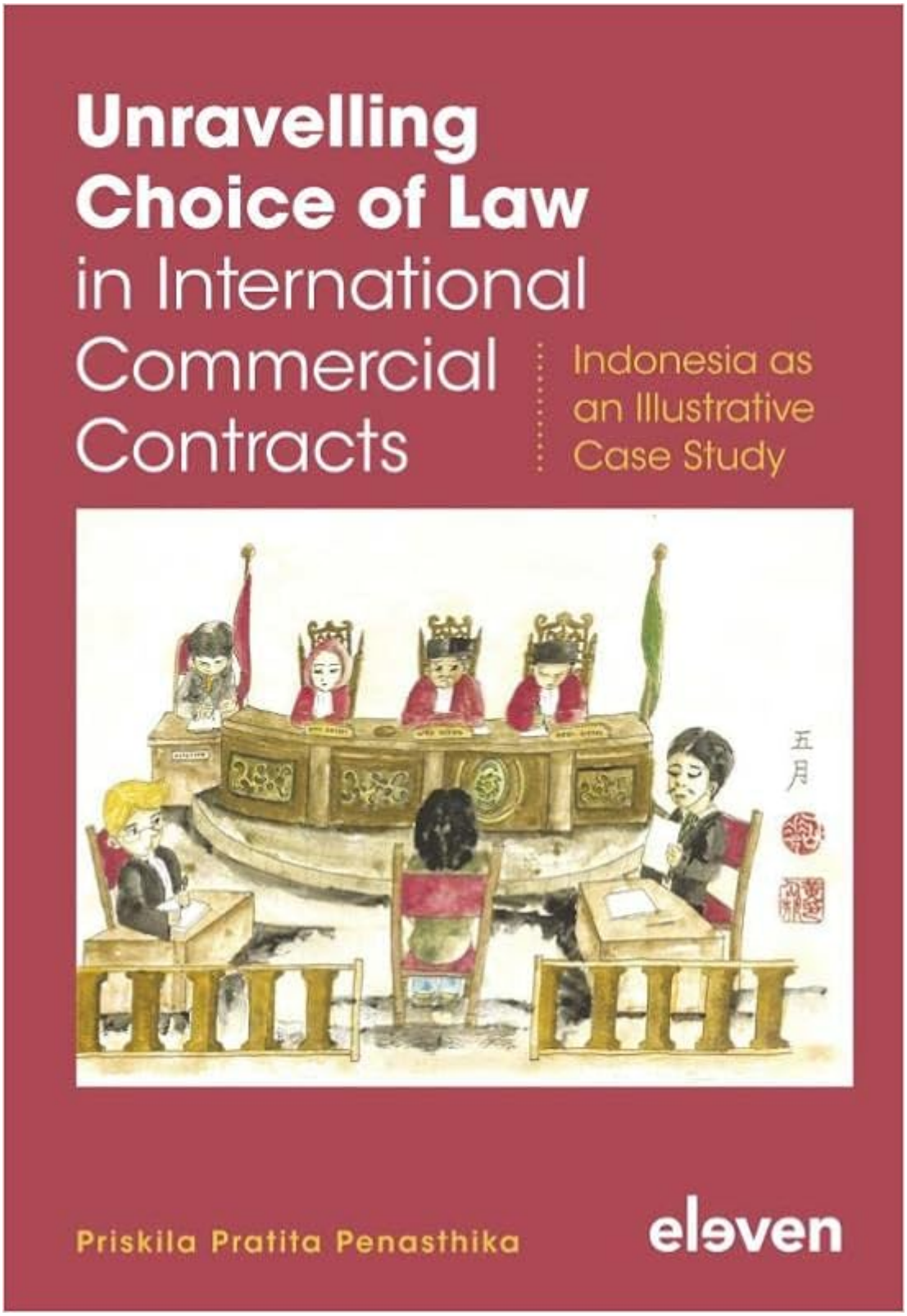
Review of: PP Penasthika, Unravelling Choice of Law in International Commercial Contracts: Indonesia as an Illustrative Case Study (The Hague: Eleven Publishers 2022)



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Chapter Six then concludes the monograph, summarising the research findings

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

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

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

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

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

[2] Penasthika (ibid).

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

[4] Penasthika (n 1), 179.

