Relevance of Indian Limitation Law vis-à-vis Foreign-seated International Arbitration With Indian Law As The Applicable Substantive Law

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Introduction

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

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

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

Classification of limitation in the context of foreign-seated

arbitrations – procedural or substantive?

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

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

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

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

In the *Extramarks* case, the issue at stake was the limitation period for filing an application before the High Court for the appointment of the arbitrator, for a purported India-seated domestic arbitration. The DHC held that conceptually, limitation bars a legal remedy and not a legal right, the legal policy being to ensure that legal remedies are not available endlessly but only up-to a certain

point in time. The DHC further held that a party may concede a claim at any time; but cannot concede availability of a legal remedy beyond the prescribed period of limitation. In essence, according to the DHC, passing of limitation bars a remedy, which would generally mean that limitation is a procedural law subject. This distinction is in line with the traditional 'right is substantive and remedy is procedural' divide that exists in the common law. However, this position is not a settled one and remedy, could, arguably, be governed by the substantive law governing the contract.

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

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

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

Suspending/Extending Limitation in Foreign-seated Arbitrations

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

The legality of such agreements is not entirely clear under Indian law. For instance, Section 28 of the Limitation Act expressly bars agreements that limit the time within which a party may enforce its rights. However, the converse, i.e., the possible extension of limitation, is not discussed in the Limitation Act. According to Section 25(3) of the Indian Contract Act, the parties can enter into an agreement to enforce a time-barred debt as long as there is a written and signed promise to pay the debt, essentially acknowledge the debt/liability. However, as noted above a standstill agreement is not an admission or acknowledgement of liability and hence Section 25(3) would not applicable. It has also been noted that the legality of standstill agreements in India is sub-judice before the Madras High Court.

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

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

Essentially, the legality of standstill agreements in foreign seated arbitration with Indian substantive law faces a critical impediment explored above, i.e., the divide between substantive and procedural classification. One possible view could be that since the parties have already chosen the seat of the arbitration, all

procedural law issues will be governed by law of the seat, if, indeed, limitation is treated as a procedural issue. A second, contrary view may be that the legality of a standstill agreement would be tested on the touchstone of Indian law, since the choice of applicable substantive law of the contract is Indian law under which limitation cannot be conceded beyond the prescribed period by consent.

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

Conclusion

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

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

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

Theory

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

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

During the twentieth century, many countries adopted the restrictive theory. (Pierre-Hugues Verdier and Erik Voeten have a useful list of the dates on which countries switched on the last page of this article.) Russia and China were the most prominent holdouts. Russia joined the restrictive immunity camp in 2016 when its law on the jurisdictional immunity of foreign states went into effect. That left China. In December 2022, Chinese lawmakers published a draft law on foreign state immunity, an English translation of which has recently become available. If adopted, this law would move China to into the restrictive immunity camp as well.

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

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

It is clear that China's draft law has been heavily influenced by the provisions of

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

China's Adherence to the Absolute Theory of Foreign State Immunity

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

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

far—China's signature seemed to signal a shift in position.

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

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

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

The Draft Law on Foreign State Immunity

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

Article 2 defines "foreign state" to include "sovereign states other than the People's Republic of China," "institutions or components of … sovereign states," and "natural persons, legal persons and unincorporated organisations authorised by … sovereign states … to exercise sovereign powers on their behalf and carry out activities based on such authorization." Article 18(1) provides that Chinese courts will accept the Ministry of Foreign Affairs' determination of whether a state constitutes a sovereign state for these purposes.

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

Exceptions to Immunity from Suit

Waiver Exception

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

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

These provisions closely track Articles 7-9 of the U.N. Convention. The U.S. FSIA, § 1605(a)(1), similarly provides that a foreign state shall not be immune in any case "in which the foreign state has waived its immunity either explicitly or by implication." Section 1607 also contains a provision on counterclaims. In contrast to China's draft law, U.S. courts have held that choosing U.S. law to govern a contract constitutes an implied waiver of foreign state immunity (a position that has been rightly criticized).

Commercial Activities

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

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

activities abroad "that act cause[] a direct effect in the United States."

