The Greek Supreme Court has decided: Relatives of persons killed in accidents are immediate victims

A groundbreaking judgment was rendered last October by the Greek Supreme Court. Relatives of two Greek crew members killed in Los Llanos Air Base, Spain, initiated proceedings before Athens courts for pain and suffering damages (solatium). Although the action was dismissed by the Athens court of first instance, and the latter decision was confirmed by the Athens court of appeal, the cassation was successful: The Supreme Court held that both the Brussels I bis Regulation and the Lugano Convention are establishing international jurisdiction in the country where the relatives of persons killed are domiciled, because they must be considered as direct victims.

THE FACTS

On 26 January 2015, an F-16D Fighting Falcon jet fighter of the Hellenic Air Force crashed into the flight line at Los Llanos Air Base in Albacete, Spain, killing 11 people: the two crew members and nine on the ground.

The relatives of the Greek crew members filed actions for pain and suffering damages before the Athens court of first instance against a US (manufacturer of the aircraft) and a Swiss (subsidiary of the manufacturer) company. The action was dismissed in 2019 for lack of international jurisdiction. The appeals lodged by the relatives before had the same luck: the Athens court of appeal confirmed in 2020 the first instance ruling. The relatives filed a cassation, which led to the judgment nr. 1658/5.10.2022 of the Supreme Court.

THE JUDGMENT OF THE SUPREME COURT

Out of a number of cassation grounds, the Supreme Court prioritized the examination of the ground referring to the international jurisdiction deriving from

Articles 7(2) Brussels I bis Regulation and 5(3) Lugano Convention 2007. Whereas the analysis of the court was initially following the usual path, established by the CJEU and pertinent legal scholarship, namely, that third persons suffering moral (immaterial) damages are classified as indirect victims of torts committed against their relative, when the accident results in the death of the relative, they have to be considered as direct victims, which leads to their right to file a claim for damages (solatium) in the courts of their domicile.

In particular, the analysis of the Supreme Court is the following:

1. Articles 7(2) Brussels I bis Regulation and 5(3) Lugano Convention 2007

'With regard to the mental suffering caused by the incident as a result of the tort, after his death, the relative can no longer be subject to rights (and obligations) and, therefore, have claims against the wrongdoer.

In this case, the relatives of the deceased have by law a personal claim against the defendants, since the infliction of mental suffering is a primary and direct damage to their person; therefore, the place of its occurrence is important for the establishment of the court's international jurisdiction in the court which this place is located, for the adjudication of their respective claim.

In other words, the infliction of mental suffering is a direct injury to the persons close to the deceased; it is separate and independent from the primary injury suffered by the latter, without this mental suffering being considered, due to the previous injury of the deceased, as indirect damage. The wrongdoer's behavior, considered independently, also constitutes an independent reason for an obligation towards them for monetary satisfaction (and compensation), without the mental suffering caused presupposing any other damage to the above persons, so that it could be characterized as a consequence of it, and, consequently , as indirect with respect to this damage.

The place where the mental suffering comes from is not the place, where by chance the person was informed of the death of his relative and felt the mental pain, but the place of his main residence, where he mainly and permanently suffers this pain, which certainly has a duration of time and, therefore, burdens him not all at once, but for a long, as a rule, period of time.

It should be noted that, according to Greek law, in the case of tortious acts, a

claim for compensation and monetary satisfaction due to moral damage is only available to the person immediately harmed by the act or omission, and not by the third party indirectly injured. Hence, where Article 932 of the Civil Code states that, in the event of the death of a person, monetary compensation may be awarded to the victim's family due to mental distress, it clearly considers the relatives of the deceased as immediately damaged and, in any case, fully equates them with their primary affected relative.

In view of the above, articles 7(2) of Regulation 1215/2012 and 5(3) of the Lugano Convention, have the meaning that the mental suffering, which is connected to the death of a person as a result of a tort committed in a member state, and which is suffered by the relatives of this victim, who reside in another member state, constitutes direct damage in the place of their main residence. Therefore, the court, in whose district the person, who suffered mental anguish due to the death of his relative, has his residence, has territorial competence and international jurisdiction to adjudicate the claim arising from the mental suffering caused for the payment of damages.

The above conclusion also results from the grammatical interpretation of the above provisions, given that they do not make any distinction as to whether the damage concerns the primary sufferer or other persons, but only require that the damage caused to the plaintiff may be characterized as direct.

An opposite opinion would necessarily lead in this case to the international jurisdiction only of the court of the place where the damaging event occurred, a solution, however, that is not in accordance with the interpretation of the above rules by the CJEU, which accepts, without distinction or limitation, equally and simultaneously, the international jurisdiction of the place where the direct damage occurred.

2. The interdependence of Brussels I bis Regulation and Rome II Regulation

It is true that in the interpretation of Article 4(1) Regulation 864/2007 on the law applicable to non-contractual obligations, the CJEU ruled that, damages connected with the death of a person due to such an accident within the Member State of the trial court, suffered by the victim's relatives residing in another Member State, must be characterized as "indirect results" of the said accident,

under the meaning of the provision in question (case Florin Lazar v Allianz SpA, C-350/14).

However, in addition to the fact that this judgment concerned the choice of applicable law, the same court has accepted that, according to recital 7 Regulation 864/2007, the intention of the EU legislator was to ensure consistency between Regulation 44/2001 (already 1215/2012), and the material scope as well as the provisions of Regulation 864/2007; however, "it does not follow in any way that the provisions of Regulation 44/2001 must, for this reason, be interpreted in the light of the provisions of Regulation 864/2007. In no case can the intended consequence result in an interpretation of the provisions of Regulation 44/2001, inconsistent with the system and its purposes.

And the Supreme Court concluded:

According to all of the above, pursuant to the provision of article 35 of the Civil Code, as interpreted in the light of articles 7(2) Regulation 1215/2012 and 5(3) Lugano Convention, the Greek courts have international and local jurisdiction to adjudicate claims for payment of reasonable monetary satisfaction due to mental anguish, as a result of the death of a relative of the claimants, committed in another Member State, if the claimants reside in the court's district.

THE MINORITY OPINION

One member of the Supreme Court distanced himself from the panel, and submitted a minority opinion, which was founded on the prevailing opinion followed by the CJEU and legal scholarship. In particular, according to the minority report, the damage caused to the claimants due to the death of their relative remains an indirect one, given that the damage caused was of a reflective and not of a direct nature. The minority opinion emphasized also on the predictability factor, which was not elaborated by the panel.

COMMENTS

The judgment of the Supreme Court opens the Pandora's box in a matter well settled so far. An earlier judgment rendered by the Italian Supreme Court

followed the prevailing view [*see Corte di Cassazione (IT) 11.02.2003 – 2060 – Staltari e altre ./. GAN IA Compagnie française SA ed altri*, available in: unalex Case law Case IT-19].

In matters where national courts wish to deviate from the prevalent, if not unanimous view taken by the CJEU and European legal scholarship, the most prudent solution would be to address the matter to the Court, by filing a request for a preliminary ruling. The latter applies to both international jurisdiction, and interdependence between the Brussels I bis and the Rome II Regulation.

Standard (and burden) of proof for jurisdiction agreements

Courts are often required to determine the existence or validity of jurisdiction agreements. This can raise the question of the applicable standard of proof. In common law jurisdictions, the question is not free from controversy. In particular, Stephen Pitel has argued on this very blog that jurisdiction clauses should be assessed on the balance of probabilities, as opposed to the "good arguable case" standard that is commonly applied (see, in more detail, Stephen Pitel and Jonathan de Vries "The Standard of Proof for Jurisdiction Clauses" (2008) 46 Canadian Business Law Journal 66). That is because the court's determination on this question will ordinarily be final – it will not be revisited at trial.

In this post, I do not wish to contribute to the general debate about whether the "good arguable case" standard is appropriate when determining the existence and validity of jurisdiction agreements. Rather, I want to draw attention to a particular feature of the English "good arguable case" standard that can cause problems when applied to jurisdiction agreements. The feature is that, in cases where the court is unable to say who has "the better argument", it will proceed on the basis of plausibility (*Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10, [2019] WLR 3514 at [79]-[80]). Application of this

lower standard may lead to unfairness in the treatment of jurisdiction agreements. The party who bears the burden of proof will get the benefit of the doubt that is inherent in the test. However, there is no principled way to allocate the burden. Should it be the party seeking to rely on the agreement, with the result that there is a kind of bias in favour of upholding jurisdiction agreements, or should it be the plaintiff, as was the approach taken recently by the New Zealand High Court in *Kea Investments Ltd v Wikeley Family Trustee Limited* [2023] NZHC 466?

