The Supreme Court of Japan on Punitive Damages…

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

1. **Introduction**

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

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

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

2. **Facts:**

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

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

3. **Rulings**

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

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

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

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

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

4. **Comments:**

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

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

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

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

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

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

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

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

Territorial Jurisdiction for Breach of Contract in Nigeria or whatever

Jurisdiction is a fundamental aspect of Nigerian procedural law. In Nigerian judicial parlance, we have become accustomed to the principle that the issue of jurisdiction can be raised at any time, even at the Nigerian Supreme Court – the highest court of the land – for the first time.[1] The concept of jurisdiction in Nigerian conflict of laws (often called "territorial jurisdiction" by many Nigerian judges) is the most confusing aspect of Nigerian conflict of laws. This is because the decisions are inconsistent and not clear or precise. The purpose of this write

up is to briefly highlight the confusion on the concept of jurisdiction in Nigerian conflict of laws through the lens of a very recently reported case (reported last week) of *Attorney General of Yobe State v Maska* & *Ano*r. ("*Maska*").[2]

In *Maska* the 1st claimant/respondent instituted an action for summary judgment against the defendant/appellant and the 2nd respondent at the High Court of Katsina State for breach of contract. The 1st claimant/respondent alleged that the defendant/appellant purchased some trucks of maize from the 1st claimant/respondent and promised to pay for it. The 1st claimant/respondent also alleged that the defendant/appellant failed to pay for the goods, which resulted in the present action. It was undisputed that the place of delivery (or performance) was in Kastina State, the 1st claimant/respondent's place of business, where the defendant/appellant took delivery of the goods. However, the defendant/appellant challenged the jurisdiction of the Kastina State High Court to hear the case on the basis that the contract in issue was concluded in Yobe State, where it claimed the cause of action arose, which it argued was outside the jurisdiction of Kastina State. On this basis the defendant/appellant argued that the court of Yobe State had exclusive jurisdiction.

The High Court of Kastina State assumed jurisdiction and rejected the argument of the defendant/appellant. The defendant/appellant appealed but it was not successful. The Court of Appeal held that the concept of territorial jurisdiction for breach of contract is based on any or a combination of the following three factors – (a) where the contract was made (*lex loci contractus)*; (b) where the contract is to be performed (*lex loci loci solutions)***;**.and (c) where the defendant resides. In the instant case, the place of performance – particularly the place of delivery – was in Kastina State – so the High Court of Kastina State could assume jurisdiction in this case.[3]

Maska adds to the confusion on the concept of jurisdiction in Nigerian conflict of laws. In *Maska,* the focus was on what it labeled as "territorial jurisdiction for breach of contract" in inter-state matters. In international and inter-state matters, Nigerian judges apply at least four approaches in determining whether or not to assume jurisdiction in cases concerned with conflict of laws.

First, some Nigerian judges apply the traditional common law rules on private international law to determine issues of jurisdiction.[4] This approach is based as of right on the residence and/or submission of the defendant to the jurisdiction of the Nigerian court. Where the defendant is resident in a foreign country and does not submit to the jurisdiction of the Nigerian court, then leave of court is required in accordance with the relevant civil procedure rules to bring a foreign defendant before the Nigerian Court. This is all subject to the principle of *forum non conveniens* – the appropriate forum where the action should be brought in the interest of the parties and the ends of justice. In *Maska,* the common law approach of private international law was not applied. If it was applied the High Court of Kastina State would not have had jurisdiction as of right because the defendant/appellant was neither resident in Kastina State nor submitted to the jurisdiction of the Kastina State High Court. In recent times, the common law approach to conflict of laws appears to be witnessing a steady decline among Nigerian appellate judges except for Abiru JCA (a Nigerian Court of Appeal judge) who has vehemently supported this approach by submitting that the concept of territorial jurisdiction in Nigeria is one of the misunderstood concepts of Nigerian conflict of laws.[5]

Second, some Nigerian judges apply choice of venue rules to determine conflict of law rules on jurisdiction.[6] This is wrong. Indeed, some Nigerian judges have rightly held that choice of venue rules are not supposed to be used to determine matters of jurisdiction in Nigerian conflict of laws.[7] Choice of venue rules are used to determine which judicial division within a State (in the case of the State High Court) or judicial division within the Nigerian Federation (in the case of the Federal High Court) has jurisdiction. Choice of venue rules are mainly utilised for geographical and administrative convenience. Unfortunately, it appears that in *Maska* choice of venue rules were utilised to determine the jurisdiction of the Kastina State High Court in matters of conflict of laws. Order 10 rule 3 of the Kastina State High Court Civil Procedure Rules provides that all suits for breach of contract "shall be commenced and determined in the Judicial Division in which such contract ought to have been performed or in which the defendant resides or carries on business." Although *Maska* did not explicitly refer to Order 10 rule 3, it referred to some previous decisions of Nigerian appellate judges that were influenced by choice of venue rules to determine which court has jurisdiction in matters of conflict of laws.[8] *Maska* makes the confusion more problematic because it did not cite the wrong choice of venue rules in question (Order 10 rule

3 of the Kastina State High Court Civil Procedure Rules) but wrongly created the impression that this represents the position on Nigerian conflict of laws on jurisdiction.

Third, some Nigerian judges apply the strict territorial jurisdiction approach.[9] This approach is that a Nigerian court cannot assume jurisdiction where the cause of action arose in one State, or another foreign country. I label this approach as "strict" because my understanding of the Nigerian Supreme Court decisions on this point is that based on constitutional law a Nigerian court is confined to matters that arose within its territory, so that one State High Court cannot assume jurisdiction over a matter that occurs within another territory. This approach is also wrong as it ignores the principles of traditional Nigerian common law conflict of laws. There is no provision of the Nigerian constitution that states that a court's jurisdiction is limited to matters that occur within its territory. It also leads to injustice and unduly circumscribes the jurisdiction of the Nigerian court, which ultimately makes Nigerian courts inaccessible and unattractive for litigation. Nigerian courts should have jurisdiction as of right once a defendant is resident or submits to the jurisdiction of the Nigerian court. In *Maska*, even if the strict territorial jurisdiction approach was applied, the Kastina State High Court would have had jurisdiction because the cause of action for breach of contract arose in Kastina State where the defendant/appellant took delivery of the goods.

Fourth some Nigerian judges apply the mild territorial jurisdiction approach.[10] This approach softens the strict territorial jurisdiction approach. This is an approach that has mainly been applied by the Nigerian Court of Appeal probably as a way of ameliorating the injustice of the strict territorial approach applied in some Nigerian Supreme Court decisions. This approach is that more than one court can have jurisdiction in matters of conflict of laws where the cause of action is connected to such States. With this approach, all the plaintiff needs to do is to tailor its claim to show that the cause of action is also connected to its claim. The danger with this approach is that it can lead to forum shopping and unpredictability – the plaintiff can raise the slightest grounds on why the cause of action is connected with its case to institute the action in any court of the Nigerian federation. The mild territorial jurisdiction approach was applied in *Maska* because the Court of Appeal held either the Kastina State High Court or Yobe State High Court could assume jurisdiction as the cause of action was

connected with both of them.