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

Territorial Torts

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

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

Property

Article 10 of the draft law creates an exception to immunity for claims involving

immoveable property in China, interests in moveable or immoveable property arising from gifts, bequests, or inheritance, and interests in trust property and bankruptcy estates. This provision closely parallels Article 13 of the U.N. Convention and finds a counterpart in § 1605(a)(4) of the FSIA.

Arbitration

The draft law also contains an arbitration exception. Article 12 provides that a foreign state that has agreed to arbitrate disputes is not immune from suit with respect to "the effect and interpretation of the arbitration agreement" and "the recognition or annulment of arbitral awards." Like Article 17 of the U.N. Convention, the arbitration exception in the draft law is limited to disputes arising from commercial activities but extends to investment disputes. The arbitration exception in § 1605(a)(6) of the FSIA, by contrast, extends to disputes "with respect to a defined legal relationship, whether contractual or not."

Reciprocity Clause

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

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

Conclusion

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

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

BNP Paribas sued in France for financing fossil fuel companies

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

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

Article 1 of la Loi de Vigilance imposes a duty to establish and implement an effective vigilance plan on any company whose head office is located on French territory and complies with the thresholds stated. This vigilance plan is supposed to include vigilance measures for risk identification and prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the

operations of the company and of the companies it controls, its subcontractors and suppliers with whom the company has an established commercial relationship. As such, there is no distinction under the French law regarding the sector in which the company is operating which is in line with the United Nations Guiding Principles. Thus, it was surprising to see that France was quite vocal about not including the financial sector within the scope of CSDDD, as France was the first Member State to adopt a law on the duty of vigilance of the multinational companies and la Loi de Vigilance itself does not make distinctions based on the sector in which the company is operating.

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

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

The case against BNP before the French courts is a reminiscent of the case against Shell before the Dutch courts in 2019 where the environmental group (Milieudefensie) and co-plaintiffs argued that Shell's business operations and sold energy products worldwide contributes significantly to climate change (and also much more than it has pledges to in its corporate policies and to the levels internationally determined by conventions) was a violation of its duty of care

under Dutch law and human rights obligations. It is important here to highlight that the plaintiffs took Shell to the Dutch courts based on the environmental damage caused in the Netherlands, due to Shell's operations worldwide.

In the said case, the applicable law to the dispute was determined by Rome II Regulation on non-contractual obligations, article 7. Article 7 presents an additional venue to the general rule for determining the applicable law (article 4) and grants the victims of environmental damage an opportunity to base their claims on the law of the country in which the event giving rise to the damage occurred. As such, the claimant primarily chose to base its claims on the law of the country in which the even giving rise to the damage occurred, as they claimed that the corporate policies for the Shell group were decided in its headquarters in the Netherlands. The Court considered the adoption of the corporate policy of the Shell group as an independent cause of the damage which may contribute to environmental damage with respect to Dutch residents. Thus, the Court considered that the choice of Dutch law by Milieudefensie was in line with the idea of protection of the victims behind the applicable law clauses in Rome II Regulations and upheld the choice to the extent that the action aimed to protect the interests of the Dutch residents (see paragraphs 4.3-4.4 of the decision).

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

In contrast, the BNP case has a more preventive nature and aims to force BNP to change and adapt its actions to the changing climate and scientific context. The NGOs primarily request an injunction for BNP to comply with the obligations provided for in the French Vigilance Law, as BNP falls within the scope of the French Law. More specifically, the NGOs request that BNP publishes and implements a new due diligence plan, containing the measures explained in the writ of summons. Therefore, the obligations arising from the French Vigilance Law are of a civil nature. Consequently, the law applicable to this dispute should also be determined by Rome II Regulation on non-contractual obligations. As

explained above, Rome II Regulation gives an additional option for the plaintiffs to choose the applicable law in cases of environmental damage as either the country of damage or the country where the event that gives rise to the damage occurred. In the BNP case, the plaintiffs' claim was based on French law. Applying Rome II Regulation, France can be considered as the country of the event which gives rise to the damage because it is where the corporate policies are prepared. Alternatively, it is also where the environmental damage occurs, as well as the rest of the world. Moreover, the plaintiffs relied on the general obligation of environmental vigilance as enshrined in the Charter of the Environment, which is considered an annex to the French Constitution and thus has the same authoritativeness. Invoking the constitution might bring in an argument on the basis of Article 16 Rome II, namely overriding principles of mandatory law.

