HCCH First Secretary Ribeiro-Bidaoui's response re the debate surrounding the 2005 HCCH Choice of Court Convention

Dr. João Ribeiro-Bidaoui (First Secretary at the Hague Conference on Private International Law) has posted a compelling answer on the Kluwer Arbitration Blog to the debate sparked by Prof. Gary Born's criticism in a series of posts published on the same Blog (see Part I, Part II, and Part III). First Secretary Ribeiro-Bidaoui's response is masterfully crafted in drawing the boundaries between equally valuable and essential instruments, and certainly constitutes a most welcome contribution.

For further commentary on these exchanges, see also on the EAPIL Blog, here.

Red-chip enterprises' overseas listing: Securities regulation and conflict of laws

Written by Jingru Wang, Wuhan University Institute of International Law

1.Background

Three days after its low-key listing in the US on 30 June 2021, Didi Chuxing (hereinafter "Didi") was investigated by the Cyberspace Administration of China (hereinafter "CAC") based on the Chinese National Security Law and Measures for Cybersecurity Review.[1] Didi Chuxing as well as 25 Didi-related APPs were

then banned for seriously violating laws around collecting and using personal information,[2] leading to the plummet of Didi's share. On 16 July 2021, the CAC, along with other six government authorities, began an on-site cybersecurity inspection of Didi.[3] The CAC swiftly issued the draft rules of Measures for Cybersecurity Review and opened for public consultation.[4] It proposed that any company with data of more than one million users must seek the Office of Cybersecurity Review's approval before listing its shares overseas. It also proposed companies must submit IPO materials to the Office of Cybersecurity Review for review ahead of listing.

It is a touchy subject. Didi Chuxing is a Beijing-based vehicle for hire company. Its core business bases on the accumulation of mass data which include personal and traffic information. The accumulated data not only forms Didi's unique advantage but also is the focus of supervision. The real concern lays in the possible disclosure of relevant operational and financial information at the request of US securities laws and regulations, which may cause data leakage and threaten national security. Therefore, China is much alert to information-based companies trying to list overseas.

The overseas listing of China-related companies has triggered regulatory conflicts long ago. The Didi event only shows the tip of an iceberg. This note will focus on two issues: (1) China's supervision of red-chip companies' overseas listing; (2) the conflicts between the US's demand for disclosure and China's refusal against the US's extraterritorial jurisdiction.

2. Chinese supervision on red-chip companies' overseas listing

A red-chip company does most of its business in China, while it is incorporated outside mainland China and listed on the foreign stock exchange (such as New York Stock Exchange). Therefore, it is expected to maintain the filing and reporting requirements of the foreign exchange. This makes them an important outlet for foreign investors who wish to participate in the rapid growth of the Chinese economy. When asking Chinese supervision on red-chip companies listed overseas, such as Didi, the foremost question is whether the Chinese regulatory authority's approval is required for them to launch their shares overseas. It is uneasy to conclude.

One reference is the Chinese Securities Law. Article 238 of the original version of the Chinese Securities Law provides that "domestic enterprises issuing securities overseas directly or indirectly or listing their securities overseas shall obtain approval from the securities regulatory authority of the State Council following the relevant provisions of the State Council." This provision was amended in 2019. The current version (Art. 224 of the Chinese Securities Law) only requires the domestic enterprises to comply with the relevant provisions of the State Council. The amendment indicated that China has adopted a more flexible approach to addressing overseas listing. Literally, the securities regulatory authority's approval is no longer a prerequisite for domestic enterprises to issue securities overseas.

When it comes to Didi's listing in the US, a preliminary question is the applicability of such provision. Art. 224 is applied to "domestic enterprise" only. China adopts the doctrine of incorporation to ascertain company's nationality.[5] According to Article 191 of the Chinese Company Law, companies established outside China under the provisions of foreign law are regarded as foreign companies. Didi Global Inc. is incorporated in the state of Cayman Islands, and a foreign company under the Chinese law. In analogy, Alibaba Group Holding Ltd., another representative red-chip enterprise, had not obtained and not been required to apply for approval of the Chinese competent authority before its overseas listing in 2014. A Report published by the Chinese State Administration of Foreign Exchange specifically pointed out that "domestic enterprises" were limited to legal persons registered in mainland China, which excluded Alibaba Group Holding Ltd., a Cayman Islands-based company with a Chinese background.[6]

In summary, it is fair to say that preliminary control over red-chip enterprise's overseas listing leaves a loophole, which is partly due to China's changing policy. That's the reason why Didi has not been accused of violating the Chinese Securities Law but was banned for illegal accumulation of personal information, a circumvent strategy to avoid the possible information leakage brought by Didi's public listing. Theoretically, depends on the interpretation of the aforementioned rules, the Chinese regulatory authority may have the jurisdiction to demand preliminary approval. Based on the current situation, China intends to fill the gap and is more likely to strengthen the control especially in the field concerning data security.

3. The conflict between the US's demand for audit and China's refusal against the US's extraterritorial jurisdiction

Another problem is the conflict of supervision. In 2002, the US promulgated the Sarbanes-Oxley Act, under which the Public Company Accounting Oversight Board (hereinafter "PCAOB") was established to oversee the audit of public companies. Under the Sarbanes-Oxley Act, wherever its place of registration is, a public accounting firm preparing or issuing, or participating in the preparation or issuance of, any audit report concerning any issuer, shall register in the PCAOB and accept the periodic inspection.[7] The PCAOB is empowered to investigate, penalize and sanction the accounting firm and individual that violate the Sarbanes-Oxley Act, the rules of the PCAOB, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants. Opposed to this provision (although not intentionally), Article 177 of the Chinese Securities Law forbids foreign securities regulatory authorities directly taking evidence in China. It further stipulates that no organization or individual may arbitrarily provide documents and materials relating to securities business activities to overseas parties without the consent of the securities regulatory authority of the State Council and the relevant State Council departments. Therefore, the conflict appears as the US requests an audit while China refused the jurisdiction of PCAOB over Chinese accountant companies.

It is suspected that despite the PCAOB's inofficial characteristic, information (including the sensitive one) gathered by the PCAOB may be made available to government agencies, which may threaten the national security of China.[8] Consequently, China prevents the PCAOB's inspection and some of Chinese public accounting firm's application for registration in the PCAOB has been suspended.[9] In 2013, the PCAOB signed a Memorandum of Understanding with Chinese securities regulators that would enable the PCAOB under certain circumstances to obtain audit work papers of China-based audit firms. However, the Memorandum seems to be insufficient to satisfy the PCAOB's requirement for supervision. The PCAOB complained that "we remain concerned about our lack of access in China and will continue to pursue available options to support the interests of investors and the public interest through the preparation of informative, accurate, and independent audit reports."[10] After the exposure of

Luckin Coffee's accounting fraud scandal, the US promulgated the Holding Foreign Companies Accountable Act in 2020. This act requires certain issuers of securities to establish that they are not owned or controlled by a foreign government. Specifically, an issuer must make this certification if the PCAOB is unable to audit specified reports because the issuer has retained a foreign public accounting firm not subject to inspection by the PCAOB. If the PCAOB is unable to inspect the issuer's public accounting firm for three consecutive years, the issuer's securities are banned from trade on a national exchange or through other methods.

China has made "national security" its core interest and is very prudent in opening audit for foreign supervisors. From the perspective of the US, however, it is necessary to strengthen financial supervision over the public listing. As a result, Chinese enterprises have to make a choice between disappointing the PCAOB and undertaking domestic penalties. Under dual pressure of China and the US, sometimes Chinese companies involuntarily resort to delisting. This may not be a result China or the US long to see. In this situation, cooperation is a better way out.

4. Conclusion

China's upgrading of its cybersecurity review regulation is not aimed at burning down the whole house. Overseas listing serves China's interest by opening up channels for Chinese companies to raise funds from the international capital market, and thus contribute to the Chinese economy. The current event may be read as a sign that China is making provisions to strengthen supervision on red-chip companies' overseas listing. It was suggested that the regulatory authority may establish a classified negative list. Enterprises concerning restricted matters must obtain the consent of the competent authority and securities regulatory authority before listing.[11] It is not bad news for foreign investors because the listed companies will undertake more stringent screening, which helps to build up an orderly securities market.