In conclusion, in very recent times the Nigerian traditional common law principle of conflict of laws (based on English common law conflict of laws without EU influences) on jurisdiction is beginning to witness a steady decline among Nigerian judges and lawyers. The concept of strict territorial jurisdiction, mild territorial jurisdiction, and choice of venue rules appears to be the current norm despite criticism from some Nigerian academics and even a Court of Appeal judge (Justice Abiru).[11] *Maska* is just another case that demonstrates why the principle of private international law should feature more in the parlance of Nigerian lawyers and judges. I have argued for judicial decisions and academic works in private international law in Africa to be intellectually independent and creative. This means that in Nigeria we should not blindly follow English common law rules. It could be that the common law approach might be an inadequate basis of jurisdiction for Nigerian private international law especially in inter-state matters. For example in *Maska*, if the Kastina State High Court had applied the common law private international law rules, it would not have had jurisdiction despite being the place of performance, since the defendant was neither resident nor submitted to the jurisdiction of the court! Should there be a reformulation of the principle of jurisdiction in Nigerian conflict of laws in international and inter-state matters so that it is clear, consistent and predictable? This is a discussion for another day.

[1]*Madukolu v Nkemdilim* (1962) 2 SCNLR 341; *Drexel Energy and Natural Resources Ltd v Trans International* Bank Ltd (2008) 18 NWLR (Pt. 1119) 388, 424 – 27, 437 – 38 *Dangote General Textiles Products Ltd v Hascon Associates (Nig) Ltd* (2013) 16 NWLR (Pt. 1379) 60, 91*; B Apugo & Sons Ltd v Orthopaedic Hospitals Management Board* (2016) 13 NWLR 206, 240. In principle, what can be raised for the first time on appeal is substantive jurisdiction as prescribed by the Constitution or enabling statute and not procedural jurisdiction. This is a point that has been stressed by Abiru JCA in recent cases such as *Khalid v Ismail (* 2013) LPELR-22325 (CA); *Alhaji Hassan Khalid v Al-Nasim Travels & Tours Ltd* (2014) LPELR-22331 (CA) 23 – 25 ; *Nigerian National Petroleum Corporation v Zaria* (2014) LPELR-22362 (CA) 58 – 60; *Obasanjo Farms (Nig)*

Ltd v Muhammad (2016) LPELR-40199 (CA).

[2](2021) 7 NWLR (Pt. 1776) 535.

[3] *Attorney General of Yobe State v Maska* & *Ano (2021) 7 NWLR (Pt. 1776)* 535, 548-9.

[4]See generally *British Bata Shoe Co v Melikan* (1956) SCNLR 321; *Nigerian Ports Authority v Panalpina World Transport (Nig) Ltd* (1973) 1 ALR Comm 146, 172; *Muhammed v Ajingi* (2013) LPELR-20372 (CA); *Barzasi v Visinoni* (1973) NCLR 373.

[5]*Muhammed v Ajingi* (2013) LPELR-20372 (CA) 23-5; Foreword to CSA Okoli and RF Oppong, *Private International Law in Nigeria* (1st edition, Hart, Oxford, 2020); 'The Concept of Territorial Jurisdiction' in IO Smith (ed), *Law and Developments in Nigeria: Essays in Honour of Alhaji Femi Okunnu, SAN, CON* (Ecowatch Publications (Nig) Ltd , 2004).

[6]See generally the Supreme Court cases of; *Dangote General Textiles Products Ltd v Hascon Associates (Nig) Ltd* (2013) 16 NWLR (Pt. 1379) 60; *First Bank of Nigeria Plc v Kayode Abraham* (2008) 18 NWLR (Pt. 1118) 172; *Arjay Ltd v Airline Management Support Ltd* (2003) 7 NWLR (Pt. 820) 57.

[7]*British Bata Shoe Co v Melikian* (1956) SCNLR 321, 325 – 26, 328; *Muhammed v Ajingi* (2013) LPELR-20372 (CA); *Zabusky v Israeli Aircraft Industries* (2008) 2 NWLR (Pt. 109) 109, 133-6; *Ogunsola v All Nigeria Peoples Party* (2003) 9 NWLR (Pt. 826) 462, 480

[8]*A.-G. Abia State v. Phoenix Environmental Services Nig. Ltd* (2015) LPELR-25702

[9] See the Supreme Court cases of *Capital Bancorp Ltd v Shelter Savings and Loans Ltd* (2007) 3 NWLR 148; *Dairo v Union Bank of Nigeria Plc* (2007) 16 NWLR (Pt 1059) 99; *Mailantarki v Tongo & Ors* (2017) LPELR-42467; *Audu v. APC & Ors* (2019) LPELR – 48134.

[10]*Sarki v Sarki & Ors* (2021) LPELR – 52659 (CA).; *Onyiaorah v Onyiaorah* (2019) LPELR-47092 (CA).

[11]See generally Abiru JCA in *Muhammed v Ajingi* (2013) LPELR-20372 (CA) 23

– 25, 25 – 26; CSA Okoli and RF Oppong, *Private International Law in Nigeria* (1st edition, Hart, Oxford, 2020) 95-103; AO Yekini, "Comparative Choice of Jurisdiction Rules in Cases having a Foreign Element: are there any Lessons for Nigerian Courts?" (2013) 39 *Commonwealth Law Bulletin* 333; Bamodu O., "In Personam Jurisdiction: An Overlooked Concept in Recent Nigerian Jurisprudence" (2011) 7 *Journal of Private International Law* 273.

Foreign Judgments: The Limits of Transnational Issue Estoppel, Reciprocity, and Transnational Comity

Written by Professor Yeo Tiong Min, SC (honoris causa), Yong Pung How Chair Professor of Law, Yong Pung How School of Law, Singapore Management University

In *Merck Sharp & Dohme Corp v Merck KGaA* [2021] SGCA 14, a full bench of the Singapore Court of Appeal addressed the limits of transnational issue estoppel in Singapore law, and flagged possible fundamental changes to the common law on the recognition and enforcement of foreign judgments in Singapore. The litigation involves multiple parties spread over different jurisdictions. The specific facts involved in the appeal are fairly straightforward, centring on what has been decided in a judgment from the English court, and whether it could be used to raise issue estoppel on the interpretation of a particular term of the contract between the parties. The Court of Appeal affirmed the decision of the High Court that it could. What makes the case interesting are the wide-ranging observations on the operation of issue estoppel from foreign judgments, and more fundamentally on the basis of the recognition and enforcement of foreign judgments in the common law of Singapore.

The Court of Appeal affirmed the case law in Singapore that so far have ruled that

a foreign judgment is capable of raising issue estoppel in Singapore proceedings. It upheld the uncontroversial requirements that the judgment must first be recognised under the private international law of Singapore, and that there must be identity of issues and parties. It is the first Singapore case, however, to discuss and affirm the need for the foreign judgment to be final and conclusive (under the law of the originating state) not just on the merits, but also on the issue forming the basis of the issue estoppel. The Court also highlighted the caution that needs to be exercised when determining what has actually been conclusively decided under a foreign legal system, especially where the foreign courts operate under different procedural rules.

The Court discussed the outer limits of transnational issue estoppel without reaching a conclusion because they were not in issue on the facts of the case. It accepted that issue estoppel raises a question of *lex fori* procedure, and that as a starting point, the same principles of issue estoppel apply whether the previous judgment is a local or foreign one. It made a number of important observations on the limitations of transnational issue estoppel. First, it affirmed that issue estoppel from a foreign judgment would not be applicable if: (a) there is a mandatory law of the forum that applies irrespective of the foreign elements of the case and irrespective of any applicable choice of law rules; (b) the issue in question engages the public policy of the forum; or (c) where the issue that is the subject of the estoppel is procedural for the purpose of the conflict of laws. Second, it noted that that transnational issue estoppel should be applied with due consideration of whether the foreign decision is territorially limited in its application. Third, the Court highlighted the possibility that it may not apply issue estoppel to a defendant in circumstances where the defendant did not, and was not reasonably expected to, argue the point, or argue the point fully, in answer to the claim brought against it in the foreign jurisdiction.

