New Issue of Revue Critique de droit international privé (2024/2)

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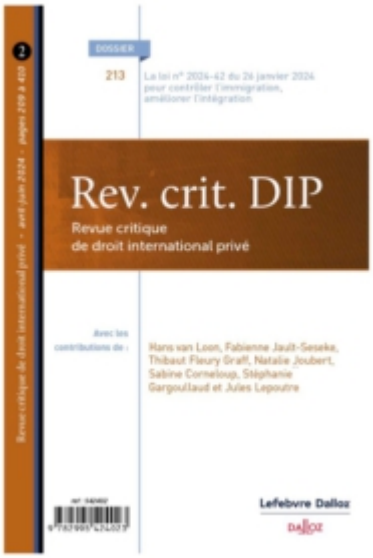

The second issue of the Revue Critique de droit international privé of 2024 was released a few weeks back. It contains a rich thematic dossier of seven articles and several case notes.

Under the direction of Prof. Sabine Corneloup (Université Paris-Panthéon-Assas), the doctrinal section of this issue is entirely devoted to an in-depth study of the latest French immigration law (Loi n° 2024-42 du 26 janvier 2024 pour contrôler l'immigration, améliorer l'intégration). In line with the Revue Critique's recent policy, this doctrinal part has been made available in English on the editor's website (for registered users and institutions). Against the backdrop of tightening migration controls at the global scale, this Act radically shifts administrative, procedural, and substantial aspects of the status of aliens in France.

The dossier opens up with Prof. Hans van Loon's (University of Edinburgh, former Secretary General of the HCCH) call for *La nécessité d'un cadre mondial de coopération pour une réglementation durable de la migration de travailleurs* (The need for a cooperative global framework for a sustainable regulation of labor migration). Its abstract reads as follows:

"Sustainable regulation of labor migration cannot be based exclusively on unilateral initiatives by a given country individually, but requires the development of a worldwide framework for cooperation between states, which is sorely lacking at present. Both realistic and highly ambitious, the author proposes a – fully drafted – framework convention aimed at strengthening practical cooperation at global level for a particular type of crossborder displacement of persons for work: temporary and circular migration. This framework could subsequently be extended to other types of migration."

Adopting the same critical ambition, the subsequent articles further engage with the French bill by following the order of its chapters.

In this vein, Prof. Fabienne Jault-Seseke (Université Paris-Saclay, UVSQ) first assesses the law's provisions relating to *L'accès au séjour : l'objectif d'intégration au service d'un discours brouillé* (Access to residency: the objective of integration serving a blurred discourse). It is introduced as follows:

"Fabienne Jault-Seseke highlights the restriction of the conditions for obtaining residence permits, both for new arrivals and for foreign citizens applying for long-term permits. With regard to one of the Act's flagship measures – the regularization of undocumented workers in short-staffed occupations – the author regrets that the reform's contribution is ultimately very limited, and that its scope has been further reduced by an administrative order, casting doubt on the legislator's real desire to promote work as a factor of integration."

Then, Prof. Thibaut Fleury Graff (Université Paris-Panthéon-Assas) severely judges *L'éloignement des étrangers dans la loi du 26 janvier 2024 : régression des protections, extension des rétentions* (The expulsion of foreign nationals under the January 26, 2024 law: regression of protections, extension of detentions). His contribution's abstract reads as follows:

"The author shows the regression in protection resulting from the removal of legislative obstacles to expulsion. In place of the general, objective protection against expulsion enjoyed by certain categories of foreign nationals under the law, the reform substitutes a case-by-case review, by the administrative authority and the administrative judge, of the rights and freedoms constitutionally and conventionally recognized for foreign nationals. This

casuistic approach to deportation is accompanied by new provisions facilitating measures that deprive or restrict freedom (administrative detention, house arrest, bans), the duration of which has also been extended."

In the fourth article, Prof. Natalie Joubert (Université de Bourgogne) takes a hard look on *La loi Immigration du 26 janvier 2024 et les droits sociaux* (The immigration law of January 26, 2024 and social rights). Her analysis is presented as follows:

"Natalie Joubert highlights the issue of 'disguised national preference', which was to have taken the form of a condition of length of legal residence in France – ultimately censured by the Constitutional Council – in historical context, before showing that this condition was not actually censured in itself, but only for its excessive duration. In terms of taking into account the vulnerability of foreign nationals, the author contrasts an advance in protection of access to housing, with a regression in the protection of young adults and asylum seekers."

The Act also implements *Une réforme structurelle du droit d'asile* (A structural reform of asylum law), which is precisely the subject of Prof. Sabine Corneloup's study. Its abstract reads as follows:

"In the field of asylum law, the most noteworthy contribution has been the structural reform of both the administrative and judicial phases of the asylum procedure. Sabine Corneloup analyzes the territorialization of the two phases, which raises considerable material and human stakes, and shows that the introduction of the principle of a single judge before the National Asylum Court, which removes the United Nations High Commissioner from the procedure, can only give rise to the most serious reservations. Whether or not the collegiate system is maintained in the future will depend exclusively on the policy of the President of the Court. With regard to the status of individuals, the author shows that, through the new cases of administrative detention and house arrest of asylum seekers, the Act affects the very legal grounds for such measures."

The sixth contribution is authored by Stéphanie Gargoullaud (Cour d'appel de Paris) and tackles the procedural aspects of *La loi Immigration du 26 janvier 2024*

et les règles du contentieux administratif et judiciaire (The Immigration Act of January 26, 2024 and the rules of administrative and judicial litigation). The following abstract was provided:

> *"Stéphanie Gargoullaud analyzes the law's main contributions to both judicial and administrative processes. The legislator's stated aim of simplifying the rules 4 meets a strong expectation on the part of those concerned, given that the French system had become too complex. While simplification is perceptible in the case of administrative recourse, where the number of procedures has been reduced to three, it is hardly visible in the numerous provisions reforming court process concerning administrative detention and waiting zones."*

Last but not least, Prof. Jules Lepoutre (Université Côte d'Azur) discusses La nationalité dans la loi du 26 janvier 2024 : une apparition éphémère, des questions persistantes (*Nationality in the law of January 26, 2024: a fleeting appearance, some enduring interrogations*). The abstract reads as follows:

> *"Nationality and citizenship law was at the heart of parliamentary debates, even though it did not feature in the initial bill and occupies a rather anecdotal place in the enacted text. The provisions introduced by the Senators concerning the restriction of 'droit du sol', the extension of forfeiture of nationality, the raising of language requirements for naturalization, etc. did not pass constitutional scrutiny. Jules Lepoutre shows that both the policy pursued by the legislator and the control exercised by the constitutional court reveal much about contemporary issues relating to belonging: the presence of reiterative ideologies, and the strong interconnexion between nationality and citizenship on the one hand and immigration and integration on the other."*

What's more, the international audience will undoubtedly be interested in the Bibliographic section of the issue, which has always been a remarkable feature of the Revue critique. Under the direction of Dr. Elie Lenglart (Université Université de Lille) and Dr. Sandrine Brachotte (UC Louvain), this section has diversified to include major French-language and non-French-language publications in both private international law and international arbitration, as well as contemporary works in global law. Notably, some reviews are authored in English and will therefore benefit readers beyond the borders of the *francophonie*.

The full table of contents is available here.

Previous issues of the Revue Critique (from 2010 to 2022) are available on Cairn.

Book review: Research Handbook on International Abortion Law (Cheltenham: Edward Elgar Publishing, 2023)

RESEARCH HANDBOOK ON International Abortion Law

Edited by
Mary Ziegler

RESEARCH HANDBOOKS IN LAW AND SOCIETY

Written by Mayela Celis

Undoubtedly, Abortion is a hot topic. It is discussed in the news media and is the subject of heated political debate. Indeed, just when one thinks the matter is settled, it comes up again. In 2023, Elgar published the book entitled "**Research Handbook on International Abortion Law**", ed. Mary Ziegler (Cheltenham: Edward Elgar Publishing Limited, 2023). For more information, click here. Although under a somewhat misleading name as it refers to *international* abortion law, this book provides a wonderful comparative overview of national abortion laws as regulated by States from all the four corners of the world and internal practices, as well as an analysis of human rights law.

This book does not deal with the conflict of laws that may arise under this topic. For a more detailed discussion, please refer to the post Singer on Conflict of Abortion Laws (in the U.S.) published on the blog of the European Association of Private International Law.

In this book review, I will briefly summarise 6 parts of this book (excluding the introduction) and will provide my views at the end.

This book is divided into 7 parts:

Part I – Introduction

Part II – Histories of liberalization

Part III – The promise and limits of decriminalization

Part IV – Abortion in popular politics

Part V – Movements against abortion

Part VI – Race, sex and religion

Part VII – The role of international human rights

Part II – Histories of Liberalization

Part II begins with a historical journey of the abortion reform in Sweden in the

1930s and 1940s. It highlights the limited legalization of abortion in Sweden in 1938 and the revised abortion law in 1946 introducing a "socialmedical" indication. In particular, it underscores how the voices of women were absent from the process.

It then moves on to a comparative study of the history of abortion in the USA and Canada from 1800 to 1970, that is before Roe (USA) and Morgentaler (Canada). It analyses the distinct approaches of Canada and the USA when dealing with abortion (legislative vs. court-based). Furthermore, it provides a very interesting historical account on how the right of abortion came about in both countries – it sets the stage for Roe v. Wade (pp. 50-52).

Finally, Part II examines the situation in South Africa by calling it "unfinished business". In South Africa, Abortion is a right codified in law: The Choice on Termination of Pregnancy Act 92 of 1996. However, this article argues that the legislative response is not enough. Factors such as lack of enough health facilities that perform abortions, gender inequality etc. are an obstacle to making safe abortion a reality.

Part III – The promise and limits of decriminalization

This Part analyses several laws regarding abortion. First, it explores Malawi's 160-year-old law that criminalises abortion based on a UK law, as well as the failed tentative attempt to adopt a new law in 2020. Interestingly, this article analyses CEDAW resolutions against the UK, which promptly complied with the resolution (pp. 92-93).

Secondly, it studies the recently adopted law in Thailand on 7 February 2021 that makes abortion available up to 12 weeks' gestation period. However, this article criticises that the law creates a loophole as the abortion must be performed by a physician or a registered medical facility and in compliance with the law, greatly medicalizing abortion.

Finally, this Part examines Australian laws and policy over the past 20 years and while acknowledging the significant advances in reproductive rights, it notes that a number of barriers to abortion still remain. This chapter is better read in conjunction with Chapter 10, also about Australia.

Part IV – Abortion in popular politics

This Part begins with an excellent comparative public policy study between France and the United States. In particular, it discusses the weaknesses of Roe v. Wade, underlining the role and analysis of the late justice Ruth Bader Ginsburg. It also puts into context the superiority of the French approach regarding abortion, which is proven with the reversal of Roe.