The High Court in that case had granted an interim anti-enforcement injunction in relation to a default judgment from Kentucky (see *Kea Investments Ltd v Wikeley Family Trustee Limited* [2022] NZHC 2881, and my earlier post here). Kea Investments Ltd (Kea), a British Virgin Islands company, alleged that the US default judgment was based on fabricated claims intended to defraud Kea. It claimed that the defendants – a New Zealand company, an Australian resident with a long business history in New Zealand, and a New Zealand citizen – had committed a tortious conspiracy against it and sought a declaration that the Kentucky judgment would not be recognised or enforceable in New Zealand. Two of the defendants – Wikeley Family Trustee Limited and Mr Wikeley – protested the Court's jurisdiction.

The Court set aside the protest to jurisdiction, dismissing an argument that Kea was bound by a US jurisdiction clause. One of the reasons for this was that the jurisdiction clause was unenforceable by virtue of Kea's allegations of fraud and conspiracy (see here for a more extensive case note). The Court applied the "good arguable case" standard to determine the relevance of the allegations. It relied on the test in *Four Seasons Holding Inc v Brownlie* [2017] UKSC 80, which sets out the good arguable case standard applicable to "jurisdictional facts" that form the basis for an application to serve proceedings outside of the forum. Gault J considered that, even though the test in *Four Seasons* was concerned with the different scenario of a plaintiff seeking to establish jurisdictional facts to support an assumption of jurisdiction by the forum court, it was appropriate to apply the test by analogy to the defendants' application for a stay or dismissal of the New Zealand proceeding by virtue of the US jurisdiction clause (at [44]).

However, the good arguable case test is especially difficult to apply in cases where the court is unable "to form a decided conclusion on the evidence before it and is therefore unable to say who has the better argument" (at *Kaefer*

Aislamientos SA de CV v AMS Drilling Mexico SA de CV [2019] EWCA Civ 10, [2019] WLR 3514 at [79]). In such cases, the good arguable case inquiry is no longer a relative inquiry, and all that is needed is a plausible (albeit contested) evidential basis. It follows that the question of the *burden* of proof may become determinative.

Gault J considered that it was the plaintiff, Kea, that had to show a plausible evidential basis here. Thus, the Judge considered that Kea had to show "a plausible evidential basis" for its argument that there was no jurisdiction clause: "[t]he test is whether there is a plausible (albeit contested) evidential basis for the claimant's case in relation to the jurisdiction clause (by analogy with the application of the relevant gateway). It is not whether the defendants have a plausible (albeit contested) evidential basis for their position that the Coal Agreement was executed by Kea" (at [60], see also [63]). In other words, it was Kea who was given the benefit of the doubt inherent in the test, and not the defendants.

It is likely that Gault J's approach can at least to some extent be explained by reference to the peculiar facts of the case. However, if his approach were adopted more generally, the result would be that in cases of evidential uncertainty that cannot be resolved, the good arguable case inquiry necessarily favours plaintiffs over defendants, and New Zealand jurisdiction agreements over foreign jurisdiction agreements. This would not be a desirable outcome.

The alternative is that the burden is on the party seeking to enforce the jurisdiction agreement. This seems to be the view adopted by *Dicey, Morris and Collins on the Conflict of Laws* (16th ed, at [12-093]). However, this approach is problematic too, because it introduces a bias in favour of upholding jurisdiction agreements. In *Kaefer*, the plaintiffs sought to rely on an English jurisdiction agreement under Art 25 of the recast Brussels Regulation. Commenting on the case, Andrew Dickinson argued that the application of the test of plausibility was not consistent with the scheme of the Regulation, which requires that "the defendant, not the claimant, … be given the benefit of the doubt" ("Lax Standards" 135 (2019) LQR 369). Dickinson pointed to the "significant unfairness to the defendant of being required to defend proceedings before a court other than that of his domicile in the absence of conclusive and relevant evidence that the court has jurisdiction under the Regulation". I think that the concern is valid

more generally. Why should any party – whether it is the defendant or the claimant – be held to a jurisdiction agreement even though there is only a plausible basis for its existence?

It follows that courts should always try to engage in a relative inquiry when determining the existence and validity of jurisdiction agreements. It is likely that this is already occurring in practice, and so perhaps the concerns raised in this post are more theoretical than real. If so, it is in the interest of legal certainty and accessibility that the test be clarified.

China's Draft Law on Foreign State Immunity—Part II

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

In December 2022, Chinese lawmakers published a draft law on foreign state immunity, an English translation of which is now available. In a prior post, I looked at the draft law's provisions on immunity from suit. I explained that the law would adopt the restrictive theory of foreign state immunity, bringing China's position into alignment with most other countries.

In this post, I examine other important provisions of the draft law, including immunity from attachment and execution, service of process, default judgments, and foreign official immunity. These provisions generally follow the U.N. Convention on Jurisdictional Immunities of States and Their Property, which China signed in 2005 but has not yet ratified.

China's draft provisions on immunity from attachment and execution, service of process, and default judgments make sense. Applying the draft law to foreign officials, however, may have the effect of limiting the immunity that such officials would otherwise enjoy under customary international law. This is probably not what China intends, and lawmakers may wish to revisit those provisions before

the law is finally adopted.

Immunity from Attachment and Execution

Articles 13 and 14 of China's draft law cover the immunity of foreign state property from "judicial compulsory measures," which the U.N. Convention calls "measures of constraint" and the U.S. Foreign Sovereign Immunities Act (FSIA) refers to as measures of attachment and execution. They include both pre-judgment measures to preserve assets and post-judgment measures to enforce judgments. Under customary international law, immunity from attachment and execution is separate from and generally broader than immunity from suit. It protects foreign state property located in the forum state, in this case the property of foreign states located in China.

Article 13 provides that the property of a foreign state shall be immune from judicial compulsory measures with three exceptions: (1) when the foreign state has expressly waived such immunity; (2) when the foreign state has specifically designated property for the enforcement of such measures; and (3) to enforce Chinese court judgments when the property is used for commercial activities, relates to the proceedings, and is located in China. Article 13 further states that a waiver of immunity from jurisdiction shall not be deemed a waiver of immunity from judicial compulsory measures.

Article 14 goes on to identify types of property that shall *not* be regarded as used for commercial activities for the purpose of Article 13(3). These include the bank accounts of diplomatic missions, property of a military character, central bank assets, property that is part of the state's cultural heritage, property of scientific, cultural, or historical value used for exhibition, and any other property that a Chinese court thinks should not be regarded as being in commercial use.

Articles 13 and 14 of China's draft law closely parallel Articles 19-21 of the U.N. Convention. The main difference appears in Article 13(3)'s exception for enforcing court judgments, which is expressly limited to Chinese court judgments and requires that the property "relates to the proceedings." Article 19(c) of the U.N. Convention, by contrast, is not limited to judgments of the state where enforcement is sought and does not require that the property relate to the proceedings. On first glance, China's draft law appears to resemble more nearly § 1610(a)(2) of the U.S. FSIA, which is expressly limited to U.S. judgments and

requires that the property be used for the commercial activity on which the claim was based.

Upon reflection, however, it appears that China's limitation of draft Article 13(3) to Chinese court judgments sets it apart from the U.S. practice as well as the U.N. Convention. In the United States, a party holding a foreign judgment may seek recognition of that judgment in U.S. courts, thereby converting it into a U.S. judgment. Because the U.S. judgment recognizing the foreign judgment falls within the scope of § 1610(a), it is possible to attach the property of a foreign state in the United States to enforce a non-U.S. judgment.

It seems that the same is not true in China, which is to say that Article 13(3) cannot be used to enforce foreign judgments. Under Article 289 of China's Civil Procedure Law (numbered Article 282 in this translation of the law prior to its 2022 amendment), the recognition of a foreign judgment results in a "ruling" (??). The text of Article 13(3), however, is limited to "judgments on the merits" (??), which appears to exclude Chinese decisions recognizing foreign judgments. (I am grateful to my students Li Jiayu and Li Yadi for explaining the distinction to me.) In short, Article 13(3) appears *really* to be limited to Chinese court judgments, as neither the U.N. Convention nor the U.S. FSIA are in practice.

