Forward to the Past: A Critical Note on the European Parliament's Approach to Artificial Intelligence in Private International Law

On 20 October 2020, the European Parliament adopted – with a large margin – a resolution with recommendations to the Commission on a civil liability regime for artificial intelligence (AI). The text of this resolution is available here; on other issues of AI that are part of a larger regulatory package, see the Parliament's press release here. The draft regulation (DR) proposed in the resolution is noteworthy from a choice-of-law perspective because it introduces new, specific conflicts rules for artificial intelligence (AI) (on the general issues of AI and PIL, see the conference report by Stefan Arnold here). With regard to substantive law, the draft regulation distinguishes between legally defined high-risk AI systems (Art. 4 DR) and other AI systems involving a lower risk (Art. 8 DR). For high-risk AI systems, the draft regulation would introduce an independent set of substantive rules providing for strict liability of the system's operator (Art. 4 DR). Further provisions deal with the amount of compensation (Art. 5 DR), the extent of compensation (Art. 6 DR) and the limitation period (Art. 7 DR). The spatial scope of those autonomous rules on strict liability for high-risk AI systems is determined by Article 2 DR, which reads as follows:

"1. This Regulation applies on the territory of the Union where a physical or virtual activity, device or process driven by an AI-system has caused harm or damage to the life, health, physical integrity of a natural person, to the property of a natural or legal person or has caused significant immaterial harm resulting in a verifiable economic loss.

2. Any agreement between an operator of an AI-system and a natural or legal person who suffers harm or damage because of the AI-system, which circumvents or limits the rights and obligations set out in this Regulation, concluded before or after the harm or damage occurred, shall be deemed

null and void as regards the rights and obligations laid down in this Regulation.

3. This Regulation is without prejudice to any additional liability claims resulting from contractual relationships, as well as from regulations on product liability, consumer protection, anti-discrimination, labour and environmental protection between the operator and the natural or legal person who suffered harm or damage because of the AI-system and that may be brought against the operator under Union or national law."

The unilateral conflicts rule found in Art. 2(1) DR would prevail over the Rome II Regulation on the law applicable to non-contractual relations pursuant to Art. 27 Rome II, which states that the Rome II Regulation shall not prejudice the application of provisions of EU law which, in relation to particular matters, lay down conflict-of-law rules relating to non-contractual obligations. Insofar, it must be noted that Art. 2(1) DR deviates considerably from the choice-of-law framework of Rome II. While Art. 2(1) DR reflects the lex loci damni approach enshrined as the general conflicts rule in the Rome II Regulation (Art. 4 Rome II), one must not overlook the fact that product liability is subject to a special conflicts rule, i.e. Art. 5 Rome II, which is considerably friendlier to the victim of a tort than the general conflicts rule. Recital 20 Rome II states that "[t]he conflict-of-law rule in matters of product liability should meet the objectives of fairly spreading the risks inherent in a modern high-technology society, protecting consumers' health, stimulating innovation, securing undistorted competition and facilitating trade". In order to achieve these purposes, the Rome II Regulation opts for a cascade of connections, starting with the law of the country in which the person sustaining the damage has his or her habitual residence when the damage occurred, provided that the product was marketed in that country (Art. 5(1)(a) Rome II). If that connection fails because the product was not marketed there, the law of the country in which the product was acquired governs, again provided that the product was marketed in this state (Art. 5(1)(b) Rome II). Finally, if that fails as well, the Regulation returns to the lex loci damni under Art. 5(1)(c) Rome II, if the product was marketed there. This cascade of connections is evidently influenced by the desire to protect the mobile consumer from being confronted with a law that may be purely accidental from his point of view because it has neither a relationship with the legal environment that he is accustomed to (his habitual residence) nor to the place where he decided to expose himself to the danger possibly emanating from the product (place of acquisition). The rule reflects the presumption that most consumers will be affected by a defective product in the country where they are habitually resident. Insofar, Art. 2(1) DR is, in comparison with the Rome II Regulation, friendlier to the *operator* of a high-risk AI system than to the *consumer*.

Even if one limits the comparison between Art. 2(1) DR and the Rome II Regulation to the latter's general rule (Art. 4 Rome II), it is striking that the DR does not adopt familiar approaches that allow for deviating from a strict adherence to lex loci damni. Contrary to Art. 4(2) Rome II, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, Art. 2 DR does not allow to apply the law of that country. Moreover, an escape clause such as Art. 4(3) or Art. 5(2) Rome II is missing in Art. 2 DR. Finally yet importantly, Art. 2(2) DR bars any party autonomy with regard to strict liability for a high-risk AI system, which deviates strongly from the liberal approach found in Art. 14 Rome II.

Apart from the operator's strict liability for high-risk AI systems, the draft regulation would introduce a fault-based liability rule for other AI systems (Art. 8 DR). In principle, the spatial scope of the latter liability rule would also be determined by Art. 2 DR as already described. However, unlike the comprehensive set of rules on strict liability for high-risk systems, the draft regulation's model of fault-based liability is not completely autonomous. Rather, the latter type of liability contains important carve-outs regarding the amounts and the extent of compensation as well as the statute of limitations. Pursuant to Art. 9 DR, those issues are left to the domestic laws of the Member States. More precisely, Art. 9 DR provides that

"Civil liability claims brought in accordance with Article 8(1) shall be subject, in relation to limitation periods as well as the amounts and the extent of compensation, to the laws of the Member State in which the harm or damage occurred."

Thus, we find a lex loci damni approach with regard to fault-based liability as well. Again, all the modern approaches codified in the Rome II Regulation – the cascade of connecting factors for product liability claims, the common habitual residence rule, the escape clause, and party autonomy – are strikingly absent from the draft regulation.

Moreover, the draft regulation, in principle, limits its personal scope to the liability of the operator alone (as legally defined in Art. 3(d)–(f) DR). Recital 9 of the resolution explains that the European Parliament "[c]onsiders that the existing fault-based tort law of the Member States offers in most cases a sufficient level of protection for persons that suffer harm caused by an interfering third party like a hacker or for persons whose property is damaged by such a third party, as the interference regularly constitutes a fault-based action; notes that only for specific cases, including those where the third party is untraceable or impecunious, does the addition of liability rules to complement existing national tort law seem necessary". Thus, for third parties, the conflicts rules of Rome II would continue to apply.

At first impression, it seems rather strange that a regulation on a very modern technology – artificial intelligence – should deploy a conflicts approach that seems to have more in common with Joseph Beale's First Restatement of the 1930's than with the modern and differentiated set of conflicts rules codified by the EU itself at the beginning of the 21st century, i.e. the Rome II Regulation. While the European Parliament's resolution, in its usual introductory part, diligently enumerates all EU regulations and directives dealing with substantive issues of liability, the Rome II Regulation is not mentioned *once* in the Recitals. One wonders whether the members of Parliament were aware of the European Union's acquis in the field of private international law all. In sum, compared with Rome II, the conflicts approach of the draft regulation would be a regrettable step backwards. It remains to be seen how the relationship between the draft regulation and Rome II will be designed and fine-tuned in the further course of legislation.

Back to the Future – (Re-)Introducing the Principle of

Ubiquity for Business-related Human Rights Claims

On 11 September 2020, the European Parliament's Committee on Legal Affairs presented a draft report with recommendations to the Commission on corporate due diligence and corporate accountability. This report has already triggered first online comments by Geert van Calster and Giesela Rühl; the present contribution aims both at joining and at broadening this debate. The draft report consists of three proposals: first, a directive containing substantive rules on corporate due diligence and corporate accountability; secondly, amendments to the Brussels I*bis* Regulation that are designed to grant claimants from third states access to justice in the EU Member States; and thirdly, an amendment to the Rome II Regulation on the law applicable to non-contractual obligations. The latter measure would introduce a new Art. 6a Rome II, which codifies the so-called principle of ubiquity for business-related human rights claims, i.e. that plaintiffs are given the right to choose between various laws in force at places with which the tort in question is closely connected. While the basic conflicts rule remains the place of damage (*lex loci damni*) under Art. 4(1) Rome II, Art. 6a of the Rome II-draft will allow plaintiffs to opt for the law of the country in which the event giving rise to the damage occurred (the place of action or *lex loci delicti commissi* in the narrow sense), the law of the country in which the parent company has its domicile, or, where it does not have a domicile in a Member State, the law of the country where it operates.

The need for having a conflicts rule on the law applicable to business-related human rights claims derives from the fact that the draft report proposes a directive which only lays down minimum requirements for corporate due diligence concerning human rights, but which does not contain an independent set of rules on civil liability triggered by a violation of such standards. Thus, domestic corporate and tort laws will continue to play an important role in complementing the rules of the directive once they have been transposed into domestic law. In theory, this problem might be avoided by trying to pass a wholesale EU Regulation containing both rules on corporate due diligence as well as on related issues of civil liability. The EU has already passed the Regulations on Timber and Conflict Minerals, which deal with fairly specific issues and which are limited in their scope. Taking into account, however, that both domestic corporate law and tort law are very intricate bodies of law, the EU legislature so far has, in the overwhelming number of cases, opted for the less intrusive and more flexible instrument of a directive (see, e.g., the Directive [EU] 2017/1132 relating to certain aspects of company law or the Product Liability Directive). The regulatory choice made in the draft report is thus fully consistent with established modes of EU legislation and the principle of subsidiarity.