Fourth, issue estoppel effect may be denied to a foreign judgment if it conflicts with the public policy of the forum. This last point is generally uncontroversial. However, what is notable in the judgment is that the Court left open the question whether an error made by the foreign court regarding the content or application of Singapore law would provide a defence based on public policy, or as a standalone limitation. As a standalone limitation, it would be inconsistent with the conclusiveness principle in *Godard v Gray* (1870) LR 6 QB 139, as well as the Hague Convention on Choice of Court Agreements. Thus, it may be that foreign

judgments could be reviewed on the merits at least in respect of some types of errors of Singapore law, at least under the common law. Further clarification will be needed on this issue from the Court of Appeal in the future.

Fifth, the Court discussed the exception to issue estoppel. A distinctive feature of Singapore law on issue estoppel is the rejection of the broadly worded "special circumstances" exception to issue in English common law (*Arnold v National Westminster Bank plc* [1991] 2 AC 93). Singapore law (*The Royal Bank of Scotland NV v TT International Ltd* [2015] 5 SLR 1104) has instead a narrow exception based on the satisfaction following cumulative requirements:

(a) the decision said to give rise to issue estoppel must directly affect the future determination of the rights of the litigants;

(b) the decision must be shown to be clearly wrong;

(c) the error in the decision must be shown to have stemmed from the fact that some point of fact or law relevant to the decision was not taken or argued before the court which made that decision and could not reasonably have been taken or argued on that occasion;

(d) there can be no attempt to claw back rights that have accrued pursuant to the erroneous decision or to otherwise undo the effects of that decision; and

(e) it must be shown that great injustice would result if the litigant in question were estopped from putting forward the particular point which is said to be the subject of issue estoppel – in this regard, if the litigant failed to take advantage of an avenue of appeal that was available to him, it will usually not be possible for him to show that the requisite injustice nevertheless exists.

The Court noted the difficulty in applying requirement (b) to a foreign judgment because the principle of conclusiveness (*Godard v Gray* (1870) LR 6 QB 139) prohibits re-opening the merits of the foreign decision (note that this is potentially challenged above but only in respect of Singapore law matters). It considered four possible approaches to this issue: (1) leave things as they are, with the consequence that foreign judgments may have stronger issue estoppel effect than local judgments; (2) do not apply the conclusiveness principle to issue estoppel; (3) apply the broader "special circumstances" exception to foreign judgments rather than the narrow approach in domestic law; or (4) apply the law of the

originating state to the issue whether an exception can be made to issue estoppel. The Court was troubled by all four suggested solutions, and it left the question, to be considered further in a future case which raises the issue squarely.

The Court also endorsed the principle that issue estoppel from a foreign judgment will be defeated by an inconsistent prior foreign judgment or by an inconsistent prior or subsequent local judgment. However, it left open the question whether a foreign judgment obtained after the commencement of local proceedings can be used to raise issue estoppel in the local proceedings. In response to a submission that the foreign judgment should nevertheless be recognised unless there was an abuse of process in the way it was obtained, the Court thought that it was equally plausible to take the view that the commencement of local proceedings could be a defence unless the commencement of local proceedings amounted to an abuse of process.

The most interesting aspects of the decision, with possible far-reaching implications, are two-fold. First, the Court of Appeal cast serious doubt on the obligation theory of the common law and preferred to rest the basis of the recognition and enforcement of foreign judgments on "considerations of transnational comity and reciprocal respect among courts of independent jurisdictions". Second, it left open the question whether reciprocity should be a precondition to the recognition of foreign judgments at common law. A precondition of reciprocity was said to be entirely consistent with the rationale of transnational comity, and with the position under the statutory registration regimes as well as the Hague Convention on Choice of Court Agreements. These two aspects of the decision are discussed in the public lecture, "The Changing Global Landscape for Foreign Judgments", Yong Pung How Professorship of Law Lecture, Yong Pung How School of Law, Singapore Management University, 6 May 2021 (available here).

Shell litigation in the Dutch courts – milestones for private international law and the fight against climate change

by Xandra Kramer (Erasmus University Rotterdam/Utrecht Univeristy) and Ekaterina Pannebakker (Leiden University), editors

1. Introduction

As was briefly announced earlier on this blog, on 29 January 2021, the Dutch Court of Appeal in The Hague gave a ruling in a long-standing litigation launched by four Nigerian farmers and the Dutch *Milieudefensie*. The Hague Court held Shell Nigeria liable for pollution caused by oil spills that took place in 2004-2007; the UK-Dutch parent company is ordered to install equipment to prevent damage in the future. Though decided almost four months ago, the case merits discussion of several private international law aspects that will perhaps become one of the milestones in the broader context of liability of parent companies for the actions of their foreign-based subsidiaries.

Climate change and related human rights litigation is undoubtedly of increasing importance in private international law. This is also on the radar of the European institutions as evidenced among others by the ongoing review of the Rome II Regulation (point 6). Today, 26 May 2021, another milestone was reached, both for for private international law but for the fight against global climate change, with the historical judgment (English version, Dutch version) by the Hague District Court ordering Shell to reduce Co2 emissions (point 7). This latter case is discussed more at length in today's blogpost by Matthias Weller.

2. Oil spill in Nigeria and litigation in The Hague courts

As is well-known Shell and other multinationals have been extracting oil in Nigeria since a number of decades. Leaking oil pipes have been causing environmental damage in the Niger Delta, and consequently causing health damage and social-economic damage to the local population and farmers. Litigation has been ongoing in the Netherlands and the United Kingdom for years (see Geert van Calster blog for comments on a recent ruling by the English Supreme Court). At stake in the present case are several oil spills that occurred between 2004-2007 at the underground pipelines and an oil well near the villages Oruma, Goi and Ikot Ada Udo. The spilled oil pollutes agricultural land and water used by the farmers for a living.

Shortly after the oil spills, four Nigerian farmers instituted proceedings in the Netherlands, at the District Court of The Hague. The farmers are supported by the Dutch foundation *Milieudefensie*, which is also a claimant in the procedure. The claimants submit that the land and water, which the Nigerian farmers explored for living, became infertile. They claim compensation for the damage caused by the Shell's wrongful acts and negligence while extracting oil and maintaining the pipelines and the well. Furthermore, they claim to order Shell to secure better cleaning of the polluted land and to take appropriate measures to prevent oil leaks in the future.

The farmers summon both the Shell's Nigerian subsidiary and the parent company at the Dutch court. To be precise, they institute proceedings against the Shell's Nigerian subsidiary – Shell Petroleum Development Company of Nigeria Ltd and against the British-Dutch Shell parent companies – Royal Dutch Shell Plc (UK), with office in The Hague; Shell Petroleum N.V. (a Dutch company) and the 'Shell' Transport and Trading Company Ltd (a British company). It is this corporate structure that brings the Nigerian farmers to the court in The Hague and paves the way for the jurisdiction of Dutch courts.

3. Jurisdiction of Dutch courts: anchor defendant in the Netherlands and sufficient connection

Both the first instance court (in 2009) and the court of appeal at The Hague (in appeal in 2015) hold that the Dutch courts have jurisdiction. The ruling of the

Court of Appeal is available in English and contains a detailed motivation of the grounds of jurisdiction of the Dutch courts. See in particular at [3.3] – [3.9].

