property owned by him. Under s 20(5)(b), (unsecured)

personal debts had to be deducted from "the value of the matrimonial property owned by" the debtor spouse to the extent that they "exceed the value of any separate property of that spouse". Given the size of Mr Webb's debt, the effect of s 20(5)(b) would have been to leave Mrs Webb with nothing. She argued that the debt fell outside of s 20(5)(b) because it was not enforceable in the Cook Islands and Mr Webb was unlikely to pay it voluntarily.

Whether the debt had to be enforceable against the matrimonial property in the Cook Islands

Lord Kitchin, with whom the majority agreed, concluded that s 20(5)(b) only applied to debts that were either enforceable against the matrimonial assets or likely to be paid out of those assets. Debts that were not so enforceable were not to be taken into account when dividing the matrimonial assets (unless the debtor spouse intended to pay them by using those assets in his name). A different interpretation would lead to "manifest injustice", because if the Inland Revenue "cannot enforce its judgment against those assets, Mr Webb can keep them all for himself" (at [41]). If the Inland Revenue could not execute its judgment against the assets, and Mr Webb did not pay the debt, the reason for applying s 20(5)(b) – which was to protect a debtor spouse's unsecured creditors – disappeared.

Lord Kitchin considered that this conclusion found support in *Government of India v Taylor*, where Viscount Simonds (at 508) had explained that the meaning of "liabilities" in s 302 of the Companies Act 1948 excluded obligations that were not enforceable in the English courts. The result in that case was that a foreign government could not prove in the liquidation of an English company in respect of tax owed by that company (at [42]).

In *Webb*, the judgment debt in question was a personal debt incurred by Mr Webb. However, Lord Kitchin seemed to suggest that the outcome would have been no different if the debt had been a debt incurred in the course of the relationship under s 20(5)(a) (at [46]). The word "debts" had the same meaning in s 20(5)(a) and (b), as referring to debts which are enforceable against the matrimonial property or which the debtor spouse intends to pay.

Lord Wilson did not agree with the Board's interpretation. He considered that it put a gloss on the word "debts" (at [118]), and that it had "the curious and inconvenient consequence of requiring a court … to determine … whether the

debt is enforceable against specified assets" (at [120]). Rather, a debt was a liability that was "likely to be satisfied by the debtor-spouse" or that was "actionable with a real prospect of recovery on the part of the creditor" (citing *Fisher on Matrimonial Property* (2nd ed, 1984) at para 15.6) – regardless of whether recovery would be against matrimonial or other assets (at [123]).

Applying this interpretation to the tax liability in question, Lord Wilson concluded that the liability was clearly actionable (because it had already been the subject of proceedings) and that the Inland Revenue did have a real prospect of recovery in New Zealand (at [126]-[127]). Mr Webb was living in New Zealand and was presumably generating income there, and the Commissioner had applied for the appointment of receivers of his property. This was sufficient to conclude that the debt was enforceable in New Zealand, "including on a practical level" (at [131]). The facts were different from the case of *Livingstone v Livingstone* (1980) 4 MPC 129, where the New Zealand Court had concluded that a Canadian tax debt could "for practical purposes" be disregarded because the debtor had already left the country at the time the demand was issued, he had no intention of returning and he had removed his assets from the jurisdiction. In such a case, if the debtor spouse were permitted to deduct the foreign tax debt without ever actually repaying it, they could take the benefit of the entire pool of matrimonial assets and thus undermine the policy and operation of the whole regime.

In our view, Lord Wilson's interpretation is to be preferred. The relevant question should be whether the debt is one that will be practically recoverable (whether in the forum or overseas). A debt may still be practically recoverable even if it is not enforceable against the matrimonial assets and is unlikely to be paid out of those assets. It is true that, in many cases under s 25(1)(b), the chances of recovery would be slim if the matrimonial assets are out of reach and the debtor spouse has no intention of paying the debt voluntarily (which seemed to be the case for Mr Webb: at [62]). By definition, personal debts are only relevant "to the extent that they exceed the value of any separate property of that spouse", so in practice their recoverability would depend on future or matrimonial assets. Lord Wilson's assessment of the evidence – as allowing a finding that there was a real likelihood that Mr Webb would have to repay the debt in New Zealand – is open to question on that basis. But that doesn't mean that the debts *must* be enforceable against the matrimonial assets. While this interpretation would lead to fairer outcomes under s 25(1)(b) – because it avoids the situation of the debtor spouse not having

to share their matrimonial assets even though the debt is recoverable elsewhere – it could lead to strange results under s 25(1)(a), which provides for the deduction of matrimonial debts that are owed by a spouse individually. It would be unfair, under s 25(1)(a), if such debts were not deductible from the value of matrimonial property owned by the spouse by virtue of being unenforceable against that property, in circumstances where the debts are enforceable against the spouse's personal property.

The Board's reliance on *Government of India v Taylor* [1955] AC 491 (HL) in this context is unhelpful. The question before the House of Lords was whether a creditor could claim in a liquidation for a debt that would not be enforceable in the English courts (regardless of whether the debt would be enforceable over certain – or any – assets). Under the Matrimonial Property Act, on the other hand, the court is not directly engaged in satisfying the claims of creditors, so the debt need not be an obligation enforceable in the forum court. Neither need it be an obligation enforceable against matrimonial property, wherever located. It simply needs to be practically recoverable.

Whether the debt was enforceable against the matrimonial property in the Cook Islands

As we have noted, Lord Wilson argued that there was a real prospect of the debt being paid – the implication being that this was not a case about a foreign tax debt at all. Mr and Mrs Webb were New Zealanders, and Mr Webb had relocated to New Zealand before the proceedings were commenced in 2016 and had stayed there. The practical reality was that unless he found a way to meet his revenue obligations he would be bankrupted again. Lord Kitchin noted Mr Webb's apparent determination to avoid satisfying his liabilities to the IRD. Nevertheless, there was no suggestion that Mr Webb would leave New Zealand permanently to live in the Cook Islands and there enjoy the benefits of the matrimonial property.

Nevertheless, the majority's analytical framework required it to consider whether the tax debt was enforceable against the matrimonial property in the Cook Islands. The majority found that for the purpose of the foreign tax principle, the Cook Islands should be treated relative to New Zealand as a foreign sovereign state, despite their close historical and constitutional ties (and found that the statutory mechanism for the enforcement of judgments by lodging a memorial, cognate to the historical mechanism for the enforcement of Commonwealth

judgments, did not exclude the foreign tax principle).

It was obvious that bankruptcy was a serious prospect, the IRD having appointed a receiver over Mr Webb's assets shortly before the hearing before the Board. That begged the question whether the IRD could have recourse to the Cook Islands assets, but on this point the case proceeded in a peculiar way. The Board observed that it had been given no details of the steps that a receiver or the Official Assignee might be able to take to collect Cook Islands assets, going so far as to doubt whether the Official Assignee would even be recognized in the Cook Islands "for the Board was informed that there was no personal bankruptcy in the Cook Islands and the position of Official Assignee does not exist in that jurisdiction." Section 655(1) of the Cook Islands Act 1915 states that "Bankruptcy in New Zealand shall have the same effect in respect to property situated in the Cook Islands as if that property was situated in New Zealand", but the Board was not prepared to take any account of it, the provision having been introduced for the first time at the final appeal and there being some doubt about whether it was even in force.

The unfortunate consequence was that the Board gave no detailed consideration to the question of how the foreign tax principle operates in the context of cross-border insolvency, a point of considerable interest and practical significance.

The common law courts have been prepared to recognise (and in appropriate cases, defer to) foreign insolvency procedures for over 250 years, since at least the time of *Solomons v Ross* (1764) 1 H Bl 131, 126 ER 79 where the Court of Chancery allowed funds to be paid over to the curators of a debtor who had been adjudicated bankrupt in the Netherlands. But the relationship between this principle and the foreign tax principle has never been clear.

The UNCITRAL Model Law on Cross-Border Insolvency 1997 preserves states' ability to exclude foreign tax claims from an insolvency proceeding. As to the common law, the New Zealand Law Commission (expressing what may be the best guide to the content of Cook Islands law) observed in 1999 that the policy justification for refusing enforcement of foreign tax judgments may not apply in the same way in the context of cross-border insolvency where the collective interests of debtors are concerned. It noted that a number of countries (including Australia, the Isle of Man and South Africa) had moved past an absolute forbidding of foreign tax claims where such claims form part of the debts of an

insolvent debtor subject to an insolvency regime. It thus concluded that "foreign taxation claims may sometimes be admitted to proof in a New Zealand bankruptcy or liquidation." While the Privy Council had a number of difficult issues to confront, it is perhaps unfortunate that they did not take the opportunity to bring clarity to this important issue.

Territorial Jurisdiction relating to Succession and Administration of Estates under Nigerian Private International Law

Issues relating to succession and administration of estate of a deceased person raise significant issues in Nigerian private international law (or conflict of laws), whether a person dies testate or intestate. In the very recent case of *Sarki v Sarki & Ors*,[1] the Nigerian Court of Appeal considered the issue of what court had territorial jurisdiction in a matter of succession and administration of estate of a deceased person's property under Nigerian conflict of laws dealing with inter-state matters. While this comment agrees with the conclusion reached by the Court of Appeal, it submits that the rationale for the Court's decision on the issue of territorial jurisdiction for succession and administration of estates under Nigerian private international law in inter-state matters is open to question.

