The Gordian knot is cut – CJEU rules that the Posting of Workers Directive is applicable to road transport

Written by Fieke van Overbeeke[1]

On 1 December 2020 the Grand Chamber of the CJEU ruled in the FNV/Van Den Bosch case that the Posting of Workers Directive(PWD) is applicable to the highly mobile labour activities in the road transport sector (C-815/18). This judgment is in line with recently developed EU legislation (Directive 2020/1057), the conclusion of AG Bobek and more generally the '*communis opinio*'. This question however was far from an 'acte clair' or 'acte éclairé' and the Court's decision provides an important piece of the puzzle in this difficult matter.

The FNV/Van Den Bosch case dates back all the way to the beginning of 2014, when the Dutch trade union FNV decided to sue the Dutch transport company Van den Bosch for not applying Dutch minimum wages to their Hungarian lorry drivers that were (temporarily) working in and from its premises in the Netherlands. One of the legal questions behind this was whether the Posting of Workers Directive is applicable to the road transport sector, for indeed if it is, the minimum wages of the Netherlands should be guaranteed if they are more favourable than the Hungarian minimum wages (and they are).

At the Court of first instance, the FNV won the case with flying colours. The Court unambiguously considered that the PWD is applicable to road transport. Textual and teleological argumentation methods tied the knot here. The most important one being the fact that Article 1(2) PWD explicitly excludes the maritime transport sector from its scope and remains completely silent regarding the other transport sectors. Therefore the PWD in itself could apply to the road transport sector and thus applies to the case at hand.

Transport company Van Den Bosch appealed and won. The Court of Appeal

diametrically opposed its colleague of first instance, favouring merely the principles of the internal market. The Court of Appeal ruled that it would not be in line with the purpose of the PWD to be applied to the case at hand.

The FNV then took the case to the Supreme Court (Hoge Raad), at which both parties stressed the importance of asking preliminary question to the CJEU in this matter. The Supreme Court agreed and asked i.a. whether the PWD applies to road transport and if so, under which specific circumstances.

The CJEU now cuts this Gordian knot in favour of the application of the PWD to the road transport sector. Just as the Court in first instance in the Netherlands, the CJEU employs textual and teleological argumentation methods and highlights the explicit exception of Article 1(2) PWD, meaning that the PWD in itself could apply to road transport.

As regards to the specific circumstances to which the PWD applies, the CJEU sees merit in the principle of the 'sufficient connection' (compare CJEU 19 December 2018, C-16/18 Dobersberger, paragraph 31) and rules:

'A worker cannot, in the light of PWD, be considered to be posted to the territory of a Member State unless the performance of his or her work has a sufficient connection with that territory, which presupposes that an overall assessment of all the factors that characterise the activity of the worker concerned is carried out.'

So in order to apply the PWD to a specific case, there has to be a sufficient connection between worker and temporary working country. In order to carry out this assessment, the CJEU identifies several 'relevant factors', such as the characteristics of the provision of services, the nature of the working activities, the degree of connection between working activities of a lorry driver and the territory of each member state and the proportion of the activities compared to the entire service provision in question. Regarding the latter factor, operations involving loading or unloading goods, maintenance or cleaning of the lorries are relevant (provided that they are actually carried out by the driver concerned, not by third parties).

The CJEU also clarifies that the mere fact that a lorry driver, who is posted to work temporarily in and from a Member State, receives their instructions there and starts and finishes the job there is 'not sufficient in itself to consider that that

driver is “posted” to that territory, provided that the performance of that driver’s work does not have a sufficient connection with that territory on the basis of other factors.’

Finally, it is important to note that the Court provides a helping hand regarding three of the four main types of transport operations, namely transit operations, bilateral operations and cabotage operations. A *transit operation* is defined by the Court as a situation in which ‘a driver who, in the course of goods transport by road, merely transits through the territory of a Member State’. To give an example: a Polish truck driver crosses Germany to deliver goods in the Netherlands. The activities in Germany are regarded as a ‘transit operation’. A *bilateral operation* is defined as a situation in which ‘a driver carrying out only cross-border transport operations from the Member State where the transport undertaking is established to the territory of another Member State or vice versa’. To give another example, a Polish truck driver delivers goods in Germany and vice versa. The drivers in those operations cannot be regarded as ‘posted’ in the sense of the PWD, given the lack of a sufficient connection.

By referring to Article 2(3) and (6) of Regulation No 1072/2009, a *cabotage operation* is defined by the CJEU as ‘as national carriage for hire or reward carried out on a temporary basis in a host Member State, in conformity with that regulation, a host Member State being the Member State in which a haulier operates other than the haulier’s Member State of establishment’. For example, a Polish lorry driver carries out transport between two venues within Germany. According to the CJEU, these operations do constitute a sufficient connection and thus will the PWD in principle apply to these operations.

In short, the CJEU gives a green light for transit- and bilateral operations and a red light for cabotage operations. The CJEU however remains silent regarding the fourth important road transport operation: cross-trade operations. A *cross-trade operation*is a situation in which a lorry driver from country A, provides transport between countries B and C. The sufficient connection within these operations should therefore be assessed only on a case-by-case basis.

At large, the judgment of the CJEU is in line with the road transport legislation that has been adopted recently (Directive 2020/1057). This legislation takes the applicability of the PWD to road transport as a starting point and then provides specific conflict rules to which transport operations the PWD does and does not

apply. Just like the judgement of the CJEU, this legislation determines that the PWD is not applicable to transit- and bilateral operations, whereas the PWD is applicable to cabotage operations. Cross-trade operations did not get a specific conflicts rule and therefore the application of the PWD has to be assessed on a case-by-case basis, to which the various identified factors by the Court could help.

All in all, the Gordian knot is cut, yet the assessment of the applicability of the PWD to a specific case will raise considerable difficulties, given de wide margin that has been left open and the rather vague relevant factors that the CJEU has identified. Hard and fast rules however seem to be impossible to impose to the highly mobile and volatile labour activities in the sector, and in that regard the CJEU's choice of a case by case analysis of a sufficient connection seems to be the lesser of two evils.

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Enforcing Consent-to-Jurisdiction Clauses in U.S. Courts

Guest Post by John Coyle, the Reef C. Ivey II Distinguished Professor of Law at the University of North Carolina School of Law

One tried-and-true way of obtaining personal jurisdiction over a foreign person that otherwise lacks minimum contacts with a particular U.S. state is to require the person to agree *ex ante* to a forum selection clause. This strategy only works,

however, if the forum selection clause will be enforced by the courts in the chosen state. To date, scholars have written extensively about the enforceability of "outbound" forum selection clauses that redirect litigation from one court to another. They have devoted comparatively less attention to the enforceability of "inbound" forum selection clauses that purport to provide a basis for the chosen court's assertion of personal jurisdiction over a foreign defendant.

In a recent paper, Katherine Richardson and I seek to remedy this deficit. We reviewed 371 published and unpublished cases from the United States where a state court was asked to assert personal jurisdiction over an out-of-state defendant on the basis of an "inbound" consent-to-jurisdiction clause. In conducting this review, we documented the existence of several different enforcement frameworks across states. The state courts in New York, for example, take a very different approach to determining whether such a clause is enforceable than the state courts in Florida, which in turn take a very different approach to this question than the state courts in Utah.

These differences in enforcement frameworks notwithstanding, we found that consent-to-jurisdiction clauses are routinely given effect. Indeed, our data suggest that such clauses are enforced by state courts approximately 85% of the time. When the courts refuse to enforce these clauses, moreover, they tend to cite just a handful of predictable reasons. First, the courts may refuse to enforce when the clause fails to provide proper *notice* to the defendant of the chosen forum. Second, the courts may conclude that the clause should not be given effect because the parties *lack a connection* to the chosen forum or that litigating in that forum would be *seriously inconvenient*. Third, a clause may go unenforced because it is contrary to the *public policy* of a state with a close connection to the parties and the dispute.