[1] http://www.cac.gov.cn/2021-07/02/c_1626811521011934.htm

[2] http://www.cac.gov.cn/2021-07/04/c_1627016782176163.htm; http://www.cac.gov.cn/2021-07/09/c_1627415870012872.htm.

[3] http://www.cac.gov.cn/2021-07/16/c_1628023601191804.htm.

[4] Notice of Cyberspace Administration of China on Seeking Public Comments on the Cybersecurity Review Measures (Draft Revision for Comment), available at: http://www.cac.gov.cn/2021-07/10/c_1627503724456684.htm

[5] The real seat theory is recommended by commentators, but not accepted by law. Lengjing, Going beyond audit disputes: What is the solution to the crisis of China Concept Stocks?, Strategies, Volume 1, 2021, p. 193.

[6] 2014 Cross-border capital flow monitoring report of the People's Republic of China, available at: http://www.gov.cn/xinwen/site1/20150216/43231424054959763.pdf

[7] Sarbanes-Oxley Act, §102(a), §104 (a) & (b).

[8] Sarbanes-Oxley Act, §105 (b)(5)(B).

[9] https://pcaobus.org/Registration/Firms/Documents/Applicants.pdf

[10] China-Related Access Challenges, available at: https://pcaobus.org/oversight/international/china-related-access-challenges.

[11] https://opinion.caixin.com/2021-07-09/101737896.html.

The Latest Development on Anti-

suit Injunction Wielded by Chinese Courts to Restrain Foreign Parallel Proceedings

(This post is provided by Zeyu Huang, who is an associate attorney of Hui Zhong Law Firm based in Shenzhen. Mr. Huang obtained his LLB degree from the Remin University of China Law School. He is also a PhD candidate & LLM at the Faculty of Law in University of Macau. The author may be contacted at the e-mail address: huangzeyu@huizhonglaw.com)

When confronted with international parallel proceedings due to the existence of a competent foreign court having adjudicative jurisdiction, the seized foreign court located in common law jurisdictions seems to see it as no offence to Chinese courts by granting anti-suit injunctions to restrain Chinese proceedings. This is because the common law court believes that "An order of this kind [anti-suit injunction] is made in personam against a party subject to the court's jurisdiction by way of requiring compliance with agreed terms. It does not purport to have direct effect on the proceedings in the PRC. This court respects such proceedings as a matter of judicial comity". [1] However, the fact that the anti-suit injunction is not directly targeted at people's courts in the PRC does not prevent Chinese judges from believing that it is inappropriate for foreign courts to issue an anti-suit injunction restraining Chinese proceedings. Instead, they would likely view such interim order as something that purports to indirectly deprive the party of the right of having access to Chinese court and would unavoidably impact Chinese proceedings.

The attitude of Chinese courts towards the anti-suit injunction – a fine-tuning tool to curb parallel proceedings – has changed in recent years. In fact, they have progressively become open-minded to resorting to anti-suit injunctions or other similar orders that are issued to prevent parties from continuing foreign proceedings in parallel. Following that, the real question is whether and how anti-suit injunction is compatible with Chinese law. Some argued that Article 100 of the PRC CPL provides a legal basis for granting injunctions having similar effects with anti-suit injunction at common law. [2] It provides that:

"The people's court may upon the request of one party to issue a ruling to preserve the other party's assets or compel the other party to perform certain act

or refrain from doing certain act, in cases where the execution of the judgment would face difficulties, or the party would suffer other damages due to the acts of the other party or for other reasons. If necessary, the people's court also could make a ruling of such preservative measures without one party's application." [3] Accordingly, Chinese people's court may make a ruling to limit one party from pursuing parallel foreign proceedings if such action may render the enforcement of Chinese judgment difficult or cause other possible damages to the other party.

In maritime disputes, Chinese maritime courts are also empowered by special legislation to issue maritime injunctions having anti-suit or anti-anti-suit effects. Article 51 of the PRC Maritime Special Procedure Law provides that the maritime court may upon the application of a maritime claimant issue a maritime injunction to compel the respondent to do or not to do certain acts in order to protect the claimant's lawful rights and interests from being infringed. [4] The maritime injunction is not constrained by the jurisdiction agreement or arbitration agreement as agreed upon between the parties in relation to the maritime claim. [5] In order to obtain a maritime injunction, three requirements shall be satisfied – firstly, the applicant has a specific maritime claim; secondly, there is a need to rectify the respondent's act which violates the law or breaches the contract; thirdly, a situation of emergency exists in which the damages would be caused or increased if the maritime injunction is not issued immediately. [6] Like the provision of the PRC CPL, the maritime injunction issued by the Chinese maritime court is mainly directed to mitigate the damages caused by the party's behaviour to the other parties' relevant rights and interests.

In Huatai P&C Insurance Corp Ltd Shenzhen Branch v Clipper Chartering SA, the Maritime Court of Wuhan City granted the maritime injunction upon the claimant's application to oblige the respondent to immediately withdraw the anti-suit injunction granted by the High Court of the Hong Kong SAR to restrain the Mainland proceedings. [7] The Hong Kong anti-suit injunction was successfully sought by the respondent on the grounds of the existence of a valid arbitration agreement. [8] However, the respondent did not challenge the jurisdiction of the Mainland maritime court over the dispute arising from the contract of carriage of goods by sea. Therefore, the Maritime Court of Wuhan City held that the respondent had submitted to its jurisdiction. As a result, the application launched by the respondent to the High Court of the Hong Kong SAR for the anti-suit injunction to restrain the Mainland Chinese proceedings had infringed the legitimate rights and interests of the claimant. In accordance with Article 51 of the PRC Maritime Special Procedure Law, a Chinese maritime injunction was

granted to order the respondent domiciled in Greece to withdraw the Hong Kong anti-suit injunction (HCCT28/2017). [9] As the maritime injunction in the Huatai Property case was a Mainland Chinese ruling issued directly against the anti-suit injunction granted by a Hong Kong court, it is fair to say that if necessary Chinese people's court does not hesitate to issue a compulsory injunction "which orders a party not to seek injunction relief in another forum in relation to proceedings in the issuing forum". [10] This kind of compulsory injunction is also called 'anti-anti-suit injunction' or 'defensive anti-suit injunction'. [11]

When it comes to civil and commercial matters, including preserving intellectual property rights, the people's court in Mainland China is also prepared to issue procedural orders or rulings to prevent the parties from pursuing foreign proceedings, similar to anti-suit injunctions or anti-anti-suit injunction in common law world. In Guangdong OPPO Mobile Telecommunications Corp Ltd and its Shenzhen Branch v Sharp Corporation and ScienBiziP Japan Corporation, the plaintiff OPPO made an application to the seized Chinese court for a ruling to preserve actions or inactions.[12] Before and after the application, the defendant Sharp had brought tort claims arising from SEP (standard essential patent) licensing against OPPO by commencing several parallel proceedings before German courts, a Japanese court and a Taiwanese court. [13] In the face of foreign parallel proceedings, the Intermediate People's Court of Shenzhen City of Guangdong Province rendered a ruling to restrain the defendant Sharp from pursing any new action or applying for any judicial injunction before a Chinese final judgment was made for the patent dispute. [14] The breach of the ruling would entail a fine of RMB 1 million per day. [15] Almost 7 hours after the Chinese 'anti-suit injunction' was issued, a German 'anti-anti-suit injunction' was issued against the OPPO. [16] Then, the Shenzhen court conducted a court investigation to the Sharp's breach of its ruling and clarified the severe legal consequences of the breach. [17] Eventually, Sharp choose to defer to the Chinese 'anti-suit injunction' through voluntarily and unconditionally withdrawing the anti-anti-suit injunction granted by the German court. [18] Interestingly enough, Germany, a typical civil law country, and other EU countries have also seemingly taken a U-turn by starting to issue anti-anti-suit injunctions in international litigation in response to anti-suit injunctions made by other foreign courts, especially the US court. [19]