There are other differences between the U.S. FSIA and China's draft law. With respect to the property of a foreign state itself, the FSIA requires that the property be used for a commercial activity in the United States by the foreign state—even when the foreign state has waived its immunity—which can be a difficult set of conditions to satisfy. Articles 13(1) and (2) of China's draft law, by contrast, impose no similar conditions. The U.S. FSIA has separate and looser rules for attaching the property of agencies or instrumentalities of foreign states in § 1610(b), rules that do not require the property to be used for a commercial activity in the United States as long as the agency or instrumentality is engaged in a commercial activity in the United States. And § 1611(b) of the FSIA singles out only central bank and military assets as exceptions to the rules allowing post-judgment attachment and execution, whereas the draft law's Article 14 additionally mentions bank accounts of diplomatic missions, property that is part of the state's cultural heritage, and property of scientific, cultural, or historical value used for exhibition.

Service of Process

China's draft law also provides for service of process on a foreign state. Article 16 states that service may be made as provided in treaties between China and the foreign state or "by other means acceptable to the foreign state and not prohibited by the laws of the People's Republic of China." (The United States and China are both parties to the Hague Service Convention, which provides for service through the receiving state's Central Authority.) If neither of these means is possible, then service may be made by sending a diplomatic note. A foreign state may not object to improper service after it has made a pleading on the merits. Again, this provision closely follows the U.N. Convention, specifically Article 22.

Section 1608 of the FSIA is the U.S. counterpart. It distinguishes between service on a foreign state and service on an agency or instrumentality of a foreign state. For service on a foreign state, § 1608 provides four options that, if applicable, must be attempted in order: (1) in accordance with any special arrangement between the plaintiff and the foreign state; (2) in accordance with an international convention; (3) by mail from the clerk of the court to the ministry of foreign affairs; (4) through diplomatic channels. For service on an agency or instrumentality, § 1608 provides a separate list of means.

Default Judgment

If the foreign state does not appear, Article 17 of China's draft law requires a Chinese court to "take the initiative to ascertain whether the foreign state is immune from … jurisdiction." The court may not enter a default judgment until at least six months after the foreign state has been served. The judgment must then be served on the foreign state, which shall have six months in which to appeal. Article 23 of the U.N. Convention is similar, except that it provides periods of four months between service and default judgment and four months in which to appeal.

U.S. federal courts must similarly ensure that a defaulting foreign state is not entitled to immunity, because the FSIA makes foreign state immunity a question of subject matter jurisdiction, and federal courts must address questions of subject matter jurisdiction even if they are not raised by the parties. Section 1608(e) goes on to state that "[n]o judgment by default shall be entered by a court

of the United States or of a State against a foreign state … unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." In other words, courts in the United States are additionally obligated to examine the *substance* of the claim before granting a default judgment. China's draft law does not appear to impose any similar obligation.

Foreign Officials

Article 2 of China's draft law defines "foreign state" to include "natural persons … authorized … to exercise sovereign powers." Thus, unlike the U.S. FSIA, China's draft law may cover the immunity of some foreign officials.

The impact of the draft law on foreign official immunity is mitigated by Article 19, which says that the law shall not affect diplomatic immunity, consular immunity, special missions immunity, or head of state immunity. Article 3 of the U.N. Convention similarly specifies that these immunities are not affected by the Convention. What is missing from these lists of course, is conduct-based immunity. Under customary international law, foreign officials are entitled to immunity from suit based on acts taken in their official capacities, and such immunity continues after the official leaves office.

It appears that China's draft law would govern the conduct-based immunity of foreign officials in Chinese courts and would give them less immunity than customary international law requires. By including "natural persons" within the definition of "foreign state," the draft law makes the exceptions to immunity for foreign states discussed in my prior post applicable to foreign officials as well. Thus, foreign officials who engage in commercial activity on behalf of a state might be subject to suit in their personal capacities and not just as representatives of the state. This does not make much sense.

Although it appears that China simply copied this quirk from the U.N. Convention, it makes no more sense in Chinese domestic law than it makes in the Convention. Chinese authorities would be wise to reconsider this issue before the law is finalized. They could address the problem by adding conduct-based immunity to Article 19's list of immunities not affected. Or, better still, they could omit "natural persons" from the definition of "foreign state" in Article 2.

Conclusion

Adoption of China's draft law on foreign state immunity would be a major step in the modernization of China's laws affecting transnational litigation. As described in this post and my previous one, the draft law generally follows the provisions of the U.N. Convention and would apply those rules to all states including states that chose not to join the Convention. The provisions of the U.N. Convention are generally sensible, but they are not perfect. In those instances where the U.N. Convention rules are defective—for example, with respect to the conduct-based immunity of foreign officials—China should not follow them blindly.

[This post is cross-posted at Transnational Litigation Blog.]

What is a Judgment (in the context of Reg 655/2014)? – CJEU Case C-291/21 Starkinvest

Less than half a year after the CJEU's decision in Case C-646/20 *Senatsverwaltung für Inneres* (discussed here by Krzysztof Pacula), the Court had to engage again with the question of what constitutes a "judgment" in the sense of an EU instrument in Case C-291/21 *Starkinvest*.

This time, the question arose in the context of Regulation 655/2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters. The regulation envisages two kinds of situation:

1. The creditor has already obtained a "judgment" (Art. 7(1)): In this case, the creditor only needs to show that there is an urgent need for a protective measure to ensure that the judgment can be effectively enforced against the debtor.
2. The creditor has not yet obtained a "judgment" (Art. 7(2)): In this case,

the creditor *also* needs to show "that he is likely to succeed on the substance of his claim against the debtor".

In *Starkinvest*, the claimant had obtained a decision from the Tribunal de commerce de Liège, Belgium, that ordered the debtor to cease seeling certain goods, subject to a penalty payment of EUR 2 500 per breach. On the basis of that decision, they later sought payment of EUR 85 000 in penalties, which they requested the referring court to secure through a European Account Preservation Order. Confronted with the question of how to characterise the initial decision in the context of the above dichotomie, the court referred the case to the CJEU.

The CJEU followed the advice of Advocate General Szpunar, holding that

> *Article 7(2) of [the Regulation] must be interpreted as meaning that a judgment that orders a debtor to make a penalty payment in the event of a future breach of a prohibitory order and that therefore does not definitively set the amount of that penalty payment does not constitute a judgment requiring the debtor to pay the creditor's claim, within the meaning of that provision, such that the creditor who requests a European Account Preservation Order is not exempt from the obligation to provide sufficient evidence to satisfy the court before which an application for that order is brought that he or she is likely to succeed on the substance of his or her claim against the debtor.*

In reaching that decision, the court emphasised the fact that in a case like this, the precise amount of the debt had not yet been established by a court (see paras. 51–52, 55); accordingly, there was no sufficient justification for exempting the claimant from the requirement to satisfy the court that they are likely to succeed on the merits.

International commercial courts

for Germany?

This post is also available via the EAPIL blog.

On 25 April 2023 the German Federal Ministry of Justice *(Bundesministerium der Justiz – BMJ)* has published a bill relating to the establishment of (international) commercial courts in Germany. It sets out to strengthen the German civil justice system for (international) commercial disputes and aims to offer parties an attractive package for the conduct of civil proceedings in Germany. At the same time, it is the aim of the bill to improve Germany's position vis-à-vis recognized litigation and arbitration venues – notably London, Amsterdam, Paris and Singapore. Does this mean that foreign courts and international commercial arbitration tribunals will soon face serious competition from German courts?

English-language proceedings in all instances

Proposals to improve the settlement of international commercial disputes before German courts have been discussed for many years. In 2010, 2014, 2018 and 2021, the upper house of the German Federal Parliament *(Bundesrat)* introduced bills to strengthen German courts in (international) commercial disputes. However, while these bills met with little interest and were not even discussed in the lower house of Parliament *(Bundestag)* things look much brighter this time: The coalition agreement of the current Federal Government, in office since 2021, promises to introduce English-speaking special chambers for international commercial disputes. The now published bill of the Federal Ministry of Justice can, therefore, be seen as a first step towards realizing this promise. It heavily builds on the various draft laws of the Bundesrat including a slightly expanded version that was submitted to the Bundestag in 2022.