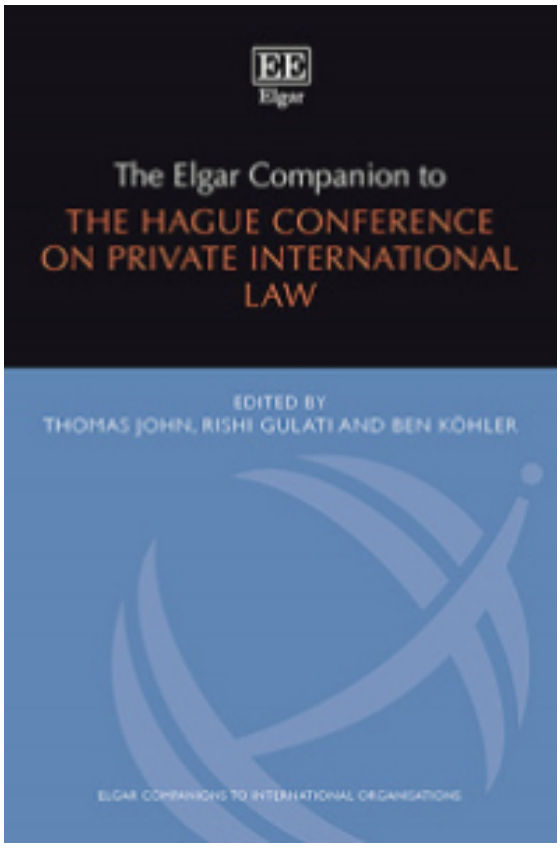
After mapping the relevant terrain, we then proceed to make several proposals for reform. We argue that the courts should generally decline to enforce consent-to-jurisdiction clauses when they are written into contracts of adhesion and deployed against unsophisticated counterparties. We further argue that the

courts should decline to enforce such clauses in cases where the defendant was never given notice as to where, exactly, he was consenting to jurisdiction. Finally, we argue that the courts should retain the flexibility to decide whether to dismiss on the basis of *forum non conveniens* even when a forum selection clause specifically names the jurisdiction where the litigation is brought. Each of these reforms would, in our view, produce fairer and more equitable results across a wide range of cases.

Although our research focused primarily on state courts, our reform proposals are relevant to federal practice as well. Federal courts sitting in diversity are required by Federal Rule of Civil Procedure 4(k)(1)(a) to follow the law of the state in which they sit when they are called upon to determine whether to enforce a consent-to-jurisdiction clause. If a given state were to revise or reform its rules on this topic along the lines set forth above, the federal courts sitting in that state would be obliged to follow suit.

Introduction to the Elgar Companion to the Hague Conference on Private International Law (HCCH) — Part I

The following entry is the first of two parts that provide an introduction to the Elgar Companion to the Hague Conference on Private International Law (HCCH). Together, the parts will offer readers an overview of the structure of the Companion (Part I) as well as of the core themes as they emerged from the 35 Chapters (Part II). Both parts are based on, and draw from, the Editors' Introduction to the Elgar Companion to the HCCH, which Elgar kindly permitted.



Introduction

The Elgar Companion to the HCCH will be launched on 15 December 2020 as part of a 1 h long virtual seminar. The Companion, edited by Thomas John, Dr Rishi Gulati and Dr Ben Koehler, is a unique, unprecedented and comprehensive insight into the HCCH, compiling in one source accessible and thought-provoking contributions on the Organisation's work. Written by some of the world's leading private international lawyers, all of whom have directly or indirectly worked closely with the HCCH, the result is a collection of innovative and reflective contributions, which will inform shaping the future of this important global institution.

The Companion is timely: for more than 125 years, the HCCH has been the premier international organisation mandated to help achieve global consensus on the private international law rules regulating cross-border personal and commercial relationships. The organisation helps to develop dedicated multilateral legal instruments pertaining to personal, family and commercial legal situations that cross national borders and has been, and continues to be, a shining example of the tangible benefits effective and successful multilateralism can yield

for people and businesses globally.

Approach to private international law

The Companion approaches private international law classically, that is, by understanding the subject matter with reference to its three dimensions: jurisdiction, applicable law, and the recognition and enforcement of foreign judgments. But, as the contributions in this work show, since its inception, and in particular since the 1980s, the HCCH has helped to reach international consensus concerning a further, a "fourth" dimension of private international law: cross-border legal cooperation.

In line with this development, and with the firm belief that such cooperation is crucial to the private international law of the 21st century, the Companion has adopted a strong focus on cross-border legal cooperation, including by an increased use of technology. This deliberate choice was fortuitous: the global pandemic is testing the domestic and international justice sector like never before, bringing into sharp focus the often non-existing or still arcane methods prevalent especially in the area of cross-border legal cooperation.

Structure of the Companion

The Companion comprises 35 Chapters that are organised into three Parts.

Part I of the Companion: Institutional perspectives

Part I consists of three Sections. Section 1 considers the HCCH as an international organisation and the contributions trace the development of the Organisation from its inception in 1893 until the present day, including its trajectory towards a truly global organisation. The initial Chapters specifically concern the history of the HCCH; its institutional setting, especially in terms of

the HCCH's privileges and immunities; as well as a contribution on the relationship between the HCCH, and the other two international organisations dealing with international private law issues, i.e., UNCITRAL and UNIDROIT, often also referred to as the HCCH's 'Sister Organisations'.

The following Section is dedicated to the HCCH as an organisation with global reach. The Chapters demonstrate how the HCCH is evolving from an organisation whose membership was historically European-based into an increasingly global institution. The HCCH currently has 86 Members (as of December 2020), comprising 85 States and the EU. Perhaps other Regional Economic Integration Organisations (REIO) may also become members one day, and this should be encouraged. Remarkably, since the turn of the century, the HCCH has added 39 New Members (or 45% of its current membership), including six South American States, two States from North America, one in Oceania, fourteen in Asia, eleven in Europe and five in Africa.[1] Since 3 December, the HCCH has a further Candidate State: Mongolia, which has applied for membership and for which the six-month voting period is now running. Importantly, this Section considers the HCCH's expanded reach, including thoughtful contributions on the organisation's work in Latin America and the Caribbean; Africa; and in the Asia Pacific. The Chapters also reflect on the work of the HCCH's Regional Offices, namely, the Regional Office for Asia and the Pacific (ROAP), which is based in Hong Kong and commenced its work in 2012; as well as the Regional Office for Latin America and the Caribbean (ROLAC), operating out of Buenos Aires since 2005.

Part I's final Section looks at the HCCH as a driver of private international law. The Chapters contain stimulating contributions concerning some of the contemporary philosophical dimensions of private international law as shaped by globalisation, and the ways in which the HCCH can be understood in this context; the role the Organisation can play in shaping private international law into the future; considering whether the 2015 Choice of Law Principles establish a good framework for regulatory competition in contract law; what role the HCCH can play in further strengthening legal cooperation across borders; and the concept of *public order*, including its relationship with mandatory law.

Part II of the Companion: Current

instruments

Part II of the Companion concerns contributions on existing HCCH instruments. It traces the evolution, implementation, and effectiveness of each of those instruments, and looks forward in terms of how improvements may be achieved. The contributors not only provide a record of the organisation's successes and achievements, but also provide a critical analysis of the HCCH's current work. They canvassed the traditional tripartite of private international law, including forum selection, choice of law and the recognition and enforcement of judgments. In addition, they also provided their thoughts on the fourth dimension of private international law, i.e. cross-border legal cooperation, tracing the pioneering, as well as championing, role of the HCCH in this regard, resulting in cooperation being a quintessential feature, in particular of more modern conventions, developed and adopted by the HCCH.

Part II is organised following the three pillars of the HCCH: (1) family law; (2) international civil procedure, cross-border litigation and legal cooperation; and (3) commercial and financial law.

The first Section of Part II addresses HCCH instruments in the family law sphere. Contributions include an analysis of the HCCH and its instruments relating to marriage; the 1980 Child Abduction Convention; the 1993 Intercountry Adoption Convention; a Chapter on the challenges posed by the 1996 Child Protection Convention in South America; the 2000 Adult Protection Convention; a contribution on HCCH instruments in the area of maintenance Obligations; the work of the HCCH in the field of mediation in international children's cases; and a contribution overviewing the interaction between various HCCH instruments concerning child protection.

The second Section concerns HCCH instruments that are some of its major successes. But as the Chapters show, more work needs to be done given the ever-increasing cross-border movement of goods, services and people, and the need to better incorporate the use of technology in cross border legal cooperation. Contributions concern the 1961 Apostille Convention; the 1965 Service and 1970 Evidence Conventions; the 2005 Choice of Court Convention; and finally, the 2019 Judgments Convention which was decades in the making.