In some other IP cases involving Chinese tech giants, Chinese courts appear to feel more and more comfortable with granting compulsory rulings having the same legal effects of anti-suit injunction and anti-anti-suit injunction. For

example, in another seminal case publicized by the SPC in 2020, Huawei Technologies Corp Ltd ("Huawei") applied to the Court for a ruling to prevent the respondent Conversant Wireless Licensing S.A.R.L. ("Conversant") from further seeking enforcement of the judgment rendered by the Dusseldorf Regional Court in Germany. [20] Before the application, a pair of parallel proceedings existed, concurrently pending before the SPC as the second-instance court and the Dusseldorf Regional Court. On the same date of application, the German regional court delivered a judgement in favour of Conversant. Within 48 hours after receiving the Huawei's application for an anti-suit injunction, the SPC granted the injunction to prohibit Conversant from applying for enforcement of the German judgment; if Conversant failed to comply with the injunction, a fine (RMB 1 million per day) would be imposed, accumulating day by day since the date of breach. [21] Conversant applied for a reconsideration of the anti-suit injunction, and it was however rejected by the SPC eventually. [22] The SPC's anti-suit injunction against the German regional court's decision compelled both parties to go back to the negotiating table, and the dispute between the two parties striving for global parallel proceedings was finally resolved by reaching a settlement agreement. [23]

The SPC's injunction in Huawei v. Conversant is commended as the very first action preservation ruling having the "anti-suit injunction" nature in the field of intellectual property rights litigation in China, which has prematurely established the Chinese approach to anti-suit injunction in judicial practice. [24] It is believed by the Court to be an effective tool to curb parallel proceedings concurrent in various jurisdictions across the globe. [25] We still wait to see Chinese court's future approach in other civil and commercial matters to anti-suit injunction or anti-anti-suit injunction issued by itself as well as those granted by foreign courts.

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1. See Impala Warehousing and Logistics (Shanghai) Co Ltd v Wanxiang Resources (Singapore) Pte Ltd [2015] EWHC 811, para.144.
2. See Liang Zhao, 'Party Autonomy in Choice of Court and Jurisdiction Over Foreign-Related Commercial and Maritime Disputes in China' (2019) 15 Journal of Private International Law 541, at 565.
3. See Article 100, para.1 of the PRC CPL (2017).
4. See Article 51 of the PRC Special Maritime Procedure Law (1999).
5. See Article 53 of the PRC Special Maritime Procedure Law (1999).

6. See Article 56 of the PRC Special Maritime Procedure Law (1999).
7. See Huatai Property & Casualty Insurance Co Ltd Shenzhen Branch v Clipper Chartering SA (2017) E 72 Xing Bao No.3 of the Maritime Court of Wuhan City.
8. See HCCT 28/2017 of the High Court of the Hong Kong SAR.
9. See (2017) E 72 Xing Bao No.3.
10. See Andrew S. Bell, Forum Shopping and Venue in Transnational Litigation (Oxford University Press 2003), at 196.
11. See ibid.
12. See (2020) Yue 03 Min Chu No.689-1.
13. See ibid.
14. See ibid.
15. See ibid.
16. See ibid.
17. See ibid.
18. See ibid.
19. See Greta Niehaus, 'First Anti-Anti-Suit Injunction in Germany: The Costs for International Arbitration' Kluwer Arbitration Blog, 28 February 2021.
20. See Huawei Technologies Corp Ltd and Others v Conversant Wireless Licensing S.A.R.L. (2019) Zui Gao Fa Zhi Min Zhong No.732, No.733, No.734-I.
21. See ibid.
22. See Conversant Wireless Licensing S.A.R.L. v Huawei Technologies Corp Ltd and Others, (2019) Zui Gao Fa Zhi Min Zhong No.732, No.733, No.734-II.
23. See Case No.2 of the "10 Seminal Intellectual Property Right Cases before Chinese Courts", Fa Ban [2021] No.146, the General Office of the Supreme People's Court.
24. See ibid.
25. See ibid.

A Conflict of Laws Companion –

Adrian Briggs Retires from Oxford

By Tobias Lutzi, University of Cologne

There should be few readers of this blog, and few conflict-of-laws experts in general, to whom Adrian Briggs will not be a household name. In fact, it might be impossible to find anyone working in the field who has not either read some of his academic writings (or Lord Goff's seminal speech in *The Spiliada* [1986] UKHL 10, which directly credits them) or had the privilege of attending one of his classes in Oxford or one of the other places he has visited over the years.

Adrian Briggs has taught Conflict of Laws in Oxford for more than 40 years, continuing the University's great tradition in the field that started with Albert Venn Dicey at the end of the 19th century and had been upheld by Geoffrey Cheshire, John Morris, and Francis Reynolds* among others. His writings include four editions of *The Conflict of Laws* (one of the most read, and most readable, textbooks in the field), six editions of *Civil Jurisdiction and Judgments* and his *magnus opus Private International Law in English Courts*, a perfect snapshot of the law as it stood in 2014, shortly before the UK decided to turn back the clock. His scholarship has been cited by courts across the world. Still, Adrian Briggs has managed to maintain a busy barrister practice in London (including well-known cases such as Case C-68/93 *Fiona Shevill*, *Rubin v Eurofinance* [2012] UKSC 46, and *The Alexandros T* [2013] UKSC 70) while also remaining an active member of the academic community regularly contributing not only to parliamentary committees but also, on occasion, to the academic discussion on this blog.

To honour his impact on the field of Conflict of Laws, two of Adrian's Oxford colleagues, Andrew Dickinson and Edwin Peel, have put together a book, aptly titled 'A Conflict of Laws Companion'. It contains contributions from 19 scholars, including four members of the highest courts of their respective countries, virtually all of whom have been taught by (or together with) the honorand at Oxford. The book starts with a foreword by Lord Mance, followed by three short

notes on Adrian Briggs as a Lecturer at Leeds University (where he only taught for about a year), as a scholar at Oxford, and as a fellow at St Edmund Hall. Afterwards, the authors of the longer academic contributions offer a number of particularly delightful 'recollections', describing Adrian Briggs, *inter alia*, as "the one time wunderkind and occasional *enfant terrible* of private international law" (Andrew Bell), "the perfect supervisor: unfailingly generous with his time and constructive with his criticism" (Andrew Scott), and "a tutor, colleague and friend" (Andrew Dickinson).

The academic essays that follow are conventionally organised into four categories: 'Jurisdiction', 'Choice of Law', 'Recognition and Enforcement of Foreign Judgments', and 'Conflict of Laws within the Legal System'. They rise to the occasion on at least two accounts. First, they all use an aspect of Adrian Briggs' academic *oeuvre* as their starting point. Second, they are of a quality and depths worthy of the honorand (possibly having profited from the prospect of needing to pass his critical eye). While they all are as insightful as inspiring, Ed Peel's contribution on 'How Private is Private International Law?' can be recommended with particular enthusiasm as it picks up Adrian Briggs' observation (made in several of his writings) that, so far as English law is concerned, "a very large amount of the law on jurisdiction, but also on choice of law, is dependent on the very private law notions of consent and obligation" and critically discusses it from the perspective of contract-law expert. Still, there is not one page of this book that does not make for a stimulating read. It is a great testament to one of the greatest minds in private international law, and a true Conflict of Laws companion to countless students, scholars, colleagues, and friends.

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* corrected from an earlier version

Enforcement of Foreign Judgments about Forum Land

By Stephen G.A. Pitel, Western University

In common law Canada, it has long been established that a court will not recognize and enforce a foreign judgment concerning title to land in the forum. The key case in support is *Duke v Andler,* [1932] SCR 734.

The ongoing application of that decision has now been called into question by the British Columbia Court of Appeal in *Lanfer v Eilers*, 2021 BCCA 241 (available here). In the court below the judge relied on *Duke* and refused recognition and enforcement of a German decision that determined the ownership of land in British Columbia. The Court of Appeal reversed and gave effect to the German decision. This represents a significant change to Canadian law in this area.

The Court of Appeal, of course, cannot overturn a decision of the Supreme Court of Canada. It reached its result by deciding that a more recent decision of the Supreme Court of Canada, that in *Pro Swing Inc v Elta Golf Inc*, 2006 SCC 52, had overtaken the reasoning and result in *Duke* and left the Court of Appeal free to recognize and enforce the German decision (see paras 44-45 and 74). This is controversial. It has been questioned whether *Pro Swing* had the effect of superseding *Duke* but there are arguments on both sides. In part this is because *Pro Swing* was a decision about whether to recognize and enforce foreign non-monetary orders, but the orders in that case had nothing to do with specific performance mandating a transfer or title to land in the forum.