The fundamental conflicts problem arising in cross-border human-rights litigation is well-known: Art 4(1) Rome II leads to the application of the law in force at the place of damage, which is frequently located in a third world country having a "weak legal system and enforcement (cf. Recital 2 of the draft directive). Starting a suit in such a forum frequently results not in a "home-court advantage" for plaintiffs, but rather diminishes their prospects of success. Insofar, suing a multinational corporation in the EU becomes attractive. While the hurdle of international jurisdiction can be surmounted rather easily in most cases, e.g. by suing the defendant at its general jurisdiction (Art. 4(1) Brussels I*bis*), a Member State court will nevertheless, under Art. 4(1) Rome II, apply a third state law. In the discussion about domestic due diligence laws, the widely preferred, if not the only viable solution so far has consisted in characterising such laws as being of an overriding mandatory nature within the meaning of Art. 16 Rome II, thus ensuring their application in spite of the otherwise applicable tort law. Seen from the national perspective, this is of course a sound approach because a Member State legislature simply has no mandate to tinker with the Rome II Regulation itself. Once the question of corporate due diligence and liability is answered at the EU level itself, however, there is no practical need for limiting the doctrinal discussion to a unilateral approach within the narrow framework of Art. 16 Rome II. In light of this fact, it is not surprising that the draft report explores another conflicts tool that has been developed in order to strengthen the protection of weaker parties or general interests, i.e. the principle of applying the law more favourable to a party in a given case. This approach, which nowadays mostly consists in letting the plaintiffs choose which law they consider more favourable to them, is well-known, for example, in the domestic PIL codes of Italy and Germany. In those countries, it even is the general rule in international tort law – a hardly convincing solution, because the victim is not the weaker party in every case (for an in-depth treatment of this issue, see here). Therefore, the more modern Rome II Regulation opted for a more differentiating approach: *lex loci* *damni* is the general rule (Art. 4(1) Rome II), whereas the principle of ubiquity – i.e. that a tort may be located in more than one place – is only codified in groups of cases where a specific interest legitimises deviating from this rule: first, environmental damage (Art. 7 Rome II), and secondly, multi-state cases involving cartel damages (Art. 6(3) Rome II). Moreover, while Rome II is not applicable to violations of personality rights, the CJEU's case law on Art. 7(2) Brussels I*bis* has frequently been emulated in domestic conflicts law as well. In sum, the principle of ubiquity has always remained a part of the doctrinal toolbox of EU choice of law.

Insofar, the question must be answered as to whether the ubiquity approach has major advantages compared with the mandatory rule approach. The first factor in favour of applying the principle of ubiquity to business-related human rights claims as well is that it considerably reduces the need for the frequently difficult delineation between human rights violations (Art. 6a Rome II draft) and environmental damages (Art. 7 Rome II). Thus, intricate problems of characterisation and, if necessary, adaptation, are avoided at the outset. In addition, tortious human rights claims may also be rooted in a violation of ILO labour standards (see the definition of "human rights risk" in Art. 3 of the proposed directive). In light of the fact that Art. 8(1) Rome I favours the employee as well by providing for an alternative connection of contractual claims, having a *favor laboratoris* for labour-related human-rights claims fits into the normative framework of EU law, too.

A second advantage is that the ubiquity approach respects party autonomy (Art. 14 Rome II), whereas the parties could not derogate from a truly mandatory rule (Art. 16 Rome II). Thus, the ubiquity approach facilitates settlements, particularly in human rights cases that involve a large number of claimants.

Thirdly, claimants from the Global South are frequently compelled by the "weak legal systems and enforcement" of their home country to seek their fortune abroad rather than by weaknesses of their own substantive laws. In many former colonies, the Common Law or the French Code Napoléon are still in force (with modifications) and would in principle allow a successful suit based on a tortious claim. In this regard, giving claimants the option to sue a company in a Member State, while at the same time applying their own law if they so wish, avoids a paternalistic, neo-colonialist stance that rests on the implicit assumption that our Western laws are inherently better than those of developing countries.

A fourth factor arguing for giving plaintiffs the right to choose the applicable law is that the mandatory rule approach will frequently not sufficiently cover the risks inherent in cross-border litigation. In the German *Rana Plaza* case, the claims of the plaintiffs failed because, under the law of Pakistan, they were barred by the statute of limitations, which was extremely short (just one year) compared with German standards, particularly for a cross-border case (see OLG Hamm NJW 2019, 3527). In light of the CJEU case law on Art. 16 Rome II, however, German limitation periods could hardly be characterised as being of an overriding mandatory nature (ECLI:EU:C:2019:84). Under Art. 6a Rome II-draft, the claimants could simply have chosen German law to govern their case.

On the other hand, the ubiquity approach has been criticised as leading to an impairment of foreseeability because the question of the applicable law remains unanswered until the plaintiffs have made their choice. However, under the mandatory rule approach as well, foreseeability of the applicable law is not necessarily guaranteed. Only a Member State court would apply the due diligence standard as a part of its own *lex fori* (Art. 16 Rome II), but a company would always face the risk of being sued in a third state where it would not be ensured that a local court would take a foreign mandatory rule into account. Even among the Member States, such a courtoisie could not be taken for granted because, unlike Art. 9(3) Rome I, the Rome II Regulation contains no rule on the applicability of *foreign* overriding mandatory rules. One might argue that this concern is purely academic because the proposed directive would harmonise the standards of corporate due diligence in the EU anyway. Yet this would be a serious error because the proposal (Art. 1(1) subpara. 2) only establishes *minimum* requirements.

Thus, the advantages inherent in the ubiquity approach clearly outweigh those of the mandatory rule approach. Nevertheless, it is certainly true that there can be too much of a good thing. Allowing the plaintiffs to choose between *four* different laws is hardly practical and sets up a very dangerous liability trap for lawyers who would have to perform extremely difficult studies in comparative law before advising their clients on where to sue a defendant. Thus, the number of options should simply be reduced to two: either the place of damage or the habitual residence of the defendant.

The latter option should refer to the habitual residence of a corporation because this is the connecting factor commonly used in the Rome II Regulation (Art. 23

Rome II). There is no practical need to replace it with “domicile” which is a concept deployed in European civil *procedure* (Art. 63 Brussels I*bis*), but not in EU choice-of-law Regulations.

In sum, Article 6a Rome II-draft certainly leaves room for further refinement, but its basic approach rests on a sound doctrinal rationale and has major practical advantages compared with the mandatory rule model so far favoured in domestic due diligence laws. Thus, the EP draft deserves an appropriate and thorough consideration rather than a hasty judgment.

Chinese Court Holds Arbitral Award by Foreign Arbitration Institutions in China Enforceable

(This is another version of views for the recent Chinese case on international commercial arbitration provided by Chen Zhi, a PhD candidate in the University of Macau, Macau, PRC)

On 6 August 2020, Guangzhou People’s Intermediate Court (“Guangzhou court”) handed down a ruling on a rare case concerning the enforcement of an award rendered by International Commercial Court of Arbitration (“ICC”) in China,[1] which have given rise to heated debate by the legal community in China. This case was thought to be of great significance by many commentators because it could open the door for enforcement of arbitral awards issued by foreign institution with seat of proceeding in China, and demonstrates the opening-up trend for foreign legal service.
[1]Brentwood Industries Inc. v. Guangdong Faanlong Co, Ltd and Others 2015 Sui Zhong Min Si Fa Chu No.62?

Backgrounds of the facts
The plaintiff, Brentwood Industries, Inc. a USA based company, entered into a Sale and Purchase Agreement (“SPA”) along with a Supplementary Agreement

with three Chinese companies (collectively, “Respondents”) in April 2010. Article 16 of Sale and Purchase Agreement provided as follow:
Any dispute arising out of or in connection with this contract shall be settled by amicable negotiation between the parties. If such negotiations fail to resolve the dispute, the matter shall be referred to the Arbitration Commission?sic?of International Chamber of Commerce for arbitration at the project site in accordance with international practice. The award thereof shall be final and binding on the Parties. The costs of the arbitration shall be borne by the losing party, unless the Arbitration Commission?sic?decides otherwise. The language of the arbitration shall be bilingual, English and Chinese.

According to Article 3 of Supplementary Agreement, the project site was in Guangzhou.
On 29 May 2011, Brentwood submitted an application to Guangzhou Court, seeking for nullification of the arbitration clause in SPA. The Guangzhou Court handed down a judgement in early 2012 rejecting Brentwood’s application and confirming the validity of the arbitration clause.
Because the ICC does not have an office in Guangzhou, Brentwood subsequently commenced an arbitration proceeding before Arbitration Court of International Chamber of Commerce Hong Kong Office on 31 August of 2012. In the course of proceeding, all three respondents participate in the arbitration presenting their written defenses, and among them, one respondent also raised objection of jurisdiction of the ICC Court to handle the case. The ICC Court decided that the jurisdiction issue shall be addressed by a sole arbitrator after giving all parties equal opportunities to present their arguments. Hence, with the consensus of all parties, the ICC Court appointed a sole arbitrator on 10 January of 2013.

On 3rd April 2013, the case management conference was held in Guangzhou and each party appeared and agreed upon the Term of Reference. After exchange of written submissions and hearing (all attended by all parties), the arbitrator rendered Final Award with the reference No. 18929/CYK (the Final Award) on 17 March 2014.

Enforcement proceeding and judgment

Brentwood sought to enforce the Final Award before the Guangzhou Court, mainly on the basis of non-domestic award as prescribed in Article 1(1) of the “New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, which China is a signatory party (“New York Convention”). To increase its options in obtaining enforcement, Brentwood also invoked the Arrangement on Reciprocal Enforcement of Arbitral Awards Between SPC and Hong Kong Special Administrative Region Government, in the event the court regards the award as Hong Kong award because conducted by the ICC Hong Kong Office.

The Respondents raised their own objections respectively, which can be summarized to four main points:

(1) non-domestic award under New York Convention was not applicable to the PRC because it had declared reservation on this matter;

(2) the arbitration clause was invalid because the ICC Court was not an arbitration institutions formed in accordance with Article 10 of the PRC Arbitration Law (revised in 2017);

(3) there are substantive errors in the Final Award;

(4) the arbitrator exceeded its power in the Final Award.

The Guangzhou Court ruled that the arbitration clause was valid and its validity had been confirmed in previous case by the same court. As for the nationality and enforceability of the Final Award, the court opined that it shall be regarded as a domestic award which can be enforced in accordance to Article 273 of Civil Procedural Law (revised in 2012), and stipulated that the awards by foreign-related arbitration institutions in China were enforceable before competent intermediated courts. Based on the above reasoning, the court stated that Brentwood had invoked the wrong legal basis, and it refused to amend its claim after the court asked clarification multiple times. Hence, the court concluded that the case shall be closed without enforcing the Final Award, while Brentwood had the right to file a new enforcement proceeding with correct legal basis.