In *Sarki*, the claimants/respondents were the parents of the deceased person, while the defendant/appellant was the wife of the deceased person. The

defendant/appellant and her late husband were resident in Kano State till the time of his death. The deceased was intestate, childless, and left *inter alia* immovable properties in some States within Nigeria – Bauchi State, Gombe State, Plateau State, Kano State, Jigawa State and the Federal Capital Territory, Abuja. The deceased's family purported to distribute his property in accordance with Awak custom (the deceased's personal law) with an appreciable proportion to the defendant/appellant. The defendant/appellant was apparently not pleased with the distribution and did not cooperate with the deceased's family, who tried to gain access to the deceased's properties. The claimants/respondents brought an action against the defendant/appellant before the Gombe State High Court. The claimants/respondents claimed *inter alia* that under Awak custom, which was the personal law of the deceased person, they are legitimate heirs of his property, who died childless and intestate; a declaration that the distribution made on 22 August 2015 by the deceased's family in accordance with Awak custom, giving an appreciable sum of the property to the defendant/appellant is fair and just; an order compelling the defendant/appellant to produce and hand over all the original title documents of the landed properties and boxer bus distributed by the deceased family on 22 August 2015; and cost of the action. In response, the defendant/appellant made a statement of defense and counter-claim to the effect that she and the deceased are joint owners of all assets and properties acquired during their marriage; a declaration that the estate of the deceased is subject to rules of inheritance as envisaged by marriage under the Marriage Act[2] and not native law and custom; a declaration that as court appointed Administratrix, she is entitled to administer the estate of the deceased person; an order of injunction restraining the claimants/respondents to any or all of the assets forming part of the estate of the deceased person based on custom and tradition; and costs of the action.

The Gombe State High Court held that the Marriage Act was applicable in distributing the estate of the deceased person and not native law and custom. However, the Court distributed the property evenly between the claimants/respondents and defendant/appellants on the basis that it will be unfair for the claimants/respondents as parents of the deceased not to have access to the deceased's property. The defendant/appellant successfully appealed this ruling and won on the substantive aspect of the case. The private international law issue was whether the Gombe State High Court had territorial jurisdiction in this case, rather than the Kano State High Court where the defendant/appellant

alleged the cause of action arose? The defendant/appellant argued that the cause of action arose exclusively in Kano State because that is where the deceased lived and died, and the defendant/appellant had obtained letters of administration issued by the Kano State High Court. The defendant/appellant lost on this private international law issue.

The Court of Appeal began on the premise that the issue of whether Gombe State or Kano State had jurisdiction was a matter of private international law, and not an issue of that was governed by a States' civil procedures rules that governs dispute within a judicial division.[3] It also held that it is the plaintiff's statement of claim that determines jurisdiction.[4] The Court of Appeal then approved its previous decisions that in inter-state matters of a private international law matter, a State High Court is confined to the location of the cause of action.[5] In this connection, the Court of Appeal rejected the argument of counsel for the defendant/appellant and held that the cause of action arose both in Kano and Gombe State – the latter State being the place where the dispute arose with the deceased's family on the distribution of the deceased's estate. Thus, both the Kano State High Court and Gombe State High Court could assume jurisdiction over the matter.[6] The Court of Appeal further held that other States such as Kano, Bauchi and Plateau could also assume jurisdiction because letters of administration were granted by the State High Courts of these jurisdictions.[7] In the final analysis, the Court of Appeal held that the claimants/respondents could either institute its action in either Gombe, Kano, Bauchi and Plateau – being the place where the cause of action arose, but procedural economy (which leads to convenience, saving time, saving costs, and obviates the risk of conflicting orders) encouraged the claimants/respondents to concentrate its proceedings in one of these courts – Gombe State High Court in this case.[8] Accordingly, this private international law issue was resolved in favour of the claimants/respondents.

There are three comments that could be made about the Court of Appeal's judgments. First, it appears the issue of territorial jurisdiction was raised for the first time on appeal. It does not appear that this issue was raised at the lower court. If this is the case, it is submitted that the defendant/appellant should have been deemed to have waived its procedural right on jurisdiction on the basis that it submitted to the jurisdiction of the Gombe State High Court. Matters of procedural jurisdiction can be waived by the parties but not substantive jurisdiction such as jurisdiction mandatorily prescribed by the constitution or

enabling statutes in Nigeria.[9] The issue of territorial jurisdiction among various State High Courts was a procedural matter and should have been raised promptly by the defendant/appellant or it would be deemed to have waived its right to do so by submitting to the jurisdiction of the Gombe State High Court.

Second, the Court of Appeal appeared to miss the point that there are Nigerian Supreme Court authorities that addressed the issue before it. According to the Supreme Court of Nigeria, in matters of succession and administration of states, the *lex situs* is given a predominant role for matters of jurisdiction purposes so that a Nigerian court would ordinarily not assume jurisdiction over foreign property, whether in an international or inter-state matter. Nigerian courts, as an exception, apply the rule to the effect that, where the Court has jurisdiction to administer an estate or trust, and the property includes movables or immovables situated in Nigeria and immovables situated abroad, the court has jurisdiction to determine questions of title to the foreign immovables for the purpose of administration. Again Nigerian courts apply this rule both in inter-State and international matters.[10] This rule established by the Nigerian Supreme Court in accordance with the English common law doctrine should have guided the Court of Appeal to hold that since it had jurisdiction over the deceased immovable properties in Gombe State, it also had jurisdiction over other immovable properties constituting the deceased's estate in other States in Nigeria. The issue of where the cause of action arose was clearly irrelevant.

This brings me to the third and final comment – where the cause of action arose – the issue of territorial jurisdiction. The Nigerian Supreme Court has held in some decided cases that in inter-state matters, a State High Court cannot assume jurisdiction over a matter where the cause of action is exclusively located in another State, irrespective of whether the defendant is resident and willing to submit to the court's jurisdiction.[11] This current approach by the Supreme Court may have influenced the Court of Appeal to be fixated on the issue of territorial jurisdiction and confining itself to where the cause of action arose. Looking at the bigger picture, the current approach of the Nigerian Supreme Court in relation to matters of action *in personam* demonstrates a clear misunderstanding of applying common law private international law matters of jurisdiction in inter-state matters.[12] If a defendant is resident in a State and/or willing to submit, it shouldn't matter where the cause of action arose in inter-state and international matters. Indeed, there is no provision of the Nigerian 1999

Constitution or enabling statute that prohibits a State High Court from establishing extra-territorial jurisdiction in inter-state or international matters, provided the defendant is resident and/or wiling to submit to the Court's jurisdiction. The current approach of the Nigerian Supreme Court unduly circumscribes the jurisdiction of the State High Courts in inter-state matters, and also risks making Nigerian courts inaccessible in matters of international commercial litigation in matters that occur exclusively outside Nigeria, thereby making the Nigerian court commercially unattractive for litigation, and resulting in injustice.[13] Therefore it is time for the Supreme Court to overrule itself and revert to its earlier approach that held that in inter-state or international matters a Nigerian court can establish jurisdiction, irrespective of where the cause of action arose, provided the defendant is resident and/or submits to the jurisdiction of the Nigerian court.[14]

In my final analysis, I would state that the Court of Appeal in *Sarki* reached the right conclusion on the issue of private international law, but the rationale for its decision is open to question. Moreover, though this private international law issue was resolved against the defendant/appellant, it substantially won on the substantive issues in the case. If this case goes on appeal to the Supreme Court, it should be an opportunity for the Supreme Court to set the law right again on the concept of jurisdiction in matters of succession and administration and estates, and overrule itself where it held that in inter-state matters, a State High Court is restricted to the place where the cause of action arose, irrespective of whether the defendant is resident and/or willing to submit to its jurisdiction.

[1] (2021) LPELR – 52659 (CA).

[2] Cap 218 LFN 1990.

[3]*Sarki* (n 1) 13-14.

[4] *Ibid* 14.

[5] *Ibid* 14-18, approving *Lemit Engineering Ltd v RCC Ltd* (2007) LPELR-42550 (CA).

[6] *Sarki* (n 1) 21.

[7]*Ibid* 21-3.

[8] *Ibid* 23-5, approving *Onyiaorah v Onyiaorah* (2019) LPELR-47092 (CA).

[9] See generally *Odua Investment Co Ltd v Talabi* (1997) 10 NWLR (Pt. 523) 1 ; *Jikantoro v Alhaji Dantoro* (2004) 5 SC (Pt. II) 1, 21 . This is a point that has been stressed by Abiru JCA in recent cases such as *Khalid v Ismail (* 2013) LPELR-22325 (CA); *Alhaji Hassan Khalid v Al-Nasim Travels & Tours Ltd* (2014) LPELR-22331 (CA) 23 – 25 ; *Nigerian National Petroleum Corporation v Zaria* (2014) LPELR-22362 (CA) 58 – 60; *Obasanjo Farms (Nig) Ltd v Muhammad* (2016) LPELR-40199 (CA). See also *The Vessel MT. Sea Tiger & Anor v Accord Ship Management (HK) Ltd* (2020) 14 NWLR (Pt. 1745) 418.

[10] *Ogunro v Ogedengbe* (1960) 5 SC 137; *Salubi v Nwariaku* (2003) 7 NWLR 426.

[11] *Capital Bancorp Ltd v Shelter Savings and Loans Ltd* (2007) 3 NWLR 148; *Dairo v Union Bank of Nigeria Plc* (2007) 16 NWLR (Pt 1059) 99; *Mailantarki v Tongo & Ors* (2017) LPELR-42467; *Audu v. APC & Ors* (2019) LPELR – 48134.

[12]See generally Abiru JCA in *Muhammed v Ajingi* (2013) LPELR-20372 (CA) 23 – 25, 25 – 26; CSA Okoli and RF Oppong, *Private International Law in Nigeria* (1st edition, Hart, Oxford, 2020) 95-103; AO Yekini, "Comparative Choice of Jurisdiction Rules in Cases having a Foreign Element: are there any Lessons for Nigerian Courts?" (2013) 39 *Commonwealth Law Bulletin* 333; Bamodu O., "In Personam Jurisdiction: An Overlooked Concept in Recent Nigerian Jurisprudence" (2011) 7 *Journal of Private International Law* 273.

[13] See for example *First Bank of Nigeria Plc v Kayode Abraham* (2003) 2 NWLR 31 where the Court of Appeal held the lower court did not have jurisdiction because the cause of action arose exclusively outside Nigeria. This decision was however overturned by the Supreme Court in *First Bank of Nigeria Plc v Kayode Abraham* (2008) 18 NWLR (Pt 1118) 172 on other dubious grounds. For a critique, see CSA Okoli and RF Oppong, *Private International Law in Nigeria* (1st edition, Hart, Oxford, 2020) 90.