The final Section in Part II consists of contributions on HCCH commercial and

finance instruments. Contributions specifically focus on the 1985 Trusts Convention; the 2006 Securities Convention; and the 2015 Choice of Law Principles, which constitute a soft law instrument demonstrating versatility in the kind of instruments HCCH has helped negotiate.

Part III – Current and possible future priorities

Part III of the Companion consists of Chapters that discuss the substantive development of private international law focusing on current and possible future priorities for the HCCH. In that regard, this Companion seeks to bridge the HCCH's past and its future.

The first Section focuses on current priorities. It consists of contributions on a highly difficult and sensitive area of international family law, i.e. parentage and international surrogacy and how the HCCH may assist with its consensual solutions; how the HCCH may play a global governance role in the area of the protection of international tourists; and how the exercise of civil jurisdiction can be regulated. Specifically, this Chapter shows how the doctrine of *forum non conveniens* is increasingly being influenced by access to justice considerations, a matter borne out by comparative analysis.

The second Section of Part III, and of the Companion, contemplates possible future priorities for the HCCH. Contributions concern how private international law rules ought to be developed in the context of FinTech; what role the HCCH may play in setting out the private international law rules in the sphere of international commercial arbitration; how the digitisation of legal cooperation ought to reshape the fourth dimension of private international law; the potential development of special private international law rules in the context of complex contractual relationships; how the HCCH can engage with and embrace modern information technology in terms of the development of private international law; and finally, what role there is for the HCCH in developing a regulatory regime for highly mobile international employees. It is hoped that in addition to providing ideas on how progress may be made on its current priorities, the contributions in Part III can also provide a basis for the HCCH's future work.

Concluding remarks and outlook

The editors, who collaboratively prepared this entry, chose this structure for the Companion to provide the reader with an easy access to a complex organisation that does complex work. The structure also makes accessible the span of time the Companion bridges, chronicling the HCCH's history, reaching back to 1893, while looking forward into its future.

The second entry on Conflict-of-Laws.net will outline the editor's reflections on the 35 Chapters, drawing out some of the key themes that emerged from the Companion, including the HCCH's contribution to access to justice and multilateralism.

[1] HCCH, 'Members & Parties' <https://www.hcch.net/en/states> accessed 6 December 2020. The latest Member State is Nicaragua for which the Statute of the HCCH entered into force on 21 October 2020.

Report on the ERA conference of 29-30 October 2020 on 'Recent Developments in the European Law of Civil Procedure'

This report has been prepared by Carlos Santaló Goris, a researcher at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, and Ph.D. candidate at the University of Luxembourg.

On 29-30 October 2020, ERA – the Academy of European Law – organized a conference on "Recent Developments in the European Law of Civil Procedure", offering a comprehensive overview of civil procedural matters at the European and global level. The program proved very successful in conveying the status quo

of, but also a prospective outlook on, the topics that currently characterise the debates on cross-border civil procedure, including the Brussels I-bis Regulation and 2019 HCCH Judgments Convention, the digitalisation of access to justice, the recent developments on cross-border service of documents and taking of evidence, and judicial cooperation in civil and commercial matters in the aftermath of Brexit.

For those who did not have the opportunity to attend this fruitful conference, this report offers a succinct overview of the topics and ideas exchanged over this two-day event.

Day 1: The Brussels I (Recast) and Beyond

The Brussels regime, its core notions and the recent contributions by the CJEU via its jurisprudence were the focus of the first panel. In this framework, Cristina M. Mariottini (Max Planck Institute Luxembourg) tackled the core notion of civil and commercial matters (Art. 1(1)) under the Brussels I-bis Regulation. Relying, in particular, on recent CJEU judgments, among which C-551/15, *Pula Parking*; C-308/17, *Kuhn*; C-186/19, *Supreme Site Services*, she reconstructed the functional test elaborated by the CJEU in this area of the law, shedding the light on the impact of recent developments in the jurisprudence of the Court, i.a., with respect to immunity claims raised by international organizations.

Marta Pertegás Sender (Maastricht University and University of Antwerp) proceeded then with a comprehensive overview of the choice-of-court agreement regimes under the Brussels I-bis Regulation and the 2005 Hague Convention on choice of court agreements. Relying, inter alia, on the CJEU case law on Article 25 of the Brussels I-bis Regulation (C-352/13, *CDC Hydrogen*; C-595/17, *Apple Sales*; C-803/18, *Balta*; C-500/18, *AU v. Reliantco*; C-59/19, *Wikingerhof* (pending)), she highlighted the theoretical and practical benefits of party autonomy in the field of civil and commercial matters.

The interface between the Brussels I-bis Regulation and arbitration, and the boundaries of the arbitration exclusion in the Regulation, were the focus of Patrick Thieffry (International Arbitrator; Member of the Paris and New York Bars) in his presentation. In doing so he analysed several seminal cases in that subject area (C-190/89, *Marc Rich*; C-391/95, *Van Uden*; C-185/07, *West Tankers*; C?536/13, *Gazprom*), exploring whether possible changes were brought about by

the Brussels I-bis Regulation.

The evolution of the CJEU's jurisprudence vis-à-vis the notions of contractual and non-contractual obligations were at the heart of the presentation delivered by Alexander Layton (Barrister, Twenty Essex; Visiting Professor at King's College, London). As Mr Layton effectively illustrated, the CJEU's jurisprudence in this field is characterized by two periods marking different interpretative patterns: while, until 2017, the CJEU tended to interpret the concept of contractual matters restrictively, holding that "all actions which seek to establish the liability of a defendant and which are not related to a contract" fall within the concept of tort (C-189/87, *Kalfelis*), the Court interpretation subsequently steered towards an increased flexibility in the concept of "matters relating to a contract" (C-249/16, *Kareda*; C-200/19, *INA*).

The principle of mutual trust of the European Area of Freedom, Security and Justice vis-à-vis the recent Polish judicial reform (and its consequential backlash on the rule of law) was the object of the presentation delivered by Agnieszka Fr?ckowiak-Adamska (University of Wroc?aw). Shedding the light on the complex status quo, which is characterized by several infringement actions initiated by the European Commission (C?192/18, *Commission v Poland*; C?619/18, *Commission v Poland*; C?791/19 R, Commission v Poland (provisional measures)) as well as CJEU case law (e.g. C?216/18 PPU, *Minister for Justice and Equality v LM*), Ms Fr?ckowiak-Adamska also expounded on the decentralised remedies that may be pursued by national courts in accordance with the EU civil procedural instruments, among which public policy, where available, and refusal by national courts to qualify Polish judgments as "judgments" pursuant to those instruments.

The second half of the first day was dedicated to the 2019 HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. In this context, it is of note that the EU, among others, has opened a Public Consultation into a possible accession to the Convention (see, esp., Thomas John's posting announcing the EU's public consultation). While Ning Zhao (Senior Legal Officer, HCCH) gave an overview of the *travaux preparatoires* of the 2019 HCCH Convention and of the main features of this instrument, Matthias Weller (University of Bonn) delved into the system for the global circulation of judgments implemented with the Convention, highlighting its traditional but also innovative

features and its potential contributions, in particular to cross-border dealings.

The roundtable that followed offered the opportunity to further expound on the 2019 HCCH Judgments Convention. Namely, Norel Rosner (Legal and Policy Officer, Civil Justice, DG for Justice and Consumers, European Commission) explained that the EU has a positive position towards the Convention, notably because it facilitates the recognition and enforcement of EU judgments in third countries and because it will help create a more coherent system of recognition and enforcement in the EU Member States of judgments rendered in other (of course, non-EU) Contracting States. The roundtable also examined the features and objectives of Article 29, which puts forth an "opt-out" mechanism that allows Contracting States to mutually exclude treaty obligations with those Contracting States with which they are reluctant to entertain the relations that would otherwise arise from the Convention. As Ms Mariottini observed, this provision – which combines established and unique characters compared to the systems put forth under the previous HCCH Conventions – contributes to defining the "territorial geometry" of the Convention: it enshrines a mechanism that counterbalances the unrestricted openness that would otherwise stem from the universality of the Convention, and is a valuable means to increase the likelihood of adherence to the Convention. Matthias Weller proceeded then to explore the consequences of limiting a Contracting State's objection window to 12 months from adherence to the Convention by the other Contracting State and raised the case of a Contracting State whose circumstances change so dramatically, beyond the 12-month window, that it is no longer possible to assure judicial independence of its judiciary. In his view, solutions as the ones proposed by Ms Fr?ckowiak-Adamska for the EU civil procedural instruments may also apply in such circumstances.