China's Stance to domestic award by foreign institutions

There is no law directly applicable to awards issued by foreign institution with seat in China. The current legislation divided awards into three categories:

(1) domestic award rendered by Chinese arbitration institutions, which is governed by the Arbitration Law and Civil Procedure Law.

(2) foreign-related award made by Chinese institutions, which is enforceable under Article 273 of Civil Procedure Law.

(3) awards made offshore, which are governed by international conventions (i.e. New York Convention), judicial arrangements and Supreme People Court's judicial interpretation depending on the place of arbitration.

The problem arises mainly because of the conflict between Chinese law and international conventions. Unlike the common practice in international arbitration across the world, which decides the nationality of award and competent court for remedies thereof based on the seat of arbitration proceeding, Chinese law traditionally relied upon the nationality of arbitration institutions instead. The term “arbitration seat” was not embedded in the legislation framework until the SPC’s Interpretation on Application of Arbitration Law in 2006, and Supreme People’s Court only begins to decide the nationality of award based on the seat since 2009.[2]

Due to the lacuna in law, there is no remedy for such China seated foreign award, and therefore parties may face enormous legal risks: on one hand, such award cannot be enforced by any Chinese court if the losing party refuse to perform it voluntarily, on the other hand, the party who is dissatisfactory with the award or arbitration proceeding has no way to seek for annulment of the award.

In 2008, Ningbo Intermediate Court ruled on a controversial case concerning the enforcement of an ICC award rendered in Beijing,[3] granting enforcement by regarding the disputed award as “non-domestic” award as prescribed in the last sentence of the Article 1(1) of New York Convention, under which the member states may extend the effect of Convention to certain type of award which is made inside its territory while is not considered as domestic for various reasons. It shall be noted that the method used by Ningbo Court is problematic and have given rise to heavy criticisms,[4] because China had filed the reservation set out in Article 1(3) of New York Convection confirming that it will apply the Convention to the “recognition and enforcement of awards made only in the territory of another Contracting State”. In other words, said non-domestic award approach shouldn’t be use by Chinese courts.

With this respect, the approach employed in Brentwood seems less controversial because it does not concern a vague and debatable concept not included in current law. Moreover, by deciding the nationality of award based on the seat of arbitration instead of the base of institution, the Guangzhou Court is actually promoting the reconciliation of Chinese law with New York Convention.

[2]See Article 16 of SPC’s Interpretation on Several Questions in Application of Arbitration Law Fa Shi 2006 No.7, see also SPC’s Notice on Matters of Enforcing Hong Kong Award in Continental China Fa 2009 No. 415. As cited in Gao Xiaoli, The Courts Should Decide the Nationality of Arbitral Award by Seat Instead of Location of Arbitration Institution, People’s Judicature (Volume of Cases),

Vol.2017 No. 20, p. 71.
[3] Duferco S.A. v. Ningbo Art & Craft Import & Export Corp. 2008 Yong Zhong Jian No.8.
[4] Author Dong et al, Does Supreme People's Court's Decision Open the Door for Foreign Arbitration Institutions to Explore the Chinese Market?, available at http://arbitrationblog.kluwerarbitration.com/2014/07/15/does-supreme-peoples-courts-decision-open-the-door-for-foreign-arbitration-institutions-to-explore-the-chinese-market/

Comments

Brentwood decision does not appear out of thin air, but contrarily, it is in line with the opening-up trend in the judicial practice of commercial arbitration in China started in 2013. At that time, the Supreme People's Court ruled on the landmark Longlide case by confirming the validity of arbitration agreement which require arbitration proceeding conducted by foreign arbitration in China.[5]This stance has been followed and further developed by the First Intermediate Court of Shanghai in the recent Daesung Industrial Gases case,[6]. In this case, a clause providing "arbitration in Shanghai by Singapore International Arbitration Center" was under dispute by two respondents who alleged that foreign based institutions were prohibited from managing arbitration proceeding in China. However the court viewed this assertion as lacking of legal basis in Chinese law, and was contradictory to the developing trend of international commercial arbitration in the PRC.

In addition, local administrative authorities have shown firm stance and laudable attempt to promote the opening-up policy by attracting foreign institutions to carry out business in China. In late 2019, the justice department of Shanghai adopted new policies permitting foreign arbitration bodies to setup branch and carry out business in Lingang Free Trade Pilot Zone, and to set up detailed rules for registration and supervision in this regard.[7] On 28 August of 2020, the State Council agreed to a new proposal jointly by the Beijing government and the Ministry of Commerce on further opening up service industry, allowing world-renowned offshore arbitration institutions to run business in certain area of Beijing after registration at the Beijing justice department and the PRC Justice Ministry. This goes even further than Shanghai's policy by stipulating that competent authorities shall support preservations for arbitration proceeding, increasing the reach of foreign institution on local justice system.[8]

Nevertheless, there are still lots of works to be done for the landing of foreign

institutions:
First, as the lacuna in the law still exists, the judicial policy will continue to be "uncertain, fraught with difficulty and rapidly evolving" in this regard, as described by the High Court of Singapore. [9] Because Article 273 of Civil Procedural Law does not contain award by foreign institution stricto senso, and Guangzhou Court applied it only on analogous basis, this approach is more likely to be an expedient measure by taking into account surrounding circumstances (i.e. the validity of arbitration clause in dispute had been confirmed by the court itself, and all respondents had actively participated in the arbitration proceeding), instead of corollary of legal terms. Further, albeit the decision in Brentwood case is consistent with SPC's opening-up and arbitration friendly policy, no evidence shows its legal validity was endorsed by SPC like that in Longlide case. Therefore, it is doubtful whether this approach will be employed by other courts in future.
Second, even though the validity and enforceability issues have been settled, the loophole in law concerning auxiliary measures (i.e. interim relief, decision of jurisdiction, etc.) and annulment proceeding remains unsolved, which will probably be another obstruction for foreign institution to proceed with arbitration proceeding in Continental China. The above mentioned proposal by Beijing government provides a good example in this respect, while this problem can only be fully settled through revision of law.

Third, the strict limitations on the content of arbitration agreement remain unchanged. Arbitration agreements providing ad hoc proceeding is still invalid by virtue of the law. Moreover referring dispute without foreign-related factor to foreign institutions is also unacceptable under current judicial policy, even for exclusively foreign-owned enterprises. These limitations have been heavily criticized by legal practitioners and researchers over the years, however whilst the above issues have been formally lifted, the arbitration agreement shall be well drafted in terms of both arbitration institution and the seat of arbitration.

[5] Longlide Packaging Co. Ltd. v. BP Agnati S.R.L. (SPC Docket Number: 2013-MinTa Zi No.13).
[6] Daesung Industrial Gases Co., Ltd.&Another v. Praxair (China) Investment Co., Ltd 2020 Hu 01 Min Te No.83.
[7] See: Measures for the Establishment of Business Bodies by Offshore Arbitration Institutions in the New Lingang Area of the Pilot Free Trade Zone of China (Shanghai) available at

http://sfj.sh.gov.cn/xxgk_gfxwj/20191020/3fbcd61ef43147379c5841e28bdf6007.html

[8] See Article 8 of State Council's Instruction on the Work Plan for the Construction of a National Demonstration Zone for Expanding and Opening Up Beijing's Services Industry in a New Round of Comprehensive Pilot Project?available at http://www.gov.cn/zhengce/content/2020-09/07/content_5541291.htm?trs=1

[9] BNA v BNB [2019] SGHC 142 para.116.

Human rights in global supply chains: Do we need to amend the Rome II-Regulation?

Written by Giesela Rühl, Humboldt-University of Berlin

The protection of human rights in global supply chains has been high on the agenda of national legislatures for a number of years. Most recently, also the European Union has joined the bandwagon. After Commissioner for Justice Didier Reynders announced plans to prepare a European human rights to due diligence instrument in April 2020, the JURI Committee of the European Parliament has now published a Draft Report on corporate due diligence and corporate accountability. The Report contains a motion for a European Parliament Resolution and a Proposal for a Directive which will, if adopted, require European companies – and companies operating in Europe – to undertake broad mandatory human rights due diligence along the entire supply chain. Violations will result, among others, in a right of victims to claim damages.

The proposed Directive is remarkable because it amounts to the first attempt of the European legislature to establish cross-sectoral mandatory human rights due diligence obligations coupled with a mandatory civil liability regime. However, from a private international law perspective the Draft Report attracts attention because it also contains proposals to change the Brussels Ia Regulation and the Rome II Regulation. In this post I will briefly discuss – and criticize – the proposed changes to the Rome II Regulation. For a discussion of the changes to the Brussels Ia Regulation I refer to *Geert Van Calster's* thoughts on GAVC.

Victims' unilateral right to choose the applicable law

The proposed change to the Rome II Regulation envisions the introduction of a new Article 6a entitled "Business-related human rights claims". Clearly modelled on Article 7 Rome II Regulation relating to environmental damage the proposal allows victims of human rights violations to choose the applicable law. However, unlike Article 7 Rome II Regulation, which limits the choice to the law of the place of injury and the law of the place of action, the proposed Article 6a allows victims of human rights violations to choose between potentially four different laws, namely

1) the law of the country in which the damage occurred, i.e. the law of the place of injury,

2) the law of the country in which the event giving rise to damage occurred, i.e. the law of the place of action,

3) the law of the country in which the parent company has its domicile or, where the parent company does not have a domicile in a Member State,

4) the law of the country where the parent company operates.

The rationale behind the proposed Article 6a Rome II Regulation is clear: The JURI Committee tries to make sure that the substantive provisions of the proposed Directive will actually apply – and not fall prey to Article 4(1) Rome II Regulation which, in typical supply chain cases, leads to application of the law of the host state in the Global South and, hence, non-EU law. By allowing victims to choose the applicable law, notably the law of the (European) parent company, the JURI Committee takes up recommendations that have been made in the literature over the past years.