Claim against Shell parent company/companies. Dutch courts have jurisdiction to hear the claim against Shell Petroleum based on art. 2(1) Brussels I Regulation, as the company has its registered office in the Netherlands. Furthermore, the jurisdiction of Dutch courts to hear the claims against Royal Dutch Shell is based on art. 2(1) in conjunction with art. 60(1) Brussels I Regulation and the jurisdiction over claims to Shell Transport and Trading Company – on art. 6(1) and art. 24 Brussels I Regulation.

Claim against Shell's Nigerian subsidiary. The jurisdiction of the Dutch courts to hear the claim against Shell's Nigerian subsidiary is based on art. 2(1) in conjunction with art. 60(1) Brussels I Regulation and on art. 7(1) of the Dutch Code of civil procedure (DCCP). Art. 7(1) deals with multiple defendants. By virtue of art. 7(1) DCCP, if the Dutch court with jurisdiction to hear the claim against one defendant (in this case this is the Royal Dutch Shell), has also the jurisdiction to hear the claims against co-defendant(s), 'provided the claims against the various defendants are connected to the extent that reasons of efficiency justify a joint hearing'. The jurisdiction on the claim against the so-called 'anchor defendant' (for instance, the parent company) can thus carry with itself the jurisdiction on the other, connected, claims against other defendants.

Both the first instance court and the court in appeal found that the claims were sufficiently connected, despite the contentions of Shell. The Shell's contentions were twofold. First, Shell stated that the claimants abused procedural law, because the claims against Royal Dutch Shall were 'obviously bound to fail and for that reason could not serve as a basis for jurisdiction as provided in art. 7(1) DCCP' (at [3.1] in the 2015 ruling). According to Shell, the claim was bound to fail, because the oil leaks were caused by sabotage, in which case Shell would be exempt from liability under the applicable Nigerian law. This contention was dismissed: the claim was not necessarily bound to fail, according to the first instance court. The appellate court added that it was too early to assume that the oil spill was caused by sabotage. Second, Shell contested the jurisdiction of the Dutch courts because the parent companies could not reasonably foresee that they would be summoned in the Netherlands for the claims as the ones in the case. Dismissing this contention the court of appeal at The Hague stated in the 2015 ruling that 'in the light of (i) the ongoing developments in the field of *foreign*

direct liability claims (cf. the cases instituted in the USA against Shell for the alleged involvement of the company in human rights violations; *Bowoto v. Chevron Texaco* (09-15641); *Kiobel v Royal Dutch Petroleum Co*., 133 S. Ct. 1659 (2013), as well as *Lubbe v. Cape Plc*. [2000] UKHL 41), added to (ii) the many oil spills that occurred annually during the extraction of oil in Nigeria, (iii) the legal actions that have been conducted for many years about this (for over 60 years according to Shell), (iv) the problems these oil spills present to humans and the environment and (v) the increased attention for such problems, it must have been reasonably foreseeable' for the parent companies taken to court with jurisdiction with regard to Royal Dutch Shell (see the 2015 ruling at [3.6].

4. Application of (substantive) Nigerian law

Substantive law. All claims addressed in the Court of Appeal ruling of 29 January 2021 are assessed according to Nigerian law. This is the law of the state where the spill occurred, the ensuing damage occurred and where the Shell's Nigerian subsidiary (managed and monitored by Shell) has its registered office. The events that are the subject of litigation occurred in 2004-2007 and fall outside the temporal scope of Rome II. Applicable law is defined based on the Dutch conflict of laws rules on torts, namely art. 3(1) and (2) *Wet Conflictenrecht Onrechtmatige Daad* (see the first instance ruling at [4.10]).

Procedural matters. Perhaps because the case of damage to environment as the one in the discussed case, the application of substantive law is strictly tied to the evidence, the court goes on to specify private international law with further finesse. It mentions explicitly that procedural matters are regulated by the Dutch code of civil procedure. In the meantime, the substantive law aspects of the procedure, including the question which sanctions can be imposed, are governed by the *lex causae* (Nigerian law). The same holds true for substantive law of evidence, including the specific rules on the burden of proof relating to a particular legal relationship. The other, general matters relating to the burden of proof and evidence are regulated by the *lex fori*, thus the Dutch law of civil procedure (at [3.1]).

5. The ruling of The Hague Court of Appeal

In its the ruling, the Dutch court holds Shell Nigeria liable for damage resulting from the leaks of pipelines in Oruma and Goi. Nigerian law provides for a high threshold of burden of proof that rests on the one who invokes sabotage of the pipelines (in this case, Shell). The fact of sabotage must be (evidenced to be) beyond reasonable doubt. Shell could not provide for such evidence for the pipelines in Oruma and Goi. Furthermore, Shell has not undertaken sufficient steps for the cleaning and limiting environmental damage. Shell Nigeria is therefore liable for the damage caused by the leaks in the pipelines. The amount of the damage to be compensated is still to be decided. The relevant procedure will follow up. The ruling is, however, not limited to this. Shell is also ordered to build at one of the pipelines (the Oruma-pipeline) a Leak Detection System (LDS), so that the future possible leaks could be swiftly noticed and future damage to the environment can be limited. This order is made to Shell Nigeria and to the parent companies.

Spills at Oruma and Goi are are two out of three oil spills. The procedure on the third claim – the procedure regarding the well at Ikot Ada Udo will continue: the reason for the oil spill is not yet clear and the next hearing has been scheduled.

6. Human rights litigation and Rome II

This Shell case at the Dutch court is one in a series of cases where human rights and corporate responsibility are central. Increasingly, it seems, victims of environmental damage and foundations fighting for environmental protection can celebrate victories. In the introduction we mentioned the English Supreme Court ruling in Okpaby v Shell [2021] UKSC 3 of February 2021. In this case the Supreme Court reversed judgments by the Court of Appeal and the High Court in which the claim by Nigerian farmers brought against Shell's parent company and its subsidiary in Nigeria had been struck out (see also Geert van Calster's blog, guest post by Robert McCorquodale). Also there is a growing body of doctrinal work on human right violations in other countries, corporate social responsibility, due diligence and the intricacies of private international law, as a quick search on the present blog also indicates.

From a European private international law perspective, as also the discussion above shows, the Brussels I*bis* Regulation and the Rome II Regulation are key. The latter Regulation has been subject of an evaluation study commissioned by

the European Commission over the past year, and the final report is expected in the next months. Apart from evaluating ten years of operation of this Regulation, one of the focal points is the issue of cross-border corporate violations of human rights. The question is whether the present rules provide an adequate framework for assessing the applicable law in these cases. As discussed in point 5 above, in the Dutch Shell case the court concluded that Nigerian law applied, which may not necessarily be in the best interest of environmental protection. This was based on Dutch conflict rules applicable before the Rome II Regulation became applicable, but Art. 4 Rome II would in essence lead to the same result. For environmental protection, however, Art. 7 Rome II may come to the rescue as it enables victims to make a choice for the law of the country in which the event giving rise to damage occurred instead of having the law of the country in which the damage occurs of Art. 4 applied. In a similar vein, the European Parliament in its draft report with recommendations to the Commission on corporate due diligence and corporate accountability, dated 11 September 2020, proposes to incorporate a general ubiquity rule in art. 6a, enabling a choice of law for victims of business-related human rights violations. In such cases a choice could be made for the law of the country in which the event giving rise to the damage occurred, or 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. This draft report, which also addresses the jurisdiction rules under the Brussels I*bis* Regulation was briefly discussed on this blog in an earlier blogpost by Jan von Hein.