[14] See generally *Nigerian Ports Authority v Panalpina World Transport (Nig) Ltd* (1973) 1 ALR Comm 146, 172; *British Bata Shoe Co v Melikan* (1956) SCNLR 321. See also *Barzasi v Visinoni* (1973) NCLR 373., 381-2.

Global sales law in a global pandemic: The CISG as the applicable law to the EU-AstraZeneca Advance Purchase Agreement?

Written by Dr Ben Köhler, MPI Hamburg

Last week, following severe criticisms of its procurement strategy and a dispute with AstraZeneca over the delays in delivery of the vaccine, the EU Commission has published the Advance Purchase Agreement for the Production, Purchase and Supply of a Covid-19 Vaccine in the European Union (APA) it had concluded with AstraZeneca in August 2020. Although some important clauses were blackened at the request of AstraZeneca, the document gives interesting insights into the procurement practice of the EU and has incited a plethora of comments by the legal experts. Despite the broad coverage in legal and non-legal press, the issue of applicable law has received comparably little attention (but see Till Maier-Lohmann on the CISG's potential applicability). In its first part, this post will argue that, as far as one can tell by the published document, the CISG is likely to be the applicable law to the contract, before outlining some of the consequences of the CISG's potential application in the second part.

I. The CISG as the applicable law to the APA?

The issue of the applicable law would be considered by Belgian courts that are exclusively competent under the APA's forum selection clause (§ 18.5 (b) APA). Since Belgium is a Contracting State to the CISG, Belgian courts are bound to apply the CISG's provisions on its sphere of application that take precedence over the conflict rules in the Rome I-Regulation (Article 25 Rome I-Regulation).

Pursuant to Article 1 (1) (a) CISG, the Convention applies to contracts of sale of goods between parties that have their places of business in different Contracting States.

1. **Vaccine procurement as a (private) contract for the sale of goods?**

The CISG does not distinguish between private law and public law entities and is not limited to contracts between private parties.[1] It is therefore applicable to sales contracts concluded by public law entities such as States if these entities do not act in exercise of their sovereign powers but *iure gestionis* like a private person could act as well,[2] irrespective of whether a public law tender procedure has preceded the conclusion of the contract.[3] The tender process that precedes the conclusion of the contract also does not fall under the exclusion of sales by auction in Art. 2 (b) CISG.[4]

A more nuanced question is whether the APA is a contract for the sale of goods. The question may seem moot since the parties themselves have labelled the agreement Advance Purchase Agreement and the contract provides for the delivery of vaccines against payment. However, it also contains some other elements that may be relevant for the qualification as a sales contract under Articles 1, 3 CISG. The first question is whether the buyers' involvement in the manufacturing process is relevant. Pursuant to Article 3 (1) CISG, the Convention applies to the sale of goods to be manufactured unless the party ordering the goods undertakes to supply a substantial part of the materials. Indeed, the APA contains an obligation of the buyers to "use Best Reasonable Efforts to assist AstraZeneca in securing the supply" of drug substances and other materials (§ 6.1 APA) as well as an obligation to provide funding to AstraZeneca in order to enable it to procure the necessary materials (§ 7.1 APA). However, this assistance and funding does not seem to amount to an undertaking to supply a substantial part of the materials, particularly as the contract stipulates that "AstraZeneca shall secure the supply of all drug substances […] and drug product capacity […] as well as components critical to the development, manufacture and supply of the Initial Europe Doses" (§6.1). The second question is whether the obligation to deliver vaccines is "the preponderant part of the obligations" of the seller under Article 3 (2) CISG. Here, it seems clear that the core of the contract is the delivery of the vaccines, not the provision of a service of any kind. Other obligations, such as the reporting obligations (§§ 6.3, 10.2 APA), only seem to

serve a complementary purpose to ensure the successful delivery of effective vaccines.

Finally, the APA purports to be merely an advance agreement.[5] The decisive factor is, however, not the designation of the agreement but whether it already contains the essential features of a sales contract.[6] The APA contains obligations to produce and deliver the vaccine for AstraZeneca (using their 'best reasonable efforts' in the manufacturing) and obliges the Commission and the Participating Member States to acquire vaccines. The APA is thus a sales contract for the purposes of Article 1 (1) (a) CISG.[7]

2. Parties having their places of business in different Contracting States?

Pursuant to Article 1 (1) (a) CISG, the parties to the APA need to have places of business in different Contracting States. The first difficulty is thus to identify the parties to the APA.[8] According the APA, the parties are AstraZeneca AB and the European Commission "acting on behalf and in the name of the member states of the European Union". The APA goes on to state that "[t]he Commission, the Participating Member States and AstraZeneca may each be referred to herein individually as a **'Party'** and collectively as the **'Parties'**." Taken at face value, this would mean that, on the side of the buyers, both the European Commission and the Participating Member States are the parties to the contract in terms of Article 1 (1) (a) CISG. This understanding is in line with the APA's provisions that not only contain obligations of the Participating Member States but also of the Commission (see e.g. § 9.1 APA).

The parties to the APA need to have their respective places of business in different Contracting States, irrespective of where the goods are manufactured or whereto they are delivered.[9] As per the APA, AstraZeneca AB has its place of business in Sweden while the Commission has its place of business in Brussels. Both Belgium and Sweden are Contracting States. Questions arise only in relation to some of the 27 Participating Member States.[10] While most Participating Member States are Contracting States to the CISG, Ireland and Malta are not. Portugal recently acceded to the CISG but the Convention has not yet entered into force. Amongst the other Participating Member States, Sweden has its place of business in the same Contracting State as AstraZeneca, ie in Sweden,[11] and Finland and Denmark are Contracting States in general but have declared a

reservation under Article 94 CISG that exempts sales contracts between parties with their places of business in different Scandinavian States from the CISG's sphere of application.[12]According to the prevailing view, however, in cases of multiparty contracts, it is sufficient that one party on either side of the transaction have their respective places of business in different Contracting States for the whole contract to be governed by the CISG.[13] Given that the Commission and most of the Participating Member States have their respective places of business in Contracting States other than Sweden, Finland or Denmark, the CISG would be applicable. I have argued elsewhere that the prevailing view is too expansive and that, in cases of multiparty contracts, courts should apply Article 10 (a) CISG by analogy to the different parties (rather than merely to different places of business) on either side of the transaction.[14] Even if one were to follow this approach, the APA would arguably still fall within the sphere of application of the CISG, since the most closely connected place of business on the side of the buyers seems to be the place of business of the Commission that is acting on behalf and in the name of the Participating Member States. The Parties to the APA thus have their respective places of business in different Contracting States pursuant to Article 1 (1) (a) CISG.

However, even if one of the parties were considered to have its place of business in a non-Contracting State,[15] the Convention would still apply by virtue of Article 1 (1) (b) CISG since the Belgian conflict of laws rules, most notably Article 3 (1) Rome I-Regulation, would point to the law of Belgium as a Contracting State to the CISG.

3. Exclusion of the CISG by the Parties in the APA?

The Parties are free to exclude the CISG pursuant to Article 6 CISG. In their choice of law clause, the Parties have chosen the "laws of Belgium" to govern the APA. Although the question of whether the parties wished to exclude the Convention is to be decided on a case-by-case basis, it seems firmly established that, as a general matter, the choice of the law of a Contracting State does not amount to an exclusion of the Convention as the CISG forms part of the Contracting State's law.[16] Importantly, Belgian courts have repeatedly held that the choice of Belgian law includes the Convention. The choice of law clause would thus in principle not impede the application of the Convention by Belgian courts.

An analysis of the publicly available documents seems to suggest that Belgian

courts would indeed apply the CISG to the APA if a claim was brought.[17]

II. Some of the consequences of the CISG's application

The question one might ask now is: does it matter at all whether the CISG is applicable? After all, there are a lot of detailed provisions in the contract, for instance on force majeure (§ 18.7 APA) and termination for cause (§ 12.3 APA), that take precedence over the default rules laid down in the Convention (Article 6 CISG). I will briefly outline two of the many consequences of the application of the CISG to the APA.

1. Interpretation of contract

Many of the issues that are currently debated with respect to the contract are ultimately issues of interpretation of contract. For instance, the questions of whether AstraZeneca is only obliged to deliver vaccines that are produced in the EU or of how to apply the notion of 'best reasonable efforts' will turn on how different sections of the APA are interpreted. The relevant CISG provision here is Article 8 CISG, although the Convention's rules on interpretation may, to a certain extent, be modified by the APA's provisions, most notably by the clause on interpretation of the agreement (§ 18.1 APA) and the Entire Agreement-Clause (§ 18.9 APA). Pursuant to Article 8 (1), (2) CISG, the interpretation of the contract is controlled by a common intention of the parties and, lacking such intention, by the understanding of a reasonable third party.

2. Allocation of vaccines amongst several buyers in cases of shortage of supply

It was reported that AstraZeneca limited its delivery to the EU while fulfilling its obligations towards other third-party buyers such as the United Kingdom. The allocation of scarce goods amongst competing buyers has been debated in CISG scholarship and the prevailing opinion seems to point to a pro rata delivery to the different buyers in proportion to their respective contractual entitlements.[18] Of course, this default position may need to be reconsidered in light of the provisions of the APA, eg the default allocation between Participating Member States on a pro rata basis reflecting the size of their respective populations (§ 8.3 (b)) or AstraZeneca's warranties (§ 13 APA).

III. Conclusion

The above analysis may be surprising: Why should a Convention that is unknown even to many lawyers govern the arguably most important procurement contracts in recent European history? Conversely, however, one might ask which legal instrument should be more appropriate to govern an international sales contract between 29 Parties from 27 different States? More than forty years after its adoption, the CISG may face its first test on global centre stage – it will be up to the test!

[1] Peter Mankowski in: Mankowski (ed.), *Commercial Law* (C.H. Beck Hart Nomos, 2019), CISG, Art. 1, para. 31; Ulrich G. Schroeter, „Grenzfragen des Anwendungsbereichs und international einheitliche Auslegung des UN-Kaufrechts (CISG)", IHR 2019, 133, 134.

[2] Mankowski (n 1) Art. 1, para. 31.

[3] Schroeter (n 1) 134.