I find it hard to accept the decision as a matter of precedent. The title to land aspect of the foreign decision seems a significantly different element than what is at issue in most non-monetary judgment decisions, such that it is hard to simply subsume this within *Pro Swing*. What is really necessary is detailed analysis of whether the historic rule should or should not be changed at a normative level. How open should courts be to recognizing and enforcing foreign judgments concerning title to land in the forum? This raises related issues, most fundamentally whether the *Mocambique* rule itself should change. If other courts now know that British Columbia is prepared to enforce foreign orders about land

in that province, why should foreign courts restrain their jurisdiction in cases concerning such land?

In this litigation, the defendant is a German resident and by all accounts is clearly in violation of the German court's order requiring a transfer of the land in British Columbia (see para 1). Why the plaintiff could not or did not have the German courts directly enforce their own order against the defendant's person or property is not clear in the decision. Indeed, it may be that the German courts only were prepared to make the order about foreign land precisely because they had the power to enforce the order *in personam* and that it thus did not require enforcement in British Columbia (analogous to the *Penn v Baltimore* exception to *Mocambique*).

Given the conflict with *Duke*, there is a reasonable likelihood that the Supreme Court of Canada would grant leave to appeal if it is sought. And if not, a denial of leave would be a relatively strong signal of support for the Court of Appeal's decision. But the issue will be less clear if no appeal is sought, leaving debate about the extent to which the law has changed.

The EAPO Regulation: An unexpected interpretative tool of the French civil procedural system

Carlos Santaló Goris, Researcher at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law and Ph.D. candidate at the University of Luxembourg, offers an analysis of some aspects of a judgment rendered by the Paris Court of Appeals.

Regulation No 655/2014, establishing a European Account Preservation Order ("EAPO Regulation") introduced not only the first uniform provisional measure at

the EU level but also the first European specific system to search for the debtors' bank accounts. The so-called information mechanism is, though, less accessible than the EAPO itself. According to Article 5 of the EAPO Regulation, creditors can apply for an EAPO *ante demandam*, during the procedure on the substance of the matter; or when they have already a title (a judgment, a court settlement, or an authentic document). However, only creditors with a title can submit a request for information. Furthermore, in case the title is not yet enforceable, creditors are subject to specific additional prerequisites.

In broad terms, the information mechanism operates following a traditional scheme of cross-border cooperation in civil matters within the EU. A court in a Member State sends a request for information to an information authority in the same or other Member State. The information authority then searches for the bank accounts and informs the court of origin about the outcome of that search.

Member States have a wide margin of discretion in implementing the information mechanism. They can freely pick the national body appointed as information authority. They also have the freedom to choose whichever method they consider more appropriate to search for the debtors' bank accounts as long as it is "effective and efficient" and "not disproportionately costly or time-consuming" (Article 14(5)(d) EAPO Regulation).

France assigned the role of information authority to its national enforcement authority, the bailiffs ("huissiers"). Information about the debtors' bank accounts is obtained by filing an application with FICOBA ("Fichier national des comptes bancaires et assimilés"). FICOBA is a national register hold by the French tax authority containing data about all the bank accounts existing in France. Other Member States, such as Poland or Germany, have also relied on similar domestic registers.

This is where the paradox emerges. In France, creditors without an enforceable title who apply for a French domestic preservation order do not have access to FICOBA; conversely, creditors without an enforceable title who apply for an EAPO do. Article L151 A of the French Manual on Tax Procedures ("Livre des procédures fiscales") expressly indicates that bailiffs can access FICOBA for the purpose of ensuring the execution of an enforceable title ("aux fins d'assurer l'exécution d'un titre exécutoire"). The only exception is found, precisely, when they have to search for information in an EAPO procedure. This situation

generates an imbalance between creditors who can access the EAPO Regulation and those who cannot.

In a judgment rendered by the Paris Court of Appeal on 28 January 2021 (Cour d'appel de Paris, Pôle 1 – chambre 10, 28 janvier 2021, n° 19/21727), the court found that such a difference of treatment between creditors with and without access to the EAPO Regulation "constitutes an unjustified breach of equality and discrimination between creditors" ("cette différence de traitement constitue une rupture d'égalité injustifiée et une discrimination entre créanciers"). Relying on the principle of equality, the court decided to extend access to FICOBA, beyond the context of the EAPO Regulation, to those creditors without an enforceable title.

The relevance of this judgment lies in the French court's use of the EAPO Regulation to interpret a national domestic procedure. The influence of the national civil procedures system on the European procedure is well known. Uniform European civil procedures, such as the EAPO Regulation, contain numerous references to the Member States' national law. Furthermore, courts tend to read these instruments through the lens of the national civil procedural systems, even with regard to those aspects that should apply uniformly (here is an example concerning the EAPO Regulation kindly offered by Prof. Requejo Isidro). The Paris Court of Appeal shows us that the European civil procedures can also be a source of inspiration when it comes to interpreting domestic procedural law.

The irony behind this judgment is that, during the *travaux préparatoires* of the EAPO Regulation, the French delegation expressly requested to restrain access to the information mechanism to those creditors who had "an enforceable title to support [their] application". One of the reasons argued by the delegation was that "in French law, access to information is only given if the creditor possesses an enforceable title". Ultimately, it is the French civil procedural system that is being influenced by the EAPO Regulation, and not the other way around.

China Enacts the Anti-Foreign Sanctions Law

Xu Huang, Sophia Tang
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1. Background

On 10 June 2021, China's Standing Committee of the National People's Congress (hereinafter "NPC") issued "Anti-Foreign Sanctions Law of the People's Republic of China" (hereinafter "CAFSL"), which entered into force on the date of the promulgation. This is a reaction in response to the current tension between China and some western countries, in particular, the US and the EU that have imposed a series of sanctions on Chinese officials and entities. For example, in August 2020, the Trump administration imposed sanctions on 11 individuals for undermining Hong Kong's autonomy and restricting the freedom of expression or assembly of the citizens of Hong Kong. In June 2021, President Biden issued Executive Order 14032 to amend the ban on US persons purchasing securities of certain Chinese companies. In March 2021, the EU imposed unilateral sanctions on relevant Chinese individuals and entity, based on the human rights issues in Xinjiang. China has responded by imposing counter sanctions, which were issued by the Ministry of Foreign Affairs as administrative orders. The Anti-Foreign Sanctions Law provides the legal basis for China's further action and counter measures. This law was enacted after only two readings rather than the normal three demonstrating China's urgent need to defend itself against a growing risk of foreign hostile measures.

2. The main content

Competent Authority: All relevant departments under the State Council have been authorized to involve issuing the anti-sanction list and anti-sanction measures (Art. 4 and Art. 5). The "Ministry of Foreign Affairs" and "other relevant departments under the State Council" are authorized to issue orders of announcement (Art. 9). Reviewing from the current practice of China's response

to foreign sanctions, the Ministry of Foreign Affairs has always issued sanctions lists against foreign individuals and organizations, so it is likely that the China's Ministry of Foreign Affairs will still lead the movement of announcing and countering the foreign sanctions. However, other departments now also have the authority to sanction relevant individuals and entities. This provides flexibility if the foreign sanctions relate to a particular issue that is administrated by the particular department and when it is more efficient or appropriate for the particular department to handle it directly.

Targeted measures: Circumstances under which China shall have the right to take corresponding anti-sanction measures are as follows: (1) a foreign country violates international law and basic norms of international relations; (2) contains or suppresses China on various pretexts or in accordance with its own laws; (3) adopts discriminatory, restrictive measures against any Chinese citizen or organization; (4) meddles in China's internal affair (Art. 3).The CAFSL does not expressly specify whether the circumstances should be satisfied simultaneously or separately. From the perspective of legislative intent, it is obvious that the full text of the CAFSL is intended to broaden the legal authority for taking anti-sanctions measures in China, so it may not require the fulfillment of all four conditions.