Mbatha v. Cutting: Implications for Litigants of Indian Origin

Guest Post by Chytanya S. Agarwal*

I. Introduction

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

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

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

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

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

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

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

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

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

III. Indian Jurisprudence on Foreign Judgements Concerning Personal Laws

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

1. Jurisdiction

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

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

2. Application of Indian Law

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

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

3. Recognition: Other preconditions

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

IV. *Mbatha*'s Implications on NRIs

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

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

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

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

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

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

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

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

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

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

Views and News from the 9th

Journal of Private International Law Conference 2023 in Singapore

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



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

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

Arbitration (Day 1, Panel 1)

Saloni Khanderia

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

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

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

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

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

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

Foreign Judgments (Day 1, Panel 2)

Tobias Lutzi

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

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

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

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

Plenary Session 2

Michael Douglas

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

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

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

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

Choice of Law (Day 3, Panel 3)

Zheng Sophia Tang

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

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

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

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

The EU Sustainability Directive and Jurisdiction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Doing Business Jurisdiction

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

Forum Necessitatis and Universal Jurisdiction

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

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

Forum connexitatis

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

Forum legis

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

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

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

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

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

5. Implementation

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

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

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

By Dr Johannes Ungerer, University of Oxford

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The CJEU on Procedural Rules in Child Abduction Cases: private international law and children's rights law

Comment on CJEU case *Rzecznik Praw Dziecka e.a., C-638/22 PPU*, 16 February 2023)

Written by Tine Van Hof, post-doc researcher in Private International Law and Children's Rights Law at the University of Antwerp, previously published on EU live

The Court of Justice of the EU has been criticised after some previous cases concerning international child abduction such as *Povse* and *Aguirre Zarraga* for prioritising the effectiveness of the EU private international law framework (i.e. the Brussels IIa Regulation, since replaced by Brussels IIb, and the principle of mutual trust) and using the children's rights law framework (i.e. Article 24 of the EU Charter of Fundamental Rights and the principle of the child's best interests) in a functional manner (see e.g. Silvia Bartolini and Ruth Lamont). In *Rzecznik Praw Dziecka* the Court takes both frameworks into account but does not

prioritise one or the other, since the frameworks concur.

Rzecznik Praw Dziecka e.a. concerns Article 388^1(1) of the Polish Code of Civil Procedure, which introduced the possibility for three public entities (Public Prosecutor General, Commissioner for Children's Rights and Ombudsman) to request the suspension of the enforcement of a final return decision in an international child abduction case. Such a request automatically results in the suspension of the enforcement of the return decision for at least two months. If the public entity concerned does not lodge an appeal on a point of law within those two months, the suspension ceases. Otherwise, the suspension is extended until the proceedings before the Supreme Court are concluded. The Court of Justice was asked to rule on the compatibility of this Article of the Polish CCP with Article 11(3) of the Brussels IIa Regulation and with Article 47 of the EU Charter.

Private international law and children's rights law

As Advocate General Emilou emphasised in the Opinion on *Rzecznik Praw Dziecka*, (see also the comment by Weller) child abduction cases are very sensitive cases in which several interests are intertwined, but which should eventually revolve around the best interests of the child or children. In that regard, the Hague Child Abduction Convention, as complemented by Brussels IIa for intra-EU child abduction situations, sets up a system in which the prompt return of the child to the State of habitual residence is the principle. It is presumed that such a prompt return is in the children's best interests in general (*in abstracto*). This presumption can be rebutted if one of the Child Abduction Convention's exceptions applies. Next to these instruments, which form the private international law framework, the children's rights law framework also imposes certain requirements. In particular, Article 24(2) of the EU Charter, which is based on Article 3 of the UN Convention on the Rights of the Child, requires the child's best interests (*in abstracto* and *in concreto*) to be a primary consideration in all actions relating to children. The Court of Justice analyses Article 388^1(1) of the Polish CCP in light of both frameworks. The Court's attentiveness towards private international law and children's rights law is not new but should definitely be encouraged.