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

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

However, the NGOs claim that contrary to these commitments, through various financing and investment activities, BNP becomes one of the main contributors to the fossil fuel sector by supporting the big oil and gas companies (p 4 of the

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

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

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

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

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

Applying Mexican Law in U.S. Courts? Mexico v Smith & Wesson

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

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

extraterritorial".

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

17th Anniversary & New General Editors

17 years ago on this day, the very first post was published on conflictoflaws.net. While the Rome I Regulation has remained relevant, the discipline has certainly undergone significant changes throughout the years – without losing any of its importance. Many, if not most, of those changes have been covered across the over 5,000 posts that have appeared on this blog. More than 2,500 readers are subscribed to our e-mail newsletter, while an even larger number of people now follows us on Twitter and LinkedIn.

In light of our continued commitment to cover all relevant developments in PIL, regionally and globally, we are happy to use the occasion of the blog's birthday for two announcements.

Most significantly, Thalia Kruger and Matthias Weller are handing over their responsibilities as General Editors to us, Jeanne Huang and Tobias Lutzi.

Matthias initially assumed this position alongside Giesela Rühl in 2017. He continued to serve as General Editor when Giesela handed over the baton to Thalia in 2019. It is no overstatement that without their tireless work behind the scenes, the blog would be unlikely to exist in its present form. During their tenure, they put the blog on a solid technical foundation, secured its funding, and ensured quality and diversity of its Editorial Board.

As new General Editors, we are deeply grateful for the excellent shape in which

they are leaving this project – although it makes us all the more aware of the big shoes we have been asked to fill.

What is more, after several years of fruitful partnership with Hart Publishing, we are happy to announce that we have been able to secure a new sponsor for the blog. The Lindemann Foundation, a German non-profit foundation dedicated to supporting research in private international law, will allow us to continue running the blog. We are deeply grateful for the trust they are putting into us and this blog. We also appreciate the support from Hart in the past, and we will keep in touch with them.

Speaking on behalf of the entire Editorial Board, we are reiterating our heartfelt gratitude to Thalia and Matthias and look forward to the next seventeen years of News & Views in Private International Law.

Jeanne and Tobias

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.

Anti-enforcement injunction granted by the New Zealand court

For litigants embroiled in cross-border litigation, the anti-suit injunction has become a staple in the conflict of laws arsenal of common law courts. Its purpose being to restrain a party from instituting or prosecuting proceedings in a foreign country, it is regularly granted to uphold arbitration or choice of court agreements, to stop vexatious or oppressive proceedings, or to protect the jurisdiction of the forum court. However, what is a party to do if the foreign proceeding has already run its course and resulted in an unfavourable judgment? Enter the anti-enforcement injunction, which, as the name suggests, seeks to restrain a party from enforcing a foreign judgment, including, potentially, in the country of judgment.

Decisions granting an anti-enforcement injunction are "few and far between" (*Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309, [2016] 1 WLR 2231, [118]). Lawrence Collins LJ (as he then was) described it as "a very serious matter for the English court to grant an injunction to restrain enforcement in a foreign country of a judgment of a court of that country" (*Masri v Consolidated Contractors International (UK) Ltd (No. 3)* [2008] EWCA Civ 625, [2009] QB 503 at [93]). There must be a good reason why the applicant did not take action earlier, to prevent the plaintiff from obtaining the judgment in the first place. The typical scenario is where an applicant seeks to restrain enforcement of a foreign judgment that has been obtained by fraud.

This was the scenario facing the New Zealand High Court in the recent case of *Kea Investments Ltd v Wikeley Family Trustee Limited* [2022] NZHC 2881. The Court granted an (interim) anti-enforcement injunction in relation to a default judgment worth USD136,290,994 obtained in Kentucky (note that the order was made last year but the judgment has only now been released). The decision is noteworthy not only because anti-enforcement injunctions are rarely granted, but also because the injunction was granted in circumstances where the foreign proceeding was not also brought in breach of a jurisdiction agreement.