It does not clarify the specific meanings of "violates international law and the basic norms of international relations", "contains or suppresses", and "meddles in China's internal affairs", which vary in different states and jurisdictions. But considering the sanctions issued by China and answers by the NPC spokesman, the key targeted circumstances are meddling China's internal affairs. It is reasonable to assume that these circumstances, mainly aimed at unilateral sanctions suppressing China under the pretexts of so-called sea-based, epidemic-based, democracy-based and human rights-based issues in Xinjiang, Tibet, Hong Kong and Taiwan. Therefore, other issues may not be included.

Art. 3 aims against the sanctions imposed by foreign states, for example the US and the EU. But from the text of the law, the concept of "sanctions" is not used, instead the concept of "discriminatory, restrictive measures" is adopted, which is very vague and broad. Discriminatory restrictive measures can be interpreted as foreign unilateral sanctions directly targeting Chinese individuals and organizations, which are the so-called "primary sanctions", different from the "secondary sanctions" restricting Chinese parties from engaging in normal

economic, trade and related activities with directly sanctions third state's parties. In a press conference, the NPC spokesman stated that "the main purpose of the CAFSL is to fight back, counter and oppose the unilateral sanctions against China imposed by foreign states." It should only apply to tackle the primary sanctions against China.

Targeted entities: The targeted entities of the anti-sanction list and anti-sanction measures are vague and broad. The targeted entities of anti-sanctions list include individuals and organizations that are directly involved in the development, decision-making, and implementation of the discriminatory restrictive measures (Art. 4). What means involvement in the development or decision-making or implementation is ambiguous. And the indirect involvement is even vaguer, which may broaden the scope of the list. Besides, following entities may also be targeted: (1) spouses and immediate family members of targeted individuals; (2) senior executives or actual controllers of targeted organizations; (3) organizations where targeted individuals serve as senior executives; (4) organizations that are actually controlled by targeted entities or whose formation and operation are participated in by targeted entities (Art. 5).

Anti-sanction measures: The relevant departments may take four categories of anti-sanction measures: (1) travel ban, meaning that entry into China will not be allowed and deportation will be applied;(2) freezing order, namely, all types of property in China shall be seized, frozen or detained; (3) prohibited transaction, which means entities within the territory of China will not be allowed to carry out transactions or other business activities with the sanctioned entities; (4) the other necessary measures, which may include measures like "arms embargoes" or "targeted sanctions" (Art. 6). Former three anti-sanction measures have been taken by the Ministry of Foreign Affairs in practice. For example, on 26 March 2021, China decided to sanction relevant UK individuals and entities by prohibiting them from entering the mainland, Hong Kong and Macao of China, freezing their property in China, and prohibiting Chinese citizens and institutions from doing business with them.

Relevant procedure: The decisions made by the competent authorities shall be final and not subject to judicial review(Art. 7).The counterparty shall not file an administrative lawsuit against anti-sanction measures and other administrative decisions. The counterparty can change the circumstance causing anti-sanction measures, and request the relevant department for the modification and

cancellation of anti-sanction measures. If any change in the circumstances based on which anti-sanction measures are taken happens, the competent authorities may suspend, change or cancel the relevant anti-sanction measures (Art. 8). The transparency requirement stipulates the relevant orders shall be announced (Art. 9).

A coordination mechanism for the anti-foreign sanctions work shall be established by the state to coordinate the relevant work. Coordination and cooperation, and information sharing among various departments shall be strengthened. Determination and implementation of the relevant anti-sanction measures shall be based on their respective functions and division of tasks and responsibilities (Art. 10).

Legal consequences of violation: There are two types of legal consequences for violating the obligation of "implementation of the anti-sanction measures". Entities in the territory of China will be restricted or prohibited from carrying out relevant activities (Art. 11). Any entities, including foreign states' parties, will be held legally liable (Art. 14).

Besides, a party suffering from the discriminatory, restrictive measures may be entitled to bring a civil action against the entities that comply with the foreign discriminatory measures against China (Art. 12). The defendant, in theory, includes any entities in the world, even entities that are the nationals or residents of the country imposing sanctions against China. It is curious how this can be enforced in reality. In particular, if a foreign entity has no connections with China, it is hard for a Chinese court to claim jurisdiction, and even taking jurisdiction, enforcing judgments abroad can also be difficult, if not impossible. Because enforcement jurisdiction must be territorial, without assets and reputation in China, a foreign party may disregard the Chinese anti-sanction measure.

3. Impact of the CAFSL

The CAFSL is a higher-level legislation in the Chinese legal system than the relevant departmental rules, such as the Chinese Blocking Rules and "unreliable entity list". It is a much more powerful legal tool than former departmental rules as it directly retaliates against the primary sanction on China. It provides a legal basis and fills a legal gap. However, it may not be good news for international businesses that operate in both the US and China. Those companies may have to

choose between complying with US sanctions or Chinese laws, which may probably force some enterprises to make strategic decisions to accept the risk of penalty from one country, or even to give up the Chinese or US market. The CAFSL is vaguely drafted and likely to create unpredictable results to the commercial transaction and other interests. The application and enforcement of the CAFSL and Chinese subsequent rules and regulations may give detailed interpretations to clarify relevant issues to help parties comply with the CAFSL. However, to China, the CAFSL serves a political purpose, which is more important than the normal functioning of a law. It is a political declaration of China's determination to fight back. Therefore, the most important matter for Chinese law-makers is not to concern too much of the detailed rules and enforcement to provide predictability to international business, but to send the warning message to foreign countries. International businesses, at the same time, may find themselves in a no-win position and may frequently face the direct conflict of overriding mandatory regulations in China and the US. By placing international businesses in the dilemma may help to send the message and pressure back to the US that may urge the US policy-makers to reconsider their China policy. After all, the CAFSL is a counter-measure, which serves defensive purposes, and would not be triggered in the absence of sanctions against Chinese citizens and entities.

New York Court Denies Enforcement of Chinese Judgment on Systemic Due Process Grounds

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In Shanghai Yongrun Investment Management Co. v. Kashi Galaxy Venture

Capital Co., the Supreme Court of New York (New York's court of first instance) denied enforcement of a Chinese court judgment on the ground that the judgment "was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law." The decision disagrees with every other U.S. and foreign court to have considered the adequacy of the Chinese judicial system in the context of judgments recognition. In recent years, there has been a growing trend in favor of the recognition of Chinese judgments in the United States and U.S. judgments in China. See William S. Dodge & Wenliang Zhang, Reciprocity in China-U.S. Judgments Recognition, 53 Vand. J. Transnat'l L. 1541 (2020). Unless this recent decision is overturned on appeal, it threatens to reverse the trend, to the detriment of judgment creditors in both countries.

In 2016 Shanghai Yongrun purchased an interest in Kashi Galaxy. In 2017, Kashi Galaxy agreed to repurchase that interest for RMB 200 million, an agreement that Kashi Galaxy allegedly breached by paying only part of the repurchase price. The agreement was governed by Chinese law and provided that suits could be resolved by courts in Beijing. In 2018, Shanghai Yongrun sued Kashi Galaxy, Maodong Xu, and Xu's wife in the Beijing No. 1 Intermediate People's Court. After a trial in which defendants were represented by counsel, the court granted judgment in favor of Shanghai Yongrun. The Beijing Higher People's Court affirmed the judgment on appeal, but it could not be enforced in China because no assets were available within the court's jurisdiction.

In 2020, Shanghai Yongrun brought an action against Kashi Galaxy and Xu in New York state court, seeking to have the Chinese judgment recognized and enforced. Article 53 of New York's Civil Practice Law and Rules (CPLR) has adopted the 1962 Uniform Foreign Money-Judgments Recognition Act (1962 Uniform Act), which provides that final money judgments rendered by foreign courts are enforceable in New York unless one of the grounds for non-recognition set forth in CPLR 5304 is established. These grounds include that the foreign court did not have personal jurisdiction, that the foreign court did not have subject matter jurisdiction, that the defendant did not receive notice of the foreign proceeding, that the judgment was obtained by fraud, that the judgment is repugnant to the public policy of the state, that the judgment conflicts with another final judgment, that the judgment is contrary to a forum selection clause, that personal jurisdiction was based only on service, and that the judgment is for

defamation and provided less protection for speech than would be available in New York. The defendants raised none of these grounds for non-recognition. Instead, they raised the broadest and least frequently accepted ground: that "the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law." CPLR 5304(a)(1).