It then analyses abortion law in China, a State that has the most lenient abortion policies in the world. It discusses the Chinese one-child policy, which then changed to two and even three children-policy, as well as sex-selective abortions.

Subsequently, it recounts how South Australia became the last Australian jurisdiction to modernise its abortion laws and underlines the fact that laws in Australian jurisdictions on this topic are uneven and no two laws are the same.

Finally, it examines abortion history in Israel noting that apart from health reasons, abortions on no specific grounds are mainly intended for out-of-wedlock pregnancies. As a result, abortion is restricted to married women unless they claim adultery, a ground that must be reviewed by a Committee. Apparently, this leads married women to lie to get an abortion and go through the shameful process of getting approval by a Committee.

Part V – Movements against abortion

This Part begins with abortion politics in Brazil and the backlash that occurred with the government of former president Bolsonaro who, as is well known, is against abortion. It recounts a case where a priest filed an habeas corpus in favour of a foetus who had a severe birth defect. Although the case arrived at the Federal Supreme Court, it was not decided as the child died 7 minutes after being born (p. 232).

Secondly, a history scholar recounts the pro-life movement across continents and analyses what drives them (*i.e.* gender and religion).

Finally, it deals with abortion law in Poland and Hungary and the impact of illiberal courts. In particular, it discusses the trends against abortion and goes on to explain an interesting concept of “illiberal constitutionalism”. The authors argue that they do not see Poland and Hungary as authoritarian systems but as illiberal States, an undoubtedly interesting concept.

Part VI – Race, sex and religion

This Part begins examining the sex-selective abortions in India. In particular, the authors recommend an equality-based approach instead of anti-discriminatory approach in order to avoid recognising personhood to the foetus.

It then continues with an analysis of abortion law in the Arab world. The authors note that there is scant but emerging literature and that abortion laws in this region are – unsurprisingly – punitive or very restrictive. Interestingly, the position of Tunisia differs from other Arab States.

Finally, it discusses the struggles in Ecuador where a decision of the constitutional court of 2021 decriminalising abortion in cases of rape. It declared unconstitutional an article of the Ecuadorian Criminal Code, and in 2022 the legislature approved a bill based on this ruling. It also refers to teenage pregnancy and violence.

Part VII – The role of international human rights

For those interested in international human rights, this will be the most fascinating Part of the book. Part VII calls for the decriminalization of abortion in *all circumstances* and it supports this argument by making reference to several human rights documents such as those issued by the Human Rights Committee (in particular, General Comment No 36 – Article 6: Right to life) and the Committee on the Elimination of Discrimination against Women (referring to a myriad of general comments and concluding observations).

Subsequently, this Part challenges the classification of European abortion law as *fairly liberal* and provides some convincing arguments (including the setbacks in Poland in this regard and other procedural or legal barriers to access abortion in more liberal States) and some surprising facts such as the practice in the Netherlands (see footnote 60). The authors -fortunately- dared to say that this chapter is drafted from a feminist perspective as opposed to the current "male norm" in legal doctrinal scholarship.

Finally, this Part explains the history of abortion laws including the fascinating recent developments in Argentina and Ireland (referred to as "small island"!) and the influence (or the lack thereof) of international human rights law. In particular, it makes reference to the Argentinian Law 27,610 of 2020 (now unfortunately in

peril with the new government) and the repealing by referendum of the 8th Amendment in Ireland in 2018.

Below are a few personal thoughts and conclusions that particularly struck me from the book:

Starting from the beginning: the title of the book and the definitions.

In my view, and as I previously mentioned, the title of the book is somewhat misleading. Strictly speaking, there is no such thing as "international" abortion law but rather abortion prompts a discussion of international human rights, such as women's rights and the right to life, and whether or not national laws are compliant with these rights or are coherent within their own national legal framework. This is in contrast to international child abduction / adoption laws where international treaties regulate those very topics.

While perhaps counterintuitive, the definition of a "woman" has been controversial; see for example the Australian versus the Thai approaches. The Australian approach deals with gender identification and the fact that persons who do not identify as a woman can become pregnant (p. 124, footnote 1). While the Thai approach defines a woman as those capable of bearing children (p. 112). Needless to say, the definition of a woman is essential when legislating on abortion and unavoidably reflects the cultural and political complexities of a particular society. A brief reference is made to men and gender non-conforming people and their access to abortion (p. 374, footnote 2).

A surprising fact is the pervasive sex-selective abortion in some countries (sadly against female foetuses), such as India and China, and which arguments are invoked by scholars to avoid them, without falling into the "trap" of recognising personhood to the foetus.

More importantly, this book shows that the abortion discussion is much more than the polarised "pro-life" and "pro-choice" movements. The history of abortion is complicated, full of intricacies. And what is frustrating to some, this area is rapidly evolving sometimes at the whim of political parties.

Most authors seem to agree that a legislative approach to abortion is more

recommended than a court-based approach. Indeed, there is a preference for democratically elected lawmakers when it comes to dealing with abortion. This is evident from the recent setbacks that occurred in the USA.

Having said that, those expecting an in-depth analysis of the landmark US decision Dobbs v. Jackson Women's Health Organization 597 U.S. 215 (2022), which overturned Roe v. Wade, will be disappointed (only referred to very briefly in the introduction and Chapters 8, 11 and 13). Instead, however, you will be able to immerse yourself into a multidisciplinary study of abortion law, including topics such as politics, sociology, constitutional law, health law and policy, history, etc. In addition, you will read unexpected facts such as the role of Pierre Trudeau (former Prime Minister (PM) of Canada and father of current Canadian PM, Justin Trudeau – p. 56 *et seq.*) in abortion law in Canada or the delivering of abortion pills via drones (p. 393).

Because of all the foregoing, and whatever one's standpoint on abortion is, I fully recommend this book. But perhaps a cautionary note: people in favour of reproductive rights will be able to enjoy the book more fully.

I would like to end this book review with the words of the French writer and philosopher Simone de Beauvoir, which appear in her book entitled the Second Sex and which are also included in chapter 8 (p. 159) of this book:

"*Never forget that a political, economic or religious crisis would suffice to call women's rights into question*"

Full citation:

"*Rien n'est jamais définitivement acquis. Il suffira d'une crise politique, économique ou religieuse pour que les droits des femmes soient remis en question. Votre vie durant, vous devrez rester vigilantes.*"

Rivista di diritto internazionale privato e processuale (RDIPP) No 3/2023: Abstracts

The third issue of 2023 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) was just released. It features:

Pietro Franzina, Professor at the Università Cattolica del Sacro Cuore**, Un nuovo diritto internazionale privato della protezione degli adulti: le proposte della Commissione europea e gli sviluppi attesi in Italia** (A New Private International Law on the Protection of Adults: The European Commission's Proposals and the Developments Anticipated in Italy; in Italian)

> The European Commission has presented on 31 May 2023 two proposals aimed to enhance, in cross-border situations, the protection of adults who are not in a position to protect their interests due to an impairment or the insufficiency of their personal faculties. One proposal is for a Council decision that would authorise the Member States to ratify, in the interest of the Union, the Hague Convention of 13 January 2000 on the international protection of adults, if they have not done so yet. The decision, if adopted, would turn the Convention into the basic private international law regime in this area, common to all Member States. The other proposal is for a regulation the purpose of which is to improve, in the relationships between the Member States, the cooperation ensured by the Convention. The paper illustrates the objects of the two proposals and the steps that led to their presentation. The key provisions of the Hague Convention are examined, as well as the solutions envisaged in the proposed regulation to improve the functioning of the Convention. The paper also deals with the bill, drafted by the Italian Government and submitted to the Italian Parliament a few days before the Commission's proposals were presented, to prepare for the ratification of the Convention by Italy and provide for its implementation in

the domestic legal order. The bill, it is argued, requires extensive reconsideration as far as the domestic implementation of the Convention is concerned. Alternative proposals are discussed in the paper in this regard.

This issue also comprises the following comment:

Riccardo Rossi, Juris Doctor, **Reflections on Choice-of-Court Agreements in Favour of Third States under Regulation (EU) No 1215/2012**

This article tackles the absence of a provision addressing choice-of-court agreements in favour of third States under Regulation (EU) No 1215/2012 ("Brussels I*a* Regulation"). The CJEU case law and the present structure of the Regulation leave no room for the long-debated argument of *effet réflexe*. In light of Arts 33 and 34 (and Recital No 24), enforcing such agreements is now limited to the strict respect of the priority rule in the trans-European dimension. The first part of the article deals with the consequences of such a scheme. Namely, forum running, possible interferences with the free circulation of judgments within the EU pursuant to Art 45(1)(d), and inconsistencies with the 2019 Hague Convention. In its second part, from a *de lege ferenda* perspective, the article examines the most delicate issues raised by the need for introducing a new provision enforcing jurisdiction agreements in favour of third States: from the jurisdiction over the validity of such agreements, to the applicable law, to the weight to be given to the overriding mandatory provisions of the forum. Finally, it proposes a draft of two new provisions to be implemented in the currently discussed review of the Brussels I*a* Regulation.

In addition to the foregoing, this issue includes a chronicle by *Francesca C. Villata*, Professor at the University of Milan, **Il regolamento (UE) 2023/1114 relativo ai mercati delle cripto-attività: prime note nella prospettiva del diritto internazionale privato** (Regulation (EU) 2023/1114 on Market in Crypto-Assets: First Remarks from a Private International Law Perspective; in Italian).

Finally, the following book review by *Francesca C. Villata*, Professor at the University of Milan, is featured: **Gabriele CARAPEZZA FIGLIA, Ljubinka KOVA?EVI?, Eleonor KRISTOFFERSSON (eds)**, ***Gender Perspectives in Private Law***, Springer Nature, Chan, 2023, pp. XV-242.

China Adopts Restrictive Theory of Foreign State Immunity

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 September 1, 2023, the Standing Committee of the National People's Congress promulgated the Foreign State Immunity Law of the People's Republic of China (FSIL) (English translation here). When the law enters into force on January 1, 2024, China will join those countries—a clear majority—that have adopted the restrictive theory of foreign state immunity. For the law of state immunity, this move is particularly significant because China had been the most important adherent to the rival, absolute theory of foreign state immunity.

In two prior posts (here and here), I discussed a draft of the FSIL (English translation here). In this post I analyze the final version of the law, noting some of its key provision and identifying changes from the draft, some of which address issues that I had identified. I also explain why analysts who see China's new law as a form of "Wolf Warrior Diplomacy" are mistaken. Contrary to some suggestions, the FSIL will not allow China to sue the United States over U.S. export controls on computer chips or potential restrictions on Tiktok. Rather, the FSIL is properly viewed as a step towards joining the international community on an important question of international law.