The private international law framework

The Court of Justice recalls that, for interpreting a provision of EU law, one should take into account that provision's terms, its context and the objectives pursued by the legislation of which it forms part. To decide on the compatibility of the Polish legislation with Article 11(3) Brussels IIa, the Court of Justice thus analyses the terms of this provision, its context (which was said to consist of the Child Abduction Convention) and the objectives of Brussels IIa in general. Based on this analysis, the Court of Justice concludes that the courts of Member States are obliged to decide on the child's return within a particularly short and strict timeframe (in principle, within six weeks of the date on which the matter was brought before it), using the most expeditious procedures provided for under national law and that the return of the child may only be refused in specific and exceptional cases (i.e. only when an exception provided for in the Child Abduction Convention applies).

The Court of Justice further clarifies that the requirement of speed in Article 11(3) of Brussels IIa does not only relate to the procedure for the issuing of a return order, but also to the enforcement of such an order. Otherwise, this provision would be deprived of its effectiveness.

In light of this analysis, the Court of Justice decides that Article 388^1(1) of the Polish CCP is not compatible with Article 11(3) Brussels IIa. First, the minimum suspension period of two months already exceeds the period within which a return decision must be adopted according to Article 11(3) Brussels IIa. Second, under Article 388^1(1) of the Polish CCP, the enforcement of a return order is suspended simply at the request of the authorities. These authorities are not required to give reasons for their request and the Court of Appeal is required to grant it without being able to exercise any judicial review. This is not compatible with the interpretation that Article 11(3) Brussels IIa should be given, namely that suspending the return of a child should only be possible in 'specific and exceptional cases'.

The children's rights law framework

After analysing the private international law framework, the Court of Justice addresses the children's rights law framework. It mentions that Brussels IIa, by aiming at the prompt adoption and enforcement of a return decision, ensures respect for the rights of the child as set out in the EU Charter. The Court of

Justice refers in particular to Article 24, which includes the obligation to take into account, respectively, the child's best interests (para 2) and the need of the child to maintain personal relations and direct contact with both parents (para 3). To interpret these rights of the child enshrined in the EU Charter, the Court of Justice refers to the European Court of Human Rights, as required by Article 52(3) of the EU Charter. Particularly, the Court of Justice refers to *Ferrari v. Romania* (para 49), which reads as follows:

'In matters pertaining to the reunification of children with their parents, the adequacy of a measure is also to be judged by the swiftness of its implementation. Such cases require urgent handling, as the passage of time can have irremediable consequences for the relations between the children and the parent who does not live with them.'

Unfortunately, the Court of Justice does not explicitly draw a conclusion from its analysis of the children's rights law framework. Nevertheless, it can be concluded that the Polish legislation is also incompatible with the requirements thereof. In particular, it is incompatible with both the collective and the individual interpretation of the child's best interests.

On a collective level, Article 388^1(1) of the Polish CCP is contrary to the children's best interests since it does not take into account that international child abduction cases require 'urgent handling, as the passage of time can have irremediable consequences for the relations between the children and the parent who does not live with them' (as has also been acknowledged by the ECtHR as being in the best interests of children that have been abducted in general).

On an individual level, it is possible that an enforcement of the return decision is contrary to the child's best interests and that a suspension thereof is desirable.

However, Article 388^1(1) of the Polish CPP is invaluable in that regard (see also Advocate General Emilou's Opinion on *Rzecznik Praw Dziecka*, points 77-92). First, the Article exceeds what would be necessary to protect a child's individual best interests. Indeed, under that Article, the authorities can request the suspension without any motivation and without any possibility for the courts to review whether the suspension would effectively be in the child's best interests. More still, the provision is unnecessary to protect a child's individual best interests. Indeed, a procedure already existed to suspend a return decision if the

enforcement would be liable to cause harm to the child (Article 388 of the Polish CCP).

Conclusion

In this case, the private international law and the children's rights law framework concurred, and both preclude the procedural rule foreseen in Article 388^{1}(1) of the Polish CCP. The Court of Justice can thus not be criticised for prioritising the EU private international law framework in this case. Nevertheless, the Court of Justice could have been more explicit that the conclusion was reached not only based on the private international law framework but also on the children's rights law framework.