Day 2: European Civil Procedure 4.0.

Georg Haibach (Legal and Policy Officer, Civil Justice, DG for Justice and Consumers, European Commission), opened the second day of the conference with a detailed presentation on the ongoing recast of the Service Regulation (Regulation (EC) No 1393/2007). Emphasizing that the main objective of this

reform focuses on digitalization – including the fact that the proposed recast prioritises the electronic transmission of documents – Mr Haibach also shed the light on other notable innovations, such as the possibility of investigating the defendant's address.

The Evidence Regulation (Council Regulation No. 1206/2001), which is also in the process of being reformed, was at the core of the presentation delivered by Pavel Simon (Judge at the Supreme Court of the Czech Republic, Brno) who focuses not only on the status quo of the Regulation as interpreted by the CJEU (C-283/09, Wery?ski; C-332/11, ProRail; C-170/11, Lippens), but also tackled the current proposals for a reform: while such proposals do not appear to bring major substantive changes to the Regulation, they do suggest technological improvements, for instance favouring the use of videoconference.

In her presentation, Xandra Kramer (University of Rotterdam and Utrecht University) analysed thoroughly two of the CJEU judgments on "satellite" instruments of the Brussels I-bis Regulation: the EAPO Regulation (Regulation No. 655/2014); and the EPO Regulation (Regulation No. 1896/2006). C-555/18, was the very first judgment that the CJEU rendered on the EAPO Regulation. Xandra Kramer remarked the underuse of this instrument. In the second part of her lecture, she identified two trends in the judgments on the EPO Regulation (C?21/17, Caitlin Europe; Joined Cases C?119/13 and C?120/13, ecosmetics; Joined Cases C?453/18 and C?494/18, Bondora), observing that the CJEU tries, on the one hand, to preserve the efficiency of the EPO Regulation, while at the same time seeking to assure an adequate protection of the debtor's position.

In the last presentation of the second day, Helena Raulus (Head of Brussels Office, UK Law Societies) explored the future judicial cooperation in civil matters between the EU and the United Kingdom in the post-Brexit scenario. Ms Raulus foresaw two potential long-term solutions for the relationship: namely, relying either on the 2019 Hague Convention, or on the Lugano Convention. In her view, the 2019 Hague Convention would not fully answer the future challenges of potential cross-border claims between EU Member States and the UK: it only covers recognition and enforcement, while several critical subject areas are excluded (e.g. IP-rights claims); and above all, from a more practical perspective, it is still an untested instrument. Ms Raulus affirmed that the UK's possible adherence to the Lugano Convention is the most welcomed solution among English practitioners. Whereas this solution has already received the green light

from the non-EU Contracting States to the Lugano Convention (Iceland, Norway, and Switzerland), she remarked that to date the EU has not adopted a position in this regard.

The conference closed with a second roundtable, which resumed the discussions on the future relations between the EU and the UK on judicial cooperation in civil law matters. Christophe Bernasconi (Secretary General, HCCH) offered an exhaustive review on the impact of the UK withdrawal from the EU on all the existing HCCH Conventions. From his side, Alexander Layton wondered if it might be possible to apply the pre-existing bilateral treaties between some EU Member States and the UK: in his view, those treaties still have a vestigial existence in those matters non-covered by the Brussels I-bis Regulation, and thus they were not fully succeeded. In Helena Raulus's view, such treaties would raise competence issues, since the negotiating of such treaties falls exclusively with the EU (as the CJEU found in its Opinion 1/03). As Ms Raulus observed, eventually attempts to re-establish bilateral treaties between the Member States and the UK might trigger infringement proceedings by the Commission against those Member States. The discussion concluded by addressing the 2005 Hague Convention and it is applicability to the UK after the end of the transition period.

Overall, this two-day event was characterized by a thematic and systematic approach to the major issues that characterize the current debate in the area of judicial cooperation in civil and commercial matters, both at the EU and global level. By providing the opportunity to hear, from renowned experts, on both the theoretical and practical questions that arise in this context, it offered its audience direct access to highly qualified insight and knowledge.

Cross Border Dispute Resolution under AfCFTA: A Call for the

Establishment of a Pan-African Harmonised Private International Legal Regime to Actualise Agenda 2063*

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Introduction

Over three score and ten years ago, Professor G. C. Cheshire, then Vinerian Professor of Law at the University of Oxford, issued a clarion call for the wider study of private international law in general and the renaissance of English private international law in particular.[1] As explored below, it is pertinent for African States to respond to that call today, especially within the context of the need to actualise the Agenda 2063 of the African Union, which aims for the establishment of a continental market with the free movement of persons, goods and services which are crucial for deepening economic integration and promoting economic development in Africa.

The Agreement establishing African Continental Free Trade Area

In January 2012, the 18th Ordinary Session of the Assembly of Heads of State and Government of the African Union, which held in Addis Ababa – Ethiopia, adopted a decision to establish an Africa wide Continental Free Trade Area. On 30th May

2019, the Agreement establishing the African Continental Free Trade Area ("AfCFTA"), entered into force.[2] With an expected participation of 55 countries, a combined population in excess of 1.3 billion people and a combined Gross Domestic Product (GDP) of over $2.5 trillion, the AfCFTA will be the largest trade area since the formation of the World Trade Organisation (WTO) in 1995.

Despite the benefits that the AfCFTA is widely expected to bring, Nigeria curiously delayed at first in signing the Agreement. Thankfully, reason ultimately prevailed and Nigerian signed the agreement at the 12th Extraordinary Session of the African Union (AU) Heads of State and Government held in Niamey, Niger. Very recently, the Federal Executive Council of Nigeria has also taken the decision to ratify the AfCFTA. What is now left is for the Nigerian National Assembly to domesticate the Agreement as required by the Nigerian Constitution.

It is pertinent to note that although the AfCFTA has justifiably received – and continues to receive – wide publicity, what is seldom talked about is that the Agreement is only a part of a larger long term plan, christened Agenda 2063, to ultimately establish an African Economic Community with a single Custom Union and a single common market to "accelerate the political and socio-economic integration of the continent" in accordance with Article 3 of the AU's Constitutive Act.[3]

The case for Harmonisation

The economic integration and the concomitant growth in international relationships that are sure to result from these integration efforts will undoubtedly lead to a rise in cross border disputes, which call for resolution using the instrumentality of private international law. When, not if, these disputes arise, questions such as what courts have jurisdiction, what law(s) should apply, and whether a judgment of the courts of one member State will be recognised and enforced by the courts of the other member States, are just some of the key questions that will arise.[4]In the words of Professor Richard Frimpong Oppong, a well-developed and harmonised private international law regime is an indispensable element in any economic community.[5]Curiously however, the role of private international law in facilitating and sustaining the on-going African economic integration efforts is conspicuously missing.[6]

It is against this backdrop that this writer joins others in calling for the establishment of a pan-African harmonised private international legal regime as an instrument of economic development in general and as part of the modalities for the actualisation of Agenda 2063 in particular. Incidentally, one of the first of such calls predates the adoption of the decision to establish the AfCFTA. As far back as 2006, Professor Oppong had argued that given the significant divergence in the approaches to the subject of private international law in Africa, if the idea of a common market is to materialise, African countries must embark on a comprehensive look at, and reform of, the regime of private international law.[7]He specifically stressed the need for harmonised private international law rules to govern the operation of the divergent national substantive rules.[8]Very recently, Lise Theunissen has stated, and rightly too, that the non-harmonised state of private international law in Africa forms an important obstacle to international trade and to cross-border economic transactions and that for this reason, it is crucial for the African economic integration to strive for a harmonisation of private international law.[9]Beyond these, harmonisation has other benefits.