[4] Ulrich Magnus in: *Staudinger-BGB, CISG*, [2018], Art.2, para. 34; Schroeter (n 1) 134; Frank Spohnheimer in: Kröll, Mistelis & Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (2nd edn, C.H. Beck Hart Nomos 2018), Art. 2, para. 30.

[5] Till Maier-Lohmann, "EU-AstraZeneca contract – applicability of the CISG?".

[6] See Magnus (n 4) Art. 1, para. 13; Ingeborg Schwenzer & Pascal Hachem in: Schwenzer (ed.), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, C.H. Beck Oxford University Press 2016) Art. 1, para. 8.

[7] Maier-Lohmann (n 5); see, on the application of the CISG to purchase options, Magnus (n 4) Art. 1, para. 41; Schwenzer & Hachem (n 6) Art. 1, para. 10.

[8] Maier-Lohmann (n 5).

[9] See Clayton P. Gillette & Stephen D. Walt, *The UN Convention on Contracts for the International Sale of Goods – Theory and Practice* (2nd edn, Cambridge University Press 2016) 27; Magnus (n 4) Art. 1, para. 11, with further references.

[10] See APA, Schedule B.

[11] Maier-Lohmann (n 5), with the question of how this may affect the CISG's applicability.

[12] According to the prevailing opinion, the reservation is also to be applied in other Contracting States such as Belgium, Johnny Herre in: Kröll et al. (n 4) Art. 94, para. 5; Schwenzer & Hachem (n 6) Art. 94, para. 7.

[13] Schweizerisches Bundesgericht, Entscheid vom 28.5.2019 – 4A_543/2018, CISG-online no. 4463, IHR 2019, 236; Ulrich G. Schroeter, „Irrtumsanfechtung nach nationalem Recht und Anforderungen an Ausschlussvereinbarungen bei Anwendbarkeit des UN-Kaufrechts (CISG)", IHR 2019, 231, 232.

[14] Claude Witz & Ben Köhler, "Panorama Droit uniforme de la vente internationale de marchandises", Recueil Dalloz 2020, 1074, 1077.

[15] See, the question of Maier-Lohmann (n 5), hinting at AstraZeneca's presence in the UK.

[16] Maier-Lohmann (n 5); see, with further references, CISG Advisory Council Opinion no. 16: "Exclusion of the CISG under Article 6, Rapporteur: Lisa Spagnolo, Comment 4 (b) (i); Mankowski (n 5) Art. 6, para. 8.

[17] See also Maier-Lohmann (n 5): „the Convention's applicability cannot be excluded from the outset".

[18] Christoph Brunner in: Brunner & Gottlieb (eds), *Commentary on the UN Sales Law (CISG)* (Kluwer 2019) Art. 79, para. 12; Schwenzer in: Schwenzer (ed.) (n 6) Art. 79, para. 28; Ben Köhler, *Die Vorteils- und Gewinnherausgabe im CISG* (MohrSiebeck, forthcoming 2021) 225.

A centralized court for the EAPO Regulation in the Czech Republic?

Carlos Santaló Goris, Researcher at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law and Ph.D. candidate at the University of Luxembourg, offers a summary and a compelling analysis of the Czech domestic legislation regarding the EAPO Regulation.

Introduction

On 22 January 2021, the Czech Chamber of Deputies approved "the government act amending Act No. 6/2002 Coll., on courts, judges, lay judges and the state administration of courts and amending certain other acts (the Courts and Judges Act), the wording of later regulations, and other related laws, according to the Chamber of Deputies 630 as amended by the Chamber of Deputies". The reform is now pending before the Czech Senate.

The first legislative implementation of the EAPO Regulation in the Czech national law

This act introduces the very first amendment of the Czech domestic legislation regarding Regulation No 655/2014, establishing a European Account Preservation Order ("EAPO Regulation").

The act foresees the concentration of all the applications for EAPOs in one single court, and namely the Prague 1 District Court (*Obvodní soud pro Prahu 1*). Nowadays, based on the information available in the *e-justice* portal, the competent court corresponds to the territorially competent court in the debtor's domicile. However, if the debtor lives outside the Czech Republic, the competent court is the one of the district where the debtor is domiciled.

The upcoming reform envisaged with the act will also affect the application mechanism to gather information on the bank accounts established in Article 14 of the EAPO Regulation. Creditors can also request to investigate if debtors hold bank accounts in the other Member States. Each Member State has an information authority which is charge of searching for the information on the bank accounts. Member States had to notify the Commission with the names of

the information authorities by 16 July 2016.

Currently, there is no central information authority in the Czech Republic. Any district court with territorial competence over the debtor's domicile is an information authority for the purposes of the EAPO Regulation. When the debtor is not domiciled in the Czech Republic, the information authority is the competent court in the district where the bank, which holds the accounts, is located. This can result in challenges for the courts of other Member States searching the information. In case the creditor even ignores the name of the debtor's bank, how can the competent authority to provide the information on the bank accounts be identified? One Luxemburgish judge has experienced this very dilemma.

The information on the bank accounts is obtained directly from the banks. Czech courts submit a request to "all banks in its territory to disclose, upon request by the information authority, whether the debtor holds an account with them" (Article 14(5)(b) of the EAPO Regulation).

Eventually, if the reform is approved by the Czech Senate, the information authority will also be centralized in the Prague 1 District Court.

The reasons behind the implementation

According to Dr. Katerina Valachová, the member of the Czech Chamber of Deputies who sponsored the amendments concerning the EAPO Regulation, the reform is due to "the complexity of the legislation on the EAPO, as well as the short deadlines set by the EAPO Regulation". Having a single court for all the EAPO applications will help in terms of specialization. Furthermore, since most of the headquarters of the banks that operate in the Czech Republic are located within the area of the Prague 1 District Court when the court acts as an information mechanism, it can obtain the information on the bank accounts from the banks faster.

The Czech reform in the European context

Establishing a central authority to gather information on the bank accounts is the most common solution followed among those Member States in which the EAPO Regulation applies. Only four out of the twenty-six Member States (France, Finland, Latvia, and the Netherlands), have opted for a complete decentralized information authority. Two other Member States, Austria, and Italy adopted a

hybrid approach: they have a central authority when the debtor is domiciled abroad and a decentralized authority when the debtor is domiciled in the country.

However, establishing a centralized court to handle all EAPO applications is a less common choice among other Member States. Only three countries have appointed centralized courts to issue EAPOs: Austria, Slovakia, and Finland.

The Czech Republic's two neighbouring Member States, Slovakia and Austria, introduced a partial centralization of the EAPOs applications. In Slovakia, the Banská Bystrica District Court (*Okresný súd Banská Bystrica*) handles all the EAPO applications when the debtor's "general territorial affiliation cannot be determined" within the Slovakian territory. In Austria, the Vienna Inner City District Court (*Bezirksgericht Innere Stadt Wien*) is responsible for issuing all the EAPOs when requested before initiation of the proceedings on the merits and before the enforcement of the judgment on the merits of the claim.

Finland has gone a step further than Austria and Slovakia. Similarly, to the ongoing Czech reform, it appointed one sole court – the district court of Helsinki – responsible for issuing all EAPOs.

Outside the EAPO Regulation scheme, we can also find examples of domestic "centralized courts" responsible for other European civil proceedings. For instance, in Germany the European Payment Order ("EPO") was centralized in the Local Court in Wedding, Berlin. In 2019, France the French legislator approved the creation of a centralized court, which will handle all the EPO applications.

A more efficient application of the EAPO Regulation

Establishing a centralized court for the EAPO Regulation in Czechia is very welcome among those of us who want the EAPO Regulation to become a successful instrument. The future central court will become specialized with the EAPO Regulation, an instrument that can result too complex and requires a certain amount time for its adequate understanding. The centralization will also assure a coherent and uniform application of the EAPO Regulation at the Czech national level. Moreover, in case an issue on the interpretation of the text of that Regulation arises, that centralized court might be more willing to make a preliminary reference to the European Court of Justice ("ECJ") than regular judges who might not encounter many applications for EAPOs. The ECJ has itself expressly acknowledged the benefits of the centralization in the context of the

Maintenance Regulation. In fact, in C-400/13, *Sanders and Huber*, the ECJ affirmed that "a centralization of jurisdiction, such as that at issue in the main proceedings, promotes the development of specific expertise, of such a kind as to improve the effectiveness of recovery of maintenance claims, while ensuring the proper administration of justice and serving the interests of the parties to the dispute" (C-400/13, *Sanders and Huber*, 18 December 2014, ECLI:EU:C:2014:2461, para. 45).

Hopefully, in the future more Member States will follow the example of Czechia or Finland and will concentrate the application of the EAPO in a sole court in their territories.

Review of the AJIL Unbound symposium: Global Labs of International Commercial Dispute Resolution

By Magdalena Lagiewska, University of Gdansk

This post reviews the symposium issue of the *American Journal of International Law* Unbound on "Global Labs of International Commercial Dispute Resolution". This issue includes an introduction and six essays explaining the current changes and developments in the global landscape for settling international commercial disputes. The multifarious perspectives have been discussed to show tendencies and challenges ahead.

Overall, the *AJIL Unbound* special issue is, without doubt, one of the most impactful contributions on changes in international commercial dispute resolution landscape. It is a successful attempt and a fascinating analysis of recent

developments in this field. This is certainly a must-read for anyone interested in reshaping the landscape of dispute resolution worldwide. Beyond the theoretical context, it includes many practical aspects and provides new insight into the prospects of its development and potential challenges for the future. I highly recommend it not only to the researchers on international commercial dispute resolution, but also to legal practitioners—lawyers, arbitrators, and mediators among others. Below, I have outlined each of the symposium's contributions.

As mentioned in the introduction by Anthea Roberts [1], instead of the previous bipolarity and centralization around New York and London, international commercial dispute resolution is facing a new process of decentralization and rebalancing. Today, we are all witnessing the adaptation to a new reality and the COVID-19 pandemic is speeding up the entire process. "New legal hubs" and "one-stop shops" for dispute resolution are springing up like mushrooms in Eurasia and beyond. Therefore, due to the competitiveness between the "old" and "new" dispute resolution institutions, these new bodies are more innovative and thus are expected to attract more and more interested parties.