However, a right to choose the applicable law *ex post* – while certainly good for victims – is conceptually ill-conceived because it results in legal uncertainty for all companies that try to find out *ex ante* what their obligations are. Provisions like the proposed Article 6a Rome II Regulation, therefore, fundamentally impair the deterrence function of tort law and increase compliance costs for companies because they have to adjust their behaviour to four – potentially – different laws to avoid liability. It is for this reason that choice of law rules that allow one party to unilaterally choose the applicable law *ex post* have largely (even though not completely) fallen out of favour.

Alternative roads to European law

The proposed Article 6a Rome II Regulation, however, does not only fail to convince conceptually. It also fails to convince as regards to the purpose that it seeks to achieve. In fact, there are much better ways to ensure that European standards apply in supply chain cases. The most obvious way is to simply adopt the envisioned European instrument in the form of a Regulation. Its provisions would then have to be applied as international uniform law by all Member State courts – irrespective of the provisions of the Rome II Regulation. However, even if the European legislature prefers to adopt a European instrument in the form of a Directive – for political or competence reasons –, no change of the Rome II Regulation is necessary to ensure that it is applied throughout Europe. In fact, its provisions can simply be classified as overriding mandatory provisions in the meaning of Article 16 Rome II Regulation. The national provisions implementing the Directive will then apply irrespective of the otherwise applicable law.

In the light of the above, application of European human rights due diligence standards can be ensured without amending the Rome II Regulation. It is, therefore, recommended that the JURI Committee rethinks – and then abandons – the proposed Article 6a Rome II Regulation.

Note: This post is also available via the blog of the European Association of Private International Law.

Fraud and Foreign Judgments under Singapore law

A foreign judgment is generally not to be reviewed on the merits at the recognition and enforcement stage. Yet, an exception has always been carved out for fraud under the common law rules on the basis that 'fraud unravels everything' (*Lazarus Estates Ltd v Beasley* [1956] 1 QB 702, 712 *per* Lord Denning). Thus, English courts allow a judgment debtor to raise fraud at the recognition and enforcement stage even if no new evidence is adduced and fraud had been considered and dismissed by the court of origin (*Abouloff v Oppenheimer & Co* (1882) 10 QBD 295). This seeming anomaly with the prohibition against a review of the merits of a foreign judgment has been justified on the basis that where fraud is concerned, the court of origin is misled, not mistaken (*Abouloff*). The *Abouloff* rule has been much criticized, but successive courts have refused to depart from it (see also *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804, [116] (Privy Council)). Further, in *Takhar v Gracefield Developments Ltd* ([2019] UKSC 13, [2020] AC 450) which is a case on fraud and domestic judgments, the Supreme Court held that, generally, no requirement that the fraud could not have been uncovered with reasonable diligence in advance of obtaining the judgment would be imposed on the party seeking to set aside the judgment on the basis of fraud. As one of the oft-cited criticisms for the *Abouloff* rule is that it is out of step with how English courts deal with domestic judgments, *Takhar* may have the effect of further embedding the *Abouloff* rule.

In *Hong Pian Tee v Les Placements Germain Gauthier* ([2002] SGCA 17, [2002] 1 SLR(R) 515), the Singapore Court of Appeal criticized the *Abouloff* rule on the basis that it would encourage 'endless litigation' and 'judicial chauvinism' (at [27]-[28]). Drawing on Canadian and Australian authorities on fraud and foreign judgments, the Court held that insofar as intrinsic fraud (ie, fraud which goes to the merits of the case) is concerned, the foreign judgment may only be impeached where 'fresh evidence has come to light which reasonable diligence on the part of the defendant would not have uncovered and the fresh evidence would have been likely to make a difference in the eventual result of the case' (at [30]).

The current position on fraud and domestic judgments under Singapore law is that the fresh evidence rule applies, albeit flexibly (see, eg, *Su Sh-Hsyu v Wee Yue Chew* [2007] SGCA 31, [2007] 3 SLR(R) 673). However, the Court of Appeal recently considered *Takhar* in a decision concerning a domestic adjudication determination (AD). Adjudication is available under the Building and Construction Industry Security of Payment Act (Cap 30B, Rev Ed 2006) and is a quick and inexpensive process to resolve payment disputes arising from building and construction contracts. In *Facade Solution Pte Ltd v Mero Asia Pacific Pte Ltd* ([2020] SGCA 88), the Court of Appeal held that an AD could be set aside on the ground of fraud. The party raising fraud would have to establish that the facts which were relied on by the adjudicator were false; that the other party either knew or ought reasonably to have known them to be false; and that the innocent party did not in fact, subjectively know or have actual knowledge of the true position throughout the adjudication proceedings (at [30]). The Court emphasised that 'there is no requirement on the innocent party to show that the evidence of fraud could not have been obtained or discovered with reasonable diligence during the adjudication proceeding' (at [31]). It cited *Takhar* and the High Court of Australia decision of *Clone Pty Ltd v Players Pty Ltd (in Liquidation)* [2018] HCA 12 with approval, the High Court of Australia having also rejected the reasonable diligence requirement in the context of a fraudulently obtained domestic judgment in the latter case.

The Court held (at [33]; emphasis added):

'Where it is established that an AD is infected by fraud, it is neither material nor relevant to inquire as to whether the innocent party could have discovered the truth by the exercise of reasonable diligence. A fraudulent party cannot be allowed to claim that he could have been caught had reasonable diligence been exercised, but because he was not caught, he should be allowed to get away with it. Such a view would bring the administration of justice into disrepute and it would be unprincipled to hold in effect that there is no sanction on the fraudulent party because he could have been found out earlier. Parties dealing with the *court*, and in the same vein, with the adjudicator in the adjudication of their disputes under the Act are expected to act with utmost probity.'

This passage suggests that the position on fraud and domestic judgments would change in the near future. It also raises the question whether the requirement of reasonable diligence in respect of intrinsic fraud and foreign judgments would survive for long. On the one hand, the Court in *Hong Pian Tee* had said that:

‘There is no logical reason why a different rule should apply in relation to a foreign judgment’ (at [27]) (ie, vis-à-vis a domestic judgment). The requirement of reasonable diligence has also been criticized on the basis that the court would be ‘taking the side of the fraudster against his negligent opponent’ (Briggs, ‘Crossing the River by Feeling the Stones; Rethinking the Law on Foreign Judgments’ (2005) 8 *SYBIL* 1, 21). On the other hand, there was a heavy emphasis on judicial comity in *Hong Pian Tee*. The Court observed that: ‘It is … vitally important that no court of one jurisdiction should pass judgment on an issue already decided upon by a competent court of another jurisdiction …. It must be borne in mind that the enforcement forum is not an appellate tribunal vis-à-vis the foreign judgment’ (at [28]).

It remains to be seen whether the Singapore Court of Appeal would in future resile from *Hong Pian Tee.* At least, the recent developments in the domestic context intimate that the point is arguable.

Brentwood Industries v. Guangdong Fa Anlong Machinery Equipment Co., Ltd. –A third way to enforce China-seated arbitral awards made by foreign arbitration institution

Brentwood Industries v. Guangdong Fa Anlong Machinery Equipment Co., Ltd.–A third way to enforce China-seated arbitral awards made by foreign arbitration institution

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Background

Nationality of an arbitral award marks the source of the legal validity of the award. Most countries generally divide the awards into domestic awards and foreign awards, and provide different requirements for their recognition and enforcement. It is a common practice to determine the nationality of the arbitral award by the seat of arbitration, which is the so-called “territorial theory”. However, Chinese law adopts the “institutional theory”, which raises controversy concerning the nationality of the arbitral award made by foreign arbitration institutions located in mainland. After long-term debate in practice, the *Brentwood* Case[1] finally confirmed that China-seated arbitral awards made by a foreign arbitration institution shall be regarded as Chinese foreign-related awards.

Fact and decision

Guangzhou Intermediate People’s Court (hereinafter, “the court”) delivered the judgment on *Brentwood Industries v. Guangdong Fa Anlong Machinery Equipment Co., Ltd.* on 6 Aug 2020[2]. After *DUFERCOS* Case[3], it is another landmark case that granted the enforcement of arbitral award made by a foreign arbitration institution in mainland China.

Brentwood Industries (hereinafter, “plaintiff”) concluded a sales contract with three Chinese companies (hereinafter, “defendants”) and agreed that “any dispute arising out of or in relation to the agreement shall be settled by amiable negotiation. If no agreement can be reached, each party shall refer their dispute to the International Commercial Chamber (hereinafter, “ICC”) for arbitration at the site of the project in accordance with international practice.” Due to the defendants’ delay in payment, theplaintiff submitted their disputes to the ICC for arbitration. Since the “project” mentioned in the arbitration clause was the “Guangzhou Liede Sewage Treatment Plant Phase IV Project” listed in Article 3 of the “Supplementary Agreement”, located in Guangzhou, China, the seat of arbitration shall be Guangzhou, China. After defendants refused to perform the award, which was in favor of plaintiff, plaintiff resorted to the court for recognition and enforcement.

Under current Chinese law, there are two possible ways to enforce the arbitral award made by a foreign arbitration institution in mainland China: (1) Classify such an award as a foreign award by the location of the arbitration institution under Art. 283 Civil Procedure Law of the People's Republic of China (hereinafter, "Civil Procedure Law"), which provides that an award made by a foreign arbitration institution must be recognised and enforced by a people's court pursuant to international treaties or the principle of reciprocity. (2) Classify such award as non-domestic award provided by the last sentence of Art. 1(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter, "New York Convention"), which provides that the convention shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

Besides the aforementioned choices, the court provided a third way. It ruled that the arbitral award made by a foreign arbitration institution in mainland China shall be regarded as Chinese foreign-related arbitral award. If a party fails to perform the arbitral award, the other party may refer to Art. 273 of the Civil Procedure Law for recognition and enforcement. Under Art. 273 of the Civil Procedure Law, after an award has been made by an arbitration institution of the People's Republic of China for foreign-related disputes, no party may file a lawsuit in a people's court. If a party fails to perform the arbitral award, the other party may apply for enforcement to the intermediate people's court of the place where the domicile of the person against whom an application is made is located or where the property is located.