Finally, the Brussels IIb Regulation, which replaced Brussels IIa as from 1 August 2022, made some amendments that better embed and protect the child's best interests. It provides *inter alia* that Member States should consider limiting the number of appeals against a return decision (Recital 42) and that a return decision 'may be declared provisionally enforceable, notwithstanding any appeal, where the return of the child before the decision on the appeal is required by the best interests of the child' (Article 27(6)). While the Polish provision was thus already incompatible with the old Regulation, it would certainly not be compatible with the new one. To prevent future infringements, legislative reform of the Polish CCP seems inevitable.

Reappreciating the Composite Approach with Anupam Mittal v Westbridge II

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I. INTRODUCTION

The debate surrounding the composite approach i.e., the approach of accommodating the application of both the law applicable to the substantive contract and the *Lex Fori* to the arbitration clause has recently resurfaced with *Anupam Mittal v Westbridge Ventures II* ("Westbridge"). In this case, the Singapore Court of Appeal paved way for application of both the law governing substantive contract and the *Lex Fori* to determine the arbitrability of the concerned oppression and mismanagement dispute. The same was based on principle of comity, past precedents and s 11 of the International Arbitration Act. The text of s 11 (governing arbitrability) does not specify and hence limit the law determining public policy to *Lex Fori*. In any event, the composite approach regardless of any provision, majorly stems from basic contractual interpretation that extends the law governing substantive contract to the arbitration clause unless the presumption is rebuttable. For instance, in the instant case, the dispute would have been rendered in-arbitrable with the application of Indian law (law governing substantive contract) and hence the Singapore law was inferred to be the implied choice.[1]

The test as initially propounded in *Sulamérica CIA Nacional de Seguros v Enesa Engenharia* ("Sulamerica") by the EWCA and later also adopted in Singapore[2] states that the law governing the substantive contract will also govern the arbitration clause unless there is an explicit/implicit choice inferable to the contrary. The sequence being 1) express choice, 2) determination of implied choice in the absence of an express one and 3) closest and the most real connection. The applicability of *Lex Fori* can only be inferred if the law governing the substantive contract would completely negate the arbitration agreement. There have been multiple criticisms of the approach accumulated over a decade with the very recent ones being listed in (footnote 1). The aim of this article is to highlight the legal soundness and practical boons of the approach which the author believes has been missed out amidst the rampant criticisms.

To that end, the author will *first* discuss how the composite approach is the only legally sound approach in deriving the applicable law from the contract, which is also the source of everything to begin with. As long as the arbitration clause is a

part of the main contract, it is subject to the same. To construe it as a separate contract under all circumstances would be an incorrect application of the separability doctrine. Continuing from the first point, the article will show how the various nuances within the composite approach provide primacy to the will and autonomy of the parties.

II. TRUE APPLICATION OF THE 'SEPARABILITY' PRINCIPLE

The theory of separability envisages the arbitration clause to be separate from the main contract. The purpose of this principle is to immunize the arbitration clause from the invalidity of the main contract. There are various instances where the validity of a contract is contested on grounds of coercion, fraud, assent obtained through corruption, etc. This, however, does not render the arbitration clause inoperable but rather saves it to uphold the secondary obligation of resolving the dispute and measuring the claims arising out of the breach.[3]

It is imperative to note from the context set above that the doctrine has a specific set purpose. What was set as its purpose in seminal cases such as *Heyman v Darwins Ltd* has now been cemented into substantive law with Article 16 of the UNCITRAL Model law which has further been adapted by multiple jurisdictions such as India, Singapore and the UK also having a version in s 7. The implication of this development is that separability cannot operate in a vague and undefined space creating legal fiction in areas beyond its stipulated domain. Taking into consideration this backdrop, it would be legally fallacious to strictly follow the *Lex Fori* i.e., applying the substantive law of the seat to the arbitration clause as a default or the other extreme of the old common law approach of extending the law applicable to the substantive contract as a default. The author submits that the composite approach which was first taken in *Sulamerica* and recently seen in *Westbridge* to determine the law applicable to arbitrability at a pre-award stage, enables the true application and effectuation of the separability doctrine.