To find a systemic lack of due process in the Chinese judicial system, the New York court relied entirely on the State Department's Country Reports on Human Rights Practices for 2018 and 2019. In particular, the court quoted the observations that Chinese "[j]udges regularly received political guidance on pending cases, including instructions on how to rule, from both the government and the [Chinese Communist Party], particularly in politically sensitive cases" and that "[c]orruption often influenced court decisions." The court held that these country reports "conclusively establish as a matter of law that the PRC judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law in the United States."

The implications of this ruling are broad. If the Chinese judicial system suffers from a systemic lack of due process, then no Chinese court judgments may ever be recognized and enforced under New York law. What is more, ten other states have adopted the 1962 Uniform Act, and an additional twenty-six states have adopted the updated 2005 Uniform Foreign-Country Money Judgments Recognition Act (2005 Uniform Act), which contains the same systemic due process ground for non-recognition. If followed in other jurisdictions, the New York court's reasoning would make Chinese judgments unenforceable throughout much of the United States.

But it seems unlikely that other jurisdictions will follow suit or that the New York court's decision will be upheld on appeal. U.S. decisions denying recognition on systemic due process grounds are rare. The leading cases have involved extreme and unusual circumstances: a Liberian judgment rendered during that country's civil war when the judicial system had "collapsed," Bridgeway Corp. v. Citibank, 201 F.3d 134, 138 (2d Cir. 2000), and an Iranian judgment against the sister of the former Shah, Bank Melli Iran v. Pahlavi, 58 F.3d 1406 (9th Cir. 1995). Although other courts have considered State Department country reports to be relevant in considering claims of systemic due process, none has found them to be

dispositive. For example, the Fifth Circuit rejected a claim that Moroccan courts suffered from systemic lack of due process notwithstanding a statement in the 2009 country report that "in practice the judiciary . . . was not fully independent and was subject to influence, particularly in sensitive cases." DeJoria v. Maghreb Petroleum Exploration, S.A., 804 F.3d 373, 381 (5th Cir. 2015). This language about Moroccan courts is quite similar to the country report statements about China that the New York court found conclusive.

With respect to China specifically, no U.S. court had previously denied recognition based on a systemic lack of due process. To the contrary, a prior New York state court decision held that "the Chinese legal system comports with the due process requirements," Huizhi Liu v. Guoqing Guan, Index No. 713741/2019 (N.Y. Sup. Ct., Jan. 7, 2020), and a federal court in California concluded that "the Chinese court was an impartial tribunal." Qinrong Qiu v. Hongying Zhang, 2017 WL 10574227, at *3 (C.D. Cal. 2017). Other U.S. decisions have specifically noted that the party resisting enforcement had not alleged systemic lack of due process as a ground for non-recognition. See Global Material Technologies, Inc. v. Dazheng Metal Fibre Co., 2015 WL 1977527, at *7 (N.D. Ill. 2015); Hubei Gezhouba Sanlian Industrial Co. v. Robinson Helicopter Co., 2009 WL 2190187, at *6 (C.D. Cal. 2009).

China has been promoting the rule of law, and its legal system is modernizing to follow internationally accepted standards. The independence of China's judiciary is guaranteed by its Constitution and other laws. To promote international trade and investment, China has emphasized the independence and impartiality of its courts. Other countries have repeatedly recognized and enforced Chinese judgments, including Australia, Canada, Germany, Israel, the Netherlands, New Zealand, Singapore, South Korea, and the United Kingdom. When parties have questioned the integrity of the Chinese judicial system as a whole, courts have rejected those arguments. Recently, in Hebei Huaneng Industrial Development Co. v. Deming Shi, [2020] NZHC 2992, the High Court of New Zealand found that the Chinese court rendering the judgment "was part of the judicial branch of the government of the People's Republic China and was separate and distinct from legislative and administrative organs. It exercised a judicial function. Its procedures and decision were recognisably judicial." When claims of improper interference are raised in the context of judgments recognition, the New Zealand court suggested, "the better approach is to see whether justice was done in the

particular case."

The New York court's decision in Shanghai Yongrun is not only contrary to past decisions involving the enforcement of Chinese judgments in the United States and other countries. It also threatens to undermine the enforceability of U.S. judgments in China. Under Article 282 of the Civil Procedure Law of the People's Republic of China, foreign judgments are recognized and enforced "in accordance with the principle of reciprocity." For U.S. judgments, Chinese courts in cases like Liu v. Tao (Reported on by Ron Brand) and Nalco Co. v. Chen have found China's reciprocity requirement to be satisfied by U.S. decisions that recognized and enforced Chinese judgments. If U.S. courts change course and begin to hold that China's judiciary can never produce enforceable judgments, Chinese courts will certainly change course too and deny recognition to U.S. judgments for lack of reciprocity.

Maintaining reciprocity with China does not require U.S. courts to enforce every Chinese judgment. U.S. courts have denied recognition and enforcement of Chinese judgments when the Chinese court lacked personal jurisdiction, Folex Golf Indus., Inc. v. O-Ta Precision Industries Co., 603 F. App'x 576 (9th Cir. 2015), or when the Chinese judgment conflicted with another final judgment, UM Corp. v. Tsuburaya Prod. Co., 2016 WL 10644497 (C.D. Cal. 2016). But so far, U.S. courts have treated Chinese judgments the same as judgments from other countries, applying the case-specific grounds for non-recognition in an evenhanded way. The systemic due process ground on which the New York court relied in Shanghai Yongrun is fundamentally different because it holds Chinese judgments to be categorically incapable of recognition and enforcement.

New York may be on the verge of expanding the case-specific ground for non-recognition by adopting the 2005 Uniform Act to replace the 1962 version that is currently in place. A bill to adopt the 2005 Act has passed both the Assembly and the Senate in New York. The 2005 Act adds two grounds for non-recognition not found in the 1962 Act: (1) that "the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment"; and (2) that "the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law." These grounds, already found in the laws of twenty-six other states that have adopted the 2005 Uniform Act, would allow New York courts to review foreign judgments for corruption and for lack of due process in the specific case without

having to condemn the entire foreign judiciary as incapable of producing recognizable judgments. It is worth noting that the defendants in Shanghai Yongrun did not claim that there was any defect in the Chinese proceedings that led to the judgment against them.

Many court systems around the world are imperfect. The case-specific grounds for non-recognition found in the 1962 and 2005 Uniform Acts allow U.S. courts to refuse enforcement to foreign judgments on a range of case-specific grounds from lack of jurisdiction or notice, to public policy, to corruption or lack of due process. These case-specific grounds largely eliminate the need for U.S. courts to declare that an entire judicial system is incapable of producing valid judgments.

Territorial Jurisdiction for Disputes between Members of a Political Party in Nigeria

Election or political party disputes often feature before Nigerian courts. In Nigeria jurisdiction in matters of conflict of laws (called "territorial jurisdiction" by many Nigerian judges) also applies to matters of disputes between members of a political party in the inter-state context.[1]

In *Oshiomhole v Salihu (No. 1)*[2] (reported on June 7, 2021), one of the issues for determination was whether the High Court of the Federal Capital Territory, Abuja possessed territorial jurisdiction to handle a dispute between members of Nigeria's ruling political party. The 1st defendant/appellant was at the time the National Chairman of the 2nd defendant/appellant (the ruling party in Nigeria). It was alleged by some Members of the party that he had been suspended at the ward level in Edo State and he was thus disqualified from holding the position of National Chairman. The 1st defendant/appellant, inter alia, filed a preliminary

objection to the suit and argued that the High Court of the Federal Capital Territory did not possess territorial jurisdiction because the cause of action arose in Edo State where he was alleged to have been suspended as the National Chairman. The Court of Appeal (per Onyemenam JCA in his leading judgment) dismissed the preliminary objection and held as follows:

"The issue herein is straightforward. Order 3 rule 4 of the High Court of Federal Capital Territory (Civil Procedure) Rules 2018 provides that:

"All other suits shall where the defendant resides or carries on business or where the cause of action arose in the Federal Capital Territory, be commenced and determined in the High court of Federal Capital Territory, Abuja."