The Restrictive Theory of Foreign State Immunity

Under the restrictive theory of foreign state immunity, foreign 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 moved from an absolute theory of foreign state immunity, under which countries could never be sued in another country's courts, to the

restrictive theory. Russia and China long adhered to the absolute theory. But Russia joined the restrictive immunity camp in 2016, when its law on the jurisdictional immunity of foreign states went into effect.

In 2005, China signed the U.N. Convention on Jurisdictional Immunities of States and Their Property, which follows the restrictive theory. But China has not ratified the U.N. Convention, and the Convention has not gained enough signatories to enter into force. As I noted in a prior post, China stated in 2009 that, despite signing the U.N. Convention, its position on foreign state immunity had not changed and that it still followed the absolute theory.

China's new FSIL therefore marks a significant shift in China's position on an important question of international law. As I explained in my earlier posts and discuss further below, the FSIL follows the U.N. Convention in many respects. By adopting this law, however, China has extended these rules not only to other countries that may join the Convention but to all countries, even those like the United States that are unlikely ever to sign this treaty.

Significant Provisions of the State Immunity Law

China's FSIL begins, as most such laws do, with a general presumption that foreign states and their property are immune from jurisdiction. Article 3 says: "Foreign states and their property enjoy immunity from the jurisdiction of PRC courts, except as otherwise provided by this Law." Article 2 defines "foreign states" to include "foreign sovereign states," "state organs or constituent parts of foreign sovereign states," and "organizations or individuals who are authorized by foreign sovereign states to exercise sovereign authority and who engage in activities on the basis of such authorization." These provisions generally track Articles 1 and 2(1)(b) of the U.N. Convention.

Waiver Exception

Articles 4-6 of the FSIL law provide that a foreign state is not immune from jurisdiction when it has consented to the jurisdiction of Chinese courts. Article 4 sets forth means by which a foreign state may expressly consent to jurisdiction. Article 5 provides that a foreign state is deemed to consent if it files suit as a

plaintiff, participates as a defendant and files "an answer or a counterclaim on the merits of the case," or participates as a third party in Chinese courts. Article 5 further provides that a foreign state participating as a plaintiff or third party waives immunity from counterclaims arising from the same legal relationship or facts. Article 6, on the other hand, says that a foreign state shall not be deemed to have consented to jurisdiction by appearing in Chinese court to assert immunity, by having its representatives testify, or by choosing Chinese law to govern a particular matter. These provisions track Articles 7-9 of the U.N. Convention.

Commercial Activities Exception

The FSIL 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 "took place in PRC territory, or have had a direct effect in PRC territory even though they took place outside PRC territory." Article 7 defines "commercial activity" as "transactions of goods or services, investments, borrowing and lending, and other acts of a commercial nature that do not constitute an exercise of sovereign authority." To determine whether an act is commercial, "a PRC court shall undertake an overall consideration of the act's nature and purpose." Like the U.N. Convention, the FSIL deals separately with employment contracts (Article 8) and intellectual property cases (Article 11).

Article 7's reference to both "nature and purpose" is significant. U.N. Convention Article 2(2) allows consideration of both. But considering "purpose" is likely to result in a narrower exception—and thus in broader immunity for foreign states—than considering "nature" alone. Under the U.S. Foreign Sovereign Immunities Act (FSIA), the commercial character of an act is determined only by reference to its nature and not by reference to its purpose. Applying this definition, the U.S. Supreme Court has held that issuing foreign government bonds is a commercial activity, even if done for a sovereign purpose. It is unclear if Chinese courts applying the FSIL will reach the same conclusion.

Territorial Tort Exception

Article 9 of the FSIL creates an exception to immunity for claims "arising from personal injury or death or damage to movable or immovable property caused by the relevant act of the foreign state in PRC territory." This generally tracks Article 12 of the U.N. Convention.

Property Exception

Article 10 of the FSIL 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 follows Article 13 of the U.N. Convention.

Arbitration Exception

Article 12 provides that a foreign state that has agreed to arbitrate disputes is not immune from jurisdiction with respect to certain matters requiring review by a court. These include "the validity of the arbitration agreement," "the confirmation or enforcement of the arbitral award," and "the setting aside of the arbitral award." This provision corresponds to Article 17 of the U.N. Convention.

Reciprocity Clause

China's FSIL also contains a reciprocity clause. Article 21 provides: "Where foreign states accord the PRC and its property narrower immunity that is provided by this Law, the PRC will apply the principle of reciprocity." This means, for example, that Chinese courts could hear claims against the United States for expropriations in violation of international law or for international terrorism, because the U.S. FSIA has exceptions for suchclaims, even though China's FSIL does not.

The U.N. Convention does not have a reciprocity provision. Nor do most other states that have codified the law of state immunity. But Russia's 2016 law on the jurisdictional immunities of foreign states does contain such a clause in Article 4(1), and Argentina's state immunity law contains a reciprocity clause specifically for the immunity of central bank assets, reportedly adopted at China's request.

The FSIL's reciprocity clause is consistent with the emphasis on reciprocity that one finds in other provisions of Chinese law. For example, Article 289 of China's Civil Procedure Law (numbered Article 282 in this translation, prior to the law's 2022 amendment of other provisions), provides for the recognition and enforcement of foreign judgments "pursuant to international treaties concluded or acceded to by the People's Republic of China or in accordance with the

principle of reciprocity."

The example of foreign judgments also shows that reciprocity may be interpreted narrowly or broadly. China used to insist on "de facto" reciprocity for foreign judgments—proof that the foreign country had previously recognized Chinese judgments. Last year, however, China shifted to a more liberal "de jure" approach, under which reciprocity is satisfied if the foreign country *would* recognize Chinese judgments even if it has not already done so. Time will tell how Chinese courts interpret reciprocity under the FSIL.

Service

Article 17 of the FSIL provides that Chinese courts may serve process on a foreign state as provided in treaties between China and the foreign state or by "other means accepted by the foreign state and not prohibited by PRC law." (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. This provision also follows the U.N. Convention closely, specifically Article 22.

Default Judgments

If the foreign state does not appear, Article 18 of China's draft law requires a Chinese court to "sua sponte ascertain whether the foreign state enjoys immunity from its 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 will have six months to appeal. Article 23 of the U.N. Convention is similar but with four-month time periods.

Immunity of Property from Execution

Under customary international law, the immunity of a foreign state's property from compulsory measures like execution of a judgment is separate from—and generally broader than—a foreign state's immunity from suit. Articles 13-15 of the FSIL address the immunity of a foreign state's property from compulsory measures.

Article 13 states the general rule that "[t]he property of a foreign state enjoys immunity from the judicial compulsory measures of PRC courts" and further provides that a foreign state's waiver of immunity from suit is not a waiver of immunity from compulsory measures. Article 14 creates three exceptions to immunity: (1) when the foreign state has expressly waived such immunity; (2) when the foreign state has specifically earmarked property for the enforcement of such measures; and (3) "to implement the effective judgments and rulings of PRC courts" when the property is used for commercial activities, relates to the proceedings, and is located in China. Article 15 goes on to identify types of property that shall *not* be regarded as used for commercial activities for the purpose of Article 14(3), including the bank accounts of diplomatic missions, property of a military character, central bank assets, and property of scientific, cultural, or historical value.

As discussed further below, the addition of "rulings" (??) to Article 14(3) is significant because Chinese court decisions that recognize foreign judgments are considered "rulings." This change means that the exception may be used to enforce *foreign* court judgments against the property of a foreign state located in China by obtaining a Chinese court ruling recognizing the foreign judgment. This change brings the FSIL into greater alignment with Articles 19-21 of the U.N. Convention, which similarly permit execution of domestic and foreign judgments against the property of foreign states.

Foreign Officials

As noted above, Article 2 of the FSIL defines "foreign state" to include "individuals who are authorized by foreign sovereign states to exercise sovereign authority and who engage in activities on the basis of such authorization." The impact of the FSIL on foreign official immunity is limited by Article 20, which says that the FSIL shall not affect diplomatic immunity, consular immunity, special-missions immunity, or head of state immunity. But Article 20 makes no mention of conduct-based immunity—that is, the immunity that foreign officials enjoy under customary international law for acts taken in their official capacities.

Thus, foreign officials not mentioned in Article 20 will be subject to suit in Chinese courts, even for acts taken in their official capacities, if one of the exceptions discussed above applies. If, for example, a foreign official makes misrepresentations in connection with a foreign state's issuance of bonds, the

FSIL's commercial activities exception would seem to allow claims for fraud not just against the foreign state but also against the foreign official.

The FSIL's treatment of foreign officials generally tracks the U.N. Convention, both in defining "foreign state" to include foreign officials (Art. 2(1)(b)(iv)) and in exempting diplomats, consuls, and heads of state (Art. 3). But, as I noted in an earlier post, there is no reason China had to follow the U.N. Convention's odd treatment of conduct-based immunity. Doing so in the absence of a treaty, moreover, appears to violate international law by affording some foreign officials less immunity than customary international law requires.

Some Changes from the Draft Law

The NPC Standing Committee made small but potentially significant changes to the draft law in promulgating the FSIL. The NPC Observer has a helpful chart comparing the Chinese text of the final version to the draft law.

One change that others have noted is the explicit mention of "borrowing and lending" (??) in the commercial activities exception in Article 7. The enormous amounts that China has loaned to foreign states under the Belt and Road Initiative may explain this addition. But the practical effect of the change seems limited for two reasons. First, "borrowing and lending" would have naturally fallen into the catch-all phrase "other acts of a commercial nature" in any event. Second, as noted above, Article 7 instructs Chinese courts to "undertake an overall consideration of the act's nature and purpose." Considering an act's purpose may lead Chinese courts to conclude that some "borrowing and lending" involving foreign states is not commercial if it is done for governmental purposes.

The NPC Standing Committee also helpfully changed Article 9's territorial tort exception to clarify when that exception applies. In an earlier post, I wrote that the draft law did "not make clear whether it is the tortious act, the injury, or both that must occur within the territory of China." The final text of the FSIL now clearly states that the relevant conduct of the foreign state, though not the injury, must occur within China (???????????? ??????????????). This position is generally consistent with Article 12 of the U.N. Convention but, most importantly, it is simply clearer than the text of the draft law.

Another small but important change is the addition of "rulings" (??) to Article

14(3)'s exception for compulsory measures to enforce judgments. The corresponding provision in the draft law referred to Chinese "judgments" (??) but not to "rulings." As I pointed out before, this omission was significant because Chinese decisions recognizing foreign court decisions are designated "rulings" rather than "judgments." Under the draft law, the exception would have allowed execution against the property of a foreign state for Chinese court judgments but not for Chinese rulings recognizing foreign judgments. By adding "rulings" to the final text of the FSIL, the NPC Standing Committee has brought this exception more in line with Article 19(c) of the U.N. Convention and made it available to help enforce foreign judgments against foreign-state-owned property in China if the other requirements of the exception are met.