The bill allows the federal states *(Bundesländer)* to establish special commercial chambers at selected regional courts *(Landgerichte)* which shall, if the parties so wish, conduct the proceedings comprehensively in English. Appeals and complaints against decisions of these chambers shall be heard in English before English-language senates at the higher regional courts *(Oberlandesgerichte)*. If the value in dispute exceeds a threshold value of 1 million Euros and if the parties so wish, these special senates may also hear cases in first instance. Finally, the Federal Supreme Court *(Bundesgerichtshof)* shall be allowed to conduct

proceedings in English. Should the bill be adopted – which seems more likely than not in light of the coalition agreement – it will, thus, be possible to conduct English-language proceedings in at least two, maybe even three instances. Compared to the status quo, which limits the use of English to the oral hearing (cf. Section 185(2) of the Court Constitution Act) and the presentation of English-language documents (cf. Section 142(3) of the Code of Civil Procedure) this will be a huge step forward. Nonetheless, it seems unlikely that adoption of the bill will make Germany a much more popular forum for the settlement of international commercial disputes.

Remaining disadvantages vis-à-vis international commercial arbitration

To begin with, the bill – like previous draft laws – is still heavily focused on English as the language of the court. Admittedly, the bill – following the draft law of the Bundesrat of March 2022 – also proposes changes that go beyond the language of the proceedings. For example, the parties are to be given the opportunity to request a verbatim record of the oral proceedings. In addition, business secrets are to be better protected. However, these proposals cannot outweigh the numerous disadvantages of German courts vis-à-vis arbitration. For example, unlike in arbitration, the parties have no influence on the personal composition of the court. As a consequence, they have to live with the fact that their – international – legal dispute is decided exclusively by German (national) judges, who rarely have the degree of specialization that parties find before international arbitration courts. In addition, the digital communication and technical equipment of German courts is far behind what has been standard in arbitration for many years. And finally, one must not forget that there is no uniform legal framework for state judgments that would ensure their uncomplicated worldwide recognition and enforcement.

Weak reputation of German substantive law

However, the bill will also fail to be a resounding success because it ignores the fact that the attractiveness of German courts largely depends on the attractiveness of German law. To be sure, German courts may also apply foreign law. However, their real expertise – and thus their real competitive advantage especially vis-à-vis foreign courts – lies in the application of German law, which, however, enjoys only a moderate reputation in (international) practice. Among the disadvantages repeatedly cited by practitioners are, on the one hand, the

numerous general clauses (e.g. §§ 138, 242 of the German Civil Code), which give the courts a great deal of room for interpretation, and, on the other hand, the strict control of general terms and conditions in B2B transactions. In addition – and irrespective of the quality of its content – German law is also not particularly accessible to foreigners. Laws, decisions and literature are only occasionally available in English (or in official English translation).

Disappointing numbers in Amsterdam, Paris and Singapore

Finally, it is also a look at other countries that have set up international commercial courts in recent years that shows that the adoption of the bill will not make German courts a blockbuster. Although some of these courts are procedurally much closer to international commercial arbitration or to the internationally leading London Commercial Court, their track record is – at least so far – rather disappointing.

This applies first and foremost to the Netherlands Commercial Court (NCC), which began its work in Amsterdam in 2019 and offers much more than German courts will after the adoption and implementation of the bill: full English proceedings both in first and second instance, special rules of procedure inspired by English law on the one hand and international commercial arbitration law on the other, a court building equipped with all technical amenities, and its own internet-based communication platform. The advertising drum has also been sufficiently beaten. And yet, the NCC has not been too popular so far: in fact, only 14 judgments have been rendered in the first four years of its existence (which is significantly less than the 50 to 100 annual cases expected when the court was set up).

The situation in Paris is similar. Here, a new chamber for international commercial matters (chambre commerciale internationale) was established at the Cour d'appel in 2018, which hears cases (at least in parts) in English and which applies procedural rules that are inspired by English law and international arbitration. To be sure, the latter cannot complain about a lack of incoming cases. In fact, more than 180 cases have been brought before the new chamber since 2018. However, the majority of these proceedings are due to the objective competence of the Chamber for international arbitration, which is independent of the intention of the parties. In contrast, it is not known in how many cases the Chamber was independently chosen by the parties. Insiders, however, assume

that the numbers are “negligible” and do not exceed the single-digit range.

Finally, the Singapore International Commercial Court (SICC), which was set up in 2015 with similarly great effort and ambitions as the Netherlands Commercial Court, is equally little in demand. Since its establishment, it has been called upon only ten times by the parties themselves. In all other cases in which it has been involved, this has been at the instigation of the Singapore High Court, which can refer international cases to the SICC under certain conditions.

No leading role for German courts in the future

In the light of all this, there is little to suggest that the bill, which is rather cautious in its substance and focuses on the introduction of English as the language of proceedings, will lead to an explosion – or even only to a substantial increase – in international proceedings before German courts. While it will improve – even though only slightly – the framework conditions for the settlement of international disputes, expectations regarding the effect of the bill should not be too high.

Note: Together with Yip Man from Singapore Management University Giesela Rühl is the author of a comparative study on new specialized commercial courts and their role in cross-border litigation. Conducted under the auspices of the International Academy of Comparative Law (IACL) the study will be published with Intersentia in the course of 2023.

A conference to honor Professor Linda Silberman at NYU

This week a conference took place to honor Professor Linda Silberman at New York University (NYU). She is currently the Clarence D. Ashley Professor of Law Emerita at NYU. The full program is available here.



Anyone who has had the privilege of taking Linda Silberman's classes would agree with me that she is an outstanding scholar and professor. Someone who takes the art of teaching to another level, a very kind and brilliant person who truly enjoys building the legal minds of the lawyers and academics of the future. In my view, nothing in the academic world compares to taking the "international litigation" class with her. Thus, this is more than a well-deserved event.

The conference flyer indicates the following:

"When Professor Linda Silberman came to NYU in 1971, she was the *first woman* hired for the NYU Law tenure-track faculty. In 1977, she became the *first tenured female professor on the NYU Law faculty*. Although she took emerita status in September 2022, she continues as the Co-Director of the NYU Center on Transnational Litigation, Arbitration, and Commercial Law. For over 30 years, Professor Silberman taught hundreds of first-year students Civil Procedure and she is the co-author of a leading Civil Procedure casebook that starts with her name. Throughout her career, Professor Silberman also taught Conflict of Laws and in the past twenty-five years branched out to teach Comparative Procedure, Transnational Litigation, and International Arbitration. Professor Silberman is a prolific scholar and her articles have been cited by numerous courts in the United States, including the Supreme Court, and also by foreign courts. Professor Silberman has been active in the American Law Institute as an Advisor on various ALI projects, including serving as a co-Reporter on a project on the recognition of foreign country judgments. She has also been a member of numerous U.S. State Department delegations to the Hague Conference on Private International Law. In 2021, Professor Silberman gave the general course on Private International Law at the Hague Academy of International Law."

Below I include some of the publications of Professor Silberman (an exhaustive

list is available here):

Books

- Civil Procedure: Theory and Practice (Wolters Kluwer 6th ed., 2022; 5th ed., 2017; 4th ed., 2013; 3d ed., 2009; 2d ed., 2006; 1st ed., 2001) (with Allan R. Stein, Tobias Barrington Wolff and Aaron D. Simowitz)
- Recognition and Enforcement of Foreign Judgments (Edward Elgar Publishing, 2017) (ed. with Franco Ferrari)
- Civil Litigation in Comparative Context (West Academic Publishing 2d ed., 2017; 1st ed., 2007) (with Oscar G. Chase, Helen Hershkoff, John Sorabji, Rolf Stürner et al.)
- Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute (American Law Institute, 2006) (with Andreas F. Lowenfeld)
- The Hague Convention on Jurisdiction and Judgments: Records of the Conference held at New York University School of Law on the Proposed Convention (Juris, 2001) (ed. with Andreas F. Lowenfeld)