The main aim of this symposium was to outline the new challenges of the international commercial dispute resolution mechanism around the world. New dispute resolution centres not only influence on the current landscape, but also they offer "fresh insight" in this field.

The first essay by Pamela K. Bookman and Matthew S. Erie, entitled "Experimenting with International Commercial Dispute Resolution" [2], pays attention to the new phenomena on emerging "new legal hubs" (NLHs), international commercial courts and arbitral courts worldwide. This new tendency has recently appeared in China, Singapore, Dubai, Kazakhstan and Hong Kong. All of these initiatives affect the international commercial dispute settlement landscape and increase the competitiveness among these centres. Those centres bravely take advantage of "lawtech" and challenge themselves. As a result, they are experimenting with legal reforms and some institutional design to attract more interested parties and to become well-known platforms providing high-quality dispute resolution services. The Authors set forth the challenges and threats that may exist in this respect. They also provide an insightful analysis of the impact of these new initiatives on the international commercial dispute resolution, international commercial law, and the geopolitics of disputes.

Further, Giesela Rühl's contribution focuses on "The Resolution of International Commercial Disputes – What Role (if any) for Continental Europe?" [3]. The author pays attention to the Netherlands, which took the initiative to establish a new court exclusively devoted to international cases, and Germany and France, which took more skeptical efforts to establish international commercial chambers both before and after the Brexit referendum in 2016. Rühl believes that the far-reaching reform should be implemented at the European level. Therefore, she advocates the establishment of a common European Commercial Court. This seems to be an interesting approach that would certainly strengthen Europe's position in the global dispute resolution landscape.

Julien Chaisse and Xu Qian outline the importance and key features of the recently established China International Commercial Court (CICC) [4]. Given its foundation, this court should operate as a "one-stop shop" combining litigation, arbitration, and mediation. It is dedicated to solving Belt and Road Initiative (BRI) related disputes. The Authors point out that this court is much more akin to a national court than a genuine international court. Therefore, they challenge its importance with respect to BRI-related disputes and attempt to determine whether the Court will play a significant role in the international dispute settlement landscape. These considerations are especially important given the primary sources in Chinese which bring the reader closer to Chinese legislation.

The following essay, by Wang Guiguo and Rajesh Sharma, addresses the International Commercial Dispute Prevention and Settlement Organization (ICDPASO) established in 2019 [5]. It is another global legal hub that offers "one-stop" services in China. At first glance, the ICDPASO seems to be an interesting body with an Asian flavour, however, the Authors shine a spotlight on some practical challenges ahead and its limited jurisdiction. This body differs significantly from the aforementioned CICC. Whether the ICDPASO will be a game-changer in the BRI-related disputes and will influence importantly on international dispute resolution landscape seems to be a melody of the future. It is ultimately too soon to answer those questions now, but it is certainly worthwhile to watch this institution.

Further, S.I. Strong brings attention to the actual changes in international commercial courts in the US and Australia [6]. Although Continental Europe, the Middle East, and Asia try to reshape the current international dispute resolution landscape, common law jurisdictions, such as the United States and Australia, are

less inclined to changes in establishing international courts specialized in cross-border disputes. Compared to the US, Strong believes that Australia has made more advanced efforts to establish such courts. Nevertheless, aside from the traditional international commercial courts, the newly emerging international commercial mediation services are gaining popularity, most notably due to the entry into force of the UN Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention).

Last but not least, Victoria Sahani contribution's outlines third-party funding regulation [7]. While third-party funding remains a controversial issue in litigation or arbitration, whether domestic or international, it is becoming much more popular globally. There are already over sixty countries experimenting with regulatory questions about third-party funding. In this case, we also deal with some "laboratories" that try out different methods of regulation.

The entire symposium is available here.

Can China's New "Blocking Statute" Combat Foreign Sanctions?

by Jingru Wang, Wuhan University Institute of International Law

1. **Background**

A blocking statute is adopted by a country to hinder the extraterritorial application of foreign legislation.[1] For example, the EU adopted Council Regulation No 2271/96 (hereinafter "EU Blocking Statute") in 1996 to protest the US's extraterritorial sanctions legislation concerning Cuba, Iran and Libya.[2] Since Donald Trump became the US president, the US government officially defined China as its competitor.[3] Consequently, China has been increasingly targeted by US sanctions. For example, in 2018, the US imposed broad sanctions

on China's Equipment Development Department (EDD), the branch of the military responsible for weapons procurement and its director for violating the US law on sanctions against Russia.[4] In 2020, the US announced new sanctions on Chinese firms for aiding North Korea's nuclear weapons program.[5] A number of "Belt and Road" countries are targeted by US primary sanctions, which means that Chinese entities may face a high risk of secondary sanctions for trading with these countries. In these contexts, Chinese scholars and policy makers explore the feasibility to enact blocking law to counter foreign sanctions.[6] On 9 January 2021, China's Ministry of Commerce (hereinafter "MOFCOM") issued "Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures" (hereinafter "Chinese Blocking Rules"), which entered into force on the date of the promulgation.[7]

2. **Analysis of the Main Content**

Competent Authority: Chinese government will establish a "Working Mechanism" led by the MOFCOM and composed of relevant central departments, such as the National Development and Reform Commission. The Working Mechanism will take charge of counteracting unjustified extraterritorial application of foreign legislation and other measures (Art. 4).

Targeted extraterritorial measures: The Chinese Blocking Rules target foreign legislation and other measures unjustifiably prohibit or restrict Chinese parties from engaging in normal economic, trade and related activities with third state's parties (Art. 2), which is the so-called "secondary sanction". Namely, if China considers sanctions unilaterally imposed by the US against a third country unjustified and violating international law, it may nullify such sanctions and allow Chinese companies to continue to transact with the third country. These Rules do not impact restrictions on business activities between China and the sanctioning country.

Unlike the EU Blocking Statute, the Chinese Blocking Rules do not provide an annex listing the legislation subject to the blocking but grant the Working Mechanism discretion. To determine whether foreign legislation or other measures fall within the application scope of the Chinese Blocking Rules, the Working Mechanism shall consider (1) the international law and fundamental

principle of international relations; (2) potential impact on China's national sovereignty, security and development interests; (3) potential impact on the legitimate interest of the Chinese party and (4) all other factors (Art. 6). On the one hand, the non-exhaustive list grants the Working Mechanism broad flexibility to analyse on a case-by-case basis. China has repeatedly become the target of US secondary sanctions. An exhaustive list of foreign legislation and other measures is insufficient to deal with the changing situations. On the other hand, China is prudent in confrontation with other countries. In a press conference, the MOFCOM spokesman stated that "the working mechanism will closely follow the inappropriate extraterritorial application of relevant national laws and measures."[8] Therefore, the response of other countries will influence the enforcement of the Chinese Blocking Rules.

It is noteworthy the Chinese Blocking Rules will not affect China's performance of its international obligations. These Rules shall not apply to such extraterritorial application of foreign legislation and measures as provided for in treaties or international agreements to which China is a party (Art. 15).

Information reporting system: A Chinese party prohibited or restricted by foreign legislation and other measures from engaging in normal economic, trade and related activities with a third state's party shall report such matters to the MOFCOM within 30 days (Art. 5). Otherwise, the Chinese party may be warned, ordered to rectify or fined (Art. 13). To encourage the information report, Art. 5 of the Chinese Blocking Rules also provides that the competent authority shall keep such report confidential at the request of the Chinese party. The staff of the competent authority may undertake administrative penalties if they fail with such obligation (Art. 14).

Concerning the Information reporting system, when the report obligation is triggered is unclear. Should the Chinese party report within 30 days after the foreign legislation is published or other measures are taken or after its actual operation is restricted? Moreover, since the Chinese Blocking Rules do not list targeted foreign legislation and other measures, the Chinese party should rely on their judgment to report. Finally, who should report on behalf of the legal person remains to be answered.

Prohibition order: Once the unjustified extraterritorial application of foreign legislation and other measures is confirmed, the Working Mechanism may decide

that the MOFCOM shall issue a prohibition order to ban the effect of relevant foreign legislation and other measures (Art. 7). A Chinese party that fails to observe the prohibition order will be punished (Art. 13). Therefore, Chinese parties are forced to comply with either Chinese or foreign laws. In other words, they will be punished by one or the other. To free the party from the dilemma, a Chinese party may apply for exemption from compliance with a prohibition order (Art. 8). China-based subsidiaries of foreign companies are formed under Chinese law. They are considered to be Chinese entities. Therefore, unless otherwise provided by law, they are subject to the prohibition order issued under the Chinese Blocking Rules and can apply for the exemption.

One major uncertainty is whether third state's parties are subject to the prohibition order. These Rules do not stipulate that foreign entities will be punished by violating the prohibition order or can apply for the exemption. However, it is suggested that the prohibition order may bind the third state's party for two reasons. Firstly, the US may issue secondary sanctions to prohibit Chinese parties from trading with third state's parties (Iran as an example), or to prohibit third state's parties (EU as an example) from trading with Chinese parties. According to Art. 2 of the Chinese Blocking Rules, both situations may obstruct the normal economic, trade and related activities between the Chinese party and the third state's party. If the prohibition order merely applies to the Chinese party, it cannot protect Chinese businesses from being prejudiced by the US secondary sanctions in the latter situation. Secondly, a Chinese party can bring a lawsuit before the People's Court against the party who infringes the legitimate interest of such Chinese party by complying with the foreign legislation and other measures covered by the prohibition order (Art. 9). This article does not limit the defendant to "a Chinese party." Thus it shall include the third state's party. If the prohibition order does not bind the third state's party, it is doubtful that such third state's party is liable for not complying with the prohibition order.

The prohibition order refrains relevant parties from complying with specific foreign legislation and other measures. A question is how should the prohibition order be observed. According to the European Commission's Guidance Note, the purpose of the EU Blocking Statute is to ensure that business decisions on trading with third States remain free. It does not oblige EU operators to do business with Iran or Cuba. Also, the Chinese Blocking Rules cannot and should not oblige the Chinese party and the third state's party to engage with each other. Therefore, it

raises the worry that these Rules may apply better for breach of existing contract but be more difficult to "force" someone to enter into a contract or in terms of the pre-contractual obligation.