7. Shell and climate continued: The Hague court strikes again

Today, all eyes were on the next move of The Hague District Court in an environmental claim brought against Royal Dutch Shell Plc (RDS). It concerns a collective action under the (revised) Dutch collective action act (see earlier on this blog by Hoevenaars & Kramer, and extensively Tzankova & Kramer 2021), brought – once again by *Milieudefensie*, also on behalf of 17,379 individual claimants, and by six other foundations (among others *Greenpeace*). The claim boils down to requesting the court to order Shell to reduce emissions. First, the court extensively deals with the admissibility and representativeness of the claimants as part of the new collective action act (art. 3:305a Dutch Civil Code). Second, the court assesses the international environmental law, regulation and

policy framework, including the UN Climate Convention, the IPCC, UNEP, the Paris Agreement as well as European law and policy and Dutch law and policy.

Third, and perhaps most interesting for the readers of this blog, the court assesses the applicable law, as the claim concerns the global activities of Shell. As Weller has highlighted in his blogpost that discussion mostly evolves around Art. 7 Rome II. Milieudefensie pleaded that Art. 7 should, pursuant to its choice, lead to the applicability of Dutch law and, should this provision not lead to Dutch law, on the basis of Art. 4(1) Rome II. In establishing the place where the event giving rise to the damage occurs the court states that 'An important characteristic of the environmental damage and imminent environmental damage in the Netherlands and the Wadden region, as raised in this case, is that every emission of CO2 and other greenhouse gases, anywhere in the world and caused in whatever manner, contributes to this damage and its increase.' Milieudefensie holds RDS liable in its capacity as policy-setting entity of the Shell group. RDS pleads for a restrictive interpretation and argues that corporate policy is a preparatory act that falls outside the scope of Art. 7 as 'the mere adoption of a policy does not cause damage'. However, The Hague Court finds this approach too narrow and agrees with the claimants that Dutch law applies on the basis of Art. 7 and that, in so far as the action seeks to protect the interests of Dutch residents, this also leads to the applicability of Dutch law on the basis of Art. 4.

The judgment of the court, and that's what has been all over the Dutch and international media, is that it orders 'RDS, both directly and via the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell group, to limit or cause to be limited the aggregate annual volume of all CO2 emissions into the atmosphere (Scope 1, 2 and 3) due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels'.

To be continued – undoubtedly.

The Role of the International Social Service in the History of Private International Law

by Roxana Banu

The "International Social Service" (initially named "International Migration Service") was created in 1920 by the Young Women Christian Association as a network of social work branches helping migrant women and children. In 1924 it became an independent transnational network of social work agencies offering socio-legal services to migrants and refugees, irrespective of gender, religion or race. It grew exponentially since then and is now present in over 120 countries helping more than 75,000 families each year. Since its inception and largely unbeknownst to private international law scholars, it worked (and continues to work) on virtually every aspect of transnational family law. In the first half of the twentieth century the ISS used its extensive database of social work case records to draft expert opinions on private international law matters for the League of Nations, bar associations, the US Congress, the Hague Conference on Private International Law and others. It devised and coordinated interdisciplinary teams of experts to conduct research on cross-border family maintenance and cross-border adoptions. It experimented with all sorts of legal arguments in order to push for new claims in private international law, especially in U.S. courts.

The ISS has been hiding in plain sight in the history of private international law since the 1920s. Anyone lucky enough to visit ISS-USA's archives at the University of Minnesota would be astonished by ISS's extensive engagement with virtually every aspect of transnational family law. During the first half of the 20th century the ISS left no stone untouched in an effort to devise an international socio-legal framework for cross-border family maintenance claims. It lobbied scholars, consuls, employers, national legislators and international organizations; its global network of social workers worked together to inform women living abroad when their husbands attempted to file divorce proceedings in the U.S.; it experimented with entirely new and imaginative legal arguments to convince U.S. courts to assume jurisdiction over foreign women's maintenance claims against

their husbands living in the U.S.; and it submitted expert evidence to the Child Welfare Committee of the League of Nations.

Unbeknownst to contemporary private international law scholars, the report sent by Ernst Rabel to the League of Nations on cross-border maintenance claims had in fact been commissioned by the ISS and based almost entirely on its case files. The entire project on cross-border maintenance claims was in fact the brainchild of Suzanne Ferriere, ISS's General Secretary until 1945 and thereafter its assistant director and one of only three women on the International Committee of the Red Cross during WWII.

In the 1930s the ISS was involved in the debates on the nationality of married women at the League of Nations. Unlike other feminist organizations, which were skeptical of the League's attempt to conceptualize the issue of married women's nationality as a conflict of laws question, the ISS offered an analysis of its case records precisely to press the League to become more conscious and more precise about the conflict-of-laws dimensions of the issue of married women's nationality. It continued to press for legal aid for foreign citizens, to help foreigners bring inheritance and property claims either in the U.S. or in their countries of origin and to press U.S. and foreign courts to co-operate with each other in cross-border family law matters.

In between the two World Wars several ISS social workers were responsible for the relocation of Jewish children to the U.S., devising new rules on cross-border guardianship and adoption almost from scratch. After the Second World War ISS personnel collaborated with the United Nations Relief and Rehabilitation Administration in setting up cross-border adoption and guardianship standards for displaced unaccompanied minors. Meanwhile, back in the U.S., ISS members petitioned the US Congress to raise the quota for adopted children and to disallow adoptions by proxy.

Most of the issues the ISS had been working on in the first half of the 20th century belonged to an unchartered private international law territory. With modest funds, ISS branches often engaged in detailed legal research projects. Among many other gems, ISS USA's archive contains numerous article clippings, extensive correspondence and research inquiries sent to universities, legislators or other social workers in an attempt to piece together private international law concepts and techniques that were unknown even to legal practitioners and

scholars at the time.

Recovering the history of ISS's engagement with private international questions is worthwhile in itself. But even more remarkably, one could zoom in and out of the ISS and thereby begin to write an entirely new history of private international law. Zooming in, one is exposed to a surprising joined history between transnational social work and private international law. As the ISS was pioneering new transnational case-law methods, it placed private international law squarely in its center, to the dismay of both social workers and private international law scholars. Reading social workers' forays into private international law together with their writings on transnational social work methods and on multiculturalism offers a new window into private international law's and social workers' engagements with the foreign, contradictory and paradoxical as they may be. Zeroing in on the ISS as a private international law agent also exposes a whole range of women – social workers, philanthropists, ambassadors' wives, Hollywood actresses – that are entirely unknown to a field that it yet to write its gendered history.

Zooming out of the ISS offers yet another lens through which to re-write private international law's history. On the one hand, ISS combined a micro-analysis on individual cases and individual families with a macro-analysis of the geopolitical context causing hardship for families across borders. Tapping into this dual standpoint presses private international law, through the eyes of the ISS, to reconstruct its relationship with migration law and policy and with the field of international relations. On the other hand, moving the analysis from the ISS outward means joining private international law back with the extensive network that the ISS itself was relying on when doing its work. Among many other remarkable figures, this network exposes Jewish women émigrés to the Americas who were using their dual-legal background to help migrants or who had managed to become private international law professors in their own right. For example, although most would be familiar with Werner Goldschmidt's work in Private International Law, few would know that his sister-in-law, Ilse Jaffe Goldschmidt opened an ISS branch in Venezuela (the Nansen Medal was awarded to its director general, Maryluz Schloeter Paredes, in 1980) and worked extensively on cross-border adoption matters.