Comment

Since *Long Lide* Case[4], Chinese court had affirmed the validity of arbitration agreements providing arbitration proceedings conducted by a foreign arbitration institution in mainland China. But in practice, arbitral awards based on these agreements still face the dilemma in recognition and enforcement. Because in China, different from international practice, the nationality of an arbitral award is determined by the location of the arbitration institution instead of the seat of arbitration, which is referred to as the "institutional theory". Under Art. 283 Civil Procedure Law, to recognise and enforce an award made by a foreign arbitration institution by a people's court, the people's court shall handle the matter pursuant to international treaties concluded or acceded to by the People's Republic of China or in accordance with the principle of reciprocity. It impliedly refers to the New York Convention. However, concerning the determination of the nationality of the arbitral award, the New York Convention adopts the "territorial theory", which provides: "this Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought". The "territorial theory" adopted by the New York Convention collides with the provision of the Civil Procedure Law. The confusion on application of law has not yet been dispelled.

In response to the conflict between domestic legislation and international convention, judicial practice has shown inclination to convert towards the "territorial theory". For example, in *DMT* case[5], the nationality of an arbitral award made by ICC in Singapore was deemed Singapore rather than France. But in line with the "territorial theory", arbitral awards made in mainland China shall therefore be deemed as Chinese awards. Under the "reciprocity reservation" filed by China, the New York convention shall only be applied to the recognition and enforcement of awards made in the territory of another contracting state. Hence, the New York Convention shall not be applied to China-seated arbitral awards.

As early as *DUFERCOS* Case, the court defined the arbitral award made by the ICC in Beijing as non-domestic and therefore enforced it under the New York Convention. However, it failed to clarify what exactly constitutes a non-domestic award and how to interpret the reciprocity reservation. Originally, both non-domestic awards and reciprocity reservation were methods to encourage the acceptance and enlarge the application of the New York Convention. Conversely, their coexistence has impaired the effect of the New York Convention.

From this perspective, the Guangzhou Intermediate Court did find another way out by completely avoiding such conflict. The current Chinese law divides arbitral awards into: (1)domestic awards; (2)Chinese foreign-related awards; (3)foreign awards. Compared with domestic awards, Chinese foreign-related awards take into account the particularity of foreign-related factors, and the review standards for recognition and enforcement are less strict, subject to procedural review only. Compared with foreign awards, Chinese foreign-related awards can be set aside by Chinese court, which makes them under more restrictive supervision. That is reason why some argued that China-seated arbitral awards will be subject to stricter supervision by Chinese court because there are more diversified judicial review channels.[6] Indeed, arbitral awards made by Chinese foreign-related arbitration institution are under triple supervision carried out by the seat of arbitration, the place of recognition and enforcement, and China. But it should be noted that when it comes to China-seated arbitral awards made by foreign arbitration institution, China, as the seat of arbitration, has the inherent power to review the arbitral award and set it aside. Moreover, according to Art. 70 and Art. 71 of the Chinese Arbitration Law, reasons for setting Chinese foreign-related arbitral awards aside do not exceed the scope of reasons for refusing recognition and enforcement of these awards. Therefore, they are not imposed with any additional burden by being regarded as Chinese foreign-related arbitral awards. Concerning the recognition and enforcement of Chinese foreign-related award, Art. 274 of the Civil Procedure Law provided a more tolerant standard than the New York Convention. Compared with Art. 5 of the New York Convention, the legal capacity of the parties to the agreement and the final effect of the award are no longer obstacles to recognition and enforcement. Since arbitral awards made by foreign arbitration institutions are regarded as Chinese foreign-related award, they are treated more favorably than foreign awards concerning recognition and enforcement. Left the legal problems behind, it showed China's effort to support the arbitration within the current legislative framework.

However, Chinese foreign-related arbitral award itself is a distorting product of the conflicts between "institutional theory" and "territorial theory". Application of Art. 273 of the Civil Procedure Law can only temporarily ease the tension. "Institutional theory" stipulated by Chinese law is an issue left over from history. "Foreign-related arbitration institutions" historically referred to the China International Economic and Trade Arbitration Commission (hereinafter referred to as CIETAC) and China Maritime Arbitration Commission (hereinafter referred to as CMAC). They were established respectively in 1954[7] and 1958[8]. At that time, only CIETAC and CMAC can accept foreign-related arbitration cases, while domestic arbitration institutions can only accept domestic arbitration cases. Accordingly, arbitral awards made by different arbitration institutions were divided into Chinese foreign-related arbitral awards and domestic arbitral awards. However, nowadays, such restrictions are extinct in practice. In 1996, the State Council of People's Republic of China issued a document stating that: "The main responsibility of the newly established arbitration institution is to accept domestic arbitration cases; if the parties to a foreign-related arbitration case voluntarily choose the newly established arbitration institution for arbitration, the newly established arbitration commission can accept the case."[9] In fact, there is no longer division of foreign-related arbitration institution and domestic arbitration institution. Hence, the "institutional theory" can no longer meet the needs of practice. Under the "territorial theory", the arbitral awards are divided into domestic awards, non-domestic awards and foreign awards. We may wonder whether China would revoke the reciprocity reservation, the obstacle in recognition and enforcement of non-domestic arbitral awards, in the future. Would China-seated arbitral awards made by foreign arbitration institution be defined as non-domestic awards by then? To get out of the dilemma once for all, the responsibility remains on the shoulder of legislative body.

[1] https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=bded4e3c31b94ae8b42fac2500a68cc4

[2] https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=bded4e3c31b94ae8b42fac2500a68cc4

[3] https://www.pkulaw.com/specialtopic/61ffaac8076694efc8cef2ae6914b056bdfb.html

[4] https://www.pkulaw.com/chl/233828.html

[5] http://www.pkulaw.cn/fulltext_form.aspx/pay/fulltext_form.aspx?Db=chl&Gid=bd44ff4e02d033d0bdfb

[6]Good News or Bad News? Arbitral Awards Rendered in China by Foreign Arbitral Institutions Being Regarded as Chinese Awards available at: https://www.chinajusticeobserver.com/a/good-news-or-bad-news-arbitral-awards-rendered-in-china-by-foreign-arbitral-institutions-being-regarded-as-chinese-awards?from=timeline

[7] http://www.cietac.org/index.php?m=Page&a=index&id=2

[8] http://www.cmac.org.cn/%E6%B5%B7%E4%BB%B2%E7%AE%80%E4%BB%8B

[9] http://cicc.court.gov.cn/html/1/218/62/83/440.html

Anti-Suit Injunction Issued in China: Comity, Pragmatism and Rule of Law

1 Anti-suit Injunctions issued in *Huawei v Conversant* and *Xiaomi v Intel Digital*

Chinese courts have issued two anti-suit injunctions recently in cross-border patent cases. The first is the Supreme Court's ruling in *Huawei v Conversant,* (2019) Zui Gao Fa Zhi Min Zhong 732, 733 and 734 No 1. (here) Huawei, a Chinese telecom giant brought an action on 25 Jan 2018 in Jiangsu Nanjing Intermediate Court requiring determination of FRAND royalty for all Chinese patents held by Conversant that is essential to 2G, 3G and 4G standard (standard essential patent or 'SEP'). Conversant brought another action in Düsseldorf, Germany on 20 April 2018 claiming Huawei infringed its German patents of the same patent family. On 16 Sept 2019, the Chinese court ordered a relatively low rate pursuant to Chinese standard and Conversant appealed to the Supreme Court on 18 Nov 2019. On 27 Aug 2020, the German Court held Huawei liable and approved the FRAND fee proposed by Conversant, which is 18.3 times of the rate determined by the Chinese court. Pursuant to Huawei's application, the Chinese Supreme Court restrained Conversant from applying the German court to enforce the German judgment. The reasons include: the enforcement of the Düsseldorf judgment would have a negative impact on the case pending in Chinese court; an injunction is necessary to prevent irreparable harm to Huawei; the damage to Conversant by granting the injunction is significantly smaller than the damage to Huawei if not granting injunction; injunction will not harm public interest or international comity.

On 9 June 2020, Chinese company Xiaomi brought the proceedings in the Wuhan Intermediate Court requesting the determination of the global FRAND rate for SEPs held by the US company, Inter Digital. On 29 July, Intel Digital sued Xiaomi in Delhi High Court in India for infringement of Indian patents of the same patent family and asking for injunction. The Wuhan Intermediate Court ordered Inter Digital to stop the injunction application in India and prohibited Intel Digital from applying injunctions, applying for the determination of FRAND rate or enforcing junctions already received in any countries. (Xiaomi v Intel Digital (2020) E 01 Zhi Min Chu 169 No 1) The court provides reasons as follows: Inter Digital intentionally brought a conflicting action in India to hamper the Chinese proceedings; the Indian proceedings may lead to judgments irreconcilable to the Chinese one; an anti-suit injunction is necessary to prevent irreparable harm to Xiaomi's interests; an anti-suit injunction will not harm Intel Digital's legitimate interests or public interests.

2 Innovative Judicial 'Law Making' to Transplant Foreign Law

These two cases are interesting in that they open the door for the courts to 'make law' by providing Chinese legislation innovative interpretation. Chinese law does not explicitly permit the courts to issue anti-suit or anti-arbitration injunctions. Article 100 of the Civil Procedure Law of China permits Chinese courts to order or prohibit the respondent to do, or from doing, certain actions, if the respondent's behaviour may lead to the difficulty to enforce the judgment or cause other damages to the other party. But this act preservation provision was generally used only in the preservation of property, injunction of infringing actions, or other circumstances where the respondent's action may directly cause substantive harm to the applicant's personal or proprietary rights. It was never applied as the equivalent to anti-suit injunctions. The 'Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in Cases Involving the Review of Act Preservation in Intellectual Property Disputes' (No. 21 [2018] of the Supreme People's Court) enforced from 1 Jan 2019 did not mention the court's competence to issue anti-suit injunction. These two judgments provide innovative interpretation to Art 100 by extending act preservation measures to cover anti-suit injunction.