Judicial Remedy: A Chinese party can bring a lawsuit before the People's Court of PRC against the party who infringes its legitimate interest by complying with the foreign legislation or measures covered by the prohibition order. A Chinese party may also suit the party who benefits from the judgment or ruling made under such foreign legislation or other measures before the People's Court (Art. 9). Problems may arise if the losing party has no asset in China seized for enforcement by the Chinese court. Other countries may be reluctant to recognize and enforce such judgment.

Government support: Members of the Working Mechanism shall provide guidance and service to Chinese parties to deal with unjustified extraterritorial application of foreign legislation and other measures (Art. 10). Suppose a Chinese party that observes the prohibition suffers significant losses resulting from non-compliance with the relevant foreign legislation and measures. In that case, relevant government departments may provide necessary support based on specific circumstances (Art. 11). Which government department is responsible for these matters? Does "Necessary support" include financial compensation or support on litigation in the sanctioning country? These questions remain to be answered.

3. **Impact of the Blocking Statute**

Considering that China has long suffered from secondary sanctions issued by the US government, promulgating the Chinese Blocking Rules is not a surprise. Overall, the Chinese Blocking Rules attempt to establish three core institutions anticipated by Chinese scholars: (1) blocking the effect and enforcement of specific foreign legislation in China; (2) prohibiting relevant parties from complying with specific foreign legislation and other measures; (3) enabling relevant parties to recover the damage from the party who complies with the foreign legislation and measures covered by the prohibition order. Therefore, a blocking statute serves as both shield and sword to fight against foreign sanctions.

But the function of blocking statute shall not be overemphasized. The same as the EU Blocking Statute, the Chinese Blocking Rules create a quandary for relevant parties.

For Chinese parties, if they comply with the Chinese prohibition order, they have to deal with US penalties. Chinese parties may invoke "foreign sovereign compulsion"[9] as a defence to insulate themselves from certain US sanctions penalties. In determining whether to buy such argument, US courts often consider whether foreign states actively enforce them.[10] The Chinese Blocking Rules can provide a legal basis for Chinese parties to exempt from the US sanctions by strategic enforcement actions. If so, Chinese parties will be relieved to transact with third state's parties. But the Chinese government may not be willing to provide the same exemption. Out of self-interest, Chinese parties may be more likely to comply with the Chinese Blocking Rules.

These Rules have not yet stipulated the legal result if third states' parties violate the Chinese prohibition order. In principle, prescriptive jurisdiction can be extraterritorial, but enforcement jurisdiction must be territorial. Therefore, China cannot always extend the effect of Blocking Rules to a third state's party even if it has the will. However, it is reasonable to assume that third state's parties may be added to the "unreliable entities list"[11] for disregarding the Chinese prohibition order. It may prompt third state's parties to observe the Chinese prohibition order voluntarily to preserve their assets and reputation in China. But even if third state's parties value the Chinese market, it is uneasy for them to choose China over the US.

China has become more active in exploring countermeasures against the US. On 19 September 2020, MOFCOM released provisions on establishing "unreliable entity list."[12] Promulgation of the Chinese Blocking Rules is another proactive attempt. However, both are departmental rules, which are at a relatively low-level in the Chinese legal system. Predictably, higher-level legislation concerning the extraterritorial effect of foreign legislation and other measures will be enacted in the future. It may prompt China and the US back to the negotiating table.

[1] Menno T. Kamminga, "Extraterritoriality", Max Planck Encyclopedia of Public International Law, November 2012, para. 26.

[2] COUNCIL REGULATION (EC) No 2271/96, available at:

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:01996R2271-20140220.

[3] White House, National Security Strategy of the United States of America, December 2017.

[4] CAATSA – Russia-related Designations, available at: https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20180920_33. aspx.

[5] North Korea Designations, available at: https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20201208.

[6] Ye Yan, "On the EU Blocking Statute", Pacific Journal, Vol. 28, No. 3, Mar. 2020, pp. 50-66; Huo Zhengxin, "Extraterritoriality of Domestic Law: American Model, Jurisprudential Deconstruction and Chinese Approach", Tribune of Political Science and Law, Vol. 38, No. 2, Mar. 2020, pp. 173-191.

[7] Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures, available at: http://www.mofcom.gov.cn/article/i/jyjl/e/202101/20210103032421.shtml.

[8] The Head of the Department of Treaty of Law of Ministry of Commerce answers press on "Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures", available at: http://www.mofcom.gov.cn/article/news/202101/20210103029779.shtml.

[9] "Foreign Sovereign Compulsion" means that if a party is obliged to do or not to do an act by a state, it may constitute a defence for not complying with the obligation specified by the US law before the US court. See American Law Institute, Restatement of the Law, Third, The Foreign Relations Law of the United States, American Law Institute Publishers, 1990, p. 341.

[10] M. J. Hoda, "The Aerospatiale Dilemma: Why U.S. Courts Ignore Blocking Statutes and What Foreign States Can Do About It", California Law Review, Vol. 106, No. 1, 2018.

[11] The entity added to the list will be restricted on China-related trade, investment in China and travel or work permits. See “MOFCOM Order No. 4 of 2020 on Provisions on the Unreliable Entity List”, available at:

http://www.mofcom.gov.cn/article/b/fwzl/202009/20200903002593.shtml.

[12] Ibid.

Personal Injury and Article 4(3) of Rome II Regulation

This blog post is a follow up to my earlier announcement on the decision of Owen v Galgey [2020] EHWC 3546 (QB).

Introduction

Cross border relations is bound to generate non-contractual disputes such as personal injury cases. In such situations, the law that applies is very important in determining the rights and obligations of the parties. The difference between two or more potentially applicable laws is of considerable significance for the parties involved in the case. For example a particular law may easily hold one party liable and/or provide a higher quantum of damages compared to another law. Thus, a preliminary decision on the applicable law could easily facilitate the settlement of the dispute between the parties without even going to trial.

Rome II Regulation[1] governs matters of non-contractual obligations. Article 4 of Rome II applies to general torts/delicts such as personal injury cases. It provides that:

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in

which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

In the recent case of *Owen v Galgey & Ors.,*[2] the English High Court was faced with the issue of applying Article 4 of Rome II to a personal injury case. This comment disagrees with the conclusion reached by the High Court Judge in displacing English law under Article 4(2) of Rome II, and applying French law under Article 4(3) of Rome II.

Facts

The Claimant is a British citizen domiciled and habitually resident in England who brought a claim for damages for personal injury sustained by him as result of an accident in France on the night of April 3rd 2018, when he fell into an empty swimming pool which was undergoing works at a villa in France – a holiday home owned by the First Defendant, whose wife is the Second Defendant. The First and Second Defendants are also British citizens who are domiciled and habitually resident in England. The Third Defendant is a company domiciled in France, and the insurer of the First and Second Defendants in respect of any claims brought against them in connection with the Villa. The Fourth Defendant is a contractor which was carrying out renovation works on the swimming pool at the time of the accident, and the Fifth Defendant is the insurer of the Fourth Defendant. The Fourth and Fifth Defendants are both companies which are domiciled in France.

It was common ground between the parties that French law applied to the Claimant's claims against the Fourth and Fifth Defendants. But there was a dispute at to the applicable law in relation to his claims against the First to Third Defendants. These Defendants contended that, by operation of Article 4(2) of Rome II, English law applies because the Claimant and the First and Second Defendants are habitually resident in England. However, the Claimant contended that French law applied by operation of Article 4(3) the Rome II because, he says, it is clear that the tort in this case is manifestly more closely connected with France than it is with England.

It was common ground that French law applied under Article 4(1) of Rome II because the direct damage occurred in France in this case; and English law applied under Article 4(2) of Rome II because the Claimant and First and Second Defendants were all habitually resident in England. The legal issue to be resolved was therefore whether under Article 4(3) the tort/delict was manifestly more closely connected to France than it is with England.

Decision

In a nutshell, Linden J held that French law applied under Article 4(3) of Rome II. The Court considered Article 4 of Rome II as a whole and read it in conjunction with both the Explanatory Memorandum[3] and Recitals to Rome II.[4]

Linden J held that Article 4(2) created a special rule which automatically displaced Article 4(1), and Article 4(2) was intended to satisfy the legitimate expectation of the parties.[5] On this basis, he observed that Article 4(2) could only apply in two party cases (only one victim and one tortfeasor), and not multi-party situations.[6] Linden J explicitly disagreed with an earlier decision of Dingemans J in *Marshall v Motor Insurers' Bureau* & *Ors*[7] that held that Article 4(2) applied in multi-party situations.[8]

Linden J considered the relevant circumstances that could give rise to applying Article 4(3) in this case in the following chronological order:

1. the desire for a single law to govern the whole case involving the Claimant and the First to Fifth Defendants;[9]
2. the circumstances relating to all the parties in the case;[10]

3. the place of direct damage under Article 4(1);[11]
4. the habitual residences of the parties, including where any insurer defendants are registered at the time of the tortious incident and when the damage occurs;[12]
5. the habitual residence of the Claimant at the time of the consequences of the tort, including any consequential losses;[13]
6. the nationalities of the parties; [14] and
7. the fact that the parties have a pre-existing relationship in or with a particular country.[15]

Linden J held, following previous English decisions,[16] that the burden of proof was on the party that seeks to apply Article 4(3).[17] He held that Article 4(3) could only be applied as an exceptional remedy where a clear preponderance of factors supports its application.[18] However he observed that the facts of the case do not have to be unusual for Article 4(3) to apply, though Article 4(3) was intended to operate in a clear and obvious case.[19]

After considering the submission of the parties in the case, Linden J preferred the Claimant's submission that Article 4(3) applied in this case. In his words: "France is where the centre of gravity of the situation is located and the preponderance of factors clearly points to this conclusion. This conclusion also accords with the legitimate expectations of the parties."[20]

Linden J gave great weight to the place of direct damage. In his words:

"The tort/delict occurred in France, as I have noted. This is also where the injury or direct damage occurred. The dispute centres on a property in France and it concerns structural features of that property and how the First, Second and Fourth Defendants dealt with works on a swimming pool there. Although these defendants deny that there was fault on the part of any of them, the First and Second Defendants say that the Fourth Defendant was responsible if the pool presented a danger and the Fourth Defendant says that they were. The allegations of contributory negligence/fault also centre on the Claimant's conduct whilst at the Villa in France.