By this Rule, apart from the matters that fall under Order 3 Rules 1 & 2 of the High Court of Federal Capital Territory (Civil Procedure) Rules 2018, the High Court of Federal Capital Territory, Abuja shall have territorial jurisdiction where:

1. The defendant resides within the Federal Capital Territory or
2. The defendant carries on business within the Federal Capital Territory or
3. The cause of action arose within the Federal Capital Territory or

In either of the three circumstances stated above, the High Court of Federal Capital Territory, Abuja shall have territorial jurisdiction to hear and determine the suit. The appellants' contention herein is that the cause of action arose in Edo State and not in the Federal Capital Territory, Abuja and as such the High court of Federal Capital Territory, Abuja lacks the jurisdiction to hear the suit. This argument is one third percent correct for the simple fact that, where cause of action arose is not the sole source of territorial jurisdiction of the High court of Federal Capital Territory, Abuja. In the instant case, the office of the 1st appellant as National Chairman of the 2nd appellant; as well as the Registered office and Secretariat of the 2nd appellant are both within the Federal Capital Territory, Abuja. This makes the High court of Federal Capital Territory, Abuja, have territorial jurisdiction over the suit filed by the respondents under Order 3 rule 4(1) of the High Court of Federal Capital Territory(Civil Procedure) Rules, 2018…

I therefore hold that the trial court has the territorial jurisdiction to hear the respondent's suit and resolve the issue in favour of the 1st – 6th respondents."[3]

The above rationale for the Court of Appeal's decision of Onyemenam JCA in his leading judgment is clearly wrong. Order 3 rule 4 of the High Court of Federal Capital Territory (Civil Procedure) Rules 2018 is a choice of venue rule for allocating jurisdiction as between the judicial division of the Federal Capital Territory for the purpose of geographical and administrative convenience. It cannot and should not be used to resolve inter-state matters of conflict of laws. It is submitted that the better view is stated by the Court of Appeal in *Ogunsola v All Nigeria Peoples Party,*[4] where Oduyemi JCA in his leading judgment at the Court of Appeal, rightly held that:

"Where the dispute as to venue is not one between one division or another of the same State High Court or between one division or the other of the F.C.T. Abuja High Court, but as between one division or the other of the F.C.T Abuja High Court, but as between the High Court of one State in the Federation and the High Court of the F.C.T. then the issue of the appropriate or more convenient forum is one to be determined under the rules of Private International Law formulated by courts within the Federation."[5]

In *Oshiomhole* (*supra*) the opportunity was missed to apply and develop jurisdictional conflict of law rules for disputes between members of a political party in Nigeria. The result of the decision reached in *Oshiomhole* (*supra*) in applying choice of venue rules through Order 3 rule 4 of the High Court of Federal Capital Territory (Civil Procedure) Rules 2018 will conflate with the principles of Nigerian private international as the defendants were resident in the State they were sued. So the Court of Appeal in *Oshiomhole* (*supra*) incorrectly reasoned its way to the right conclusion – the High Court of the Federal Capital Territory had jurisdiction in this case.

Unfortunately, in recent times the Supreme Court of Nigeria has held that the High Court of a State cannot establish jurisdiction over a cause of action that occurs in another State – the strict territorial jurisdiction approach.[6] This approach has also been applied to disputes between members of a political party.[7] This approach is also wrong as it ignores the principles of traditional Nigerian common law conflict of laws. It also leads to injustice and unduly circumscribes the jurisdiction of the Nigerian court, which ultimately makes Nigerian courts inaccessible and unattractive for litigation. Nigerian courts

should have jurisdiction as of right once a defendant is resident or submits to the jurisdiction of the Nigerian court. In *Oshiomhole* (*supra*), if the strict territorial jurisdiction approach was applied, the High Court of the Federal Capital Territory, Abuja would not have had jurisdiction because the cause of action arose in Edo State.

In summation, applying the right principle of private international law, the Court of Appeal in *Oshiomhole* (*supra*) reached the right decision (residence of the defendant) through an incorrect reasoning of relying on Order 3 rule 4 of the High Court of Federal Capital Territory (Civil Procedure) Rules 2018, which is choice of venue rule for judicial divisions within a State. If the recent Supreme Court cases, which apply the strict territorial jurisdiction approach was applied in this case, *Oshiomhole (supra*) would be *per incuriam* and, the High Court of the Federal Capital Territory, Abuja would not have had jurisdiction because the cause of action arose in Edo State.

[1]*Ogunsola v All Nigeria Peoples Party* (2003) 9 NWLR (Pt. 826) 462, 480.

[2] (2021) 8 NWLR (Pt. 1778) 237.

[3]*Oshiomhole v Salihu (No. 1*) (2021) 8 NWLR (Pt. 1778) 237, 275-6.

[4](2003) 9 NWLR (Pt. 826) 462, 480 .

[5] *Ogunsola v All Nigeria Peoples Party* (2003) 9 NWLR (Pt. 826) 462, 480 .

[6] *Capital Bancorp Ltd v Shelter Savings and Loans Ltd* (2007) 3 NWLR 148; *Dairo v Union Bank of Nigeria Plc* (2007) 16 NWLR (Pt 1059) 99,

[7]*Mailantarki v Tongo & Ors* (2017) LPELR-42467; *Audu v. APC & Ors* (2019) LPELR – 48134.

The Supreme Court of Japan on Punitive Damages…

Written by Béligh Elbalti (Associate Professor, Graduate School of Law and Politics – Osaka University)

1. **Introduction**

Assume that you successfully obtained a favourable judgment from a foreign court that orders the losing party to pay punitive damages in addition to compensatory damages. Assume also that, later, you could obtain a partial satisfaction of the amount awarded by the court by way of compulsory execution in the rendering state. Happy with the outcome and knowing that punitive damages cannot be enforced in Japan, you confidently proceed to enforce the remaining part before a Japanese court arguing that the payment you would like to obtain now corresponds to the compensatory part of the award. Could the judgment be enforced in Japan where punitive damages are considered as contrary to public policy? In other words, to what part of the damages the paid amount corresponds: the compensatory part or the punitive part?

This is the question that the Supreme Court of Japan answered in its recent judgment rendered on 25 May 2021.

The present case has already yielded an important Supreme Court decision rendered on 18 January 2019 (decision available here). The main issue that was addressed therein concerned the compatibility of the foreign judgment with the procedural public policy of Japan. The summary below will however be limited to the issue of punitive damages as this was the main issue the Supreme Court has addressed in its decision reported here.

2. **Facts:**

In 2013, the Xs (Appellees) filed an action with a Californian court seeking damages against the Y (appellant) and several other persons for illegally obtaining their trade secrets and business models. In 2015, the Californian court rendered a default judgment against Y ordering him to pay about USD 275,500, including punitive damages (USD 90,000) and compensatory damages (USD

184,990) as well as other related additional fees. Soon after the decision became final and binding, Xs petitioned for the compulsory execution of the said decision in the US and could obtain partial payment of the awarded damages (USD 134,873). Thereafter, Xs moved to claim the payment of the remaining part (i.e. USD 140,635) by seeking the enforcement of the Californian judgment after deducting the part of the payment already made. Xs argued that the judgment did not violate public policy as the amount they were seeking to obtain in Japan was anyway confined within the scope of the compensatory damages. Y challenged the petition for enforcement, *inter alia*, on the ground that punitive damages were incompatible with Japanese public policy and therefore had no effect in Japan; accordingly, the payment made in the US should be appropriated to the satisfaction of the compensatory part of the foreign judgment. Thus the question above.

3. **Rulings**

The first instance court (Osaka District Court) considered that the punitive damages ordered by the Californian court were effectively punitive in nature and as such against public policy and had no effect in Japan. The court then considered that the payment made abroad could not correspond to the payment of the punitive damages part, because this would result in enlarging the scope of the enforcement of the other part of the judgment and consequently lead to a result that did not substantially differ from the recognition of the effect of the punitive award. The court stated that the payment made abroad corresponded to the part *other than* the punitive portion of the damages. It finally ruled that the enforcement petition was to be admitted to the extent of the remaining amount (i.e. only USD 50,635), after deducting both the payment already made (USD 134,873) and the punitive damages part (USD 90,000).