A. Lex Fori

To substantiate the above made assertion, the author will first look at the *Lex Fori* paradigm. Any legal justification for the same will first have to prove that an arbitration clause is not subject to the main contract. This is generally carried out using the principle of separability. However, when we examine the text of article 16, Model law or even the provisions of the impugned jurisdictions of India and

Singapore (in reference to the Westbridge case), separability can only be operationalised when there is an objection to the validity or existence of the arbitration clause. It would be useful to borrow from Steven Chong, J's reading of the doctrine in *BCY v BCZ*, which is also a case of the Singapore High Court that applied the composite approach of *Sulamerica*. Separability according to them serves a vital and narrow purpose of shielding the arbitration clause from the invalidity of the main contract. The insulation however does not render the clause independent of the main contract for all purposes. Even if we were to examine the severability provision of the UK Arbitration Act (Sulamerica's jurisdiction), the conclusion remains that separability's effect is to make the arbitration clause a distinct agreement only when the main contract becomes ineffective or does not come into existence.

To further buttress this point, it would be useful to look at the other contours of separability. For instance, in the landmark ruling of *Fiona Trust and Holding Corp v Privalov* (2007), both Lord Hoffman and Lord Hope illustrated that an arbitration clause will not be severable where it is a part of the main contract and the existence of consent to the main contract in itself is under question. This may be owing to the fact that there is no signature or that it is forged, etc. To take an example from another jurisdiction, arbitration clauses in India seize to exist with the novation of a contract and the position remains even if the new contract does not have an arbitration clause. In these cases, the arbitration clause seized to be operational when the main contract turned out to be non-est. However, the major takeaway is that as a general norm and even in specific cases where the arbitration clause is endangered, it is subject to the main contract and that there are limitations to the separability doctrine. Hence, it would be legally fallacious to always detach arbitration clauses from the main contract and apply the law of the seat as this generalizes the application of separability, which in turn is contrary to its scheme. It is also imperative to note that the Sulamerica test does not impute the law governing the substantive contract when the arbitration clause is a standalone one hence treating it as a separate contract where ever necessary.

B. Compulsory Imposition of Law of Substantive Contract

Having addressed the Lex Fori approach, the author will now address the common law approach of imputing the law governing the main contract to the arbitration clause. The application and reiteration of which was recently seen in *Enka v Chubb* and *Kabab-ji v Kout Food Group.* If we were to just examine the

legal tenability of a blanket imposition of the governing law on the main contract, the author's stand even at this end of the spectrum would be one that the approach is impeding the true effectuation of separability. While it is legally fallacious to generalize the application of separability, the remark extends when it is not operationalized to save an arbitration clause. There may be circumstances as seen in *Sulamerica* and *Westbridge* wherein the arbitration clause will be defunct if the law of the main contract is applied. In such circumstances the arbitration clause should be considered a distinct contract and the law of the seat should be applied using a joint or even a disjunctive reading of prongs 2 and 3 of the *Sulamerica* test i.e., 'implied choice' and 'closest and most real connection'. Although, in the words of Lord Moore-Bick, J, the two prongs often merge in inquiry as "*identification of the system of law with which the agreement has its closest and most real connection is likely to be an important factor in deciding whether the parties have made an implied choice of proper law*" [para 25]. In any event, when the law governing substantive contract is adverse, the default implication rendered by this inquiry is that the parties have impliedly chosen the law of the seat and the arbitration clause in these circumstances has a more real connection to the law of the seat. This is because the reasonable expectation of the parties to have their dispute resolved by the stipulated mechanism and the secondary obligation of resolving the dispute as per the contract (apart from the primary obligation of the contract) can only be upheld by applying the law of the seat.

When we specifically look at *Enka v Chubb* and *Kabab-ji,* it is imperative that these cases have still left room for the 'validation principle' which precisely is saving the arbitration clause in the manner described above. While the manner in which the principle was applied in Kabab-ji may be up for criticism, the same is beyond the scope of this article. A narrow interpretation of the validation principle is nonetheless avoidable using the second and third prongs of the *Sulamerica* test as the inquiry there gauges the reasonable expectation of the parties. Irrespective, Kabab-ji is still of the essence for its reading of Articles V(I)(a) of the New York Convention("NYC") r/w Article II of the NYC. Arguments have been made that the composite approach (or the very idea of applying the law governing substantive contract) being antithetical to the NYC. However, the law of the seat is only to be applied to arbitral agreements referred to in Article II, 'failing any indication'. This phrase is broad enough to include not just explicit choices but also implicit choices of law. The applicability of *Lex Fori* is only