Engaging with the history of the ISS means retracing an incredible range of connections between private and public international, migration law and policy,

foreign affairs and social work, connections which were often built and fostered by the ISS itself. The archive contains interviews, studies in refugee camps, cross-branches socio-legal research studies, expert opinions offered to a whole range of actors, reports and opinion pieces on a broad set of geopolitical and socio-legal topics, as well as confidential letters sent between the branches cataloging the challenges of their unprecedented work. Whether one is interested to recover the range of private international law projects that the ISS was involved in or engages with the ISS as a window through which to gage a new history of private international law, its extensive archives in every corner of the world are waiting to be explored.

Roxana Banu is a Lecturer in Private International Law at Queen Mary University of London, Faculty of Law. Roxana researches on legal history and feminist perspectives on private international law. She is the author of Nineteenth Century Perspectives on Private International Law (OUP, 2018) and "A Relational Feminist Perspective on Private International Law," awarded the ASIL Prize for the best paper in Private International Law in 2016. She is currently writing a book on a gendered history of private international law, which includes a more detailed discussion of the role of the ISS in the history of private international law. She offers a brief portrait of the women of the ISS in Roxana Banu, "Forgotten Female Actors in the History of Private International Law. The Women of the International Social Service 1920-1960," in Immi Tallgren ed., Portraits of Women in International Law (forthcoming with OUP, 2021).

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One Year of Pandemic-Driven

Video Hearings at the German Federal Court of Justice in International Patent Matters: Interview with Federal Judge Hartmut Rensen, Member of the Tenth Panel in Civil Matters

Benedikt Windau, the editor of a fabulous German blog on civil procedural law, www.zpoblog.de, recently interviewed Federal Judge Dr Hartmut Rensen, Member of the Tenth Panel of the division for civil and commercial matters at the German Federal Court of Justice (*Bundesgerichtshof*) on the experiences with video hearings in national an international patent matters in the pandemic. I allow myself to pick up a few elements from this fascinating interview in the following for our international audience:

The Tenth Panel functions as a court of first appeal (*Berufungsgericht*) in patent nullity proceedings and as a court of second appeal for legal review only (*Revisionsgericht*) in patent infringement proceedings. In both functions, particularly in its function as court of first appeal, actors from all over the world may be involved, and indeed, Judge Rensen reported about parties and their respective representatives and teams from the USA, Japan, South Korea, the UK, France, Italy and Spain during the last year.

Obviously, the start of the pandemic raised the question how to proceed, once physical hearings on site could no longer take place as before, since particularly in the appeal proceedings parties had usually appeared with several lawyers, patent lawyers, technical experts, interpreters etc., i.e. a large number of people had gathered in rather small court rooms, to say nothing of the general public and media. Staying all proceedings until an expected end of the pandemic (for which we are still waiting) would indeed have infringed the parties‘ fundamental procedural right to effective justice, abstaining from oral hearings and resorting to submission and exchange of written documents instead, as theoretically

provided as an option under section 128 (2) German Code of Civil Procedure, would evidently not have been satisfying in matters as complex as patent matters (as well as probably in most other matters).

German civil procedural law allows for video hearings under section 128a (1) German Code of Civil Procedure. It reads (in the Governments official, yet may be not entirely perfect translation): „The court may permit the parties, their attorneys-in-fact, and advisers, upon their filing a corresponding application or ex officio, to stay at another location in the course of a hearing for oral argument, and to take actions in the proceedings from there. In this event, the images and sound of the hearing shall be broadcast in real time to this location and to the courtroom." The key word is „permit". If the court „permits" the parties etc. to proceed as described, it does not mean that the parties are required to do so. And indeed, parties applied for postponing scheduled hearings instead of going into video hearings. The presiding judge of the court has to decide on such a motion according to section 227 on „changes of date for scheduled hearings". Section 227 (1) Sentence 1 reads: „Should substantial grounds so require, a hearing may be cancelled or deferred, or a hearing for oral argument may be postponed". Sentence 2 reads: „The following are not substantial grounds: No. 1: The failure of a party to appear, or its announcement that it will not appear, unless the court is of the opinion that the party was prevented from appearing through no fault of its own". Is this enough ground to reject the motion in light of the offer to go into video hearings? The Tenth Panel was brave enough to answer this question positively. Further, it was brave enough to overcome the friction between section 128a – permission for video hearings to be decided by the entire bench of the court at the opening of the first hearing – and section 227 (1) – decision about the motion to postpone a scheduled hearing by the presiding judge prior to that hearing. In the interest of progress in e-justice and effective access to justice in times of the pandemic, this is to be applauded firmly, all the more because the Panel worked hard, partly on its own initiative (as the general administration of the court would have been far too slow), to equip the court room with the necessary video technology: several cameras showing each judge and the entire bench, at the same time making sure that no camera reveals internal notes, the same for each party and team. The video conference tool that is currently used is MS Teams (despite all obvious concerns) as being the most reliable one in terms of broadcasting image and sound. The Panel invited to technical rehearsals the day before the hearing and for feed-backs afterwards, in order to improve itself

and in order to build up trust, which seemed to have been quite successful. The specific nature of patent proceedings resulted in the insight that the function „screen sharing“ is one of the most helpful tools which will probably continue to be used in post-pandemic times. Sounds to me like examples of best practice. In sometimes rather „traditional“ environments of the German administration of justice, this is not a matter of course.

In relation to sovereignty issues when foreign parties are involved, the Panel takes the view that the territorial sovereignty of a foreign jurisdiction is not affected by a mere permission in the sence of section 128a because the place of the hearings can be considered still as being the locus of the court, i.e. Karlsruhe, Germany. Judge Rensen reported about talks between the Federal Ministry of Justice and its counterparts on the level of the states to the opposite, but as Judge Rensen pointed out, these are ongoing talks amongst ministerial officers, no court decisions or specific legislations that would bind the Panel. Things are certainly more difficult when it comes to the taking of evidence. The Panel has done this only once so far, apparently within the scope of application of the EU Taking of Evidence Regulation. This case was specific, insofar as the testimony appeared to be entirely in line with and supported by undisputed facts and other testimonies, and these circumstances established a particularly solid overall picture about the point. This is why the Panel held the video testimony to be sufficient, which might mean that in mixed pictures the Panel might tend towards insisting on testimony in physical presence. In general, Judge Rensen supported judge-made progress, as opposed to specific legislation on legal assistance, as such legislation (like the EU legislation, including its latest recast on the matter) might lead to the misconception that such legislation would be required as a matter of principle in all cases to allow video hearings with foreign participants. For this reason, he pleaded for taking this factor into account before reforming section 128a (if at all), as such legislation would not be in sight in relation to a number of third states. At the same time the work of e.g. the HCCH on improving and modernising legal assistance under the HCCH 1970 Convention on the Taking of Evidence may be helpful nevertheless to promote and support video hearings in legal certainty, see e.g. the HCCH 2020 Guide to good practice on the use of video-link under the Hague Evidence Convention, but indeed the approach towards states staying outside these legal frameworks must be considered likewise.

How Litigation Imports Foreign Regulation

Guest Post by Diego A. Zambrano, Assistant Professor of Law, Stanford Law School

For years now, the concept of a "Brussels Effect" on global companies has become widely accepted. A simple version of the story goes as follows: the European Union sets global standards across a range of areas simply by virtue of its large market size and willingness to construct systematic regulatory regimes. That is true, for instance, in technology where European privacy regulations force American companies (including Facebook, Google, and Apple) to comply worldwide, lest they segment their markets. As Anu Bradford has expertly argued, it is also true in environmental protection, food safety, antitrust, and other areas. When companies decide to comply with European regulations across markets, the European Union effectively "exports" its regulatory regimes abroad, even to the United States.