Previously, the only example of a court having granted an injunction in the absence of a breach of a jurisdiction agreement was the case of *SAS Institute Inc v World Programming Ltd* [2020] EWCA Civ 599 (see Tiong Min Yeo "Foreign Judgments and Contracts: The Anti-Enforcement Injunction" in Andrew Dickinson and Edwin Peel *A Conflict of Laws Companion – Essays in Honour of Adrian Briggs* (OUP, 2021) 254).

Kea Investments Ltd v Wikeley Family Trustee Limited involves allegations of "a massive global fraud" perpetrated by the defendants – a New Zealand company (Wikeley Family Trustee Ltd), an Australian resident with a long business history in New Zealand (Mr Kenneth Wikeley), and a New Zealand citizen (Mr Eric Watson) – against the plaintiff, Kea Investments Ltd (Kea), a British Virgin Islands company. Kea alleges that the US default judgment is based on fabricated claims intended to defraud Kea. Its substantive proceeding claims tortious conspiracy and a declaration that the Kentucky judgment is not recognised or enforceable in New Zealand. Applying for an interim injunction, the plaintiff argued that "the New Zealand Court should exercise its equitable jurisdiction now to prevent a New Zealand company … from continuing to perpetrate a serious and massive fraud on Kea" (at [27]) by restraining the defendants from enforcing the US judgment.

The judgment is illustrative of the kind of cross-border fraud that private international law struggles to deal with effectively: here, alleged fraudsters using the Kentucky court to obtain an illegitimate judgment and, apparently, frustrate the plaintiff's own enforcement of an earlier (English) judgment, in circumstances where the Kentucky court is unwilling (or unable?) to intervene because Kea was properly served with the proceeding in BVI.

Gault J considered that the case was "very unusual" (at [68]). Kea had no connection to Kentucky, except for the defendants' allegedly fabricated claim involving an agreement with a US choice of court agreement and a selection of the law of Kentucky. Kea also did not receive actual notice of the Kentucky proceedings until after the default judgement was obtained (at [73]). In these circumstances, the defendants were arguably "abusing the process of the Kentucky Court to perpetuate a fraud", with the result that "the New Zealand Court's intervention to restrain that New Zealand company may even be seen as consistent with the requirement of comity" (at [68]).

One may wonder whether the Kentucky Court agrees with this assessment – that a foreign court's injunction restraining enforcement of its judgment effectively amounts to an act of comity. In fact, Kea had originally advanced a cause of action for abuse of process, claiming that the alleged fraud was an abuse of process of the Kentucky Court. It later dropped the claim, presumably due to a recent English High Court decision (*W Nagel (a firm) v Chaim Pluczenik* [2022] EWHC 1714) concluding that the tort of abuse of process does not extend to foreign proceedings (at [96]). The English Court said that extending the tort to foreign proceedings "would be out of step with [its] ethos", which is "the Court's control of its own powers and resources" (at [97]). It was not for the English court "to police or to second guess the use of courts of or law in foreign jurisdictions" (at [97]).

Since Gault J's decision granting interim relief, the defendants have protested the Court's jurisdiction, arguing that Kea is bound by a US jurisdiction clause and that New Zealand is not the appropriate forum to determine Kea's claims. The Court has set aside the protest to jurisdiction (*Kea Investments Ltd v Wikeley Family Trustee Limited* [2023] NZHC 466). The Court also ordered that the interim orders continue, although the Court was not prepared to make a further order that the defendants consent to the discharge of the default judgment and withdraw their Kentucky proceedings. This, Gault J thought, was "a bridge too far" at this interim stage (at [98]).

Of Hints, Cheats, and Walkthroughs – The Australian Consumer Law, The Digital Economy, and International Trade

By Dr Benjamin Hayward

Those who enjoy playing video games as a pastime (though certainly not in the

competitive esports environment) might take advantage of different forms of assistance when they find themselves stuck. Once upon a time, they might have read up on tips and tricks printed in a physical video game magazine. These days, they are more likely to head online for help. They might seek out hints – tidbits of information that help point the gamer in the right direction, but that still allow them to otherwise work out a solution on their own. They might use cheats – which allow the gamer 'to create an advantage beyond normal gameplay'. Otherwise, they might use a walkthrough – which, as the name suggests, might walk a player through the requirements of perhaps even 'an entire video game'.