mentioned as the last resort and what the courts after all undertake is finding necessary indications to decide the applicable law. Secondly, statutory interpretation should be carried out to give effect to international conventions only to the extent possible (para 31, *Kabab-ji*). An interpretation cannot make redundant the scheme of separability codified in the statute. Lastly, even if the approach were to be slightly antithetical to NYC, its domain of operation is at the enforcement stage and not the pre-arbitration stage. Hence, it can never be the sole determining factor of the applicable law at the pre-arbitral stage. While segueing into the next point of discussion, it would be imperative to mention amidst all alternatives and criticisms that the very creation of the arbitral tribunal, initiation of the various processes, etc is a product of the contract and hence its stipulation can never be discarded as a default.

III. PLACING PARTY AUTONOMY & WILL ON A PARAMOUNT PEDESTAL

The importance of party autonomy in international arbitration cannot be reiterated enough. It along with the will of the parties constitute the very fundamental tenets of arbitration. As per Redfern and Hunter, it is an aspiration to make international arbitration free from the constraints of national laws.[4] There will always be limitations to the above stated objective, yet the aim should be to deliver on it to the most possible extent and it is safe to conclude that the composite approach does exactly that. Darren Low at the Asian International Arbitration Journal argues that this approach virtually allows party autonomy to override public policy. Although they state this in a form of criticism as the chronology in their opinion is one where the latter overrides the former. However, even they note that the arbitration in *Westbridge* was obviously not illegal. It is imperative to note that the domain of various limitations to arbitration such as public policy or comity needs to be restricted to a minimum. When the parties are operating in a framework which provides self-determining authority to the extent that parties the freedom to decide the applicable substantive law, procedure, seat, etc, party autonomy is of paramount importance. The Supreme Court of India in *Centrotrade Minerals v Hindustan Copper* concluded party autonomy to be the guiding principle in adjudication, in consideration of the abovementioned rationale.

As stated in *Fiona Trusts,* the insertion of an arbitration clause gives rise to a presumption that the parties intend to resolve all disputes arising out of that

relation through the stipulated mechanism. This presumption can only be discarded via explicit exclusion. An arbitration clause according to Redfern and Hunter gives rise to a secondary obligation of resolving disputes. Hence, as long as the parties intend to and have an obligation to resolve a dispute, an approach that facilitates the same to the most practicable extent is certainly commendable.

This can be further elucidated by taking a closer look at the line of cases on the topic. The common aspect in all these cases is that they have paved way for the application of laws of multiple jurisdictions which in turn has opened the gates to a very pro-validation approach. For instance, the SCA in *Westbridge* applied Singapore's law as the application of Indian law would have rendered the dispute in-arbitrable. There may also be circumstances wherein the *Lex Fori* may be rendering a dispute in-arbitrable. While the court in *Westbridge* stated that owing to the parallel consideration of the law of the seat, the dispute would be in-arbitrable, using the composite approach one could also pave the way for the arbitration of that dispute. This can be done by construing the place of the forum as a venue and not a seat. There are multiple reasons for parties to choose a particular place for arbitration, including but not limited to neutrality, quality of adjudication, cost, procedure applicable to arbitration, etc. And while it may be true that an award passed by a following arbitration may not be enforceable in the venue jurisdiction, it can still be enforced in other jurisdictions. There are 2 layers to be unravelled here – the first one being that it is a well settled principle in international arbitration that awards set aside in one jurisdiction can be enforced in the others as long as they do not violate the public policy of the latter jurisdiction. This was seen in *Chromalloy Aeroservices v Arab Republic of Egypt,* wherein the award was set aside by the Egyptian Court of Appeal yet it was enforced in the U.S.A. The same principle although well embedded in other cases was recently reiterated in *Compania De Inversiones v. Grupo Cementos de Chihuahua* wherein the award for an arbitration seated in Bolivia was annulled there but enforced by the Tenth Circuit in the U.S.A. The second ancillary point to this is the practicality aspect. The parties generally select the law governing the substantive contract to be one where the major operations of the company, its assets related to the contract are based and hence that is also likely to be the preferred place of enforcement. This is a good point to read in Gary Born's proposal of imputing the law of a jurisdiction that has "*materially closer connections to the issue at hand*".[5]