In a forthcoming article, How Litigation Imports Foreign Regulation, I argue that foreign regulators not only shape the behavior of American companies—they also influence American litigation. From the French Ministry of Health to the Japanese Fair Trade Commission and the European Commission, I uncover how foreign agencies can have a profound impact on U.S. litigation. In this sense, the "Brussels Effect" is a subset of broader foreign regulatory influence on the American legal system.

The intersections are rich and varied. For instance, plaintiffs in dozens of pharmaceutical cases in U.S. court are requesting that multinational defendants disclose documents previously produced to foreign regulators. These plaintiffs base their legal cases around findings by, say, the French Ministry of Health rather than the American Food and Drug Administration (FDA). Similarly, plaintiffs in antitrust cases keep close tabs on enforcement actions by the European Commission, piggybacking on the work of foreign regulators, borrowing

foreign theories and documents, and even arguing that foreign regulatory action should bolster cases in U.S. courts. And foreign regulators even submit letters to U.S. district courts, advocating for a particular outcome or objecting to the production of confidential documents.

Take a recent case, *In re Zofran*, involving allegations that GlaxoSmithKline (GSK) sold the drug Zofran while knowing it caused severe birth defects. GSK argued that "plaintiffs could offer no evidence that the drug caused birth defects" and that "even the FDA had rejected similar claims." Plaintiffs' case was headed for an adverse summary judgment until a key piece of evidence emerged—documents that GSK had produced to the "Japanese Ministry of Health and Welfare, including a series of studies showing potential birth defects that defendants had 'performed specifically to satisfy Japanese regulatory requirements.'" These documents allowed plaintiffs to dodge FDA findings and defeat a motion for summary judgment.

Or take another example, antitrust cases that piggyback on the foreign agencies. In a recent case alleging a conspiracy by American and foreign banks to fix prices for European sovereign bonds, plaintiffs left no doubt that "they remained ignorant of the conspiracy's existence until the European Commission's Statement of Objections put them on notice." In other words, a European Commission report triggered a large antitrust case in U.S. court.

Sometimes, plaintiffs draw on foreign regulators precisely because those foreign agencies disagree with U.S. regulators. In one pharmaceutical case, plaintiffs blamed a company for failing to warn of cancer risks, "citing reports from Health Canada, which they argued uncovered 'new safety information' that the FDA failed to consider."

I argue in my article that this phenomenon of private litigation that borrows foreign regulation is widespread and needs more attention. The trend comes, of course, with costs and benefits. On the one hand, drawing on foreign regulators can serve as a "failsafe" when domestic regulators are incompetent or captured. This could audit the work of our underperforming agencies, allowing litigators to compare the FDA with the Taiwanese health agency or the Environmental Protection Agency against European environmental regulators. Moreover, importing regulation can give litigants and courts access to increased expertise and information gathering. And it may even harmonize U.S. and foreign

regulations, promoting coherence and regulatory convergence.

Recent litigation involving the Boeing 737 Max crashes demonstrates the promise of imported foreign regulation. Many sources have reported a cozy relationship between Boeing and the Federal Aviation Administration, suggesting a classic case of regulatory capture. Private plaintiffs suing Boeing may thus have difficulty relying on reports from the FAA to support their cases. But Boeing does not wield similar influence over the European Aviation Safety Agency. So, plaintiffs could rely on EASA investigations to establish basic facts against Boeing, allowing the court to leverage the work of a relatively unbiased regulator.

While these benefits seem clear, costs also abound. We may worry, for instance, about empowering foreign regulators that have their own political agendas. Europeans, for one, may be protectionist against American tech companies. This could promote inefficient overregulation of activity that U.S. regulators have deemed appropriate. Foreign regulation could also chill essential domestic innovation. What if the FDA approves a COVID vaccine but private plaintiffs sue the manufacturer based on adverse reports in Japan? In a nightmare scenario, companies in the United States would worry not only about complying with America's sprawling regulations, but also about litigants trawling foreign countries for regulatory support.

Because it shows both promise but also risks, I recommend a better way to control the use of foreign regulations: Whenever a plaintiff proposes to use a foreign regulatory finding, courts should solicit the opinions of our domestic regulators. These opinions would help courts determine whether foreign regulations are compatible with America's regulatory regimes. However, agency opinions would not bind courts. Indeed, judges should take these opinions with a grain of salt and be wary of domestic regulatory capture. Even if agencies are unwilling to offer opinions, asking plaintiffs to give notice of their intent to use a foreign regulatory finding would alert domestic regulators of areas where they may be underperforming.

As traditional channels of transnational coordination die out, private parties, courts, and regulators are searching for new ways to promote transnational convergence. Both the Brussels Effect and the phenomenon of regulatory importation are examples of where the legal international order is heading.

European and International Civil Procedural Law: Some views on new editions of two leading German textbooks

For German-speaking conflict of law friends, especially those with a strong interest in its procedural perspective (and this seems to apply to almost all of them by now, I guess), the year 2021 has begun beautifully, as far as academic publications are concerned. Two fantastic textbooks were released, one on European civil procedural law, and one on international civil procedural law:

After more than ten years the second edition of Burkhard Hess's 2nd edition of his textbook on „Europäisches Zivilprozessrecht" is now on the table, 1026 pages, a plus of nearly 300 pages and now part of the renowned series „Ius Communitatis" by DeGruyter. It is a fascinating account of the foundations („Grundlegung", Part 1, pp. 3 – 311) of European civil procedure as well as a sharp analysis of the instruments of EU law („Europäisches internationales Zivilprozessrecht", Part 2, pp. 313 – 782). Part 3 focuses on the interplay between autonomous and European procedural law (pp. 783 – 976). Extensive tables of the cases by the ECJ and the ECtHR as well as a large subject index help to access directly the points in question. The foreword rightly points out that European civil procedural law has reached a new phase. Whereas 10 years ago, the execution of the agenda under the then still new competency in (now) Article 81 TFEU was at issue, today enthusiasm and speed have diminished. Indeed, the ECJ had to, and still has to, defend „the fundamental principles of EU law, namely mutual trust and mutual recognition, against populist attacks and growing breaks of taboos by right-wing populist governments in several Member States" (Foreword, p. 1, translation here and all following ones by myself; see also pp. 93 et seq. on the struggle for

securing independence of the national judge in Hungary and Poland as a matter of the EU's fundamental values, Article 2 TEU). At the same time, the EU legislator and the ECJ had shown tendencies towards overstreching the legitimatory potential of the principle of mutual trust before the EU returned to „recognition with open eyes" (as is further spelled out at para. 3.34, at p. 119), as opposed to blind trust – tendencies that worried many observers in the interest of the rule of law and a convincing balancing of the freedom of movement for judgments and other juridical acts. The overall positive view by Hess on the EU's dynamic patterns of judicial cooperation in civil matters, combined with the admirable clarity and comprehensiveness of his textbook, will certainly contribute considerably to address these challenges.