Articles

- "Nonparty Jurisdiction," 55 Vand. J. Transnat'l L. 433 (2022) (with Aaron D. Simowitz)
- "Introductory Note to Monasky v. Taglieri (U.S. Sup. Ct.)," 59 Int'l Legal Materials 873 (2020)
- "Misappropriation on a Global Scale: Extraterritoriality and Applicable Law in Transborder Trade Secrecy Cases," 8 Cybaris Intell. Prop. L. Rev. 265 (2018) (with Rochelle C. Dreyfuss)
- "Lessons for the USA from the Hague Principles," 22 Uniform L. Rev. 422 (2017)
- "The Transnational Case in Conflict of Laws: Two Suggestions for the New Restatement Third of Conflict of Laws—Judicial Jurisdiction over Foreign Defendants and Party Autonomy in International Contracts," 27 Duke J. Compar. & Int'l L. 405 (2017) (with Nathan D. Yaffe)
- "The US Approach to Recognition and Enforcement of Awards After Set-Asides: The Impact of the Pemex Decision," 40 Fordham Int'l L.J. 799 (2017) (with Nathan Yaffe)

- “Recognition and Enforcement of Foreign Judgments and Awards: What Hath Daimler Wrought?” 91 N.Y.U. L. Rev. 344 (2016)(with Aaron Simowitz)
- “The End of Another Era: Reflections on Daimler and Its Implications for Judicial Jurisdiction in the United States,” 19 Lewis & Clark L. Rev. 675 (2015)
- “Limits to Party Autonomy at the Post-Award Stage,” in Limits to Party Autonomy in International Commercial Arbitration (Juris 2016)(with Maxi Scherer)
- “United States Supreme Court Hague Abduction Decisions: Developing a Global Jurisprudence,” 9 J. Comp. L. 49 (2014);
- “The Need for a Federal Statutory Approach to the Recognition and Enforcement of Foreign County Judgments,” 26th Sokol Colloquium (2014)
- “Civil Procedure Meets International Arbitration: A Tribute to Hans Smit,” 23 Am Rev. Int. Arb. 439 (2012)
- “Goodyear and Nicastro: Observations from a Transnational and Comparative Perspective,” 63 S.Ct. L. Rev. 591 (2011)
- “Morrison v. National Australia Bank: Implications for Global Securities Class Actions,” 12 YB. Priv. Int. L. (2011 “The Role of Choice-of-Law in National Class Actions,” 156 U. Pa. L. Rev. 2001 (2008).

* photo credited to NYU

Relevance of Indian Limitation Law vis-à-vis Foreign-seated International Arbitration With

Indian Law As The Applicable Substantive Law

Written by Harshal Morwale, Counsel, Singularity Legal

Introduction

The precise determination of the laws that will govern different aspects of international arbitration is a crucial matter, given that there could be a substantial divergence between different laws, such as the law of the seat and the substantive law of the contract on the same issue. One such issue is limitation.

The determination of the law applicable to limitation is a complex exercise. The different characterization of limitation as a procedural or substantive issue adds more to the complexity. This issue could not be simpler in India. This post is prompted by a recent decision of the Delhi High Court ("DHC") in *Extramarks Education India v Shri Ram School* ("*Extramarks* case"), which although on domestic arbitration, makes various obiter observations on the nature of limitation and flexibility of parties to contract out of the same.

The aim of this post is to explore how would Indian substantive law of the contract impact limitation period and party autonomy, especially in the context of contracting out of limitation in a foreign-seated international arbitration. It will also look at the legality of limitation standstill agreements to defer the limitation period in the context of foreign-seated arbitration by examining prevailing legal principles together with relevant case laws and through the prism of the decision in the *Extramarks* case.

Classification of limitation in the context of foreign-seated arbitrations – procedural or substantive?

The limitation in India is governed by the Limitation Act, 1963 ("Limitation Act").

The Supreme Court of India ("SC") and the Law Commission of India have characterised the law of limitation as a procedural law. That being stated, the SC has also proposed a more nuanced approach to classifying law of limitation noting that while limitation is *prima facie* a procedural law construct, its substantive law characteristics cannot be wholly discounted.

This distinction was affirmed by the DHC in the *NNR Global Logistics* case, which concerned the enforcement of a foreign award where the seat of arbitration was Kuala Lumpur and the applicable substantive law of the contract was Indian law. Under Indian law, the limitation for the type of cause of action at stake, in this case, was three years as opposed to Malaysian law, where the limitation was six years. The respondent argued that since Indian law is the substantive law governing the contract, and given that the Limitation Act could be substantive law, Indian limitation law would apply. The DHC rejected this contention and held that the law of limitation is procedural, and the issues of limitation would be governed by procedural/curial law governing the arbitration, i.e., the *lex arbitri*. However, the DHC's reasoning is suspect insofar as it makes the link between limitation law and procedural law uncritically, discounting the impact or connection of limitation with the remedy, and the substantive law implications therewith.

While the premise that since the arbitral procedure is governed by the *lex arbitri* and since limitation is generally a procedural law subject, the *lex arbitri* must govern the limitation might appear fairly straight forward, there exists a degree of tentativeness as to the characterisation of limitation in the context of international arbitration. The recent DHC decision in the *Extramarks* case makes some interesting observations which could have a deep impact on the mentioned premise.

In the *Extramarks* case, the issue at stake was the limitation period for filing an application before the High Court for the appointment of the arbitrator, for a purported India-seated domestic arbitration. The DHC held that conceptually, limitation bars a legal remedy and not a legal right, the legal policy being to ensure that legal remedies are not available endlessly but only up-to a certain point in time. The DHC further held that a party may concede a claim at any time; but cannot concede availability of a legal remedy beyond the prescribed period of limitation. In essence, according to the DHC, passing of limitation bars a remedy, which would generally mean that limitation is a procedural law subject. This distinction is in line with the traditional 'right is substantive and remedy is procedural' divide that exists in the common law. However, this position is not a settled one and remedy, could, arguably, be governed by the substantive law governing the contract.

Interestingly, the Singapore Court of Appeal in *BBA v. BAZ*, drew a distinction

between procedural and substantive time bars in the context of international arbitration, noting that time bar of remedy is procedural in nature. Simultaneously, it was also observed that choice of seat does not automatically require application of the seat's limitation period and the applicable substantive law will have to be looked at. Consequently, the principle that limitation is a procedural law issue and subject to *lex arbitri* cannot be relied on reflexively.

If the position of the DHC in *NNR Global Logistics* case is contrasted with the position in *Extramarks* case, acknowledging the difficulties in making substantive and procedural classification vis-à-vis limitation in international arbitration, then the choice of Indian substantive law in a foreign-seated arbitration could potentially mean that the tribunal presiding over in a foreign-seated arbitration with Indian substantive applicable law could potentially be required to engage in the limitation period analysis from the perspective of the seat as well as the Limitation Act and might be confronted with conflicting limitation periods. However, there lacks judicial clarity as to how to resolve the conflict when there is repugnancy in limitation prescribed in the *lex arbitri* and the Limitation Act, which would more often be the case.

Notably, Schwenzer and Manner argue that choice of substantive law should prevail over choice of seat and *lex causae* must govern the question of limitation of actions, notwithstanding whether it is classified as substantive or procedural. Indeed, this is the prevalent position in the civil law jurisdictions. However, this argument, if accepted, will have certain repercussions on the party autonomy, especially from an Indian perspective in the context of standstill agreements, as explored below.

Suspending/Extending Limitation in Foreign-seated Arbitrations

A standstill agreement is a contract between the potential parties to a claim to either extend or suspend the limitation period for a fixed time or until a triggering event occurs without acknowledging the liability.

The legality of such agreements is not entirely clear under Indian law. For instance, Section 28 of the Limitation Act expressly bars agreements that limit the time within which a party may enforce its rights. However, the converse, i.e., the possible extension of limitation, is not discussed in the Limitation Act. According

to Section 25(3) of the Indian Contract Act, the parties can enter into an agreement to enforce a time-barred debt as long as there is a written and signed promise to pay the debt, essentially acknowledge the debt/liability. However, as noted above a standstill agreement is not an admission or acknowledgement of liability and hence Section 25(3) would not applicable. It has also been noted that the legality of standstill agreements in India is sub-judice before the Madras High Court.

From an India-seated domestic arbitration perspective, in light of DHC's ruling in the *Extramarks* case, that a "party may concede a claim at any time; but cannot concede availability of a legal remedy beyond the prescribed period of limitation", it would mean that limitation standstill agreements would not be valid.

From a foreign-seated arbitration with Indian substantive applicable law perspective, relying on the *NNR Global Logistics* case, it may be argued that the seat's procedural law, including limitation law provisions, will apply and as long as limitation standstill agreements are permitted under the *lex arbitri*, there should not be an issue. However, given that merits of the claim would be anchored in Indian law, if limitation is viewed from a substantive law perspective, the impact of the *Extramarks* case ruling on the parties' ability to enter into standstill agreements in foreign seated arbitration with Indian substantive law appears precarious.