The First and Second Defendants also had a significant and long-standing connection to France, the accident occurred on their property…

…the situation in relation to the swimming pool which is said to have been the

cause of the accident was firmly rooted in France and it resulted from works which were being carried out by the Fourth Defendant as a result of it being contracted to do so by the First and Second Defendants. The liability of the First and Second Defendants, if any, will be affected by how they dealt with that situation, including by evidence about their dealings with the Fourth Defendant. That situation had no significant connections with England other than the nationality and habitual place of residence of the First and Second Defendants."[21]

Linden J also gave great weight to the desire to apply a single law to govern the whole case against the First to Fifth Defendants.[22] In his words:

"…the works were carried out by a French company pursuant to a contract with them which is governed by French law. Their insurer, the Third Defendant, is a French company and they are insured under a contract which is governed by French law… It is also common ground that the claim against the Fourth Defendant, and therefore against the Fifth Defendant, also a French company, is entirely governed by French law and will require the court to decide whether the Fourth Defendant or, at least by implication, the First and Second Defendants were "custodians" of the property for the purposes of French law."[23]

On the other hand Linden J did not give great weight to the common habitual residence, common nationalities and common domiciles of the Claimant and First and Second Defendants, and the place of consequential loss which pointed to England. Linden J did not consider the pre-existing relationship between the Claimant and First and Second Defendants to be a strong connecting factor in favour of English law applying in this case. He did not regard their relationship as contractual but one that appears to be "the agreement resulted from a casual conversation between social acquaintances in the context of mutual favours having been done in the past."[24] He considered that if there was a contract between the parties, he would have held that French law applied under Article 4(3) of Rome I Regulation[25] because the parties mutually performed their obligations in France.

In the final analysis, Linden J held as follows:

"To my mind the tort/delict in this case is much more closely connected to the state of the swimming pool which, as I have said, was part of a property in France

and resulted from the French law contract between the First and Second Defendants and the Fourth Defendant. If any of the Defendants is liable, that liability will be closely connected with this contract. This point, taken in combination with the other points to which I have referred, in my view clearly outweighs the existence of any contract with the Claimant relating to the Villa, even if I had found there to be a contractual relationship and even if it was governed by English law.

Similarly, although I have taken into account the nationality and habitual place of residence of the Claimant and the First and Second Defendants, these do not seem to me to alter the conclusion to which I have come. I have also taken into account the fact that the consequences of the accident have to a significant extent been suffered by the Claimant whilst he was in England, but in my view the other factors to which I have referred clearly outweigh this consideration.

I therefore propose to declare that the law applicable to the claims brought by the Claimant against the First, Second and Third Defendants is French law."[26]

Comment

Owen is the second English case to utilise Article 4(3) as a displacement tool.[27] Interestingly, *Owen* and *Marshall* are both cases where Article 4(3) was used to trump Article 4(2) in order to restore the application of Article 4(1). These judicial decisions put to rest any contrary view that Article 4(3) cannot be used to restore the application of Article 4(1), when Article 4(2) automatically displaces Article 4(1). In this connection, I agree with the judges' conclusion on the basis that Article 4(3) operates as an escape clause to both Article 4(1)&(2). Such an approach also honours the requirement of reconciling certainty and flexibility in Recital 14 to Rome II. A contrary approach will unduly circumscribe the application of Article 4(3) of Rome II.

I do not agree with Linden J that Article 4(2) of Rome II only applies in two party cases (one victim and one tortfeasor) and does not apply in multi-party cases. I prefer the contrary decision of Dingemans J in *Marshall*. Interpreting Article 4(2) as being only applicable to two party cases is a very narrow interpretation. Moreover, the fact that Article 4(2) is a strong exception to Article 4(1) does not mean that Article 4(2) should be unduly circumscribed. Article 4(2) should not be

applied mechanically or without thought. It must be given some common sense interpretation that suits the realities of cross-border relations in torts.

Moving to the crux of the case, I disagree with the conclusion reached by Linden J that French law applied in this case. Applying the test of Article 4(3), the tort was not *manifestly* more closely connected with France. In other words, it was not obvious that Article 4(3) outweighed the application of Article 4(2). To my mind, the arguments between the opposing parties were evenly balanced as to whether the tort was *manifestly* more closely connected with France. Article 4(2) in this case, which pointed to English law, was also corroborated by the common domiciles and common nationalities of the Claimant and First and Second Defendants which should have been regarded as a strong connecting factor in this case. In addition, the non-contractual pre-existing relationship between the Claimant and First and Second Defendants, and consequential loss pointed to England, though I concede that these factors are not very strong in this case.

It is important to stress that Article 4(2) of Rome II is a fixed rule and not a presumption of closest connection as it was under Article 4(2) of the Rome Convention.[28] Once Article 4(2) of Rome II applies, it automatically displaces Article 4(1), except Article 4(3) regards the place of damage as *manifestly* more closely connected with another country. Linden J appeared to give decisive weight to the place of damage and the desire to apply a single law to all the parties in the case, but did not pay due regard to the fixed rule in Article 4(2) and the fact that it was corroborated by other factors such as the common nationalities and domiciles of the Claimant and First and Second Defendants involved in the case.

Conclusion

Owen presents another interesting case on the application of Article 4 of Rome II to personal injury cases. It is the second case an English judge would be satisfied that Article 4(3) should be utilised as a displacement tool. The use of the escape clause is by no means an easy exercise. It involves a degree of evaluation and discretion on the part of the judge. Indeed, Article 4(3) is very fact dependent. In this case, Linden J preferred the argument of the Claimant that French law applied in this case under Article 4(3). From my reading of the case, I am not convinced that this was a case where Article 4(3) *manifestly* outweighed Article

4(2). It remains to be seen whether the First, Second and Third Defendants will appeal the case, proceed to trial or settle out of court.

[1]Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations [2007] OJ L199/40 ("Rome II"). It takes effect in courts of Member States only for events giving rise to damage occurring after 11 January 2009, as decided by the Court of Justice of the European Union (CJEU) in Case C-412/10 *Homawoo* EU:C:2011:747 [37].

[2] [2020] EWHC 3546 (QB)

[3]Explanatory memorandum from the Commission, accompanying the Proposal for Rome II, COM(2003) 427final (Explanatory Memorandum).

[4] *Ibid* [15] – [24].

[5] *Ibid* [26] – [27].

[6] *Ibid* [27] – [29], [35]. However, the argument as to whether Article 4(2) applied only in two party situations was not put forward before Linden J.

[7] [2015] EWHC 3421 (QB) [17].

[8] *Owen* (n 2) [35].

[9] *Ibid* [36] – [38]. In this connection, Linden J considered and followed the decision in of Dingemans J in *Marshall* (n 7) [18].

[10]*Owen* (n 2) [39] – [45]. In this connection, Linden J considered and followed the decision of Cranston J in *Pickard v Marshall* & *Ors* [2017] EWCA Civ 17 [14] – [15].

[11]*Owen* (n 2) [46]. Linden J followed *Winrow v Hemphhill* & *Anor.* [2014] EWHC 3164 [43], and Dingemans J in *Marshall* (n 7) [19].

[12] *Owen* (n 2) [48]

[13] *Ibid* [49]. Linden J followed *Winrow* (n 11) [39]&[43] and *Stylianou v Toyoshima* [2013] EWHC 2188 (QB). At paragraph 50 Linden J stated that less

weight was to be given to this factor.

[14] *Ibid* [51]. Linden J followed *Winrow* (n 11) [54]&[55] and *Marshall* (n 7) [22].

[15] *Ibid* [52] – [[56]

[16] *Winrow* (n 11) [16] and *Marshall* (n 7) [20].

[17] *Owen* (n 2) [57].

[18]*Ibid* [58]

[19] *Ibid* [61].

[20] *Ibid* [74].

[21]*Ibid* [75]-[77]

[22] Indeed, it was common ground in this case that the contract of insurance between the First, Second and Third Defendants was governed by French law; the contract between the First Defendant and the Fourth Defendant was governed by French law; the contract of insurance between the Fourth and Fifth Defendants was governed by French law; and the Claimant's claims against the Fourth and Fifth Defendants are governed by French law. *Ibid* [12]

[23]*Ibid* [76].

[24] *Ibid* [78].

[25]Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L177/6 ("Rome I").

[26] *Ibid* [81] – [83].

[27] *Marshall* (n 7) was the first case to successfully utilise escape clause as a displacement tool.

[28][1980] OJ L266.

Álvarez-Armas on potential human-rights-related amendments to the Rome II Regulation (II): The proposed Art. 6a; Art. 7 is dead, long live Article 7?

Eduardo Álvarez-Armas is Lecturer in Law at Brunel University London and Affiliated Researcher at the Université Catholique de Louvain. He has kindly provided us with his thoughts on recent proposals for amending the Rome II Regulation. This is the second part of his contribution; a first one on the law applicable to strategic lawsuits against public participation can be found here.

Over the last few months, the European Parliament´s draft report on corporate due diligence and corporate accountability (2020/2129(INL)) and the proposal for an EU Directive contained therein have gathered a substantial amount of attention (see, amongst others, blog entries by Geert Van Calster, Giesela Rühl, Jan von Hein, Bastian Brunk and Chris Thomale). As the debate is far from being exhausted, I would like to contribute my two cents thereto with some further (non-exhaustive and brief) considerations which will be limited to three selected aspects of the proposal´s choice-of-law dimension.