Apart from the pro-validation approach which upholds the rational expectation of the parties, there are other elements of the composite approach that ensure the preservation of party autonomy and will. For instance, the courts will *firstly*, not interfere if it can be construed that the parties have expressly stipulated a law for the arbitration clause. *Secondly*, as has been mentioned above, the courts will impute the law governing the substantive contract as the applicable law when the arbitration clause is a standalone one. What can be observed from here is that the approach maintains a proper degree of caution even while inferring the applicable law. And *lastly*, the very idea of maintaining a presumption of the same law being applicable to both the main contract and the arbitration clause also aligns with upholding the will and autonomy of the parties. Various commentators have observed that parties in practice rarely stipulate a separate clause on the substantive law applicable to the arbitration clause. As observable, model clauses of the various major arbitral institutions do not contain such a stipulation and certain commentators have even gone as far as to conclude that the inclusion of such a clause would only add to the confusion. In light of this background, it was certainly plausible for Steven Chong, J in *BYC v BCZ* to conclude that "*where the arbitration agreement is a clause forming part of a main contract, it is reasonable to assume that the contracting parties intend their entire relationship to be governed by the same system of law. If the intention is otherwise, I do not think it is unreasonable to expect the parties to specifically provide for a different system of law to govern the arbitration agreement*" [para 59]. However, it has been shown above that the composite approach has not left any presumption irrebuttable in the presence of appropriate reasoning, facts and will trigger separability if necessary to avoid the negation of the arbitration agreement.

IV. CONCLUDING REMARKS

In a nutshell, what can be inferred from this article is that the composite approach keeps at its forefront principles and characteristics of party autonomy and pro-arbitration. The approach is extremely layered and well thought out to preserve the intention of the parties to the most practicable extent. It delivers on all of this while truly effectuating the principle of separability and ensuring its correct application. Hence, despite all the criticisms it is still described as a forward-looking approach owing to its various characteristics.

FOOTNOTES:

[1] For recent literature and more detailed facts, See Darren Jun Jie Low, 'The Composite Approach to Issues of Non-Arbitrability at the Pre-Award and Post-Award Stage: Anupam Mittal v. Westbridge Ventures II Investment Holdings [2023] SGCA 1', in Lawrence Boo and Lucy F. Reed (eds), *Asian International Arbitration Journal* (Kluwer Law International 2023, Volume 19, Issue 1), 83 – 94; Khushboo Shahdapuri and Chelsea Pollard, 'Dispute over Matrimonial Service Website: Singapore Adopts Composite Approach in Declaring Dispute to be Arbitrable', *(Kluwer Arbitration*, 2023) < Dispute over Matrimonial Service Website: Singapore Adopts Composite Approach in Declaring Dispute to be Arbitrable – Kluwer Arbitration Blog>; Nisanth Kadur, 'Determining Arbitrability at the Pre-Award Stage: An Analysis of the Singapore Court of Appeal's "Composite Approach"', (*American Review of International Arbitration*, 2023) <Determining Arbitrability at the Pre-Award Stage: An Analysis of the Singapore Court of Appeal's "Composite Approach" – American Review of International Arbitration (columbia.edu)>

[2] See *BCY v BCZ* [2016] SGHC 249; *BNA v BNB* [2019] SGHC 142; *Anupam Mittal v Westbridge II* [2023] SGCA 1.

[3] Martin Hunter and others, *Redfern and Hunter on International Arbitration, (6th edn, 2015 OUP) [2.101 – 2.104].*

[4] Redfern and Hunter (n 1) [1.53].

[5] Gary Born, *International Commercial Arbitration*, (3rd Ed, Kluwer Law International 2021) §4.05 [C] [2].

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

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

Facts

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

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

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

Proceedings

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

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

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

EU freedom of services?

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

Cassation based on *Gruber Logistics*

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

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

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

U.S. Supreme Court Renders Personal Jurisdiction Decision

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

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

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

The Case

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

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

The Holding

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

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

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

Points of Disagreement

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

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

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

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

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

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

The Dissent

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

Foreign Defendants in U.S. Courts

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

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

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

Broader Implications for Personal Jurisdiction Doctrine

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

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

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

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

Conclusion

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

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

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

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

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

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

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

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