In another change from the draft law, the NPC Standing Committee has added "PRC Courts" (??????????) to the beginning of Article 17 on service of process. The general practice in China is that courts, rather than litigants, serve process. This is one reason why the practice of some U.S. courts to authorize alternative service on Chinese defendants by email is problematic. For present purposes, the change simply clarifies something that Chinese practitioners would take for granted but non-Chinese practitioners might not.

Article 20 provides that the FSIL does not affect the immunities of certain foreign officials. In its second paragraph, dealing with head-of-state immunity, the NPC Standing Committee has added "international custom" (????? ?) as well as "PRC laws" and "international agreements." This makes sense. Although diplomatic immunity, consular immunity, and other immunities mentioned in the first paragraph of Article 20 are governed by treaties, head-of-state immunity is governed not by treaty but by customary international law.

Finally, in Article 21's reciprocity provision, the NPC standing committee has eliminated the word "may" (??). The effect of this change is to make the application of reciprocity mandatory when foreign states accord China and its property narrower immunity than is provided by the FSIL.

The Impact on China-U.S. Relations

Recent media coverage has suggested that China views the FSIL as a legal tool in its struggle with the United States. A senior official in China's Ministry of Foreign Affairs was quoted as saying that the law "provides a solid legal basis for China to

take countermeasures" against discriminatory action by foreign courts and may have a "preventive, warning and deterrent" effect. One analyst has even suggested that the FSIL is "an important part of China's Wolf Warrior diplomacy, and another step forward in its diplomatic bullying of other countries." Such comments miss the mark. As Professor Donald Clarke aptly observes: "All China is doing is adopting a policy toward sovereign immunity that is the one already adopted by most other states."

Professor Sophia Tang points out that, although suits against China in U.S. courts over Covid-19 pushed the issue of state immunity up on Chinese lawmakers' agenda, the question had been under discussion for years. The Covid-19 lawsuits may explain why China included Article 21's provision on reciprocity, but it bears emphasis that these suits against China were *dismissed* by U.S. courts on grounds of state immunity. If Congress were foolish enough to amend the FSIA to permit such suits, the FSIL's reciprocity provision would allow China to respond in kind, but this scenario seems unlikely.

China's FSIL will not permit suits against the United States for other actions that China has protested, such as U.S. export controls on selling semiconductors to China or potential restrictions on TikTok. These are governmental actions, and the restrictive theory adopted by the FSIL maintains state immunity for governmental actions.

On the other hand, the FSIL clearly will permit suits in Chinese courts against foreign governments that breach commercial contracts. As Professor Congyan Cai points out, the FSIL may play a role in enforcing contracts with foreign governments under China's Belt and Road Initiative. More generally, Clarke notes, China's past adherence to the absolute theory meant that Chinese parties could not sue foreign states in Chinese courts even though foreign parties could sue China in foreign courts. "China finally decided," he continues, "that there was no point in maintaining the doctrine of absolute sovereignty, since other states weren't respecting it in their courts and the only people it was hurting were Chinese plaintiffs."

Ultimately, the FSIL is a step in what Professor Cai has called China's "progressive compliance" with international law, which helps legitimate China as a rising power. The FSIL brings Chinese law into alignment with the law on state immunity in most other countries, ending its status as an outlier in this area.

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

Change of gender in private international law: a problem arises between Scotland and England

Written by Professor Eric Clive

The Secretary of State for Scotland, a Minister of the United Kingdom government, has made an order under section 35 of the Scotland Act 1998 blocking Royal Assent to the Gender Recognition Reform (Scotland) Bill 2022, a Bill passed by the Scottish Parliament by a large majority. The Scottish government has challenged the order by means of a petition for judicial review. The case is constitutionally important and may well go to the United Kingdom Supreme court. It also raises interesting questions of private international law.

At present the rules on obtaining a gender recognition certificate, which has the effect of changing the applicant's legal gender, are more or less the same in England and Wales, Scotland and Northern Ireland. The Scottish Bill would replace the rules for Scotland by less restrictive, de-medicalised rules. An unfortunate side effect is that Scottish certificates would no longer have automatic effect by statute in other parts of the United Kingdom. The United Kingdom government could remedy this by legislation but there is no indication that it intends to do so. Its position is that it does not like the Scottish Bill.

One of the reasons given by the Secretary of State for making the order is that having two different systems for issuing gender recognition certificates within the United Kingdom would cause serious problems. A person, he assumes, might be legally of one gender in England and another in Scotland. There would therefore be difficulties for some organisations operating at United Kingdom level – for example, in the fields of tax, benefits and pensions. This immediately strikes a private lawyer as odd. Scotland and England have had different systems in the

law of persons for centuries – in the laws on marriage, divorce, legitimacy, incapacity and other matters of personal status – and they have not given rise to serious problems. This is because the rules of private international law, even in the absence of statutory provision, did not allow them to.

In a paper on *Recognition in England of change of gender in Scotland: a note on private international law aspects*[1] I suggest that gender is a personal status, that there is authority for a general rule that a personal status validly acquired in one country will, subject to a few qualifications, be recognised in others and that there is no reason why this rule should not apply to a change of gender under the new Scottish rules.

The general rule is referred to at international level. In article 10 of its Resolution of September 2021 on *Human Rights and Private International Law*, the Institute of International Law says that:

> *Respect for the rights to family and private life requires the recognition of personal status established in a foreign State, provided that the person concerned has had a sufficient connection with the State of origin … as well as with the State whose law has been applied, and that there is no manifest violation of the international public policy of the requested State ….*

So far as the laws of England and Scotland are concerned, there are authoritative decisions and dicta which clearly support such a general rule. Cases can be found in relation to marriage, divorce, nullity of marriage, legitimacy and legitimation. A significant feature is that the judges have often reasoned from status to particular rules. It cannot be said that there are just isolated rules for particular life events. And the rules were developed at common law, before there were any statutory provisions on the subject.

Possible exceptions to the general rule – public policy, no sufficient connection, contrary statutory provision, impediment going to a matter of substance rather than procedure – are likely to be of little if any practical importance in relation to the recognition in England of changes of gender established under the proposed new Scottish rules.

If the above arguments are sound then a major part of the Secretary of State’s

reasons for blocking the Scottish Bill falls away. There would be no significant problem of people being legally male in Scotland but legally female in England, just as there is no significant problem of people being legally married in Scotland but unmarried in England. Private international law would handle the dual system, as it has handled other dual systems in the past. Whether the Supreme Court will get an opportunity to consider the private international law aspects of the case remains to be seen: both sides have other arguments. It would be extremely interesting if it did.

From the point of view of private international law, it would be a pity if the Secretary of State's blocking order were allowed to stand. The rules in the Scottish Bill are more principled than those in the Gender Recognition Act 2004, which contains the existing law. The Scottish Bill has rational rules on sufficient connection (essentially birth registered in Scotland or ordinary residence in Scotland). The 2004 Act has none. The Scottish Bill has a provision on the recognition of changes of gender under the laws of other parts of the United Kingdom which is drafted in readily understandable form. The corresponding provisions in the 2004 Act are over-specific and opaque. The Scottish Bill has a rule on the recognition of overseas changes of gender which is in accordance with internationally recognised principles.

The 2004 Act has the reverse. It provides in section 21 that: A person's gender is not to be regarded as having changed by reason only that it has changed under the law of a country or territory outside the United Kingdom. This is alleviated by provisions which allow those who have changed gender under the law of an *approved overseas country* to use a simpler procedure for obtaining a certificate under the Act but still seems, quite apart from any human rights aspects, to be unfriendly, insular and likely to produce avoidable difficulties for individuals.

[1] Clive, Eric, Recognition in England of change of gender in Scotland: A note on private international law aspects (May 30, 2023). Edinburgh School of Law Research Paper No. 2023/06, Available at SSRN: https://ssrn.com/abstract=4463935 or http://dx.doi.org/10.2139/ssrn.4463935

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.

Foreign Child Marriages and Constitutional Law – German Constitutional Court Holds Parts of the German Act to Combat Child Marriages Unconstitutional

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Update: the Court's press release is now available in English.

I.

Yesterday, on March 29, 2023, the German Constitutional Court published its long-awaited (and also long) decision on the German "Act to Combat Child Marriage" (Gesetz zur Bekämpfung von Kinderehen). Under that law, passed in 2017 in the midst of the so-called "refugee crisis", marriages celebrated under foreign law are voidable if one of the spouses was under 18 at the time of marriage (art. 13 para. 3 no. 2 EGBGB), and null and void if they were under 16 (art. 13 para. 3 no. 1 EGBGB) – regardless of whether the marriage is valid under the normally applicable foreign law. In 2018, the German Federal Court of Justice refused to apply the law in a concrete case and asked the Constitutional Court for a decision on the constitutionality of the provision.

That was a long time ago. The wife in the case had been fourteen when the case started in the first instance courts; she is now 22, and her marriage certainly no longer a child marriage. And as a matter of fact, the Constitutional Court decision itself is already almost two months old; it was rendered on February 1. This and the fact that the decision cites almost no sources published after 2019 except for new editions of commentaries, suggests that it may have existed as a draft for much longer. One reason for the delay may have been internal: the president of the Court, Stephan Harbarth, was one of the law's main drafters. The Court decided in 2019 that he did not have to recuse himself, amongst others for the somewhat questionable reason that his support for the bill was based on political, not constitutional, considerations. (Never mind that members of parliament are obligated by the constitution also in the legislative process, and that a judge at the Constitutional Court may reasonably be expected to be hesitant when judging on the unconstitutionality of his own legislation.)

II.

In the end, the Court decided that the law is, in fact, unconstitutional: it curtails the special protection of marriage, which the German Constitution provides, and this curtailment is not justified. The decision is long (more than sixty pages) but characteristically well structured so a summary may be possible.

Account to the Court, the state's duty to protect marriage (art. 6 para. 1 of the Basic Law, the German Constitution) includes not only marriage as an institution but also discrete, existing marriages, and not only the married status itself but also the whole range of legal rules surrounding it and ensuing from it. Now, the Court has provided a definition of marriage as protected under the Basic Law: it is a union, in principle in perpetuity, freely entered into, equal and autonomously structured, and established by the marriage ceremony as a formalized, outwardly recognizable act. (Early commentators have spotted that "between one man and one woman" is no longer named as a requirement, but it seems far-fetched to view this as a stealthy inclusion of same-sex marriage within the realm of the Constitution.) The stated definition includes marriages celebrated abroad under foreign law. Moreover, it includes marriages celebrated at a very young age as long as the requirement is met that they were entered into freely.