Essentially, the legality of standstill agreements in foreign seated arbitration with Indian substantive law faces a critical impediment explored above, i.e., the divide between substantive and procedural classification. One possible view could be that since the parties have already chosen the seat of the arbitration, all procedural law issues will be governed by law of the seat, if, indeed, limitation is treated as a procedural issue. A second, contrary view may be that the legality of a standstill agreement would be tested on the touchstone of Indian law, since the choice of applicable substantive law of the contract is Indian law under which limitation cannot be conceded beyond the prescribed period by consent.

Given that the impact of Indian substantive law on the issue of limitation and standstill agreements is not entirely clear, in light of the *Extramarks* case, the tribunals might now be required to consider a relatively unique issue of limitation period alongside large number of other considerations in an international arbitration with Indian substantive applicable law.

Conclusion

In the process of exploring the impact of Indian substantive law of the contract on parties' freedom to contract out of limitation in a foreign-seated international arbitration, the tensions between procedural law and substantive law in foreign-seated arbitrations vis-à-vis limitation become apparent. The tensions are further compounded by the ruling in the *Extramarks* case that limitation bars remedy and that the parties cannot contract out of limitation. The exact impact of the *Extramarks* case on the parties to an international arbitration contemplating standstill agreements remains unclear and the connected issues in this context remain to be seen.

(The opinions of the author are personal and do not represent the opinion of the organisations he is affiliated with.)

China's Draft Law on Foreign State Immunity Would Adopt Restrictive Theory

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

On the question of foreign state immunity, the world was long divided between countries that adhere to an absolute theory and those that adopted a restrictive theory. Under the absolute theory, states are absolutely immune from suit in the courts of other states. Under the restrictive theory, states are immune from suits based on their governmental acts (acta jure imperii) but not from suits based on their non-governmental acts (acta jure gestionis).

During the twentieth century, many countries adopted the restrictive theory. (Pierre-Hugues Verdier and Erik Voeten have a useful list of the dates on which countries switched on the last page of this article.) Russia and China were the

most prominent holdouts. Russia joined the restrictive immunity camp in 2016 when its law on the jurisdictional immunity of foreign states went into effect. That left China. In December 2022, Chinese lawmakers published a draft law on foreign state immunity, an English translation of which has recently become available. If adopted, this law would move China to into the restrictive immunity camp as well.

China's draft law on foreign state immunity has important implications for other states, which would now be subject to suit in China on a range of claims from which they were previously immune. The law also contains a reciprocity clause in Article 20, under which Chinese courts may decline to recognize the immunity of a foreign state if the foreign state would not recognize China's immunity in the same circumstances. Chinese courts could hear expropriation or terrorism claims against the United States, for example, because the U.S. Foreign Sovereign Immunities Act (FSIA) has exceptions for expropriation and terrorism.

In this post, the first of two, I look at the draft law's provisions on foreign state immunity from suit from a U.S. perspective. In the second post, I will examine the law's provisions on the immunity of a foreign state's property from attachment and execution, its provisions on service and default judgments, and its potential effect on the immunity of foreign officials.

It is clear that China's draft law has been heavily influenced by the provisions of the U.N. Convention on Jurisdictional Immunities of States and Their Property, which China signed in 2005 but has not yet ratified. But the purpose of the draft law is not simply to prepare China for ratification. Indeed, Article 21 of the law provides that when a treaty to which China is a party differs from the law, the terms of the treaty shall govern. Rather, the purpose of the law appears to be to extend the basid rules of the U.N. Convention, which is not yet in effect, to govern the immunity of *all* foreign countries when they are sued in Chinese courts, including countries like the United States that are unlikely ever to join the Convention.

China's Adherence to the Absolute Theory of

Foreign State Immunity

The People's Republic of China has long taken the position that states and their property are absolutely immune from the jurisdiction of the courts of other states. The question rose to the level of diplomatic relations in the early 1980s. China was sued in federal court for nonpayment of bonds issued by the Imperial Government of China in 1911, did not appear to defend, and suffered a default judgment. After much back and forth, the State Department convinced China to appear and filed a statement of interest asking the district court to set aside the judgment and consider China's defenses. "The PRC has regarded the absolute principle of immunity as a fundamental aspect of its sovereignty, and has forthrightly maintained its position that it is absolutely immune from the jurisdiction of foreign courts unless it consents to that jurisdiction," the State Department noted. "China's steadfast adherence to the absolute principle of immunity results, in part, from its adverse experience with extraterritorial laws and jurisdiction of western powers." In the end, the district court set aside the default, held that the FSIA did not apply retroactively to this case, and held that China was immune from suit. The Eleventh Circuit subsequently affirmed.

In 2005, China signed the U.N. Convention on Jurisdictional Immunities of States and Their Property. The Convention (available in each of the U.N.'s official languages here) adopts the restrictive theory, providing exceptions to foreign state immunity for commercial activities, territorial torts, etc. Although China has not ratified the Convention and the Convention has not yet entered into force—entry into force requires 30 ratifications, and there have been only 23 so far—China's signature seemed to signal a shift in position.

The question arose again in *Democratic Republic of the Congo v. FG Hemisphere Associates LLC* (2011), in which the Hong Kong Court of Final Appeal had to decide whether to follow China's position on foreign state immunity. During the litigation, China's Ministry of Foreign Affairs wrote several letters to the Hong Kong courts setting forth its position, which the Court of Final Appeal quoted in its judgment. In 2008, the Ministry stated:

> *The consistent and principled position of China is that a state and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution, and has never applied the so-called*

> *principle or theory of 'restrictive immunity'. The courts in China have no jurisdiction over, nor in practice have they ever entertained, any case in which a foreign state or government is sued as a defendant or any claim involving the property of any foreign state or government, irrespective of the nature or purpose of the relevant act of the foreign state or government and also irrespective of the nature, purpose or use of the relevant property of the foreign state or government. At the same time, China has never accepted any foreign courts having jurisdiction over cases in which the State or Government of China is sued as a defendant, or over cases involving the property of the State or Government of China. This principled position held by the Government of China is unequivocal and consistent.*

In 2009, the Ministry wrote a second letter explaining its signing of the U.N. Convention. The diverging practices of states on foreign state immunity adversely affected international relations, it said, and China had signed the Convention "to express China's support of the … coordination efforts made by the international community." But the Ministry noted that China had not ratified the Convention, which had also not entered into force. "Therefore, the Convention has no binding force on China, and moreover it cannot be the basis of assessing China's principled position on relevant issues." "After signature of the Convention, the position of China in maintaining absolute immunity has not been changed," the Ministry continued, "and has never applied or recognized the so-called principle or theory of 'restrictive immunity.'"

The Draft Law on Foreign State Immunity

China's draft law on foreign state immunity would fundamentally change China's position, bringing China into alignment with other nations that have adopted the restrictive theory. The draft law begins, as most such laws do, with a presumption that foreign states and their property are immune from the jurisdiction of Chinese courts. Article 3 states: "Unless otherwise provided for by this law, foreign states and their property shall be immune from the jurisdiction of the courts of the People's Republic of China."

Article 2 defines "foreign state" to include "sovereign states other than the People's Republic of China," "institutions or components of … sovereign states," and "natural persons, legal persons and unincorporated organisations authorised

by … sovereign states … to exercise sovereign powers on their behalf and carry out activities based on such authorization." Article 18(1) provides that Chinese courts will accept the Ministry of Foreign Affairs' determination of whether a state constitutes a sovereign state for these purposes.

These provisions of the draft law generally track Article 2(1)(b) of the U.N. Convention, which similarly defines "State" to include a state's "organs of government," "agencies or instrumentalities" exercising "sovereign authority," and "representatives of the State acting in that capacity." The draft law differs somewhat from the U.S. FSIA, which determines whether a corporation is an "agency or instrumentality" of a foreign state based on ownership and which does not apply to natural persons.

Exceptions to Immunity from Suit

Waiver Exception

China's draft law provides that a foreign state may waive its immunity from suit expressly or by implication. Article 4 states: "Where a foreign state expressly submits to the jurisdiction of the courts of the People's Republic of China in respect of a particular matter or case in any following manner, that foreign state shall not be immune." A foreign state may expressly waive its immunity by treaty, contract, written submission, or other means.