Equally admirable for its clarity and comprehensiveness is Haimo Schack's 8th edition of his textbook on „Internationales Zivilverfahrensrecht", including international insolvency and international arbitration, 646 pp., now elevated from the „short textbook series" to the „large textbook series" at C.H.Beck. The first part addresses foundations of the subject (pp. 1 – 68), the second part describes the limits of adjudicatory authority under public international law (pp. 69 – 90), the third part analyses all international aspects of the main proceedings (pp. 91 – 334), the fourth part recognition and enforcement (pp. 335 – 427), the fifth and sixth part deal with insolvency (pp. 428 – 472) and arbitration (pp. 473 – 544). Again, an extensive table of cases and a subject index are offered as valuable help to the user. Schack is known for rather sceptical positions when it comes to the narrative of mutual trust. In his sharp analysis of the foundations of international procedural law, he very aptly states that the principle of equality („*Gleichheit*") is of fundamental relevance, including the assumption of a principal equivalence of the adminstrations of justice by foreign states, which allows trust in and integration of foreign judicial acts and foreign laws into one's own administration of justice: *„Auf die Anwendung eigenen Rechts und die Durchführung eines Verfahrens im Inland kann man verzichten, weil und soweit man darauf vertraut, dass das ausländische Recht bzw. Verfahren dem inländischen äquivalent ist*" (We may waive the application of our own law and domestic proceedings because and as far as we trust in the foreign law and the foreign proceedings are equivalent to one's own, para. 39, at

p. 12) – a fundamental insight based, inter alia, on conceptual thinking by Alois Mittermaier in the earlier parts of the 19th century (AcP 14 [1831], pp. 84 et seq., at pp. 95, justifying recognition of foreign judgments by the assumption that the foreign judge should, in principle, be considered „as honest and learned as one's own"), but of course also on Friedrich Carl v. Sagigny, which I allowed myself to further substantiate and transcend elsewhere to the finding: to trust or not to trust – that is the question of private international law (M. Weller, RdC, forthcoming). In Schack's view, „the ambitious and radical projects" of the EU in this respect „fail to meet with reality" (para. 126, at p. 50). Equally sceptical are his views on the HCCH 2019 Judgments Convention („*Blütenträume*", para. 141, at p. 57, in translation something like „daydreams").

Perhaps, the truth lies somewhere in the middle, namely in a solid „trust management", as I tried to unfold elsewhere.

European Parliament Resolution on corporate due diligence and corporate accountability

Our blog has reported earlier on the Proposal and Report by the Committee on Legal Affairs of the European Parliament for a Resolution on corporate due diligence and corporate accountability. That proposal contained recommendations to amend the EU Regulations Brussels Ia (1215/2015) and Rome II (864/2007). The proposals were discussed and commented on by Jan von Hein, Chris Tomale, Giesela Rühl, Eduardo Álvarez-Armas and Geert van Calster.

On 10 March 2021 the European Parliament adopted the Resolution with a large majority. However, the annexes proposing to amend the Brussels Ia and Rome II Regulations did not survive. The Resolution calls upon the European Commission to draw up a directive to ensure that undertakings active in the EU respect human rights and the environment and that they operate good governance. The

European Commission has already indicated that it will work on this.

Even if the private international law instruments are not amended, the Resolution touches private international law in several ways.

* It specifies that the "Member States shall ensure that relevant provisions of this Directive are considered overriding mandatory provisions in line with Article 16 of Regulation (EC) No 864/2007" (Art. 20). It is a bit strange that this is left to national law and not made an overriding mandatory provision of EU law in line with the CJEU's Ingmar judgment (on the protection of commercial agents – also a Directive). Perhaps the legislator decides otherwise.

* It proposes a broad scope rule covering undertakings "operating in the internal market" and encompassing activities of these undertakings or "those directly linked to their operations, products or services by a business relationship or in their value chains" (Art 1(1)). It thus imposes duties on undertakings to have due diligence strategies and communicate these even if the undertakings do not have their seat in an EU Member State. In this way it moves away from traditional seat theories and place of activities tests.

ILA "Kyoto Guidelines on Intellectual Property and Private International Law" published with comments

Written by Toshiyuki Kono, Pedro de Miguel Asensio and Axel Metzger

The International Law Association's Committee on "Intellectual Property and

Private International Law" has finished its work with the adoption and publication of the "Kyoto Guidelines on Intellectual Property and Private International Law". The Guidelines are the outcome of an international cooperation of a group of 36 scholars from 19 jurisdictions lasting for ten years under the auspices of ILA. The Kyoto Guidelines have been approved by the plenary of the ILA 79th Biennial Conference, held (online) in Kyoto on December 13, 2020. The Guidelines provide soft-law principles on the private international law aspects of intellectual property, which may guide the interpretation and reform of national legislation and international instruments, and may be useful as source of inspiration for courts, arbitrators and further research in the field. Different from older regional projects, the Kyoto Guidelines have been prepared by experts from different world regions. The Guidelines have now been published with extended comments as a special issue of the Open Access journal JIPITEC: https://www.jipitec.eu.

The ILA Committee on "Intellectual Property and Private International Law" was created in November 2010. Its aim was to examine the legal framework concerning civil and commercial matters involving intellectual property rights that are connected to more than one State and to address the issues that had emerged after the adoption of several legislative proposals in this field in different regions of the world. The work of the Committee was built upon the earlier projects conducted by the Hague Conference of Private International Law as well as several academic initiatives intended to develop common standards on jurisdiction, choice of law and recognition and enforcement of judgments in intellectual property matters.

In the initial stages of the activities of the Committee it was agreed that its overall objective should be to draft a set of model provisions to promote a more efficient resolution of cross-border intellectual property disputes and provide a blueprint for national and international legislative initiatives in the field. Therefore, the focus of its activities has been the drafting of a set of guidelines with a view to provide a valuable instrument of progress concerning private international law aspects raised by intellectual property. Furthermore, the Committee conducted a

number of comparative studies and monitored the developments in different jurisdictions around the world. The Committee also worked in collaboration with several international organizations, particularly the World Intellectual Property Organization and the Hague Conference on Private International Law.

The final text of the Guidelines consists of 35 provisions, which are divided in four sections: General Provisions (Guidelines1-2), Jurisdiction (3-18), Applicable Law (19-31) and Recognition and Enforcement of Judgments (Guidelines 32-35). As suggested by the term "Guidelines", this instrument contains a set of provisions intended to guide the application or reform of private international laws in this field. The Guidelines restate certain well-established foundational principles such as the *lex loci protectionis* rule and aspire to provide concrete solutions for pressing contemporary problems, in areas such as multi-state infringements and cross-border collective copyright management. In order to make explicit the influence of the previous projects in the field and to facilitate the comparison with them, the short comments are preceded by the reference to the similar provisions adopted previously in the ALI Principles[1], CLIP Principles[2], Transparency Proposal[3] and Joint Korean-Japanese Principles[4]. As an additional instrument to facilitate the uniform interpretation of the Guidelines, the Committee has prepared a set of extended comments to all the provisions.

The Guidelies have now been published together with extended comments written by members of the ILA Committee which explain the background and application of the Guidelines.

[1] American Law Institute, *Intellectual Property: Principles Governing Jurisdiction, Choice of Law and Judgments in Transnational Disputes*, ALI Publishers, 2008.

[2] European Max Planck Group on Conflict of Laws in Intellectual Property, *Conflict of Laws in Intellectual Property (Text and Commentary)*, OUP, 2013.

[3] Japanese Transparency Proposal on Jurisdiction, Choice of Law, Recognition and Enforcement of Foreign Judgments in Intellectual Property, see the English text in J. Basedow, T. Kono and A. Metzger (eds.), *Intellectual Property in the Global Arena – Jurisdiction, Applicable Law, and the Recognition of Judgments in Europe, Japan and the US*, Mohr Siebeck, 2010, pp. 394-402.

[4] Joint Proposal by Members of the Private International Law Association of Korea and Japan, see *The Quarterly Review of Corporation Law and Society*, 2011, pp. 112-163.