It has been argued that harmonisation helps promote equal treatment and protection of citizens of an economic community as well as other economic actors transacting or litigating in the internal market by subjecting them to a uniform and certain legal regime.[10]As the learned authors of *Dicey, Morris and Collins, The Conflict of Laws* observed, part of the rationale behind the EU Judgments Regulation and its predecessor Convention is, "to avoid as far as possible the multiplication of the bases of jurisdiction in relation to the same legal relationship and to reinforce legal protection by allowing the plaintiff easily to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued".[11]Accordingly, it has been said that harmonisation boosts certainty in the law, thus reducing transaction and litigation costs for economic actors within the Community.[12]Africa is in dire need of this certainty.

Potential Challenges to Harmonisation

This writer is not unmindful of the challenges that such a project will pose especially having regard to the diverse legal traditions in Africa; the

underdeveloped nature of the subject of private international law in Africa;[13]and the diversity of approach to the question.[14]These challenges are however not insurmountable. Thankfully, there are precedents and successful examples that the relevant actors can point to, for inspiration. And the first that readily comes to mind is the well-established harmonised private international law system applicable within the European Union. There are also other examples like the Organisation of American States with its Inter-American Conference on Private International Law. Similarly, within the Common Market of the Southern Cone (MECOSUR) [comprising Argentina, Brazil, Uruguay, and Paraguay] Article 1 of the Asuncion Treaty 1991 expressly recognises the 'harmonization of legislation in relevant areas' as cardinal to the strengthening of their stated integration process.

Recommendation on the Modalities for Harmonisation

In considering the above examples, however, the question must be asked whether it is desirable to import, for instance, the tried and tested European Union private international law model into Africa or whether it is necessary to develop an autochthonous private international law system that responds to the socio-economic, cultural, and political interests of countries in Africa. In my view, the answer is in the question. It is pertinent to state at this juncture that what this writer advocates at this stage is the harmonisation of the private international law rules of the various member states in the African Union as opposed to the unification of the substantive laws which is the subject of other efforts, a case in point being the Organisation for the Harmonization of Commercial Law in Africa (OHADA).

Lise Theunissen[15]has very helpfully recommended a four-pronged approach to tackling the issue of the underdeveloped and non-harmonised state of private international law in the African Union as follows – (i) sensitization of national courts and the enlargement of regional economic community courts to ensure a harmonised and authoritative interpretation to relevant private international law legislation; (ii) a methodical continent wide engagement effort including the establishment of a private international law orientated body under the African Economic Community; (iii) the ratification of international conventions by African Union member states for instance the United Nations Convention on the

Recognition and Enforcement of Foreign Arbitral Awards or the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters; and (iv) the exploration of a potential collaboration with non-State actors for instance the Research Centre for Private International Law in Emerging Countries at the University of Johannesburg. At the very least, these suggestions deserve to be accorded close consideration.

Before now, Oppong had equally suggested the establishment of a specialised body with the specific mandate to deal with private international law regime. He also advocated for the establishment of a court empowered to provide authoritative and final interpretation of the unified rules of private international law and the entrenchment of the principle of mutual trust and respect by all African Union member states of each other's national judicial competence.[16]Above all, urgent steps must be taken to elicit the requisite political will and obtain the institutional support necessary to actualise the harmonised rules of private international law in Africa. As a starting point, however, this paper calls for the immediate convocation of an Inter-African Conference on Private International Law.

Conclusion

Despite the enormous challenges that is sure to militate against the harmonisation of the private international law rules in a divergent community like Africa, the general belief is that the African Union and the people of Africa stand a better chance to actualise the aims of establishing a common market, deepening economic integration and promoting economic development in Africa with a harmonised private international legal regime. Since Professor Cheshire issued his clarion call in 1947, European courts, lawyers and academics have largely heeded the call, but the same cannot be said of their African counterparts. The best time to have heeded the call was in 1947, the next best time is now.

*This Paper was first published in Law Digest Journal Spring 2020

[1]G. C. Cheshire 'Plea for a Wider Study of Private International Law' (1947) Intl L Q 14.

[2]African Union, Agreement establishing the African Continental Free Trade Area, available at https://au.int/en/treaties/agreement–establishing–african–continental–free–trade–arealast accessed on 14 February 2020.

[3]African Union, Constitutive Act of the African Union, available at https://au.int/en/treaties/constitutive–act–african–unionlast accessed on 14 February 2020.

[4]Chukwuma Okoli, 'Private International Law in Africa: Comparative Lessons' available at https://conflictoflaws.net/2019/private–international–law–in–africa–comparative–lessons/last accessed on 15 February 2020.

[5]Richard Frimpong Oppong, 'Private International Law and the African Economic Community: A Plea for Greater Attention' The International and Comparative Law Quarterly, Vol. 55, No. 4 (Oct., 2006), Cambridge University Press pp.911-928 available at https://www.jstor.org/stable/4092623

[6]Richard Frimpong Oppong, (n 5 above).

[7] Richard Frimpong Oppong, (n 5 above).

[8]Richard Frimpong Oppong, (n 5 above).

[9]Lise Theunissen, 'Harmonisation of Private International Law in the African Union' available at https://www.afronomicslaw.org/2020/02/08/harmonisation–of–private–international–law–in–theafrican–union/accessed on 15 February 2020.

[10]Richard Frimpong Oppong, (n 5 above). See also A. Dickinson, "Legal Certainty and the Brussels Convention Too Much of a Good Thing?" in Pascal de Vareilles-Sommieres (ed), *Forum Shopping in the European Judicial Area* (Oxford, Hart Publishing, 2007), ch 6.

[11]L Collins (gen ed), *Dicey, Morris and Collins, The Conflict of Laws* (London, Sweet and Maxwell, 14th edn, 2006), observed at para 11-062.

[12]Richard Frimpong Oppong, (n 5 above).

[13]Chukwuma Okoli on his part believes that there has been significant progress and that is a growing interest in the study of private international law in Africa. See Chukwuma Okoli, 'Private International Law in Africa: Comparative Lessons' available at https://conflictoflaws.net/2019/private–internationallaw–in–africa–comparative–lessons/accessed on 15 February 2020. While this is true, he must however acknowledge that there is still a lot of room for improvement.

[14]In this regard, Lise Theunissen, (n 8 above) has lamented the lack of any efforts to establish a private international law orientated body under the African Economic Community, despite the necessity and urgent need for same.

[15]Lise Theunissen, (n 8 above).

[16]Richard Frimpong Oppong, (n 5 above).

How Chinese Courts Tackle Parallel Proceeding Issues When

Offshore Arbitration Proceeding Is Involved?

(The following case comment is written by Chen Zhi, a PhD candidate at the University of Macau?

The parallel proceeding is a long-debated issue in International Private Law, by which parties to one dispute file two or more separate dispute resolution proceedings regarding the same or similar problems. Such parallel proceedings will increase the cost and burdensome of dispute resolution, and probably result in the risk of conflicting judgements, undermining the certainty and integrity of it. In the field of international civil and commercial litigation, parallel proceeding issue is always subject to domestic civil procedure rules or principles like lis pendens, res judicata and forum non-convenience, while the problem may be complicated when arbitration proceeding is involved. According to the New York Convention, state court which seizes the dispute has an obligation to refer the case to arbitration at the party's request, except in case the arbitration agreement is void, inoperable or unable to be performed. Nonetheless, the New York Convention does not address the standards for the validity of arbitration agreement nor the scope of judicial review on such agreement. In particular, it is silent on the scenario where the validity of the same arbitration agreement is filed before the judges and arbitrators simultaneously. This problem can be exacerbated when the court seizure of the issue concerning validity of arbitration agreement is not the court in the place of the seat of arbitration, which in principle does not have the power to put final words on this issue.i
Some jurisdictions are inclined to employ an arbitration-friendly approach called prima facies review, by which the court will constrain from conducting a full review on the substantive facts and legal matters of the case before the tribunal decide on the jurisdictional issues, and grant a stay of litigation proceeding accordingly. This approach derives from a widely accepted principle across the world called "competence-competence" which endows the tribunal with the power to decide on its jurisdiction.ii Admittedly, prima facies review is not a corollary of the competence-competence principle. Still, it was instead thought to maximize the utility of competence-competence and enhance the efficiency of arbitration by minimizing the judicial intervention beforehand.

However, some jurisdictions like Mainland China do not employ a prima facies review, and they are reluctant to acknowledge tribunal's priority in deciding jurisdiction issue, irrespective of the fact that the seat is outside their territories. This article aims to give a brief introduction on the most recent case decided by the Supreme People's Court (hereinafter as SPC), and discuss how Chinese courts would like to tackle parallel proceeding.