Despite initial appearances, these definitions do more than just tell us about recreation in general, and gaming culture in particular. They also help us understand the state of play in relation to the Australian Consumer Law's application to the digital economy, and, in turn, the ACL's implications for international digital economy trade.

This video game analogy is actually very apt: gaming set the scene for recent litigation confirming the ACL's application to off-shore video game vendors. In the *Valve* case concerning the Steam computer gaming platform, decisions of the Federal Court of Australia and (on appeal) its Full Court confirmed that reach, via interpretation of the ACL's s 67 conflict of laws provision. The High Court of Australia denied special leave for any further appeal. In the subsequent Sony Europe case, concerning the PlayStation Network, liability was not contested. On the other hand, there was a live issue in Valve – at least at first instance – as to whether or not video games constitute 'goods' for the purposes of the ACL's consumer guarantees. The ACL's statutory definition of goods includes 'computer software'. Expert evidence, not contested and accepted by the Federal Court, treated computer software as equivalent to executable files; which may work with reference to non-executable data, which is not computer software in and of itself.

Understanding the ACL's definition of 'goods' has significant implications. The 'goods' concept is a gateway criterion: it determines whether or not the ACL's consumer guarantees apply, and in turn, whether it is possible to mislead consumers about the existence of associated rights. So far as digital economy trade is concerned, case law addressing Australia's regular Sale of Goods Acts confirms that purely-digital equivalents to traditional physical goods are not 'goods' at common law. Any change to this position, according to the New South Wales Supreme Court, requires statutory intervention. Such intervention did

occur when the *Trade Practices Act 1974* (Cth) transitioned into the *Competition and Consumer Act 2010* (Cth). Now, 'computer software' constitutes a statutory extension to the common law definition of 'goods' that would otherwise apply.

It is against all this context that a very recent decision of the Federal Court of Australia – *ACCC v Booktopia Pty Ltd* [2023] FCA 194 – is of quite some interest. Whilst most of the decision is uncontroversial, one aspect stands out: the Court held, consistently with Booktopia's admission, that eBooks fall within the scope of the ACL's consumer guarantee protections. This finding contributed to an AUD $6 million civil pecuniary penalty being imposed upon Booktopia for a range of breaches of the ACL. But is it actually correct? Whether or not that is so depends upon whether the statutory phrase 'computer software' extends to digital artefacts other than traditional desktop computer programs. There is actually good reason, based upon the expert evidence tendered and accepted in the Valve litigation, to think not.

So what does the Booktopia case represent? It could be a hint – an indication that will eventually lead us to a fully-explained understanding of the ACL's wide reach across the digital economy. In this sense, it might be a pointer that helps us to eventually solve this interpretative problem on our own. Or it could be a cheat – a conclusion possibly justified in the context of this individual case given Booktopia's admissions, but not generalisable to the ACL's normal operation. Either way, given the ACCC's expressed view (not necessarily supported by the ACL's actual text) that '[c]onsumers who buy digital products … have the same rights as those who shop in physical stores', what we really need now is a walkthrough: a clear and reasoned explanation of exactly what 'computer software' actually means for the purposes of the ACL. This will ensure that traders have the capacity to know their legal obligations, and will also allow Parliament to extend the ACL's digital economy protections if its reach is actually limited in the way that my own scholarship suggests.

All of this has significant implications for international trade, as 'many transfers' of digital assets 'are made between participants internationally'. The increasing internationalisation and digitalisation of trade makes it imperative that this ambiguity be resolved at the earliest possible opportunity. Since, in the words of the Booktopia judgment, ACL penalties 'must be of an appropriate amount to ensure that [their] payment is not simply seen as a cost of doing business', traders – including international traders – do need to know with certainty whether or not

they are subject to its consumer protection regime.

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The Fourth Private International Law Conference for Young Scholars in Vienna

Written by Alessa Karlinski and Maren Vogel (both Free University Berlin).