On appeal, the issue of punitive damages was not addressed by the second Instance Court (Osaka High Court). The Court decided to reject the enforcement of the Californian default judgment on the ground of violation of procedural public policy of Japan because Y was deprived of an opportunity to file an appeal as the notice of entry of judgment was sent to a wrong address. However, unsatisfied with the ruling of the High Court as to whether Y was actually deprived of an opportunity to file an appeal, the Supreme Court quashed the High Court ruling and remanded the case to the same court for further examination. Again, the issue of punitive damages was not raised before the Supreme Court.

Before the Osaka High Court, as the court of remand, the issue of the enforceability of punitive damages was brought back to the center of the debate. In this respect, like the Osaka District Court, the Osaka High Court considered that the USD 90,000 award was punitive in nature and therefore incompatible with public policy in Japan. However, unlike the Osaka District Court, the High Court considered that since the obligation to pay punitive damages *in* California could not be denied, the payment made abroad through the compulsory execution procedure should be appropriated to the satisfaction of the amount ordered by the Californian court as a whole. Therefore, the since the remaining part (i.e. USD 140,635) did not exceed the total amount of the foreign judgment excluding the punitive damages part (i.e. USD 185,500), the High Court considered that its enforcement was not contrary to public policy. Unhappy with this ruling, Y appealed to the Supreme Court.

The Supreme Court disagreed (decision available here, in Japanese only). According to the Supreme Court, "if payment was made with respect to an obligation resulting from a foreign judgment including a part ordering the payment of monies as punitive damages, which do not meet the requirements of Art. 118(iii) CCP, it should be said that the foreign judgment cannot be enforced as if the said payment was appropriated to the satisfaction of the punitive damages part, even when such payment was made in the compulsory execution procedure of the foreign court" (translation by author).

The Supreme Court considered that the payment made should be appropriated to the satisfaction of the parts of the foreign judgment other than punitive damages. According to the Supreme Court, punitive damages had no effect in Japan and therefore, there could be no obligation to pay punitive damages when deciding the effect of a payment of an obligation resulting from a foreign judgment. The Supreme Court finally agreed with the Osaka District Court in considering that, since there was no obligation on the part of Y to pay punitive damages due to their incompatibility with Japanese public policy, Y's obligation under the foreign judgment was limited to USD 185,500. Therefore, since Y had already paid USD 134,873 in the compulsory execution procedure in rendering state, Xs were entitled to claim only the difference of USD 50,635.

4. **Comments:**

The ruling of the Supreme Court is interesting in many regards. First, the

Supreme Court reiterated its earlier categorical position on the incompatibility of punitive damages with Japanese public policy. This position is in line with the prevailing opinion in Japan according to which punitive damages are *in principle* contrary to Japanese public policy due to the fundamental difference in nature (civil v. criminal) and function (compensatory v. punitive/sanction) (For a general overview on the debate in Japan, see Béligh Elbalti, "Foreign Judgments Recognition and Enforcement in Civil and Commercial Matters in Japan", *Osaka University Law Review*, Vol. 66, 2019, pp. 7-8, 24-25 available here).

Second, the solution in the present decision can be regarded as a logical consequence of the absolute rejection of punitive damages. In effect, in deciding as it did, the Supreme Court showed its intention to discharge the judgment debtor from his/her obligation to pay punitive damages resulting from a foreign judgment even in the case where a partial payment has been made as a consequence of a compulsory procedure before the foreign court. Indeed, since there can be no obligation to pay punitive damages resulting from a foreign judgment, any payment made abroad should be appropriated to the satisfaction of the parts of the awarded damages other than the punitive portion.

Third, after the first Supreme Court decision on punitive damages, a practice has been established based on which judgment creditors who seek the enforcement of a foreign judgment containing punitive damages, usually, content themselves with the request for the enforcement of the compensatory part to the exclusion of the punitive part of the foreign judgment. (See for example, the Supreme Court judgment of 24 April 2014, available here). For a comment on this case from the perspective of indirect jurisdiction, see Béligh Elbalti, "The Jurisdiction of Foreign Courts and the Recognition of Foreign Judgments Ordering Injunction – The Supreme Court Judgment of April 24, 2014, *Japanese Yearbook of International Law*, vol. 59, 2016, pp. 295ss, available here). This practice is expected to continue after the present decision as well. However, in this respect, the solution of the Supreme Court raises some questions. Indeed, what about the situation where the judgment creditor initiates a procedure in Japan seeking the enforcement of compensatory part of the judgment first? Would it matter if the judgment creditor shows the intention to claim the payment of the punitive part later so that he/she ensures the satisfaction of the whole amount of the award? More importantly, if the judgment debtor was obliged to pay for example the full award including the punitive part in the rendering state (or in another state

where punitive damages are enforceable), would it be entitled to claim in Japan the payment back of the amount that corresponds to the punitive part of the foreign judgment? Only further developments will provide answers to these questions.

In any case, one can somehow regret that the Supreme Court missed the chance to reevaluate its position with respect to punitive damages. In effect, the court ruled as it did without paying the slightest heed to the possibility of declaring punitive damages enforceable be it under certain (strict) conditions. In this regard, the court could have adopted a more moderate approach. This approach can consist in admitting that punitive damages are not *per se* contrary to public policy, and that the issue should be decided on a case by case basis taking into account, for example, the evidence produced by the judgment creditor to the effect that the awarded amount would not violate public policy (see in this sense, Toshiyuki Kono, "Case No. 67" *in* M Bälz *et al.* (ed.)*, Business Law in Japan – Cases and Comments – Intellectual Property, Civil, Commercial and International Private Law* (Wolters Kluwer Law & Business, 2012), p. 743s); or when the amount awarded is not manifestly disproportionate with the damages actually suffered (for a general overview, see Béligh Elbalti, "Spontaneous Harmonization and the Liberalization of the Recognition and Enforcement of Foreign Judgments, *Japanese Yearbook of Private International Law*, Vol. 16, 2014, pp. 274-275 available here).

In this respect, it is interesting to note that such an approach has started to find its way into the case law in some jurisdictions, although the methods of assessment of compatibility of punitive damages with the public policy of the recognizing state and the outcome of such an assessment differed from one jurisdiction to another (for a general overview, see Csongor I Nagy, Recognition and Enforcement of US Judgments Involving Punitive Damages in Continental Europe, 30 *Nederlands Internationaal Privaatrecht* 1 2012, pp. 4ss). For example, the Greek Supreme Court has refused to enforce punitive damages but after declaring that punitive damages may not violate public policy if they are not excessive (judgment No. 17 of 7 July 1999, decision available at the Greek Supreme Court homepage). The French *Cour de cassation* has also refused to enforce a foreign judgment awarding punitive damages, but – again – after declaring that punitive damages were not *per se* contrary to French *ordre public*, and that that should be treated as such only when the amount award was

disproportionate as compared with the sustained damages (judgment No. 09-13.303 of 1 December 2010, on this case, see Benjamin West Janke and François-Xavier Licari, "Enforcing Punitive Damages Awards in France after Fountaine Pajot", 60 *AJCL* 2012, pp. 775ss). On the other hand, the Spanish Supreme Court accepted the full enforcement of an American judgment including punitive damages (judgment of No. 1803/2001 of 13 November 2001; on this case see Scott R Jablonski, "Translation and Comment: Enforcing U.S. Punitive Damages Awards in Foreign Courts – A Recent Case in the Supreme Court of Spain" 24 *JLC* 2005, pp. 225ss). Finally, the recent extraordinary *revirement jurisprudentiel* of the Italian Supreme Court deserves to be highlighted. Indeed, in its judgment No. 16601 of 5 July 2017, the *Corte Suprema di Cassazione* declared that punitive damages could be enforced under certain conditions after it used to consider, as Japanese courts still do, that punitive damages as such were contrary to Italian public policy (on this case see, Angelo Venchiarutti, "The Recognition of Punitive Damages in Italy: A commentary on *Cass Sez Un 5 July 2017, 16601, AXO Sport, SpA v NOSA Inc*" 9 *JETL* 1, 2018, pp.104ss). It may take some time for Japanese courts to join this general trend, but what is sure is that the debate on the acceptability of punitive damages and their compatibility with Japanese public policy will certainly be put back in the spotlight of doctrinal discussions in the coming days.