Case Information

Keep Bright Limited?Appellant?v. SuperAuto Investments Limited and others 2013 Min Zhong Zi No. 3 (hereinafter as Keep Bright Case), decided on 20 December 2018.

Facts and background

The dispute regards four parties, among which two major ones are companies both incorporated in the British Virgin Islands: Keep Bright Limited and SuperAuto Investments Limited (hereinafter as K and S respectively). All parties signed a Letter of Intent (LOI) on 12 April 2006 regarding a complicated transaction which involved two main parts; the first part is the transfer all share of S's Hong Kong based 100% subsidiary to K, the second part is the transfer of title of a real estate located in Zhuhai, Guangdong Province. The LOI stipulated that it shall be governed by and construed according to the Hong Kong law, while the dispute resolution clause provided that any dispute arises from the LOI can be referred to either arbitration in Hong Kong or litigation in the location of the asset.

Following the conclusion of the contract, both K and S were dissatisfied with the performance of the LOI and commenced separate dispute resolution proceedings. K initiated an arbitration before the Hong Kong International Arbitration Center (HKIAC) in March of 2010, while S filed a lawsuit against H and other parties before the Guangdong Provincial Court in April of the same year. Following two partial awards in 2011 and 2012, the HKIAC tribunal concluded the proceeding through rendering a final award in 2014, and K subsequently sought for enforcement of the awards which was granted by the Hong Kong Court of First Instance in 2015.

The litigation proceeding in Guangdong Court, instead, was still ongoing during the arbitration in Hong Kong, and for this reason, in 2011 K applied for a stay of litigation proceeding due to ongoing arbitration concerning the same matter in Hong Kong before the court, but the latter dismissed such request. The Guangdong Court issued its judgment on August 2012 which was contradictory with the awards given by the HKIAC, by using laws of Mainland China as the

governing law by reason of failure to identify relating Hong Kong laws under the choice-of-law clause of LOI. The case was then appealed to the SPC, leaving two main issues to be decided: first, whether the Guangdong Court's rejection to the stay of proceeding constituted a procedural error, and second, whether the Guangdong Court has wrongfully applied the law of Mainland China instead of the Hong Kong law.

The decision of the SPC

As for the first issue, SPC decided that parallel proceeding phenomenon shall not prejudice the jurisdiction of courts in Mainland China, except in case the arbitration awards rendered offshore has been recognized in China already. Therefore, it is proper for the Guangdong Court to continue litigation proceeding irrespective of the ongoing arbitration in Hong Kong. The SPC also noted in its final decision that H did not raise an objection to jurisdiction before the court based on the arbitration agreement.

As for the second issue, the SPC found that Guangdong Court was in error in the application of law and overturned the substantive part of the Guangdong Court's decision, making the judgment in line with awards in Hong Kong.

Comment

By the above decision of the SPC, it's clear that courts are in no position to decide on the stay of proceeding despite a pending arbitration outside the territory of Mainland China, with one exception that is the case of arbitration proceeding concluded, recognized and ready to be or already under enforced by Chinese courts. This approach is in line with the stipulation of the SPC's Judicial Interpretation on Civil Procedural Law in 2015 which tackle parallel proceedings where parties have filed other litigation proceeding before courts other than Mainland China regarding the same or identical dispute. iii Though the Judicial Interpretation does not cover parallel proceeding involving arbitration, the Keep Bright Case reveals that it makes no difference. There is no comity obligation for arbitration.

Moreover, though no objection to jurisdiction was raised in Keep Bright, it is safe to conclude that Chinese courts would likely grant arbitration tribunals the priority to decide on the jurisdiction issue, even when they are not the court in the place as the seat of arbitration, which, per the New York Convention, should have no power to put the final word on the effectiveness of arbitral agreement or award. As per another case ruled in 2019, a court in Hubei Province refused to recognize and enforce a Hong Kong seated arbitral award based on the reason that court in Mainland China had decided otherwise on the jurisdictional issue, by

which the recognition of such an award would constitute a breach of public policy.iv

In a nutshell, Chinese courts' approach to coping with parallel proceeding is far from pro-arbitration, contrary to other arbitration-friendly jurisdictions like England, Singapore, France and Hong Kong SAR. Admittedly, effective negative approach is not a standard fits for all circumstances, and it may cause prejudice to the parties when the enforcement of arbitration agreement is burdensome (in particular, boiler-plate arbitration clauses in consumer agreement which are intendedly designed by the party with more substantial bargain power for circumvention of judicial proceeding). Nonetheless, in the circumstances like the Keep Bright, proceeding with two parallel processes at the same time could be oppressive to the parties' rights. It could likely create uncertainty through conflicting results (which occurred in Keep Bright itself). With this respect, the negative effective approach seems to be the best approach to keep dispute resolutions cost and time-efficient.

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i, As per Article 5.1(a) of New York Convention, which stipulates that validity of arbitration agreement shall be subject to the law chosen by parties, failing which shall be subject to the law of the country where the award was made (arbitration seat), see also Article 6 of New York Convention which said that the enforcing court may stay the enforcement proceeding if the setting aside application is seized by competent court.

ii, For instance, English Court of Appeal stated in landmark Fiona Turst that: "[…]that it is contemplated by the Act that it will, in general, be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute". Fiona Trust & Holding Corp v Privalov [2007] EWCA Civ 20, at 34. See also judicial opinions by court of Singapore in Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals [2015] SGCA 57 , court of Hong Kong PCCW Global Ltd v Interactive Communications Service Ltd [2007] 1 HKLRD 309, and France court in Société Coprodag et autre c Dame Bohin, Cour de Cassation, 10 May 1995 (1995?

iii, See the controversial Article 533 of SPC's Interpretation on Application of Civil Procedure Law(adopted in 2015) ,which stipulates that: "Where both the courts of the People's Republic of China and the courts of a foreign country have jurisdiction, the People's Court may accept a case in which one party files a

lawsuit in a foreign court and the other party files a lawsuit in a court of the People's Republic of China. After the judgment has been rendered, no application by a foreign court or request by a party to the case to the People's Court for recognition and enforcement of the judgment or ruling made by a foreign court in the case shall be granted, unless otherwise provided in an international treaty to which both parties are parties or to which they are parties. If the judgment or ruling of a foreign court has been recognized by the people's court, the people's court shall not accept the case if the parties concerned have filed a lawsuit with the people's court in respect of the same dispute."

iv, See the decision of Yichang Intermediate Court on Automotive Gate FZCO's application for recognition and enforcement of arbitral award in Hong Kong SAR, 2015 E Yi Zhong Min Ren No. 00002, in which the court rejected to enforce a HKIAC award on the basis that the award rendered in 2013 is contradictory with Shijiazhuang Intermediate Court's ruling on the invalidity of arbitration agreement, which amounted to a breach of public policy in Mainland China, though the ruling was made five year later than the disputed award.

Nigeria and AfCFTA: What Role has Private International Law to Play?

Written by Abubakri Yekini, Lecturer at Lagos State University, Nigeria.

The idea of economic integration is not new to Africa. It is a phenomenon that has been conceived as far back as the 1960s when many African countries gained independence. In 1980, the Organisation of African Unity (now African Union) came up a blueprint for the progressive development of Africa: the Lagos Plan of Action for the Economic Development of Africa, 1980–2000. However, the first

concrete step towards achieving this objective was taken in 1991 when the African Heads of State and Government (AHSG) signed the treaty establishing the African Economic Community (AEC) (Abuja Treaty) in Nigeria. One of the operational stages of the AEC was the creation of a Continental Free Trade Area by 2028. In 2013, the AHSG further signed a Solemn Declaration during the 50th anniversary of the African Union. The Declaration sets another blueprint for a 50-year development trajectory for Africa (Agenda 2068). Item C of that Declaration is a commitment from the Member States to the speedy implementation of the Continental Free Trade Area. At last, this is now a reality.

The AfCFTA was adopted 5 years later on 21st March 2018 and it became effective on 30th May 2019. It was expected that trading activities under this framework would commence in July 2020. The ongoing global pandemic and shutdown of national economies frustrated the plan. The Agreement is now scheduled to take effect from 1st January 2021.