Article 5 provides that a foreign state "shall be deemed to have submitted to the jurisdiction of the courts of the People's Republic of China" if it files suit as a plaintiff, participates as a defendant "and makes a defence or submits a counterclaim on the substantive issues of the case," or participates as third party in Chinese courts. Article 5 further provides that a foreign state that participates as a plaintiff or third party shall be deemed to have waived its immunity to counterclaims arising out of the same legal relationship or facts. But Article 6 provides that a foreign state shall *not* be deemed to have submitted to jurisdiction by appearing in Chinese court to assert its immunity, having its representatives testify, or choosing Chinese law to govern a particular matter.

These provisions closely track Articles 7-9 of the U.N. Convention. The U.S. FSIA, § 1605(a)(1), similarly provides that a foreign state shall not be immune in any

case “in which the foreign state has waived its immunity either explicitly or by implication.” Section 1607 also contains a provision on counterclaims. In contrast to China’s draft law, U.S. courts have held that choosing U.S. law to govern a contract constitutes an implied waiver of foreign state immunity (a position that has been rightly criticized).

Commercial Activities

China’s draft law also contains a commercial activities exception. Article 7 provides that a foreign state shall not be immune from proceedings arising from commercial activities when those activities “take place in the territory of the People’s Republic of China or take place outside the territory of the People’s Republic of China but have a direct impact in the territory of the People’s Republic of China.” Article 7 defines “commercial activity” as “any transaction of goods, services, investment or other acts of a commercial nature otherwise than the exercise of sovereign authority.” “In determining whether an act is a commercial activity,” the law says, “the courts of the People’s Republic of China shall consider the nature and purpose of the act.” Unlike the FSIA, but like the U.N. Convention, the draft law deals separately with employment contracts (Article 8) and intellectual property cases (Article 11).

In extending the commercial activities exception to activities that “have a direct impact” in China, the draft law seems to have borrowed from the commercial activities exception in the U.S. FSIA. Section 1605(a)(2) of the FSIA applies not just to claims based on activities and acts in the United States, but also to activities abroad “that act cause[] a direct effect in the United States.”

The draft law’s definition of “commercial activity,” on the other hand, differs from the FSIA. Whereas the draft law tells Chinese courts to consider both “the nature and purpose” of the act,” § 1603(d) of the FSIA says “[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.” (Article 2(2) of the U.N. Convention makes room for both approaches.) Considering the purpose of a transaction would make it easier for a government to argue that certain transactions, like issuing government bonds or buying military equipment are not commercial activities and thus to claim immunity from claims arising from such transactions.

Territorial Torts

Article 9 of the draft law creates an exception to immunity "for personal injury or death, or for damage to movable or immovable property, caused by that foreign state within the territory of the People's Republic of China." This exception corresponds to Article 12 of the U.N. Convention and § 1605(a)(5) of the U.S. FSIA. Unlike § 1605(a)(5), China's draft law contains no carve-outs maintaining immunity for discretionary activities and for malicious prosecution, libel, misrepresentation, interference with contract rights, etc.

The English translation of the draft law does not make clear whether it is the tortious act, the injury, or both that must occur within the territory of China. The FSIA's territorial tort exception has been interpreted to require that the "entire tort" occur within the United States. Article 12 of the U.N. Convention does not. This question has become particularly important with the rise of spyware and cyberespionage. As Philippa Webb has discussed at TLB, U.S. courts have dismissed spyware cases against foreign governments on the ground that the entire tort did not occur in the United States, whereas English courts have rejected this requirement and allowed such cases to go forward. If the Chinese version of the draft law is ambiguous, it would be worth clarifying the scope of the exception before the law is finalized.

Property

Article 10 of the draft law creates an exception to immunity for claims involving immoveable property in China, interests in moveable or immoveable property arising from gifts, bequests, or inheritance, and interests in trust property and bankruptcy estates. This provision closely parallels Article 13 of the U.N. Convention and finds a counterpart in § 1605(a)(4) of the FSIA.

Arbitration

The draft law also contains an arbitration exception. Article 12 provides that a foreign state that has agreed to arbitrate disputes is not immune from suit with respect to "the effect and interpretation of the arbitration agreement" and "the recognition or annulment of arbitral awards." Like Article 17 of the U.N. Convention, the arbitration exception in the draft law is limited to disputes arising from commercial activities but extends to investment disputes. The arbitration

exception in § 1605(a)(6) of the FSIA, by contrast, extends to disputes "with respect to a defined legal relationship, whether contractual or not."

Reciprocity Clause

One of the most interesting provisions of China's draft law on state immunity is Article 20, which states: "Where the immunity granted by a foreign court to the People's Republic of China and its property is inferior to that provided for by this Law, the courts of the People's Republic of China may apply the principle of reciprocity." Neither the U.N. Convention nor the U.S. FSIA contains a similar provision, but Russia's law on the jurisdictional immunities of foreign states does in Article 4(1). Argentina's law on immunity also includes a reciprocity clause specifically for the immunity of central bank assets, apparently adopted by Argentina at the request of China.

The reciprocity clause in the draft law means that Chinese courts would be able to exercise jurisdiction over the United States and its property in any case where U.S. law would permit U.S. courts to exercise jurisdiction over China and its property. The FSIA, for example, has an exception for expropriations in violation of international law in § 1605(a)(3) and exceptions for terrorism in § 1605A and § 1605B. Although China's draft law does not contain any of these exceptions, its reciprocity clause would allow Chinese courts to hear expropriation or terrorism claims against the United States. The same would be true if Congress were to amend the FSIA to allow plaintiffs to sue China over Covid-19, as some members of Congress have proposed.

Conclusion

China's adoption of the draft law would be a major development in the law of foreign state immunity. For many years, advocates of the absolute theory of foreign state immunity could point to China and Russia as evidence that the restrictive theory's status as customary international law was still unsettled. If China joins Russia in adopting the restrictive theory, that position will be very difficult to maintain.

[This post is cross-posted at Transnational Litigation Blog.]

BNP Paribas sued in France for financing fossil fuel companies

This post was written bu Begüm Kilimcioglu, PhD candidate at the University of Antwerp

On 23 February 2023, one of the biggest commercial banks in the Eurozone, BNP Paribas (BNP) was sued by Oxfam, Friends of the Earth and Notre Affaire à Tous for having allegedly provided loans to oil and gas companies in breach of the vigilance duty enshrined in la Loi de Vigilance (2017) of France. This case constitutes an important hallmark for the business and human rights world as it is the first climate action case against a commercial bank and so timely considering that the European Union (EU) is currently discussing whether or not to include the financial sector within the scope of the proposed Corporate Sustainability Due Diligence Directive (CSDDD) (see here).

Article 1 of la Loi de Vigilance imposes a duty to establish and implement an effective vigilance plan on any company whose head office is located on French territory and complies with the thresholds stated. This vigilance plan is supposed to include vigilance measures for risk identification and prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls, its subcontractors and suppliers with whom the company has an established commercial relationship. As such, there is no distinction under the French law regarding the sector in which the company is operating which is in line with the United Nations Guiding Principles. Thus, it was surprising to see that France was quite vocal about not including the financial sector within the scope of CSDDD, as France was the first Member State to adopt a law on the duty of vigilance of the multinational companies and la Loi de Vigilance itself does not make distinctions based on the sector in which the company is operating.

According to la Loi de Vigilance, companies are required to conduct human rights

and environmental due diligence which includes the following steps: identification and the analysis of the risks, regular assessment of the situation (in accordance with the previously identified risks) of the subsidiaries, subcontractors or suppliers with whom the company has an established commercial relationship, mitigation and prevention of serious violations through appropriate means, establishment of an alert mechanism which collects reports of existing or actual risks, establishment of a monitoring scheme to follow up on the measures implemented and assessment of their efficiency. This plan must be publicly disclosed.

In case the company does not comply with its vigilance obligations, a court can issue a formal notice, ordering the company to comply with la Loi de Vigilance. Furthermore, la Loi de Vigilance also provides for a civil remedy when a company does not meet its obligations. If damage caused by non-compliance with la Loi de Vigilance, any person with legitimate interest can seek reparation under tort law. Consequently, as a company headquartered in France and complying with the thresholds in Article 1 of la Loi de Vigilance, BNP has the duty to effectively establish, implement and monitor a vigilance plan to prevent, if not possible mitigate and bring an end to its adverse impacts on human rights and the environment.