On February 23rd and 24th, 2023, young scholars came together at the Sigmund Freud University, Vienna, to discuss different views on private international law under the theme of "Deference to the foreign – empty phrase or guiding principle of private international law?". Continuing the success of the previous three German-Speaking Conferences of Young Scholars in PIL from previous years in Bonn, Würzburg and Hamburg, this year's conference was hosted in Austria by Martina Melcher and Florian Heindler who organized the event together with Andreas Engel, Katharina Kaesling, Ben Köhler, Bettina Rentsch, Susanna Roßbach and Johannes Ungerer.

As keynote speaker, ***Professor Horatia Muir Watt (Sciences Po Paris)*** borrowed from the often-used metaphor of the "dismal swamp" to present an "ecosophical" approach to private international law. For this purpose, she engaged anthropological and philosophical insights of Western and indigenous origin on the meaning of law and the regulatory functions of private international

law in particular.

Vanessa Grifo (University of Heidelberg) presented possible insights from the theory of the post-migrant society for international family law. Based on sociological accounts of "post-migrant" identities, *Grifo* discussed that a person's cultural identity can form "hybrid" solidarity to different legal systems and oppose the collective national identity of the country of immigration. While previously, according to *Kegel*, connecting factors were understood to build upon certain generally neutral conflict-of-laws interests, cultural identity is becoming a relevant aspect of party interests, which she demonstrated with the help of different recent judgement of the German Federal Court of Justice. This paradigm, *Grifo* argued, shows a shift from the system of the traditional German understanding of connecting factors following Kegel.

Victoria Garin (European University Institute, Florence) examined the connection between private international law and the concept of Relativism. The basis of her analysis is the contemporary private international law attempting to coordinate conflicting regulatory claims of several legal systems. *Garin* identified extraterritoriality, difference and equivalence as assumptions used in private international law to solve this conflict. These assumptions, *Garin* argued, are premised on Relativism in its forms as descriptive and normative theory. Through the lens of Relativism a critical examination of private international law, especially regarding current developments in literature, was made. *Garin* explained to what extent the criticism of Relativism can be applied to private international law theory.

Dr Shahar Avraham-Giller (Hebrew University Jerusalem) presented two seemingly contradictory developments in private international law. First *Avraham-Giller* pointed out, that legal questions are increasingly restrictively categorised as procedural questions in the EU and in common law states which leads to a broader application of foreign law as the *lex causae*. The application of the *lex fori* to procedural questions can itself be understood as an overriding mandatory provision of the forum. On the other hand, as *Avraham-Giller* projected, an increased recourse of courts to the means of other overriding mandatory provisions to safeguard national public interests can be observed. In her opinion, these seemingly contradictory developments can be explained as an answer to the development of a more "private" understanding of civil proceedings, seeking primarily peaceful settlement of private disputes, while

enforcing other values and public goals through mandatory overriding provisions at the same time.

Raphael Dummermuth (University of Fribourg) then shed light on deference to the foreign in the context of the interpretation of the Lugano Convention. First, he addressed the question of the implementation of the objective of taking into account the case law of the ECJ by non-EU courts, as stated in Art. 1(1) Protocol 2 Lugano Convention. The application of the Lugano Convention, he pointed out, requires a double consideration of the foreign: the court must consider standards or judgments that are outside the Lugano Convention and in doing so apply a foreign methodology. Nonetheless, the one-sided duty of consideration is limited where the results of interpretation are decisively based on principles of EU law. He came to the conclusion, that precedent effect should therefore only be given to results that are justifiable within the scope of the classical methodology.

The first day of the conference closed with a panel discussion between ***Professor Dietmar Czernich, Professor Georg Kodek*** *and* ***Dr Judith Schacherreiter*** on deference to the foreign in private international legal practice and international civil procedure. The discussants shared numerous insights: from the appointment of expert opinions on foreign law, to deference to the foreign in international commercial arbitration and the practice of legal advice.

Selina Mack (LMU Munich) opened the second day of the conference examining the *ordre public* in the field of succession law using the example of the right to a compulsory portion in Austria and Germany. *Mack* began by comparing similar regulations in Germany and Austria with the so-called family provision in England. She then contrasted a decision of the Supreme Court of Austria (OGH) with a decision of the German Federal Court of Justice (BGH), both of which deal with the *ordre public* according to Art. 35 of the European Inheritance Regulation when applying English law. The *ordre public* clause under Art. 35 is to be applied restrictively. While the OGH did not consider the *ordre public* to be infringed, the BGH, on the other hand, assumed an infringement. *Mack* concluded that this is a fundamental disrespect of the foreign by the BGH.