1. **A welcome but not unique initiative (Comparison with the UN draft Treaty)**

Neither Article 6a of Rome II nor the proposal for an EU Directive are isolated initiatives. A so-called draft Treaty on Business and Human Rights ("*Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*") is currently being prepared by an *Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, established in 2014 by the United Nation´s Human Rights Council. Just like it is

the case with the EP´s proposal, the 2nd revised UN draft Treaty (dated 6th August 2020) (for comments on the applicable law aspects of the 1st revised draft, see Claire Bright´s note for the BIICL here) contains provisions on international jurisdiction (Article 9, "*Adjudicative Jurisdiction*") and choice of law (Article 11, "*Applicable law*").

Paragraph 1 of the latter establishes the *lex fori* as applicable for "*all matters of substance* […] *not specifically regulated*" by the instrument (as well as, quite naturally, for procedural issues). Then paragraph 2 establishes that "*all matters of substance regarding human rights law relevant to claims before the competent court may, upon the request of the victim of a business-related human rights abuse or its representatives, be governed by the law of another State where: a) the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) have occurred; or b) the natural or legal person alleged to have committed the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) is domiciled*".

In turn, the proposed Article 6a of Rome II establishes that: "[…] *the law applicable to a non-contractual obligation arising out of the damage sustained shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred or on the law of the country in which the parent company has its domicile or, where it does not have a domicile in a Member State, the law of the country where it operates.*" (The proposed text follows the suggestions made in pp. 112 ff of the 2019 Study requested by the DROI committee (European Parliament) on Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries.)

Putting aside the fact that the material scopes of the EP's and the UN's draft instruments bear differences, the EP´s proposal features a more ambitious choice-of-law approach, which likely reflects the EU´s condition as a "Regional integration organization", and the (likely) bigger degree of private-international-law convergence possible within such framework. Whichever the reasons, the EP´s approach is to be welcomed in at least two senses.

The first sense regards the clarity of victim choice-of-law empowerment. While in the UN proposal the victim is allowed to "*request*" that a given law governs "*all*

matters of substance regarding human rights law relevant to claims before the competent court", in the EP´s proposal the choice of the applicable law unequivocally and explicitly belongs to the victim (the "*person seeking compensation for damage"*). A cynical reading of the UN proposal could lead to considering that the prerogative of establishing the applicable law remains with the relevant court, as the fact that the victim may request something does not necessarily mean that the request ought to be granted (Note that paragraph 1 uses "*shall*" while paragraph 2 uses "*may*"). Furthermore, the UN proposal contains a dangerous opening to *renvoi*, which would undermine the victim´s empowerment (and, to a certain degree, foreseeability). Therefore, if the goal of the UN´s provision is to provide for *favor laesi*, a much more explicit language in the sense of conferring the choice-of-law prerogative to the victim would be welcomed.

2. **A more ambitious initiative (The "domicile of the parent" connection, and larger victim choice)**

A second sense in which the EP´s choice-of-law approach is to be welcomed is its bold stance in trying to overcome some classic "business & human rights" conundrums by including an ambitious connecting factor, the domicile of the parent company, amongst the possibilities the victim can choose from. Indeed, I personally find this insertion in suggested Art. 6a Rome II very satisfying from a substantive justice (*favor laesi*) point of view: inserting that very connecting factor in Art. 7 Rome II (environmental torts) is one of the main *de lege ferenda* suggestions I considered in my PhD dissertation (*Private International Environmental Litigation before EU Courts: Choice of Law as a Tool of Environmental Global Governance*, Université Catholique de Louvain & Universidad de Granada, 2017. An edited and updated version will be published in 2021 in Hart´s "Studies in Private International Law"), in order to correct some of the shortcomings of the latter. While not being the ultimate solution for all the various hurdles victims may face in transnational human-rights or environmental litigation, in terms of content-orientedness this connecting factor is a great addition that addresses the core of the policy debate on "business & human rights". Consequently, I politely dissent with Chris Thomale´s assertion that this connecting factor "*has no convincing rationale*". Moreover, I equally dissent from the contention that a choice between the *lex loci damni* and the *lex loci delicti commissi* is already possible via "*a purposive reading of Art. 4 para 1 and 3 Rome*

II". For reasons I have explained elsewhere, I do not share this optimistic reading of Art. 4 as being capable of filling the transnational human-rights gap in Rome II. And even supposing that such interpretation was correct, as draft Art. 6a would make explicit what is contended that can be read into Art. 4, it would significantly increase legal certainty for victims and tortfeasors alike (as otherwise some courts could potentially interpret the latter Article as suggested, while others would not).

Precisely, avoiding a decrease in applicable-law foreseeability seems to be (amongst other concerns) one of the reasons behind Jan von Hein´s suggestion in this very blog that Art. 6a´s opening of victim´s choice to four different legal systems is excessive, and that not only it should be reduced to two, but that the domicile of the parent should be replaced by its "habitual residence". Possibly the latter is contended not only to respond to systemic coherence with the remainder of Rome II, but also to narrow down options: in Rome II the "habitual residence" of a legal person corresponds only with its "*place of central administration*"; in Brussels I bis its "domicile" corresponds with either "*statutory seat*", "*central administration*" or "*principal place of business*" at the claimant´s choice. Notwithstanding the merits in system-alignment terms of this proposal, arguably, substantive policy rationales (*favor laesi*) ought to take precedence over pure systemic private-international-law considerations. This makes all the more sense if one transposes, *mutatis mutandis*, a classic opinion by P.A. Nielsen on the three domiciles of a corporation under the "Brussels" regime to the choice-of-law realm: "*shopping possibilities are only available because the defendant has decided to organise its business in this way. It therefore seems reasonable to let that organisational structure have* […] *consequences*" (P. A. NIELSEN, "Behind and beyond Brussels I – An Insider´s View", *in* P. DEMARET, I. GOVAERE & D. HANF [eds.], *30 years of European Legal Studies at the College of Europe [Liber Professorum 1973-74 – 2003-04]*, Cahiers du Collège d´Europe Nº2, Brussels, P.I.E.-Peter Lang, 2005, pp. 241-243).

And even beyond this, at the risk of being overly simplistic, in many instances, complying with four different potentially applicable laws is, actually, in alleged overregulation terms, a "false conflict": it simply entails complying only with the most stringent/restrictive one amongst the four of them (compliance with X+30 entails compliance with X+20, X+10 and X). Without entering into further details, suffice it to say that, while ascertaining these questions *ex post facto* may be

difficult for victim´s counsel, it should be less difficult *ex ante* for corporate counsel, leading to prevention.

3. **A perfectible initiative (tension with Article 7 Rome II)**

Personally, the first point that immediately got my attention as soon as I heard about the content of the EP report´s (even before reading it) was the Article 6a *versus* Article 7 Rome II scope-delimitation problem already sketched by Geert Van Calster: when is an environmental tort a human-rights violation too, and when is it not? Should the insertion of Art. 6a crystallize, and Art. 7 remain unchanged, this question is likely to become very contentious, if anything due to the wider range of choices given by the draft Art. 6a, and could potentially end before the CJEU.

What distinguishes say *Mines de Potasse* (which would generally be thought of as "common" environmental-tort situation) from say *Milieudefensie v. Shell* 2008 (which would typically fall within the "Business & Human Rights" realm and not to be confused with the 2019 *Milieudefensie v. Shell* climate-change litigation) or *Lluiya v. RWE* (as climate-change litigation finds itself increasingly connected to human-rights considerations)? Is it the geographical location of tortious result either inside or outside the EU? (When environmental torts arise outside the EU from the actions of EU corporations there tends to be little hesitation to assert that we are facing a human-rights tort). Or should we split apart situations involving environmental damage *stricto sensu* (pure ecological damage) from those involving environmental damage *lato sensu* (damage to human life, health and property), considering only the former as coming within Art. 7 and only the latter as coming within Art. 6a? Should we, alternatively, introduce a *ratione personae* distinction, considering that environmental torts caused by corporations of a certain size or operating over a certain geographical scope come within Art. 6a, while environmental torts caused by legal persons falling below the said threshold (or, rarely, by individuals) come within Art. 7?

Overall, how should we draw the boundaries between an environmental occurrence that qualifies as a human-rights violation and one that does not in order to distinguish Art. 6a situations from Art. 7 situations? The answer is simple: we should not. We should consider every single instance of environmental tort a human-rights-relevant scenario and amend Rome II accordingly.

While the discussion is too broad and complex to be treated in depth here, and certainly overflows the realm of private international law, suffice it to say that (putting aside the limited environmental relevance of the Charter of Fundamental Rights of the EU) outside the system of the European Convention of Human Rights (ECHR) there are clear developments towards the recognition of a human right to a healthy or "satisfactory" environment. This is already the case within the systems of the American Convention on Human Rights (Art. 11 of the Additional Protocol to the Convention in the area of Economic, Social and Cultural Rights) and the African Charter on Human and People´s Rights (Art. 24). It is equally the case as well in certain countries, where the recognition of a fundamental/constitutional right at a domestic level along the same lines is also present. And, moreover, even within the ECHR system, while no human right to a healthy environment exists as such, the case-law of the European Court of Human Rights has recognized environmental dimensions to other rights (Arts. 2 and 8 ECHR, notably). It may therefore be argued that, even under the current legal context, all environmental torts are, to a bigger or lesser extent, human-rights relevant and (save those rare instances where they may be caused by an individual) "business-related".

Ultimately, if any objection could exist nowadays, if/when the ECHR system does evolve towards a broader recognition of a right to a healthy environment, there would be absolutely no reason to maintain an Art. 6a *versus* Art. 7 distinction. Thus, in order to avoid opening a characterization can of worms, it would be appropriate to get "ahead of the curve" in legislative terms and, accordingly, use the proposed Art. 6a text as an all-encompassing new Art. 7.

There may be ways to try to (artificially) delineate the scopes of Articles 7 and 6a in order to preserve a certain *effet utile* to the current Art. 7, such as those suggested above (geographical location of the tortious result, size or nature of the tortfeasor, type of environmental damage involved), or even on the basis of whether situations at stake "trigger" any of the environmental dimensions of ECHR-enshrined rights. But, all in all, I would argue towards using the proposed text as a new Art. 7 which would comprise both non-environmentally-related human-rights torts and, comprehensively, all environmental torts.

Art. 7 is dead, long live Article 7.