The case against BNP before the French courts is a reminiscent of the case against Shell before the Dutch courts in 2019 where the environmental group (Milieudefensie) and co-plaintiffs argued that Shell's business operations and sold energy products worldwide contributes significantly to climate change (and also much more than it has pledges to in its corporate policies and to the levels internationally determined by conventions) was a violation of its duty of care under Dutch law and human rights obligations. It is important here to highlight that the plaintiffs took Shell to the Dutch courts based on the environmental damage caused in the Netherlands, due to Shell's operations worldwide.

In the said case, the applicable law to the dispute was determined by Rome II Regulation on non-contractual obligations, article 7. Article 7 presents an additional venue to the general rule for determining the applicable law (article 4) and grants the victims of environmental damage an opportunity to base their claims on the law of the country in which the event giving rise to the damage occurred. As such, the claimant primarily chose to base its claims on the law of the country in which the even giving rise to the damage occurred, as they claimed

that the corporate policies for the Shell group were decided in its headquarters in the Netherlands. The Court considered the adoption of the corporate policy of the Shell group as an independent cause of the damage which may contribute to environmental damage with respect to Dutch residents. Thus, the Court considered that the choice of Dutch law by Milieudefensie was in line with the idea of protection of the victims behind the applicable law clauses in Rome II Regulations and upheld the choice to the extent that the action aimed to protect the interests of the Dutch residents (see paragraphs 4.3-4.4 of the decision).

In 2021, the Hague District Court ordered Shell to reduce both its own carbon emissions and end-use emissions by 45% by 2030 in relation to the 2019 figures. Naturally, the legal basis in the Dutch case was different than the legal basis in the French case, considering that the Netherlands does not yet have a national law like la Loi de Vigilance. Consequently, the core of the arguments of the applicants lied on the duty of care in Article 6:162 of the Dutch Civil Code and Articles 2 (right to life) and 8 (rights to private life, family life, home and correspondence) of the European Convention on Human Rights.

In contrast, the BNP case has a more preventive nature and aims to force BNP to change and adapt its actions to the changing climate and scientific context. The NGOs primarily request an injunction for BNP to comply with the obligations provided for in the French Vigilance Law, as BNP falls within the scope of the French Law. More specifically, the NGOs request that BNP publishes and implements a new due diligence plan, containing the measures explained in the writ of summons. Therefore, the obligations arising from the French Vigilance Law are of a civil nature. Consequently, the law applicable to this dispute should also be determined by Rome II Regulation on non-contractual obligations. As explained above, Rome II Regulation gives an additional option for the plaintiffs to choose the applicable law in cases of environmental damage as either the country of damage or the country where the event that gives rise to the damage occurred. In the BNP case, the plaintiffs' claim was based on French law. Applying Rome II Regulation, France can be considered as the country of the event which gives rise to the damage because it is where the corporate policies are prepared. Alternatively, it is also where the environmental damage occurs, as well as the rest of the world. Moreover, the plaintiffs relied on the general obligation of environmental vigilance as enshrined in the Charter of the Environment, which is considered an annex to the French Constitution and thus has the same

authoritativeness. Invoking the constitution might bring in an argument on the basis of Article 16 Rome II, namely overriding principles of mandatory law.

If we rewind the story a little bit, the non-governmental organizations (NGOs) stated above, firstly, served a formal notice to BNP on 26 October 2022 to stop supporting the development of fossil fuels. In the formal notice, the NGOs state that, to achieve the Paris Agreement trajectories, no more funding or investment should be given to the development of new fossil fuel projects, either directly or to the companies that carry out such operations (see p 3). They also draw attention to the fact that BNP has joined the Race to Zero campaign which aim for the inclusion of the nonstate actors in the race for carbon neutrality (p 3).

Basic research into BNP's publicly available documents reveals that it, indeed, has committed to sustainable investment, acknowledging that air pollution and climate change deplete many resources. BNP further claims that it only supports companies that contribute to society and the environment and exclude coal, palm oil and nonconventional hydrocarbons. Moreover, as can be seen from its 2021 activity report, BNP presents itself as organizing its portfolios in a way that upholds the aims of the Paris Agreement. Lastly, BNP's code of conduct, states that it commits to limiting any environmental impact indirectly resulting from its financing or investment activities or directly from its own operations (p 31). Furthermore, BNP also presents combatting climate change as its priority while stating that they finance the transition to a zero-carbon economy by 2050 by supporting its customers in energy and ecological transitions (p 31).

However, the NGOs claim that contrary to these commitments, through various financing and investment activities, BNP becomes one of the main contributors to the fossil fuel sector by supporting the big oil and gas companies (p 4 of the formal notice). In this regard, BNP allegedly provides funds for the companies that actually put fossil fuel projects into action rather than financing these projects directly. As such, the NGOs aver that BNP's vigilance plan is not in compliance with la Loi de Vigilance or its obligations to limit the climate risks resulting from its activities (p 6 of the formal notice). In this regard, the report draws attention to BNP's prior public commitments to strengthen its exclusion policies regarding coal, oil and gas sectors (see pp 8-9 of the formal notice). Consequently, claiming that BNP has failed to comply with the notice, NGOs have referred the matter to the court.

In a bid to address the negative allegations on its behalf, BNP stated that it is focused on exiting the fossil fuel market, accelerating financing for renewable energies and supporting its clients in this regard. Furthermore, BNP also stated its regret in the advocacy groups choosing litigation over dialogue and that it was not able to stop all fossil-fuel financing right away.

In the course of these proceedings, the applicants will have to prove that if BNP were able to establish, implement and monitor a vigilance plan, the damage caused by these fossil fuel projects put into motion by different energy companies could have been avoided. In other words, the fact that BNP (or any other provider of the financial means) is the facilitator of these projects and that the damage is indirectly caused by its actions, make it more difficult for it to be held liable. As such, it may be more difficult for the claimants in the BNP case to prove the causality between the action and the damage than the Dutch case.

Consequently, this intricate web of interrelations demonstrates how important it is to include the financial actors within the scope of the CSDDD and explicitly put obligations on them to firstly respect and uphold human rights and environmental standards and then to proactively engage with an effective due diligence mechanism to prevent, mitigate and/or bring an end to actual/potential human rights and environmental impact.

Therefore, I hope that the European Commission and the Parliament will hold strong positions and not cave in to the proposal by the Council to leave it up to the Member States whether or not to include the financial sector within the scope. Such a compromise would significantly hinder the effectiveness of the proposed Directive.

Applying Mexican Law in U.S.

Courts? Mexico v Smith & Wesson

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Mexico's ongoing transnational litigation against the firearms industry in U.S. courts is raising important questions of private international law, in particular as regards the application of Mexican tort law in U.S. courts. In its civil complaint against seven gun manufacturers and one wholesale arms distributor filed in federal court in 2021, Mexico argues that the defendant companies aid and abet the unlawful trafficking of guns into Mexico through irresponsible manufacturing, marketing and distribution practices. On this basis, Mexico claims that all relevant illegal conduct—resulting in human casualties, as well as material and economic loss—occurs on its territory and that, therefore, Mexican domestic tort law applies to six of its claims following the principle of *lex loci damni*.

Last September, the defendant's motion to dismiss was granted by the District Court for the District of Massachusetts largely on the basis of the Protection of Lawful Commerce in Arms Act (PLCAA, 15 U.S.C. §§ 7901-7903). PLCAA prohibits bringing a "qualified civil liability action" in federal or state court against gun manufacturers and distributors for harm "solely caused by the criminal or unlawful misuse of firearm products" by third parties. On appeal in the U.S. First Circuit, Mexico argues that the district court's application of PLCAA to bar its claims under Mexican tort law was "impermissibly extraterritorial". In particular, the claims that PLCAA prohibits, avers Mexico, only prohibit damages arising from the "criminal and unlawful misuse" of firearms in the U.S. and in respect to U.S. legislation—not Mexican laws. The high profile nature of the case suggests that the First circuit might address the extent of PLCAA's scope of application, including whether the district court's interpretation was "impermissibly extraterritorial".

For a detailed outline of the litigation history and the transnational issues at stake, including a discussion of two amicus briefs filed by professors of international and transnational law, you are welcome to read my recent post in *Just Security*, available here.