It is important to note that anti-suit injunction is a controversial instrument used to combat the conflict of jurisdiction and forum shopping. It is not issued frequently or lightly. Instead, there is a high threshold to cross. In England, for example, an anti-suit injunction can be ordered only if the foreign proceedings are vexatious or oppressive and England is the natural forum, (*Airbus Industrie GIE v Patel* [1999] AC 119) or the foreign proceedings would breach a valid exclusive jurisdiction or arbitration clause between the parties. (*The "Angelic Grace"*, [1995] 1 Lloyd's Rep. 87) In both cases, neither courts justify China is a natural forum. Such justification may be more difficult in disputes concerning foreign patent due to the territoriality of patent. Furthermore, foreign proceedings are not oppressive just because they award higher rate to the parent holder, which is not properly handled either by the Chinese judgments. In the US, anti-suit injunction requires the parties and issues in foreign proceedings are 'the same' as the local ones. (*E. & J. Gallo Winery v. Andina Licores SA*, 446 F. 3d 984 (Court of Appeals, 9th Circuit 2006)) This barrier is difficult to lift in disputes concerning infringement of national patents in the same family. In FRAND cases, the court usually relies on the 'contractual umbrella over the patent' to avoid the difficulty brought by the territoriality of patent. (*Huawei v Samsung*, Case No. 3:16-cv-02787-WHO) Even if a contractual approach is adopted, the court still needs to ascertain the foreign litigation may frustrate a local policy, would be vexatious or oppressive, would threaten the U.S. court's in rem jurisdiction, or would prejudice other equitable considerations. (*Zapata Off-Shore Company v. Unterweser Reederei GMBH*, 428 F.2d 888 (United States Court of Appeals, Fifth Circuit, 1970))

The Chinese judgments show clear sign of borrowing the common law tests. In particular, the *Huawei v Conversant* judgment has high similarity with *Huawei v Samsung* judgment rendered by the California Northern District Court. The problem is the enjoined Düsseldorf judgment awarded FRAND rate instead of an unconditional injunction like the Shenzhen judgment. While enforcing a permanent injunction in the biggest market of Samsung may lead to a forced settlement which would make the US proceedings unnecessary or redundant, enforcing the court determined FRAND rate covering only one state may not have the same effect on the Chinese proceedings. In particular, due to different standards to calculate the FRAND rate, a higher rate covering the German market is not oppressive and would not result in a forced settlement for Chinese FRAND rate. The Wuhan judgment focuses on the vexatious foreign proceedings brought in bad faith and abuse of process. The Wuhan court considers the Indian proceedings was brought to frustrate the pending proceedings before the Wuhan court. The judgment seems to follow the English trait. However, the court did not fully explain how an action purely covering Indian patents and concerning Indian market would affect the Chinese proceedings based on contract. It is also unclear whether Chinese court could award a global FRAND rate as the English court will do. Although in contrast to many other judgments, these two judgments show reasonable quality and laudable efforts of reasoning, reading in details may suggest the courts have learnt more in form instead of substance. The judicial transplant of very unfamiliar common law instruments into Chinese practice seems a little awkward and immature.

3 Comity, Pragmatism and Rule of Law

Anti-suit injunction is a controversial instrument in that it may infringe foreign judicial sovereignty and comity. Even if it is technically directed to the respondent not a foreign court, it makes judgment on the appropriateness of foreign proceedings, which, in normal circumstances, should be judged by the foreign court. No matter how indirect the interference is, an interference is there. Such an approach is fundamentally incompatible with Chinese jurisprudence and diplomatic policy, which emphasise on the principle of sovereign equality and non-interference. China usually considers parallel proceedings tolerable which concern the judicial sovereignty of two countries and each could continue jurisdiction pursuant to their domestic law. (Art 533 of Civil Procedural Law Judicial Interpretation by SPC) Adopting anti-suit injunction to tackle foreign parallel proceedings or related proceedings directly contradicts this provision.

Since Chinese courts would not deviate from the central government's policy, the two judgments may be a sign to show China is gradually adjusting its international policy from self-restraint to zealous competition, at least in the high-tech area. This is consistent with China's strategic plan to develop its high-tech industry and a series of reform is adopted to improve IP adjudication. It may imply consideration of diffused reciprocity, i.e. since some foreign courts may issue anti-suit injunction to obstruct Chinese proceedings, Chinese courts should have the same power. It may also reflects China's increased confidence on its institutions led by its economic power. The transplant of anti-suit injunction cannot be deemed as admiring foreign law, but a pragmatic approach to use any tools available to achieve their aims. Since anti-suit injunctions may interfere a state's sovereignty, a foreign state may issue 'anti-anti-suit injunction' to block it. While injunction wars occur in high-tech cases, the final trump card should be a country's economic power. Since China is the biggest market for many telecom products, it would be the last market that most companies would give up, which would provide Chinese courts a privilege.

Finally, since anti-suit injunction is not included explicitly in Chinese law, there is no consistent test applying to it. The two judgments have applied different tests following the practice from different common law countries. It is also noted that the lack of relevant training in exercise discretion in issuing anti-suit injunctions or applying precedents leads to uncertainty and some discrepancy. Issuing anti-suit injunction is serious in that it may affect comity and international relation. It thus cannot be adopted randomly or flexibly by mirroring one or two foreign judgments. If China indeed wants to adopt anti-suit injunction, a test guidance should be provided. Anti-suit injunction needs to be issued under the rule of law.

Unwired Planet v Huawei [2020] UKSC 37: The UK Supreme Court Declared Competence to Determine Global FRAND Licensing Rate

1. Background

The UK Supreme Court delivered the landmark judgment on Unwired Planet v Huawei and Conversant v Huawei and ZTE, [2020] UKSC 37 on 26 Aug 2020. In 2014, the US company Unwired Planet sued Huawei and other smartphone manufacturers for infringing its UK patents obtained from Ericsson. Some of these patents are essential to the 2G, 3G and 4G wireless telecommunication standards set by the European Telecommunications Standards Institute (ETSI), an international standards setting organization (SSO). Since Ericsson and Nokia are subject to various ETSI policies including patent policies, these policies continue to apply after they are acquired by Unwired Planet. The ETSI patent policy requires that holder of patents that are indispensable for the implementation of ETSI standards, referred to as standard essential patents (SEP) , must grant licence to implementers (such as the smartphone manufacturers) on "fair, reasonable and non-discriminatory " (FRABD) terms. In 2017, Canadian company Conversant filed similar lawsuits against Huawei and ZTE.

Unwired Planet and Conversant proposed to grant the worldwide licence, but Huawei proposed a UK only licence. Huawei believes that the UK litigation only concerns the UK licence and the licence fees paid to resolve disputes under the UK procedure should cover only British patents and not global patents. The UK Supreme Court upheld the High Court and Court of Appeal judgments, ruling that the FRAND licence will need to be global between large multinational companies. If Huawei refuses to pay the FRAND global licence rate determined by the court, the court will issue an injunction restraining Huawei's sale of infringing products in the UK.

2. Legal Issues

The Supreme Court answers five legal questions: 1. Does the English court have the power or jurisdiction without the parties' agreement to require the parties to enter into a global licence under a multinational patent portfolio? 2. Is England the proper forum for such a claim? 3. What is the meaning and effect of the non-discrimination component of the FRAND undertaking? 4. Does the CJEU's decision in Huawei v ZTE mean that a SEP owner is entitled to seek an injunction restraining infringement of those SEPs in circumstances such as those of the Unwired case? 5. Should Court grant damages in lieu of an injunction?

Given our focus on private international law, this note only focuses on the private international law related issue, namely the English court's "long arm" jurisdiction to grant a global licence for dispute concerning the infringement of the UK patent and to issue an injunction if the global licence rate is not complied.

3. Territoriality of Patents and Globalisation of Telecommunication

Telecommunication industry faces the conflict between territoriality of patents and globalisation of telecom products and equipment. Products made in different countries should be able to communicate and inter-operate and keep operational in different jurisdictions. It would be unrealistic to require patent holders to defend their patent country by country. It is also harmful to the industry if SEP holders demand unreasonable licence fees and prohibit the use of its invention within a national jurisdiction. It is unreasonable for consumers if they cannot use their mobiles smartphones or other telecom devices when travel abroad. To reconcile the conflict, the ETSI policy requires the SEP holders to irrevocably license their SEP portfolios on fair, reasonable and non-discriminatory ("FRAND") terms. The policy reconciles conflict of interest between SEP holders and SEP implementers but does not, at least directly, resolve the conflict between territoriality and globalisation. In terms of the later, the industry practice shows that multinational SEP holders and implementers usually negotiate worldwide licences, bearing in mind that the SEP holders and implementers cannot test validity of each patent of the portfolio in each country. The licence rate is thus based on the understanding that some patents may be invalid in some countries.

The Supreme Court confirmed the territoriality principle. English court only has jurisdiction to determine validity and infringement of the UK patent. But the English court, based on the jurisdiction on the UK patent, has the competence to grant a global licence rate.