A legislative curtailment of this right could be justified. But the legislator has comparably little discretion where a rule, as is the case here, effectively amounts to an actual impediment to marriage. Whether a curtailment is in fact justified is a matter for the classical test of proportionality: the law must have a proper and legitimate purpose; it must be suitable towards that purpose; it must be necessary towards that purpose; and it must be adequate ("proportional" in the narrow sense) towards the purpose, in that the balance between achieving the purpose and curtailment of the right must not be out of proportion.

Here, the law's purposes themselves – the protection of minors, the public ostracization of child marriage, and legal certainty – isarelegitimate. The worldwide fight against child marriage is a worthy goal. So is the desire for legal certainty regarding the validity of specific marriages.

The law is also suitable to serve these purpose: the minor is protected from the legal and factual burdens arising from the marriage; the law may deter couples abroad from getting married (or so the legislator may legitimately speculate; empirical data substantiating this is not available.) A clear age rule avoids the uncertainty of a case-by-case *ordre public* analysis as the law prior to 2017 had required.

According to the Court, the measures are also necessary towards these purposes, because alternative measures would not be similarly successful. Automatic nullity of the affected marriages is more effective, and potentially less intrusive, than

determining nullity in individual proceedings. It is also more effective than case-by-case determinations under a public policy analysis. And it offers better protection of minors than forcing them to go through a procedure aimed at annulling the marriage would.

Nonetheless, the Court sees in the law a violation of the Constitution: the measure is disproportionate to the curtailment of rights. That curtailment is severe: the law invalidates a marriage that the spouses may have considered valid, may have consummated, and around which they may have built a life. Potentially, they would be barred from living together although they consider themselves to be married.

The Court grants that the protection of minors is an important counterargument in view of the risks that child marriages pose to them. So is legal certainty regarding the question of whether a marriage is or is not valid.

But the legislation is disproportionate for two reasons. First, the law does not regulate the consequences of its verdict on nullity. So, not only does the minor spouse lose the legal protections of marriage, including the right to cohabitation; they also lose the rights arising from a proper dissolution of the marriage, including financial claims against the older, and frequently wealthier, spouse. These consequences run counter to the purpose of protecting the minor. Second, the law does not enable the spouses to carry on their marriage legally after both have reached maturity unless they remarry, and remarriage may well be complicated. This runs counter to the desire to protect free choice.

The court could have simply invalidated the law and thereby have gone back to the situation prior to 2017. Normally, substantive validity of a marriage is determined by the law of each spouse's nationality (art. 13 para. 1 EGBGB). Whether that law can be applied in fact, is then a matter of case-by-case determinations based on the public policy exception (art. 6 EGBGB). That is in fact the solution most private international lawyer (myself included) preferred. The Court refused this simple solution with the speculation that this might have resulted in bigamy for (hypothetical) spouses who had married someone else under the assumption that their marriages were void. (Whether such cases do in fact exist is not clear.) Therefore, the Court has kept the law intact and given the legislator until June 30, 2024 to reform it. In the meantime, the putative spouses of void marriages are also entitled to maintenance on an analogy to the rules on

divorce.

III.

The German Constitutional Court has occasionally ruled on the constitutionality of choice-of-law rules before. Its first important decision – the Spaniard decision of 1971 – dealt with whether the Constitution had anything to say about choice of law at all, given that choice of law was widely considered to be purely technical at the time, with no content of constitutional relevance. That decision, which addressed a Spanish prohibition on remarrying after divorce, already concerned the right to marry. Another, more recent decision held that a limping marriage, invalid under German law though valid under foreign law, must nonetheless be treated as a marriage for purposes of social insurance. Both decisions rear their heads in the current decision, forming a prelude to a constitutional issue that now resurfaces: the court is interested less in the status of marriage itself and more in the actual protections that emerge from a marriage.

The legal consequences of a marriage are, of course, manifold, and the legislator's explicit determination that the child marriage should yield no consequences whatsoever is therefore far-reaching. (Konrad Duden's proposal to interpret the act so as to restrict this statement to consequences that are negative for the minor is not discussed, unfortunately). Interestingly, the Court accords no fewer than one fifth of its decision, thirteen pages, to a textbook exposition of the relevance of marriage in private international law. Its consequences were among the main reasons for near-unanimity in the German conflict-of-laws field in opposition to the legal reform. Indeed, another fifth of the decision addresses the positions of a wide variety of stakeholders and experts –the federal government and several state governments, the Max Planck Institute for Comparative and International Private Law, a variety of associations concerned with the rights of women, children, and human rights as well as psychological associations. Almost all of them urged the Court to rule the law unconstitutional.

These critics will regard the decision as an affirmation, though perhaps not as a full one, because the Court, worried only about consequences, essentially upholds the legislator's decision to void child marriages entered into before the age of sixteen. This is unfortunate not only because the status of marriage itself is often

highly valuable to spouses, as we know from the long struggles for the acceptance of same-sex marriage rather than mere life partnership. Moreover, the result is the acceptance of limping marriages that are however treated as though they were valid. This may be what the Constitution requires. From the perspective of private international law, it seems slightly incoherent to uphold the nullity of a marriage on one hand and then afford its essential protections on the other, both times on the same justification of protecting minors. In this logic, the Court does not question whether the voiding of the marriage is generally beneficial to all minors in question. Moreover, in many foreign cultures, these protections are the exclusive domain of marriage. It must be confusing to tell someone from that culture that the marriage they thought was valid is void, but that it is nonetheless treated as though it were valid for matters of protection.

IV.

An interesting element in the decision concerns the Court's use of comparative law. Germany's law reform was not an outlier: it came among a whole flurry of reforms in Europe that were quite comprehensively compiled and analyzed in a study by the Hamburg Max Planck Institute (it is available, albeit only in German, open access). In recent years, many countries have passed stricter laws vis-à-vis child marriages celebrated under foreign law: France (2006), Switzerland (2012), Spain (2015), the Netherlands (2015), Denmark (2017), Norway (2007/2018), Sweden (2004/2019) and Finland (2019). Such reforms were successful virtue-signaling devices vis-a-vis rising xenophobia (not surprisingly, right-wingers in Germany have already come out again to criticize the Constitutional Court). Substantively, these laws treat foreign child marriages with different degrees of severity – the German law is especially harsh. However, comparative law reveals more than just matters of doctrine. Several empirical reports have demonstrated that foreign laws were not more successful at reducing the number of child marriages than was the German law, which is more a function of economic and social factors elsewhere than of European legislation. Worse, the laws sometimes had harmful consequences, not only for couples separated against their will, but even for politicians: in Denmark, one former immigration minister was impeached after reports by the Danish Red Cross of a suicide attempt, depression, and other negative psychosocial effects of the law on married minors. And surveys have shown that enforcement of the laws has been

spotty in Germany and elsewhere.

The Constitutional Court did not need to pay much attention to these empirical reports. In assessing whether annulling foreign marriages was necessary, the Court did however take guidance from the Max Planck comparative law study, pointing out (nos 182, 189) that the great variety of alternative measures in foreign legislation made it implausible that the German solution – no possibility to validate a marriage at age eighteen – is necessary . This makes for a good example of the usefulness of comparative law – comparative private international law, to be more precise – even for domestic constitutional law. If demonstrating that a measure is necessary requires showing a lack of alternatives, then comparative law can furnish both the alternatives as well as empirical evidence of their effectiveness. That comparative law can be put to such practical use is good news.

V.

The German legislator must now reform its law. What should it do? The Court has hinted at a minimal solution: consider these marriages void without exception, but extend post-divorce maintenance to them, and enable the couple to affirm their marriage, either openly or tacitly, once they are of age. In formulating such rules, comparative analysis of various legal reforms in other countries would certainly be of great help.

But the legislator may also take this admonition from the Constitutional Court as an impetus for a bigger step. Not everything that is constitutionally permissible is also politically and legally sound. The German reform was rushed through in 2017 in the anxiousness of the so-called refugee crisis. The same was true, with some modifications, of other countries' reforms. What the German legislator can learn from them is not only alternative modes of regulation but also that these reforms' limited success is not confined to Germany. This insight could spark legislation that focuses more on the actual situation and needs of minors than on the desire to ostracize child marriage on their backs.

Such legislation may well reintroduce case-by-case analysis, something private international lawyers know not to be afraid of. This holds true especially in view of the fact that the provision does not regulate a mass problem but rather a

relatively small number of cases which is unlikely to create excessive burdens on agencies and the judiciary. If the legislature does not want to go back to the ordre public test, perhaps it could extend the provision of Article 13 para. 3 no. 2 for marriages entered into after the age of 16 to marriages entered into earlier. This would make the marriage merely annullable; in cases of hardship, the sanction could be waived. The legislator could also substitute the place of celebration for the spouses' nationality as the relevant connecting factor for substantive marriage requirements, as the German Council for Private International Law, an advisor to the legislator, has already proposed (Coester-Waltjen, IPRax 2021, 29). This would make it possible to distinguish more clearly between two very different situations: couples wanting to get married in Germany (where the age restriction makes eminent sense) on the one hand, and couples who already got married, validly, in their home countries and find their actually existing marriage to be put in question. Indeed, this might be a good opportunity to move from a system that designates the applicable law to a system that recognizes foreign acts, as is the case already in some other legal systems.

In any case, the Court decision provides Germany with an opportunity to move the fight against child marriage back to where it belongs and where it has a better chance of succeeding – away from private international law, and towards economic and other forms of aid to countries in which child marriage would be less rampant if they were less afflicted with war and poverty.

More on the Validity of the PDVSA 2020 Bonds

Written by Mark Weidemaier, the Ralph M. Stockton, Jr. Distinguished Professor at the University of North Carolina School of Law, and Mitu Gulati, the Perre Bowen Professor of Law at the University of Virginia School of Law.

Governments with no realistic prospect of paying their debts often gamble for redemption, trying desperately to avoid default. Political leaders, with good reason, fear that a debt default will get them thrown out of office. But in trying to hold power, sometimes by borrowing even more, they often make matters worse for the country and its people. A prime example involves the collateralized bonds issued by Venezuelan state oil company, PDVSA.

Venezuela's Gamble

In 2016, PDVSA was about to default on its debt, as was the Venezuelan state itself. At that stage, it was already well beyond the point where the debt should have been restructured, given worsening domestic conditions. Instead, the Maduro government gambled. It conducted a debt swap in which investors exchanged unsecured PDVSA bonds for new ones due in 2020. To sweeten the deal, the PDVSA 2020s were backed by collateral in the form of a 50.1% interest in CITGO Holding, the parent company of U.S. oil refiner CITGO Petroleum. The deal bought a few extra years but put at risk the country's primary asset in the United States.