Africa seems to be showing some seriousness with the AfCFTA compared to previous attempts. Concerns were initially expressed when Nigeria was reluctant to sign the Agreement (Ghana Ports and Harbours Authority, 2020; Mizner, 2019; Financial Times, 2019). Such concerns cannot be dismissed considering that Nigeria is the biggest economy in Africa and has a population of about 200 million people. Happily, the Nigerian Federal Executive Council formally approved the ratification of the Agreement on 11th November 2020(Government of Nigeria, 2020). As at today, all the African countries are members of the AfCFTA except Eritrea. We can safely say that AfCFTA has come to stay.

According to the United Nations Economic Commission for Africa, the AfCFTA will be the biggest single market, with a GDP of $2.5 trillion and a whooping population of 2.5 billion people across 55 countries (UNECA, 2020). By 2050, it is also projected that Africa's population will be 2.5 billion; contributing about 26% of the world's working-age population (UNECA, 2020). As expected, AfCFTA has

been generating interesting debates. Some legal commentators have penned some thoughts on the Agreement largely from international economic/trade law perspectives (Magwape, 2018; Onyejekwe and Ekhator, 2020; Akinkugbe 2019). Only a few private international scholars have written on the framework (Theunissen, 2020; Uka, 2020).

Nigeria's ratification of AfCFTA indicates that AfCFTA will become effective in Nigeria from next year, although Nigerian law requires AfCFTA to be domesticated (Abacha v. Fawehinmi [2000] 6 NWLR (Pt 660) 228). AfCFTA is projected to have significant impacts on the Nigerian economy. Although Nigeria's trade in goods and services to other African countries stands at 19.6% (export) and 2.13% (import) as indicated in the Q4 2019 statistic (National Bureau of Statistics, 2019), it is expected that this should witness a significant growth when AfCFTA becomes effective. More intra-African trading activities would potentially lead to the increase in cross border litigation in Africa generally and Nigeria in particular. The relevant question is to what extent does Nigerian private international law support trade liberalisation agenda of AfCFTA?

The AfCFTA has a dispute settlement mechanism modelled along the WTO system. This affects only disputes between the Member States. The Agreement is conspicuously silent on cross-border disputes amongst private citizens and the divergent systems of law operating in the Member States. It thus appears that for the meantime, the divergent national private international rules which are obsolete in many Member States will continue to govern cross-border disputes. To what extent this can support the objective of intra-African trade facilitation is left to be seen.

For Nigeria, it is time we revamped the Nigerian private international law. As a prominent member of AfCFTA, Nigeria should take a special interest in the progressive development of private international law through multilateral platforms both under the AfCFTA and other global bodies such as the Hague Conference. The current lackadaisical attitude to multilateral private international rules needs to change. For instance, Nigeria has neither joined the

Hague Conference nor acceded to any of its conventions. The Evidence and Service Conventions would have delivered a more efficient international civil procedure for Nigeria. Also, the 2005 Choice of Court Convention (and hopefully the 2019 Judgments Convention) would give Nigerian judgments wider circulation and respect. At the Commonwealth level, Nigeria did not pay any significant role in the making of the 2017 Commonwealth Model Law on Judgments and has no intention of domesticating it. The point we are making is that Nigeria needs to be responsive to international calls for the development of private international law, not just from AfCFTA when such is made, but also ongoing global private international law projects.

To reap the benefit of AfCFTA, the Nigerian justice system must be made to be attractive to foreign businesspersons. No doubt, foreign litigants will be more interested in doing business in countries that have in place an efficient, effective and credible legal system that enforce contracts and dispose of cases timeously. Nigeria will be competing with countries such as South Africa, Egypt, Rwanda and Ghana. In one recent empirical research carried out by Prof Yemi Osibajo, the current Vice President of Nigeria, on the length of trial time in civil cases in Lagos State, it takes an average of 3.4 years to resolve a civil and commercial transaction in Nigeria. A further period of 2.5 and 4.5 years is required if the matter proceeded to the Court of Appeal and the Supreme Court respectively (Osinbajo, 2011). Excessive delays in dispute resolution may make Nigeria unattractive for resolving business disputes. The other side of the coin is the enforcement of contracts, especially jurisdiction agreements. Foreign litigants may be persuaded to trade with Nigeria if they are assured that foreign jurisdiction clauses will be respected by Nigerian courts. The current approach is not too satisfactory as there are some appellate court decisions which suggest that parties' choice may not be enforced in certain situations (Okoli, 2020b). Some of the local statutes like the Admiralty Jurisdiction Act which grants exclusive jurisdiction over a wide range of commercial matters may equally need to be reviewed.

Jurisdiction and judgments are inextricably linked together. Nigerian litigants should now be concerned about how Nigerian judgments would fare in other

African countries. Our jurisdictional laws need to be standardised to work in harmony with those of foreign countries. Recent decisions indicate that Nigerian courts still apply local venue rules – designed to determine which judicial division should hear a matter (for geographical and administrative convenience) within a State in Nigeria – to determine jurisdiction in matters involving foreign element; consider taking steps to release property as submission; may even exercise jurisdiction based on temporary presence (Okoli, 2020a; Okoli, 2020b; Bamodu, 1995; Olaniyan, 2012; Yekini, 2013). It is doubtful if judgments from these jurisdictional grounds will be respected in other African countries, the majority of whose legal systems are not rooted in common law. In the same vein, Nigerian courts will recognise and enforce judgments from other African countries notwithstanding that Nigeria has not extended its statutory enforcement scheme to most African countries (Yekini, 2017). Nigerian judgments may not receive similar treatment in other African states as our reciprocal statute can be misconstrued to mean that their judgments are not enforceable in Nigeria without a treaty. Nigerian government should either discard the reciprocity requirement or conclude a treaty with other African states to guarantee the enforcement of Nigerian judgments abroad.

Boosting investors' confidence requires some assurances from the Nigerian government for the respect of rule of law. The government's rating is not too encouraging in this regard. In its 2020 Rule of Law Index, the World Justice Project ranked Nigeria 108 out of 128 countries surveyed (World Justice Project, 2020). This should not surprise practitioners from Nigeria. For instance, the Nigerian government does have regard for ECOWAS judgments although court sits in Abuja, Nigeria's Federal Capital Territory. Such judgments are hardly recognised and enforced thereby contravening art 15(4) of the ECOWAS Revised Treaty which stipulates that judgments of the court shall be binding on Member States (Adigun, 2019).

Lastly, AfCFTA should spark the interest of Nigerian practitioners, judges, academia, policymakers and other stakeholders in private international law matters. Nigeria cannot afford to be a spectator in the scheme of things. It should leverage on its status in Africa to drive an Afrocentric and global private

international law agenda. More awareness should be created for the subject in the universities. Government and the business community should fund various programmes and research on the impact of AfCFTA, and subsequent frameworks that will be rolled out to drive AfCFTA, on the Nigerian legal system, its economy and people.

Determining the applicable law of an arbitration agreement when there is no express choice of a governing law – Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb [2020] UKSC 38.

This brief note considers aspects of the recent litigation over the identification of an unspecified applicable law of an arbitration agreement having an English seat. Though the UK Supreme Court concluded that the applicable law of the arbitration agreement itself was, if unspecified, usually to be the same as that of the contract to which the arbitration agreement refers, there was an interesting

division between the judges on the method of determining the applicable law of the arbitration agreement from either the law of the arbitral seat (the view favoured by the majority) or from the applicable law of the underlying contract (the view favoured by the minority). As will become clear, the author of this note finds the views of the minority to be more compelling than those of the majority.

In a simplified form the facts were that, in February 2016, a Russian power station was damaged by an internal fire. 'Chubb', insurer of the owners of the power station, faced a claim on its policy. In May 2019, Chubb sought to sue 'Enka' (a Turkish subcontractor) in Russia to recover subrogated losses. Enka objected to these Russian proceedings claiming that under the terms of its contract of engagement any such dispute was to be arbitrated via the ICC in England: in September 2019, it sought declaratory orders from the English High Court that the matter should be arbitrated in England, that the applicable law of the arbitration agreement was English, and requested an English anti-suit injunction to restrain Chubb from continuing the Russian litigation.

Neither the arbitration agreement nor the contract by which Chubb had originally engaged Enka contained a clear provision specifically and unambiguously selecting an applicable law. Though it was plain that the applicable law of the underlying contract would, by the application of the provisions of the Rome I Regulation, eventually be determined to be Russian, the applicable law of the arbitration agreement itself could not be determined as directly in this manner because Art. 1(2)(e) of the Regulation excludes arbitration agreements from its scope and leaves the matter to the default applicable law rules of the forum.