Tess Bens (MPI Luxembourg) examined methods of enforcing foreign judgments under the Brussels Ia Regulation. Said Regulation does not, in principle, harmonise enforcement law. She presented the enforcement mechanism as applying the enforcement law of the enforcing state by means of

substitution or, insofar as the order or measure was unknown to the enforcement law, by means of transposition. Due to structural differences in the enforcement law of the Member States, as *Bens* outlines, practical problems can nevertheless arise. Especially since the abolition of the exequatur procedure in the case of insufficient concretisation of the enforcement order, the Brussels Ia Regulation does not provide a procedure. Finally, she discussed that these frictions might be mitigated by anticipating differences and requirements of the enforcing by the courts, nonetheless limited due to the difficulty of predictability.

Afterwards, the participants were able to discuss various topics in a small group for one hour in three parallel groups, each introduced by two impulse speeches.

The first group looked at the factor of nationality in private international law. ***Stefano Dominelli (Università di Genova)*** introduced into the current debate on the connecting factor of nationality in matters concerning the personal status. In his opinion, it is debateable whether a shift towards the application of local law really strengthens deference to the foreign. ***Micheal Cremer (MPI Hamburg)*** looked at the handling of so-called golden passports in the EU. He pointed out, that European conflict of laws regularly does not take the purchased nationality into account, being in line with most of the theoretical approaches to the nationality principle.

The second group focused on the influence of political decisions on the application of foreign law. ***Dr Adrian Hemler (University of Konstanz)*** presented the concept of distributive justice as a reason for applying foreign law. He emphasised, that the difference between purely national and foreign constellations makes the application of foreign law necessary. In his presentation, ***Felix Aiwanger (LMU Munich)*** looked at different standards of control with regard to foreign law. He argued that legal systems that can be considered as reliable are subject to a simplified content review.

The third group discussed the treatment of foreign institutions in international family law. ***Dr Lukas Klever (JKU Linz)*** presented the recognition of decisions on personal status in cases of surrogacy carried out abroad. He discussed differences and possible weaknesses in the recognition under the Austrian conflict of laws and procedural law. ***Aron Johanson (LMU Munich)*** then provided a further perspective with a look at the institute of polygamy. He explained, that while in Germany a partial recognition can be possible, Sweden

had switched to a regular refusal of recognition. Subsequently the question of a duty of recognition arising from the free movement of persons as soon as one member state recognises polygamy was asked.

Dr Tabea Bauermeister (University of Hamburg) devoted her presentation to the conflict of laws dimension of the claim for damages in Art. 22 of the European Commission's proposal for a directive on corporate sustainability due diligence (CSDDD), paragraph 5 of which compels the member states to design it as an overriding mandatory provision. She outlined, that regulatory goals can also be achieved through mutual conflict-of-laws provisions. An example of this is the codification of international cartel offence law. *Bauermeister* concluded, that the use of mandatory overriding provisions instead of special conflict-of-laws provisions expresses a distrust of the foreign legislature's competence or willingness to regulate and therefore represents a disregard of the foreign.

Dr Sophia Schwemmer (Heidelberg University) then examined private enforcement under the CSDDD vis-à-vis third-state companies. She stated, that while third-state companies were included in the scope of application insofar as they are active in the EU internal market, the applicability of the CSDDD could normally not be achieved using the classic conflict-of-laws rules. The CSDDD resorts to an overriding mandatory provision for this purpose. However, *Schwemmer* concluded that a different approach, e.g. an extended right of choice of law for the injured party, was also imaginable and preferable.

As last speaker, ***Dr Lena Hornkohl (University of Vienna/Heidelberg University)*** addressed the effects of EU blocking regulations on private law. She stated that the application of EU blocking statutes as a reaction to extraterritorial third-country regulations can lead to almost irresolvable conflicts in private law relationships. *Hornkohl* then critically examined the ECJ case law that postulates the direct applicability of the Blocking Regulation in private law relationships. Binding private parties to the Blocking Regulation, she concluded, leads to the instrumentalisation of private law at the expense of private parties with the aim of enforcing foreign policy objectives.