Even at the time, it was uncertain whether Venezuelan law authorized the transaction. The Venezuelan Constitution requires legislative approval for contracts in the national public interest. Maduro did not seek approval because opposition lawmakers controlled the National Assembly and had made clear they would not grant it. The deal went ahead anyway.

Times have changed. The United States recognizes Juan Guaidó as Venezuela's interim president (for now). The PDVSA 2020 bonds are in default. The

bondholders want their collateral. PDVSA has challenged the validity of the bonds. But the bonds include a choice-of-law clause designating the law of New York. Does this mean that validity is to be determined under New York law? John Coyle recently wrote a terrific post about the case and its significance on this blog. We write to provide some broader context, drawing from our article, Unlawfully Issued Sovereign Debt.

Sovereign Debt and Choice-of-Law Clauses

The story of the PDVSA 2020 bonds is a common one in government debt markets. A government borrows money in dodgy ways or at a time of financial distress. Arguably, the debt contravenes domestic law, although the government may obtain legal opinions affirming its validity. The debt also includes a choice of law clause providing for the application of foreign law, typically that of New York or England. Later, a new government comes to power and disputes the validity of the debt. We have seen this pattern in Venezuela, Mozambique, Ukraine, Zambia, Liberia, Puerto Rico, and in other sovereign and sub-sovereign borrowers. (The pattern goes back even further – for a delightful treatment of the hundreds of such cases from the 1800s involving municipal debt, see here).

These cases raise what seems like a simple question: Does an international bond—i.e., one expressly made subject to foreign law—protect investors against the risk that the bond will later be deemed in violation of the issuer's domestic law? Despite seeming simple, and how frequently the question arises, there is little clarity about the answer. New York law governs a big part of the sovereign debt markets, and the choice-of-law question in the PDVSA 2020 case has been certified to the New York Court of Appeals. Will that court's decision offer clarity?

Variations in Clause Language

Count us skeptical. The problem is not just the unpredictability of choice of law rules. It is that many choice-of-law clauses are drafted in perplexing ways, which leave unclear the extent of protection they offer to investors. Consider three examples. The first is from the PDVSA 2020 bond itself where the relevant language is capitalized (as if capitalization has some magic effect):

> *THIS INDENTURE AND THE NOTES SHALL BE CONSTRUED IN ACCORDANCE WITH, AND THIS INDENTURE AND THE NOTES AND ALL*

> *MATTERS ARISING OUT OF OR RELATING IN ANY WAY WHATSOEVER TO THIS INDENTURE AND THE NOTES (WHETHER IN CONTRACT, TORT OR OTHERWISE) SHALL BE GOVERNED BY, THE LAWS OF THE STATE OF NEW YORK WITHOUT REGARD TO THE CONFLICTS OF LAW PROVISIONS THEREOF (OTHER THAN SECTION 5-1401 OF THE NEW YORK GENERAL OBLIGATIONS LAW)*

This clause apparently seeks to extend New York law to the widest possible range of questions. Whether that includes the question of whether the bonds were validly issued is, as John's post puts it, the "billion-dollar question." And the answer is not clear. The decision by the New York Court of Appeals might provide some clarity on it . . . maybe.

But now consider this clause, from a Brazilian bond (emphasis ours):

> *The indenture and the debt securities will be governed by, and interpreted in accordance with, the laws of the State of New York without regard to those principles of conflicts of laws that would require the application of the laws of a jurisdiction other than the State of New York . . .;* ***provided, further, that the laws of Brazil will govern all matters governing authorization and execution of the indenture and the debt securities by Brazil.***

Does the bold text mean that investors cannot enforce a loan issued in violation of Brazilian law? We aren't sure. As we discuss in the paper, it can be hard to identify questions of "authorization" and "execution," especially in the context of sovereign borrowing. Consider the question whether a loan violates a constitutional or statutory debt limit. Does the debt limit negate the sovereign's capacity to borrow, limit the authority of government officials to bind the sovereign, or make the loan illegal or contrary to policy? How one categorizes the issue will affect the answer to the choice-of-law question. Carve outs like this—which reserve questions of authorization and execution for resolution under local law—appear in around half the New York-law sovereign bonds we examined.

Finally, consider this clause from a Turkish bond (again, emphasis ours):

> *[The] securities will be governed by and interpreted in accordance with the laws of the State of New York, except with respect to the authorization and*

> *execution of the debt securities on behalf of Turkey* ***and any other matters required to be governed by the laws of Turkey, which will be governed by the laws of Turkey***

What now? This "other matters" carve out is even odder than the one for questions of authorization and execution. It hints that additional, unspecified matters might be governed by the sovereign's local law. Indeed, it implies that the sovereign's own law might determine which issues fall within the "other matters" exception. If so, the clause potentially allows the government to create new exceptions to the governing law clause.

Conclusion

Our discussions with senior sovereign debt lawyers have done little to dispel our uncertainty about the meaning of these clauses. They seem just as confused as we are. All we can say with confidence is that many choice of law clauses include traps for unwary investors. Until drafting practices converge on a consistent and coherent model, the choice-of-law question is likely to remain fodder for litigation.

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

Appeal on Merits in Commercial Arbitration?–An Overview

(authored by Chen Zhi, Wangjing & GH Law Firm, PhD Candidate at University of Macau)

Finality of tribunal's decision without any challenging system on merits issues has been well established and viewed as one of the most cited benefits of arbitration, which can be found in most influential legal documents such as 1958 New York Convention and UNCIITRAL Model Law on International Commercial Arbitration (issued in 1985, as revised in 2006).

Nevertheless, among all salient features of arbitration, finality of award is probably the most controversial one. In the investment arbitration, the question has been canvassed at length and has been serving as one of the central concerns in the ongoing reform of investment arbitration.[i] While in commercial arbitration, some practitioners and commentators are also making effort to advocate an appeal system. For example, a report by Singapore Academy of Law Reform Committee in February of 2020 strongly recommended introduction of appeals on question of law into international arbitration seated in Singapore,[ii] and has ignited a debate in this regard.

In legal practice, there are some legislations or arbitration institutions provide approaches allowing for the parties to apply for reconsideration of the award, which can be summarized into 3 categories: 1. The appellate mechanism conducted by state courts; 2. Appellate mechanism within the arbitration proceedings and; 3. Alternative to appellate mechanism by arbitration society.

This article will start by giving a brief introduction about the forgoing systems, and comment on the legitimacy and necessity of appellate mechanism in commercial arbitration.

1.Appealing mechanism before the court

1.1 Appellate Mechanism in England

When it comes to appellate mechanism conducted by state courts, the appeal mechanism for question of law as set out in section 69 of 1996 English Arbitration Act(EAA) is one of the most cited exceptions. It is undeniable that Section 69 of EAA constitutes an appellate mechanism in respect of arbitration conducted by judicial institutions. Nevertheless, some clarifications shall be made in this regard:

(1) The appellate mechanism serves as a default rule rather than a mandatory one, which allows parties to contract out of it. Apart from an agreement which explicitly excludes the appellate system, such consensus can be reached by other means. One of the methods is the parties' agreement on dispensing with reasons for the arbitral award, which is overall a rare practice in the field of international commercial arbitration while frequently used within some jurisdictions and sectors. Another way is the designation of arbitration rules containing provisions eliminating any appeal system, such as arbitration rules of most world renowned

arbitration institutions. For instance, Article 26.8 of London Court of International Arbitration Rules(The LCIA Rules) explicitly stipulates that parties waive "irrevocably" their right to appeal, review or recourse to any state court or other legal authority in any form.[iii] Therefore, parties may easily dispense with the right to appeal by reference of arbitration before The LCIA Rules or under its rules.

(2) Albeit parties fail to opt out of such appeals, the court is still afforded with discretion on rejection of a leave to commence such appeal. As provided by Section 69 (3) of EAA, such leave shall be granted only certain standards are satisfied, *inter alia*, the manifest error in the disputed award or raise of general public importance regarding the debating question.

(3) The competence of the appealing court is confined to review the question of laws and shall not impugned on the factual issue. In other words, any alleged errors in fact finding by tribunal is out of the court's remit. English courts are tended to reject efforts dressing up factual findings as questions of law, and have set up a high threshold regarding mixed questions of law and fact.[iv]

The abovementioned three factors have enormously narrowed down the scope of appellate system under Section 69 of EAA. Statistics in recent years also reveal the extreme low success rate in both granting of leave and overturning of the outcome. From 2015 to March 2018, more than 160 claims had been filed, while only 30 claims were permitted and 4 claims succeeded.[v] Hence, the finality of arbitration award is overall enshrined in England. Parties can hardly count on the appeal proceedings set forth in Section 69.

1.2 Appellate Mechanism Outside England

Some other jurisdictions have embedded similar appellate system, Canada and Australia employed an opt-out model like Section 69 of EAA.[vi] Other jurisdictions have adopted stringent limits on such appeal. in Singapore, appeal on merits of award is only provided by Arbitration Act governing domestic arbitration and not available in arbitration proceedings under International Arbitration Act. The Arbitration Ordinance of Hong Kong SAR of China provides an opt-in framework which further narrows down the use of appellate mechanism.

Appeal in the court is somehow incompatible with the minimal intervene principle as set out in legislations like UNCITRAL Model Law. Further, it will not only

enormously undermine efficiency of arbitration but also make the already-clogged state courts more burdensome. The important consideration about the appeal against question of law in the court is the development of law through cases,[vii] while it is not suitable for all jurisdictions.

2.Internal appellate of arbitration institution

Apart from state courts, some arbitration institutions may have the authority to act as appellate bodies under their institutional rules, which can be summarized as "institutional appellate mechanism". While such system can be observed in the arbitration concerning certain sectors such as the appeal board of The Grain and Feed Trade Association, it is rarely used by institutions open for all kinds of commercial disputes, with exceptions such as The Institute of Conflict Prevention and Resolution (CPR) and Judicial Arbitration & Mediation Services, Inc (JAMS).[viii]

Shenzhen Court of International Arbitration (SCIA) is the first arbitration institution in Mainland China who introduced optional appellate arbitration procedure into its arbitration rules published in December of 2018 (having come into effective since February 2019), enclosed with a guideline for such optional appellate arbitration procedure.