This judgment includes a few private international law matters. Firstly, the granting of global licence rate is a matter in relation to applicable law instead of jurisdiction from the private international law perspective. The case concerns the infringement and validity of the UK patents and the English court has no problem to take jurisdiction. After ruling the defendant indeed infringed the valid UK patents the English court moved to remedy. The remedy to the infringement of SEPs is the grant of FRAND rate pursuant to the ETSI policy and industry practice. This, however, does not mean the English court directly treats business custom or ETSI policy as the governing law, which, standing alone, may not be able to acquire the status as other non-state norms under the current legal framework. (Rome I Regulation) They are applied pursuant to the contract principle. The judgment heavily relies on the ETSI policy, including its language and purpose. The court concludes that the ETSI policy creates a contractual arrangement between SEP holders and implementers and it is the intention of the policy to grant global licences for SEP portfolios taking into account of industry practices and the purpose. English courts' power to determine a global FRAND licence rate is inherently consistent with the ETSI policy, given there is no alternative international forum available. There is no much consideration of any choice of law rules, except the clarification that the ETSI policy was governed by French law. The court nevertheless does not consider the French law principle in interpreting contracts. Instead, the court naturally applies these non-state norms as part of the contract between the parties. Relying on contract to seise the power to determine the global rate helps the court to avoid the necessity to determine the validity of foreign patents of the same patent family.

The Supreme Court also considered the forum non conveniens in Conversant case (forum non conveniens was not plead in Unwired Planet). The court refused to accept that China would be the more appropriate alternative forum. Although 64% of Huawei's sales occur in China and only 1% in the UK and 60% of the ZTE's operating revenue in the first six months of 2017 was from China and only 0.07% from the UK, the Supreme court held that Chinese courts might not assume jurisdiction to determine the global FRAND term. It seems possible that if China, or any other country, which maybe the most important global market for the disputed patents, follows the UK approach to grant global licence for SEP portfolios, the English court may apply *forum non conveniens* to decline jurisdiction. In fact, Chinese law does not prevent a Chinese court from issuing licence with broader territorial coverage, though there is not yet any case on this matter. The "Working Guidance for Trial of SEP disputes by the Guangdong Province Higher People's Court (for Trial Implementation)" of 2018 provides in Art 16 that if the SEP holder or implementer unilaterally applies for the licence covering areas exceeding the court's territory, and the other party does not expressly oppose or the opposition is unreasonable, the court could determine the applied licence rate with broader geographic coverage.

A more controversial point of the judgment is that the Supreme Court concludes that the ESTI policy would allow the court to issue injunction if the implementer refuses to pay the global licence rate. It is important to know that the ESTI policy does not expressly state such an effect. The UK court believes that an injunction would serve as a strong incentive for the patentee to accept a global licence. Damages, on the other hand, may encourage implementers to infringe patents until damages are applied and received in each jurisdiction. This conclusion is rather surprising as the injunction of SEPs in one jurisdiction may have the potential to disturb the whole telecommunication market for the given manufacturer. There is even argument that the purpose of ESTI is to prohibit injunction for SEPs (here; and here) The use of injunction may not "balance" the conflicting interests, but significantly favours the SEP holders to the disadvantage of the implementers

4. Forum Shopping and Conflict of Jurisdiction

It is important to note that regardless of the current geopolitical tension between the US and China, the UK Supreme Court's judgment should not be interpreted as one that has taken the political stance against China's High-Tech companies. (here) It upholds the judgments of the lower courts dated back to 2017. It is also consistent with the principle of judicial efficiency, protection of innovation and business efficacy. Although the final result protects the patent holders more than the implementers, it is hard to argue anything wrong in terms of policy. Furthermore, since Huawei and Unwired Planet had already settled and the rate set by the court had been paid, this judgment will not result in additional payment obligations or an injunction. (here) Finally, although Huawei lost this case as the implementer, Huawei is also the biggest 5G SEP holder. Pursuant to this judgment, although Huawei has been banned from the UK's 5G network, it can still require other 5G implementers for a global FRAND licence rate and apply for injunction upon a refusal.

If there is any political drive, it may be the intention to become an international litigation centre for patent disputes after Brexit. This judgment allows the English court jurisdiction to determine a global licence rate simply based on the infringement of a UK patent, no matter how small the UK market is. The one-stop solution available in the English court would be particularly welcome by patent holders, especially SEP holders, who would no longer need to prove validity in each jurisdiction. This judgment also enhances the negotiation power of the SEP holders versus implementers. It is likely that more FRAND litigation would be brought to the UK.

On the other hand, some implementers may decide to give up the UK market, especially those with small market share in the UK. Some companies may decide to accept the injunction instead of paying high global licence rate. This may also suggest that the UK consumers may find it slower and more expensive to access to some high-tech products.

Furthermore, the Supreme Court's judgment does not depend on any unique domestic legislation but the ETSI contractual arrangement which applies to its members and the industry practice and custom. There is no barrier for other countries, including China, to follow the same reasoning. It is possible many other countries may, fully or partly, follow this judgment. If the courts of multiple countries can set the global FRAND rate and they apply different standards to set this rate, forum shopping and conflict of jurisdictions may be inevitable. Anti-suit injunction and anti-enforcement injunction may be more frequently applied and issued. The China Supreme Court IP Tribunal recently restrained the Conversant from applying the German court to enforce the German judgment in a related case, which awards Conversant the FRAND rate 18.3 times of the rate awarded by the Chinese courts on the infringement of the Chinese patents of the same family. This is called act preservation in China with the similar function as the anti-enforcement injunction. ((2019) Supreme Court IP Tribunal Final One of No 732, 733 and 734) This case suggests Chinese courts would be ready to issue the similar act preservation order or injunction to prevent the other party from enforcing a global FRAND rate set by the foreign court against the Chinese implementers, whether or not Chinese court could issue the global FRAND licence. The long term impact of the Unwired Planet v Huawei may be the severer competition in jurisdiction between different courts which may require reconciliation either through judicial cooperation arrangement or through the establishment of a global tribunal by the relevant standard setting organisation.

Ruth Bader Ginsburg and the Conflict of Laws

by Tobias Lutzi, University of Cologne

Since the sad news of her passing, lawyers all around the world have mourned the loss of one of the most iconic and influential members of the legal profession and a true champion of gender equality. Through her work as a scholar and a justice, just as much as through her personal struggles and achievements, Ruth Bader Ginsburg has inspired generations of lawyers.

On top of being a global icon of women's rights and a highly influential voice on a wide range of issues, Ginsburg has also expressed her views on questions relating to the interaction between different legal systems, both within the US and internationally, on several occasions. In fact, two of her early law-review articles focus entirely on two perennial problems of private international law.

Accordingly, readers of this blog may enjoy to go through some of her writings in this area, both judicial and extra-judicial, in an attempt to pay tribute to her work.

Jurisdiction

In one of Ginsburg's earliest publications, *The Competent Court in Private International Law: Some Observations on Current Views in the United States* (20 (1965) Rutgers Law Review 89), she retraces the approach to the adjudication of persons outside the forum state in US law by reference to both the common law and continental European approaches. She argues that

> *[t]he law in the United States has […] moved closer to the continental approach to the extent that a relationship between the defendant or the particular litigation and the forum, rather than personal service, may function as the basis of the court's adjudicatory authority.*

Ginsburg points out, though, that each approach includes 'exorbitant' bases of judicial competence, which 'provide for adjudication resulting in a personal judgment in cases in which there may be no connection of substance between the litigation and the forum state.'

> *Bases of judicial competence found in the internal laws of certain continental states, but generally considered undesirable in the international sphere, include competence founded exclusively on the nationality of the plaintiff – for example, Article 14 of the French Civil Code – and competence (to render a personal*

> *judgment) based on the mere presence of an asset of the defendant when the claim has no connection with that asset-a basis found in the procedural codes of Germany, Austria, and the Scandinavian countries. Equally undesirable in the view of continental jurists is the traditional Anglo-American rule that personal service within the territory of the forum confers adjudicatory authority upon a court even in the case of a defendant having no contact with the forum other than transience*

The 'most promising currently feasible remedy' for improper use of these 'internationally undesirable' bases of jurisdiction, she argues, is the doctrine of *forum non conveniens*.

> *At the least, a plaintiff who chooses such a forum should be required to show some reasonable justification for his institution of the action in the forum state rather than in a state with which the defendant or the res, act or event in suit is more significantly connected.*

Applicable Law

As a Supreme Court justice, Ginsburg also had numerous opportunities to rule on conflicts between federal and state law.

In *Honda Motor Co v Oberg* (512 U.S. 415 (1994)), for instance, Ginsburg dissented from the Court's decision that an amendment to the Oregon Constitution that prevented review of a punitive-damage award violated the Due Process Clause of the federal Constitution, referring to other protections against excessive punitive-damage awards in Oregon law. In *BMW of North America, Inc v Gore* (517 US 559 (1996)), she dissented from another decision reviewing an allegedly excessive punitive-damages award and argued that the Court should 'resist unnecessary intrusion into an area dominantly of state concern.'

According to Paul Schiff Berman (who provided a much more complete account of Ginsburg's relevant writings than this post can offer in *Ruth Bader Ginsburg and the Interaction of Legal Systems* (in Dodson (ed), *The Legacy of Ruth Bader Ginsburg* (CUP 2015) 151)), her 'willingness to defer to state prerogatives in interpreting state law [...] may surprise those who focus on Justice Ginsburg's Fourteenth Amendment jurisprudence in gender-related cases.'