A conference volume will be published by Mohr Siebeck Verlag later this year. The next PIL Young Researchers Conference will take place in Heidelberg in 2025.

The Dutch Supreme Court on how to deal with the CISG on appeal (Willemen Infra v Jura)

On 24 February 2023, the Dutch Supreme court has ruled in the case Willemen Infra v Jura, ECLI:NL:HR:2023:313. The ruling clarifies the scope of the Dutch courts' duty to apply the CISG (UN Convention on Contracts for the International Sale of Goods, 1980) ex officio on appeal. The Dutch appellate courts shall not review of their own motion whether the first instance court had to apply the CISG to the dispute, if the question of governing law was not the subject of parties' objections on appeal and thus got "beyond the parties' dispute".

Facts

The facts of this case related to a sale of gutters by a Dutch seller to a Belgian buyer. The gutters were to be used for the renovation of a runway at Zaventem airport. According to the seller's general terms and conditions, the disputes were to be resolved before a Dutch court on the basis of Dutch law.

After the start of performance, the buyer had reasons to assume that that the seller was unable to timely supply the products of the required quality. The buyer refused to take all the purchased gutters.

Proceedings

The seller disagreed and claimed damages for the loss of profit caused by the breach of contract. In the proceedings, the buyer submitted a counterclaim, invoking partial avoidance of contract and, alternatively, nullity of contract due to vitiation of consent. The buyer submitted namely that it had concluded the contract based on misrepresentation relating to the products' quality (the certificates which the products should have) and the delivery time.

The seller relied on both the CISG and Dutch law in its written submissions,

including the statement that the choice for Dutch law in the general terms and conditions should be interpreted as excluding the application of the CISG. During the oral hearing, both parties referred to Dutch law only (see on this the Conclusion of the Advocate General, at [3.4]). The first instance court ruled as follows in relation to applicable law: '*According to the [seller], the contract is governed by Dutch law. (…) 'The court contends that [the buyer] also relies on Dutch law in its arguments, and thus follows [the seller's] reasoning. The court follows the parties in this and shall apply Dutch law*." (the formulation is quoted in *Willemen Infra* v *Jura* at [4.3.1], compare to Advisory Council's Opinion nr 16). The court has then applied the Dutch civil code, not the CISG, to the dispute.

The seller appealed against the decision, but not against the applicable law. Nevertheless, the appellate court considered of its own motion, whether the contract was governed by the CISG. It ruled that the contract fell under the CISG's scope; the Convention was directly applicable on the basis of article 1(1)(a) CISG, as both Belgium and the Netherlands are Contracting States to CISG. Furthermore, the parties to the dispute have not explicitly excluded the CISG's application based on article 6. The appellate court has applied the CISG to the contractual claim, and Dutch law – to the claim relating to the vitiation of consent, as this matter falls outside the Convention's scope. The buyer has labelled the application of the CISG 'surprising', because no claim in appeal targeted applicable law.

In cassation, the Dutch Supreme has ruled that applicable law was indeed "beyond the parties' dispute" on appeal. Therefore, the appellate court was neither free to determine applicable law anew nor free to apply CISG of its own motion (*Willemen Infra* v *Jura* at [2.1.2]- [3.1.6]).

CISG and procedural ordre public?

The ruling is logical from the point of view of civil procedure. Appellate review follows up on – and is limited by – the points invoked on appeal. Issues "beyond the parties' dispute" are not reviewed, unless these issues fall under the rules of procedural ordre public, which the appellate courts must apply of their own motion. While there is no unanimously accepted definition of the Dutch procedural ordre public, the cassation claim explicitly suggested that 'the CISG is not of ordre public' (see Conclusion of the Advocate General, at [3.3.]). Whereas this element of the cassation claim has been satisfied, neither the Advocate

General nor the Court have engaged with the discussion whether procedural ordre public covers direct application (or applicability) of the Convention's uniform substantive sales law, even if it would be confined to establishing whether the parties have opted-out the CISG based on its article 6.