SCIA's Optional Appellate Arbitration Procedure provides an opt-in appellate system against the merits issue of an award where the below prerequisites are all satisfied: (1) pre-existing agreement on appeal by parties; (2) such appeal mechanism is not prohibited by the law of the seat; (3) the award is not rendered under expedited procedure set out in SCIA Arbitration Rules.[ix]

If all the above conditions are satisfied and one of the dispute parties intend to appeal, the application of appeal shall be filed the appeal within 15 days upon receipt of the disputing award and an appealing body composed of 3 members will be constituted through the appointment of SCIA's chief. The appealing body is afforded with broad direction to revise or affirm the original award, of whom the decision will supersede the original award.[x]

The SCIA appellate mechanism is a bold initiative, while some uncertainties may arise under the current legal system in Mainland China:

First is the legitimacy of an internal appellate system under current legislation

system. Though the current statutes do not contain any provision specifying the institutional legitimacy of an appellate mechanism, while legal risk may arise by breach of finality principle set out in the Article 9 of PRC Arbitration Law, which expressly stipulates that both state court and arbitration institution shall reject any dispute which has been decided by previous award. In this respect, any decision by an appealing system, regardless of whether it is conducted by state court, is likely to be annulled or held unenforceable subsequently. Apparently, SCIA was well aware of such risk and set forth the first prerequisite for the system such that parties may circumvent the risk through designation of arbitral seat.

The second is the risk brought by designation of arbitration seat other than Mainland China while no foreign-related factor is involved. Current law in PRC is silent on the term of arbitration seat, even though the loophole may be well resolved by the new draft of revised Arbitration Law which has been published for public consultation since late July 2021,[xi] it is still unclear whether parties to arbitration without foreign-related factors have the right to designate a jurisdiction other than Mainland China. As per previous cases, courts across the jurisdiction has been for a long time rejecting parties' right to agree on submission of case to off-shore arbitration institutions provided that no foreign-related factor can be observed in the underlying dispute.[xii]If the same stance keep unchanged in respect of parties' consent on arbitration seat, parties' agreement on designating an off-shore seat to avoid the scrutiny will be invalidated and the SCIA appellate mechanism will thereby not be available.

Third is the possibility of contradictory results. In Mainland China, a domestic award is final upon parties and hence enforceable without any subsequent proceedings. With this regard, SCIA's appellate mechanism may create two contradictory outcomes in one dispute resolution proceeding under the current legal system. If the successful party seeks for enforcement of award by concealing the existence of appeal proceedings, the court will enforce it basing on its text. Even though the court is aware of the appeal proceedings in the course of enforcement, it is not obliged to stay the enforcement in absence of any legal basis. In other words, the appeal mechanism will be meaningless for all parties in case of the launch of enforcement proceedings .

3.Alternatives to appealing mechanism

As mentioned above, in Mainland China there is no room for a review on merits system in commercial arbitration under Article 9 of PRC Arbitration Law. This article has been verbatim transplanted into the most recent draft of revised Arbitration Law which has been published for public consultation since late July 2021. Therefore, the much-cited bill brings no assistance in this regard.

With all that said, a few institutions have set up a special system called "pre-decision notification"??????as an alternative to mirror the function of appeal mechanism, which is said to be credited to Deyang Arbitration Commission of Sichuan Province dated back to 2004, according to a piece of news in August 2005 reported by Legal Daily, a nationwide legal professional newspaper run by the Supreme People's Court.[xiii] Pre-decision notification allows for tribunal to notice parties their preliminary opinions about the case before rendering the final decision, and ask for parties' comments within fixed duration. Tribunal's preliminary opinions can be revised by the final award based on comments by parties, occurrence of new fact after deliberation, or merely on the tribunal's own initiative.

One notable case about the pre-decision notification mechanism is decided by Xi'an Intermediate Court of Shanxi Province dated 18 April of 2018.[xiv] The case concerns an arbitration proceeding administered by Shangluo Branch of Xi'an Arbitration Commission where the tribunal dispatched preliminary opinion to parties at the outset, whilst ruled on the contrary in the final decision. The plaintiff (respondent of the arbitration proceeding) subsequently commenced an annulment proceeding against the award on the basis that the final decision is contradictory with the one set out in pre-decision notice (together with other reasons which were not relevant to the topic of this article), whilst the court refused to set aside the award by simply indicated that the reasons replied upon by plaintiff had no merits, without giving any further comment on such system.

In another noteworthy case which concerns the fact that tribunal ruled adversely after considering parties' comments on opinion set out in pre-decision notice, in the annulment proceeding, the Guiyang Intermediate Court of Guizhou Province explicitly endorsed the legitimacy of pre-decision notification, by stating that even though it is not regulated in any current legislation, pre-decision notice can be viewed as an investigation method by means of tribunal's query to the parties, instead of a decision by tribunal. Therefore, the discrepancy between pre-decision opinion and final award does not amount to annulment of the award.[xv]

The abovementioned court decisions are somehow problematic: the pre-decision notification is by no means a mere investigating tool for the tribunal. While the preliminary opinion is made and dispatched, it shall be deemed that the tribunal has taken the stance, which shall be distinguished from tribunal's query about facts or laws in a neutral and open minded manner which is widely accepted in commercial arbitration.[xvi] Therefore, subsequent comments by parties would constitute a *de facto* appealing mechanism before the same decision-making body, which will give rise to problems such as postponing the arbitral proceedings and the question of conflict of interest. Moreover, it probably produces unfairness for parties dissatisfying with the preliminary opinion may spare no effort to change the tribunal's mind by intervening tribunal's autonomy (even by taking irregular or illegal measures).

Overall, pre-decision notification is a highly controversial practice which received lots of criticisms, and hence does not constitute a mainstream system in China. None of the first-class arbitration institutions (including CIETAC, Beijing Arbitration Commission, Guangzhou Arbitration Commission, etc.) had ever embraced such system in the field of commercial arbitration. Some institutions are seeking to repeal or limit the use of such system. For example, Zunyi Arbitration Commission abolished such system in its rules released in 2018, while other arbitration commissions who are consistently strong champions of this system also opined that it is only used in rare cases with higher controversy and complexity.

Despite of these pitfalls and controversies, the courts' decisions clearly reveal that pre-decision notification system *per se* is not necessarily a breach of finality principle set out in arbitration legislation and hence feasible for parties if it is explicitly set out in applicable arbitration rules.

Pre-decision notification has been introduced into investment arbitration in recent years, Beijing Arbitration Commission has incorporated such system into its investment arbitration which was finalized and published in September 2019, which provides that the tribunal shall provide parties with the draft of award and seek for their comments, and may give proper consideration to the parties' feedback.[xvii] By the language, pre-decision notification will act as a mandatory rule while any investor-state case is being administered by this institution.

4.Comments

Several pertinent issues have been raised with regard to appellate mechanism in arbitration, which can be boiled down to several sub-issues including legitimacy, efficiency and fairness, as well as preference of parties.

4.1 Legitimacy Perspective

According to leading legislations across the world, the competence of state court confined to procedural issues in respect of judicial review over arbitration award, with rare and narrow exceptions such as the public policy set out in UNCITRAL Model Law and New York Convention. With this respect, even though some commentators argue that an appeal on merits is not necessarily a breach of finality and minimal intervene principles set out in UNCITRAL Model Law,[xviii] a mandatory and all-catching appealing system encompassing both factual and legal issues conducted by state court is undeniably incompatible with modern arbitration legislation.

In this respect, an internal appealing mechanism conducted by arbitration institution seems to be less controversial in respect of legitimacy at first glance. While it may also be viewed as a breach of finality of award in the context of some specific legislations such as Article 9 of PRC Arbitration Law.

4.2 Efficiency and Fairness

Finality principle in commercial perceivably enhances the efficiency of dispute resolution by relieving both parties and states from endless and burdensome appealing and reconsidering proceedings, while efficiency is not free from problem while the fairness issue is concerned, giving rise to pertinent considerations about correction of error, enhancement of consistency and the increase of transparency.

Nevertheless, the fairness argument is less convincing in the context of international commercial arbitration in which parties are seeking for a neutral forum in avoidance of local protectionism.[xix] Further, consistency and transparency is less concerned in the context of arbitration which is viewed to be tailored for individual cases while less public concerns are involved, comparing with litigation.

4.3 Preference of Parties

It can be drawn from above analysis that there is no one-standard-fitting all approach for the appeal mechanism in commercial arbitration, in that scenario, parties' preference shall be taken into account by virtue of the autonomy nature of commercial.

An worldwide survey conducted by Queen Mary University in 2015 provides that 23% of the respondents were in favor of an appeal mechanism in commercial arbitration (compared to 36% approval rate in the same question about investment arbitration),[xx] which reveals a boost about 150% while compared with the rate in 2006 survey (around 9%).In 2018 survey, 14% of the respondents had selected "lack of appeal mechanism on the meritss" as one of the three worst characteristics of arbitration.[xxi]

In a nutshell, statics reveals the increasing demand for appeal system, while it is premature to say that preference for appeal mechanism has been the mainstream in commercial arbitration, it has given rise to concerns by arbitration practitioners and proper response shall be made accordingly.

[i]See Elsa Sardinha, *The Impetus for the Creation of an Appellate Mechanism*, in Meg Kinnear and Campbell McLachlan (eds), ICSID Review – Foreign Investment Law Journal, Oxford University Press 2017, Volume 32 Issue(3) pp. 503 – 527S https://www.sal.org.sg/sites/default/files/PDF%20Files/Law%20Reform/2020%20Report%20on%20the%20Right%20of%20Appeal%20against%20International%20Arbitration%20Awards%20on%20Questions%20of%20Law.pdf

[ii] See Singapore Academy of Law Reform Committee, *Report on the Right of Appeal against International Arbitration Awards on Questions of Law February 2020,* available at

[iii] Article 26.8 of LCIA Arbitration Rules?coming into effective since October 2020?,available at https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx

[iv] See Teresa Cheng, *The Search for Order Within Chaos in the Evolution of ISDS*, CIArb's 45th annual Alexander Lecture on 16 January 2020, available at https://www.doj.gov.hk/en/community_engagement/speeches/20200116_sj1.html

[v] Ben Sanderson et al.,*Appeals under the English Arbitration Act 19*96?available at

https://www.dlapiper.com/en/uk/insights/publications/2018/05/appeals-under-the-english-arbitration-act-1996/#:~:text=Section%2069%2C%20meanwhile%2C%20is%20a%20non-*mandatory%20provision%20of,the%20English%20courts%20on%20a%20point%20of%20law.*

[vi]T. Dedezade, *Are You In or Are You Out? An Analysis of Section, 69 of the English Arbitration Act 1996: Appeals on a Question of Law*, 2 Intl. Arb. L.J. 56 (2006) available at http://corbett.co.uk/wp-content/uploads/Taner-s-69-article.pdf

[vii] Ibid.

[viii] See Rowan Platt, *The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality*?, Journal of International Arbitration , Volume 30 Issue 5 p. 548?2013?