The same deference can also be found in some of her writings on the interplay between US law and other legal systems, though. In a speech to the International Academy of Comparative Law, she argued in favour of taking foreign and international experiences into account when interpreting US law and concluded:

> *Recognizing that forecasts are risky, I nonetheless believe the US Supreme Court will continue to accord "a decent Respect to the Opinions of [Human]kind" as a matter of comity and in a spirit of humility. Comity, because projects vital to our well being […] require trust and cooperation of nations the world over. And humility because, in Justice O'Connor's words: "Other legal systems continue to innovate, to experiment, and to find . . . solutions to the new legal problems that arise each day, [solutions] from which we can learn and benefit."*

Recognition of Judgments

Going back to another one of Ginsburg's early publications, in *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments* (82 (1969) Harvard Law Review 798), Ginsburg discussed the problem of the hierarchy between conflicting judgments from different states and made a case for 'the unifying function of the full faith and credit clause'. As to whether anti-suit injunctions should also the clause, she expressed a more nuanced view, though, explaining that

> *[t]he current state of the law, permitting the injunction to issue but not compelling any deference outside the rendering state, may be the most reasonable compromise […].*
>
> *The thesis of this article, that the national full faith and credit policy should override the local interest of the enjoining state, would leave to the injunction a limited office. It would operate simply to notify the state in which litigation has been instituted of the enjoining state's appraisal of forum conveniens. That appraisal, if sound, might induce respect for the injunction as a matter of comity.*

Ginsburg had an opportunity to revisit a similar question about thirty years later, when delivering the opinion of the Court in *Baker v General Motor Corp* (522 US

222 (1998)). Although the Full Faith and Credit Clause was not subject to a public-policy exception (as held by the District Court), an injunction stipulated in settlement of a case in front of a Michigan court could not prevent a Missouri court from hearing a witness in completely unrelated proceedings:

> *Michigan lacks authority to control courts elsewhere by precluding them, in actions brought by strangers to the Michigan litigation, from determining for themselves what witnesses are competent to testify and what evidence is relevant and admissible in their search for the truth.*
>
> *This conclusion creates no general exception to the full faith and credit command, and surely does not permit a State to refuse to honor a sister state judgment based on the forum's choice of law or policy preferences. Rather, we simply recognize that, just as the mechanisms for enforcing a judgment do not travel with the judgment itself for purposes of Full Faith and Credit […] and just as one State's judgment cannot automatically transfer title to land in another State […] similarly the Michigan decree cannot determine evidentiary issues in a lawsuit brought by parties who were not subject to the jurisdiction of the Michigan court.*

According to Berman, this line of reasoning is testimony to Ginsburg's judicial vision of 'a system in which courts respect each other's authority and judgments.'

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The above selection has been created rather spontaneously and is evidently far from complete; please feel free to use the comment section to highlight other *interesting* parts of Justice Ginsburg's work.

The Bee That's Buzzing in Our Bonnets. Some Thoughts about Characterisation after the Advocate General's Wikingerhof Opinion

Last week, AG Saugmandsgaard Øe rendered his Opinion on Case C-59/19 Wikingerhof, which we first reported in this post by Krzysztof Pacula. The following post has been written by Michiel Poesen, PhD Candidate at KU Leuven, who has been so kind as to share with us some further thoughts on the underlying problem of characterisation.

Characterisation is not just a bee that has been buzzing in conflicts scholars' bonnets, as Forsyth observed in his 1998 LQR article. Given its central role in how we have been thinking about conflicts for over a century, it has pride of place in jurisprudence and literature. The *Wikingerhof v Booking.com* case (C-59/19) is the latest addition to a long string of European cases concerning the characterisation of actions as 'matters relating to a contract' under Article 7(1) of the Brussels Ia Regulation n° 1215/2012.

Earlier this week, Krzysztof Pacula surveyed Advocate General Saugmandsgaard Øe's opinion in the *Wikingerhof* case on this blog (Geert Van Calster also wrote about the opinion on his blog). Readers can rely on their excellent analyses of the facts and the AG's legal analysis. This post has a different focus, though. The *Wikingerhof* case is indicative of a broader struggle with characterising claims that are in the grey area surrounding a contract. In this post, I would like to map briefly the meandering approaches to characterisation under the contract jurisdiction. Then I would like to sketch a conceptual framework that captures the key elements of characterisation.

1. Not All 'Matters Relating to a Contract' Are Created Equal

There are around 30 CJEU decisions concerning the phrase 'matters relating to a contract'. Three tests for characterisation are discernible in those decisions. In the first approach, characterisation depends on the nature of the legal basis relied on by the claimant. If a claim is based on an obligation freely assumed, then the claim is a matter relating to a contract to which the contract jurisdiction applies. Statutory, fiduciary, or tortious obligations arising due to the conclusion of a contract are also contractual obligations for private international law purposes. I will call this approach the 'cause of action test', because it centres on the nature of the cause of action pleaded by the claimant. In recent decisions, for example, the cause of action test has been used to characterise claims between third parties as contractual matters (C-337/17 *Feniks*, blogged here; C-772/17 *Reitbauer*, blogged here; joined cases C-274/16, C-447/16 and C-448/16 *flightright*).

The second approach to characterisation is to focus on the relationship between the litigants. From this standpoint, only claims between litigants who are bound by a contract can be characterised as 'matters relating to a contract'. This approach has for example been used in the *Handte* and *Réunion européenne* decisions. We will call it the 'privity test'. Sometimes scholars relied on this test to argue that all claims between contracting parties are to be characterised as matters relating to a contract.

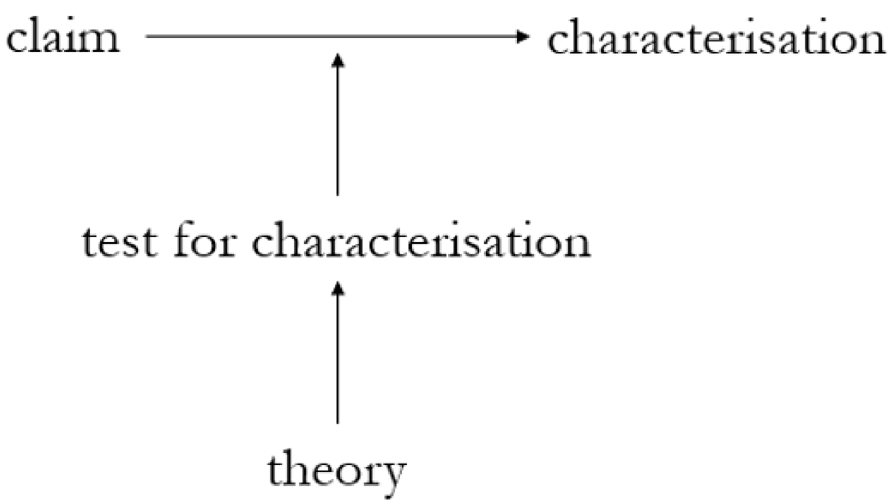
The third and final approach emphasises the nature of the facts underlying the claim brought by the claimant. This approach was first developed in the *Brogsitter* decision (C-548/12). However, it is predated by AG Jacob's opinions in the *Kalfelis* (C-189/87) and *Shearson Lehmann Hutton* (C-89/91) cases (which since have been eagerly picked up by the *Bundesgerichtshof* of Germany). The *Brogsitter* decision provided that a claim is a contractual matter if the defendant's allegedly wrongful behaviour can reasonably be regarded to be a breach of contract, which will be the case if the interpretation of the contract is indispensable to judge. I will dub this approach the 'factual breach test', since it directs attention to factual elements such as the defendant's behaviour and the indispensability to interpret the contract. It is plain to see that this is by far the most complicated of the three approaches to characterisation we discussed here (among other things because of the unclear relation between the different layers of which the test is composed, an issue that AG Saugmandsgaard Øe entertained in *Wikingerhof*, [69]–[70], and C-603/17 *Bosworth v Arcadia*).

The use in practice and literature of the three approaches laid out above demonstrates a tale of casuistry. Similar claims have been subjected to different approaches, and approaches developed in a specific setting have been applied to entirely different contexts. For example, a few CJEU decisions characterised claims between litigants who are not privy to consensual obligations as non-contractual in nature under the privity test. Other decisions characterised such claims as contractual in nature, applying the cause of action test. A similar dichotomy underlies the characterisation of claims between contracting parties. Initially, the CJEU jurisprudence applied the cause of action test, focussing on the nature of the legal basis relied on (see C-9/87 *Arcado v Haviland*). Later, the *Brogsitter* decision adopted the factual breach test, which shifted the focus to the nature of the facts underlying the claim.

It is difficult to understand why these divergences have occurred. How can they be explained?

2. The Theories Underlying Characterisation

A good way to start is to conceptualise characterisation further along the lines of this scheme:



Seen from the perspective of this scheme, the previous section described three 'tests for characterisation'. A 'test for characterisation' refers to the interpretational exercise that lays down the conditions under which a claim can be characterised as a matter relating to a contract. Each test elevates different elements of a 'claim' as relevant for the purpose of characterisation and disregards others. Those elements are the identity of the litigants, the claim's legal basis, or the dispute underlying the claim. As such, it concretises an idea about the broader purpose the contract jurisdiction should serve, which is called a 'theory'. The divergences among the tests for characterisation outlined above is explained by the reliance on different theories.

The AG's considerations about *Brogsitter* in the *Wikingerhof* opinion illustrate the scheme. The AG observed that the factual breach test is informed by what I will dub the 'natural forum theory'. According to that theory, the contract jurisdiction offers the most appropriate and hence natural forum for all claims that are remotely linked to a contract (for the sake of proximity and avoiding multiple jurisdictional openings over claims relating to the same contract). This theory explains why the factual breach test provides such a broad, hypothetical test for characterisation that captures all claims that could have been pleaded as a breach of contract. Opining against the use of the factual breach test and underlying natural forum theory, the AG suggested that the cause of action test be applied. He then integrated the indispensability to interpret the contract (originally a part of the factual breach test) into the cause of action test as a tool for determining whether a claim is based on contract ([90] et seq). Essentially, his approach was informed by what I will call the 'ring-fencing theory'. In contrast to the natural forum theory, this theory presumes that the contract jurisdiction should be delineated strictly for two reasons. First, the contract jurisdiction is a special jurisdiction regime that cannot fulfil a broad role as a natural *forum contractus* ([84]–[85]). Second, a strict delineation promotes legal certainty and efficiency, since it does not require judges to engage in a broad, hypothetical analysis to determine whether a claim is contractual or not ([76]–[77]). The scheme was applied succinctly here, but the analysis could be fleshed out for example by integrating the role of the parallelism between the Brussels Ia and Rome I/II Regulations.

The scheme can be used to understand and evaluate the CJEU's eventual judgment in *Wikingerhof*. I hope that the decision will be a treasure trove that furthers our understanding of the mechanics of characterisation in EU private international law.