[ix] See Article 68 of SCIA Arbitration Rules(coming into effective since 2019),available at http://scia.com.cn/upload/20201027/5f97bf7833c8c.pdf

[x] See SCIA Guidelines for the Optional Appellate Arbitration Procedure, available at http://www.scia.com.cn/files/fckFile/file/SCIA%20Guidelines%20for%20the%20Optional%20Appellate%20Arbitration%20Procedure.pdf

[xi] See Anton Ware et al., *Proposed Amendments to the PRC Arbitration Law: A Panacea?,* available at http://arbitrationblog.kluwerarbitration.com/2021/09/09/proposed-amendments-to-the-prc-arbitration-law-a-panacea/

[xii] See a seminal case (2013)??????10670? by Beijing 2nd Intermediate Court in January of 2014, which concerns an award rendered in proceedings governed by KCAB, the court rejected enforcement of KCAB award by the reason that the underlying dispute did not have any foreign-related factor, despite of the fact that one party to the proceedings is an enterprise wholly subsidized by Korean citizens.

[xiii] See Li Yongli et al., Enhancing Arbitration Legislation through Pre-Decision Notification. Legal Daily, 16 August 2005, p,12???????????“????”??????????????????2005?8?16??12???

[xiv] 2018 Shan 01 Min Te No. 99?2018??01??99?

[xv] 2016 Qian 01 Min Te No. 48?2016??01??48?

[xvi] Per the common practice and well established principle, tribunals are free to delivery query to parties in respect of both factual finding and ascertaining law (Jura Novit Curia), while it shall be conducted in a manner that being prepared to consider legal positions advanced by the parties, irrespective of questions well known to the tribunal. See: Revista Brasileira de Arbitragem, *International Law Association Committee on International Commercial Arbitration Ascertaining the Contents of the Applicable Law in International Commercial Arbitration Report for the Biennial Conference in Rio de Janeiro*, August 2008,

[xvii] Article 42.4 of Beijing Arbitration Commission/Beijing International Arbitration Center Rules for International Investment Arbitration?available at https://www.bjac.org.cn/page/data_dl/touzi_en.pdf

[xviii] See Singapore Academy on Law Reform Committee: *Report of Appeal Against International Arbitration Awards on Questions of Law*, February 2020, available at https://www.sal.org.sg/sites/default/files/PDF%20Files/Law%20Reform/2020%20Report%20on%20the%20Right%20of%20Appeal%20against%20International%20Arbitration%20Awards%20on%20Questions%20of%20Law.pdf

[xix] Noam Zamir ,Peretz Segal, *Appeal in International Arbitration—an efficient and affordable arbitral appeal mechanism*', in William W. Park (ed), Arbitration International, Oxford University Press 2019, Volume 35 Issue 1) p. 84.

[xx] See Queen Mary, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, p,8 available at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf

[xxi] See Queen Mary & White Case, 2018 International Arbitration Survey: The Evolution of International Arbitration, p,8 available at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey—The-Evolution-of-International-Arbitration-(2).PDF

First Issue of 2021's Journal of Private International Law

The first issue of the *Journal of Private International Law* for 2021 was released today and it features the following articles:

Paul Beaumont, Some reflections on the way ahead for UK private international law after Brexit

Since 1 January 2021 the UK has moved out of the implementation period for its withdrawal from the European Union (EU) and it is an appropriate time to reflect on the way forward for the UK in developing private international law. This article considers the practical steps that the UK should take in the near future. There is significant work that the UK can do to progress its commitment to the "progressive unification of the rules of private international law" by improving its commitment to the effective functioning of several key Conventions concluded by the Hague Conference on Private International Law (HCCH). Some of these steps can and should be taken immediately, notably accepting the accessions of other States to the Hague Evidence and Child Abduction Conventions and extending the scope of the UK's ratification of the Adults Convention to England and Wales, and Northern Ireland. Other things require more consultation and time but there are great opportunities to provide leadership in the world by ratifying the Hague Judgments Convention 2019 and, when implementing that Convention which is based on minimum harmonisation, providing leadership in the Commonwealth by implementing, at least to some extent, the Commonwealth Model Law on Recognition and Enforcement of Civil and Commercial Judgments. Within the UK, as a demonstration of best constitutional practice, intergovernmental cooperation between the UK Government and the devolved administrations should take place to consider how intra-UK private international law could be reformed learning the lessons from the UK Supreme Court's highly divided decision in Villiers. Such work should involve the best of the UK's experts (from each of its systems of law) on private international law from academia, the judiciary and legal practice. Doing so, would avoid accusations that Brexit will see a UK run by generalists

who give too little attention and weight to the views of experts. This use of experts should also extend to the UK's involvement in the future work of HCCH at all levels. The HCCH will only be able to be an effective international organisation if its Members show a commitment to harnessing the talents of experts in the subject within the work of the HCCH.

Reid Mortensen, Brexit and private international law in the Commonwealth

"Brexit is a trading and commercial opportunity for the countries of the Commonwealth, as it makes it likely that, for many, their access to United Kingdom (UK) markets will improve significantly. The question addressed in this article is whether, to support more open and trading relationships, Brexit also presents opportunities for the development of the private international law of Commonwealth countries – including the UK. Focusing on Australia, Canada, New Zealand and Singapore, as well as the UK, an account is given of the relationship between the different systems of private international law in these Commonwealth countries in the period of the UK's membership of the European Union (EU). Accordingly, consideration is given to the Europeanisation of UK private international law and its resistance in other parts of the Commonwealth. The continuing lead that English adjudication has given to private international law in the Commonwealth and, yet, the greater fragmentation of that law while the UK was in the EU are also discussed. The conclusion considers the need to improve the cross-border enforcement of judgments within the Commonwealth, and the example given in that respect by its federations and the trans-Tasman market. Possible directions that the cross-border enforcement of judgments could take in the Commonwealth are explored."

Trevor Hartley, Arbitration and the Brussels I Regulation – Before and After Brexit

This article deals with the effect of the Brussels I Regulation on arbitration. This Regulation no longer applies in the UK, but the British Government has applied to join the Lugano Convention, which contains similar provisions. So the article also discusses the position under Lugano, paying particular attention to the differences between the two instruments. The main focus is on the problems that

arise when the same dispute is subject to both arbitration and litigation. Possible mechanisms to resolve these problems – such as antisuit injunctions – are considered. The article also discusses other questions, such as freezing orders in support of arbitration.

Maksymilian Pazdan & Maciej Zachariasiewicz, The EU succession regulation: achievements, ambiguities, and challenges for the future

The quest for uniformity in the private international law relating to succession has a long history. It is only with the adoption of the EU Succession Regulation that a major success was achieved in this field. Although the Regulation should receive a largely positive appraisal, it also suffers from certain drawbacks that will require a careful approach by courts and other authorities as to the practical application of the Regulation. The authors address selected difficulties that arise under its provisions and make suggestions for future review and reform. The article starts with the central notion of habitual residence and discusses the possibility of having a dual habitual residence. It then moves to discuss choice of law and recommends to broaden further party autonomy in the area of succession law. Some more specific issues are also addressed, including legacies by vindication, the relationship between the law applicable to succession, the role of the legis rei sitae and the law applicable to the registries of property, estates without a claimant, the special rules imposing restrictions concerning or affecting succession in respect of certain assets, as well as the exclusion of trusts. Some proposals for clarifications are made in that regard.

Stellina Jolly & Aaditya Vikram Sharma, Domestic violence and inter-country child abduction: an Indian judicial and legislative exploration

The Hague Convention on the Civil Aspects of International Child Abduction aims to prevent the abduction of children by their parents by ensuring the child’s prompt return to his/her place of habitual residence. At the time of drafting the Convention, the drafters believed that non-custodial parents who were fathers perpetrated most of the abductions. However, the current statistics reveal the overwhelming majority of all abductors as primary or joint-primary caretakers. Unfortunately, it is unknown what exact proportion of these situations includes

abductions triggered by domestic violence. In the absence of an explicit provision of domestic violence against spouses as a defence against an order of return, for a parent who has abducted a child to escape domestic violence, the relevant defence is of "grave risk of harm" to and "intolerable situation" for the child under Article 13(1)(b) of the Convention. However, the lack of guidance on what constitutes "grave risk" and "intolerable situation", at least in the past, and its operationalisation in the context of domestic violence brings in pervasive indeterminacy in child abduction. In 2012, the Hague Conference on Private International Law identified "domestic violence allegations and return proceedings" as a key issue and recommended steps for developing principles on the management of domestic violence allegations in return proceedings leading to the adoption of a Good Practice Guide on this issue in 2020.

The Ministry of Women and Child Development (WCD) and the Ministry of Law and Justice, India, cite that most Indian parents who abduct their children happen to be women escaping domestic violence abroad. Thus, they are victims escaping for themselves and their children's safety. This research has summed up the judgments delivered by High Courts and the Supreme Court of India on child abduction between 1984 and 2019. Through judicial mapping, the paper discusses the cases in which battered women have highlighted and argued domestic violence as a reason against their children's return. The paper evaluates whether the reason given by the two ministries against India's accession to the Hague Convention is reflected in cases that have come up for judicial resolution and what are the criteria evolved by the judiciary in addressing the concerns of domestic violence against a spouse involved in child abduction. The paper analyses India's legislative initiative, the Civil Aspects of International Child Abduction Bill, 2016 and assesses the measures proposed by the Bill for considering domestic violence against a spouse in abduction cases.

Kittiwat Chunchaemsai, Legal considerations and challenges involved in bringing the 2005 Hague Convention on Choice of Court Agreements into force within an internal legal system: A case study of Thailand

Thailand must consider two vital elements, namely its internal legal system and environment before signing the Hague Convention on Choice of Court Agreements 2005 (Hague Convention). This paper investigates whether the law of

Thailand in its current form is inconsistent with the Hague Convention. Articles 1–15 are examined to identify areas of inconsistency and to suggest appropriate solutions. This study finds that the internal legal system of Thailand is not quite in line with the Hague Convention. This conclusion leads to analytical recommendations to suit the needs of the current Thai legal system. Implementing these recommendations is necessary for Thailand if it intends to become a Party to the Hague Convention. Thailand must not only have a specific implementation act but must also review and revise the relevant laws appropriately.

Saeed Haghani, Evolution of *lex societatis* under Iranian law: current status and future prospects

There has been a growing attention to applicable law to companies (*lex societatis*) in Iranian legal research. A brief study of relevant legal literature leads us to a list of both disagreements and complexities on the subject. Meanwhile, a recent parliamentary effort on the issue, illustrates the importance of *lex societatis* in the eyes of the Iranian legislature. A comparative approach would be of great help in the analysis of the formation and evolution of relevant Iranian legal rules. This paper tries to provide the reader with a comprehensive view of the current transitory state of Iranian law regarding *lex societatis*.