After an unsuccessful interim application in September 2019, Enka's case came before Baker J in December 2019 in the High Court. It seems from Baker J's judgment that Enka appeared to him to be somewhat reticent in proceeding to resolve the dispute by seeking to commence an arbitration; this, coupled with the important finding that the material facts were opposite to those that had justified judicial intervention in *The Angelic Grace* [1995] 1 Lloyd's Rep 87, may explain Enka's lack of success before the High Court which concluded that the correct forum was Russia and that there was no basis upon which it should grant an anti-suit injunction in this case.

In January 2020, Enka notified Chubb of a dispute and, by March 2020, had filed a request for an ICC arbitration in London. Enka also however appealed the

decision of Baker J to the Court of Appeal and duly received its requested declaratory relief plus an anti-suit injunction. The Court of Appeal sought to clarify the means by which the applicable law of an arbitration agreement should be determined if an applicable law was not identified expressly to govern the arbitration agreement itself. The means to resolve this matter, according to the court, was that without an express choice of an applicable law for the arbitration agreement itself, the curial law of the arbitral seat should be presumed to be the applicable law of the arbitration agreement. Thus, though the applicable law of the underlying contract was seemingly Russian, the applicable law of the arbitration agreement was to be presumed to be English due to the lack of an express choice of Russian law and due to the fact of the English arbitral seat. Hence English law (seemingly wider than the Russian law on a number of important issues) would determine the scope of the matters and claims encompassed by the arbitration agreement and the extent to which they were defensible with the assistance of an English court.

In May 2020, Chubb made a final appeal to the UK Supreme Court seeking the discharge of the anti-suit injunction and opposing the conclusion that the applicable law of the arbitration agreement should be English (due to the seat of the arbitration) rather than Russian law as per the deduced applicable law of the contract to which the arbitration agreement related. The UK Supreme Court was thus presented with an opportunity to resolve the thorny question of whether in such circumstances the curial law of the arbitral seat or the applicable law of the agreement being arbitrated should be determinative of the applicable law of the arbitration agreement. Though the Supreme Court was united on the point that an express or implied choice of applicable law for the underlying contract usually determines the applicable law of the arbitration agreement, it was split three to two on the issue of how to proceed in the absence of such an express choice.

The majority of three (Lords Kerr, Hamblen and Leggatt) favoured the location of the seat as determinative in this case. This reasoning did not proceed from the strong presumption approach of the Court of Appeal (which was rejected) but rather from the conclusion that since there had been no choice of applicable law for either the contract or for the arbitration agreement, the law with the closest connection to the arbitration agreement was the curial law of the arbitral seat. As will be seen, the minority (Lords Burrows and Sales) regarded there to have been a choice of applicable law for the contract to be arbitrated and proceeded from

this to determine the applicable law of the arbitration agreement.

The majority (for the benefit of non-UK readers, when there is a majority the law is to be understood to be stated on this matter by that majority in a manner as authoritative as if there had been unanimity across all five judges) considered that there was no choice of an applicable law pertinent to Art.3 of Rome I in the underlying contract by which Enka's services had been engaged. It is true that this contract did not contain a helpful statement drawn from drafting precedents that the contract was to be governed by any given applicable law; it did however make many references to Russian law and to specific Russian legal provisions in a manner that had disposed both Baker J and the minority in the Supreme Court to conclude that there was indeed an Art.3 choice, albeit of an implied form. This minority view was based on a different interpretation of the facts and on the Giuliano and Lagarde Report on the Convention on the law applicable to contractual obligations (OJ EU No C 282-1). The majority took the view that the absence of an express choice of applicable law for the contract must mean that the parties were unable to agree on the identity of such a law and hence 'chose' not to make one. The minority took the view that such a conclusion was not clear from the facts and that the terms of the contract and its references to Russian law did indicate an implied choice of Russian law. As the majority was however unconvinced on this point, they proceeded from Art.3 to Art.4 of Rome I and concluded that, in what they regarded as the absence of an express or implied choice of applicable law for the contract, Russian law was the applicable law for the contract.

For the applicable law of the arbitration agreement itself, the majority resisted the idea that on these facts their conclusion re the applicable law of the contract should also be determinative for the applicable law of the arbitration agreement. Instead, due to the Art.1(2)(e) exclusion of arbitration agreements from the scope of the Regulation, the applicable law of the arbitration agreement fell to be determined by the English common law. This required the identification of the law with which the arbitration agreement was 'most closely connected'. Possibly reading too much into abstract notions of international arbitral practice, the majority concluded that, in this case, the applicable law of the arbitration agreement should be regarded as most closely connected to the curial law of the arbitral seat. Hence English law was the applicable law of the arbitration agreement despite the earlier conclusion that the applicable law of the contract at

issue was Russian.

As indicated, the minority disagreed on the fundamental issue of whether or not there had been an Art.3 implied choice of an applicable law in the underlying contract. In a masterful dissenting judgment that is a model of logic, law and clarity, Lord Burrows, with whom Lord Sales agreed, concluded that this contract contained what for Art.3 of Rome I could be regarded as an implied choice of Russian law as '… clearly demonstrated by the terms of the contract or the circumstances of the case'. This determination led to the conclusion that the parties' implied intentions as to the applicable law of the arbitration agreement were aligned determinatively with the other factors that implied Russian law as the applicable law for the contract. Russian law was (for the minority) thus the applicable law of the underlying contract and the applicable law of the ICC arbitration (that, by March, 2020 Enka had acted to commence) was to take place within the English arbitral seat in accordance its English curial law. Lord Burrows also made plain that if had he concluded that there was no implied choice of Russian law for the contract, he would still have concluded that the law of the arbitration agreement itself was Russian as he considered that the closest and most substantial connection of the arbitration agreement was with Russian law.

Though the views of the minority are of no direct legal significance at present, it is suggested that the minority's approach to Art.3 of the Rome I Regulation was more accurate than that of the majority and, further, that the approach set out by Lord Burrows at paras 257-8 offers a more logical and pragmatic means of settling any such controversies between the law of the seat and the law of the associated contract. It is further suggested that the minority views may become relevant in later cases in which parties seek a supposed advantage connected with the identity of the applicable law of the arbitration. When such a matter will re-occur is unclear, however, though the Rome I Regulation ceases to be directly applicable in the UK on 31 December 2020, the UK plans to introduce a domestic analogue of this Regulation thereafter. It may be that a future applicant with different facts will seek to re-adjust the majority view that in the case of an unexpressed applicable law for the contract and arbitration agreement that the law of the seat of the arbitration determines the applicable law of the arbitration agreement.

As for the anti-suit injunction, it will surprise few that the attitude of the Court of Appeal was broadly echoed by the Supreme Court albeit in a more nuanced form.

The Supreme Court clarified that there was no compelling reason to refuse to consider issuing an anti-suit injunction to any arbitral party who an English judge (or his successors on any appeal) has concluded can benefit from such relief. They clarified further that the issuance of an anti-suit injunction in such circumstances does not require that the selected arbitral seat is English. The anti-suit injunction was re-instated to restrain Chubb's involvement in the Russian litigation proceedings and to protect the belatedly commenced ICC arbitration.

The enforcement of Chinese money judgments in common law courts

By Jack Wass (Stout Street Chambers, Wellington, New Zealand)

In the recent decision of *Hebei Huaneng Industrial Development Co Ltd v Shi*,[1] the High Court of New Zealand was faced with an argument that a money judgment of the Higher People's Court of Hebei should not be enforced because the courts of China are not independent of the political arms of government and therefore do not qualify as "courts" for the purpose of New Zealand's rules on the enforcement of foreign judgments.

The High Court rejected that argument: complaints of political interference may be relevant if a judgment debtor can demonstrate a failure to accord natural justice in the individual case, or another recognized defence to enforcement, but there was no basis for concluding that Chinese courts were not courts at all.

As the court noted, complaints about the independence or impartiality of foreign courts might arise in two circumstances. Where the court was deciding whether

to decline jurisdiction in favour of a foreign court, it would treat allegations that justice could not be obtained in the foreign jurisdiction with great wariness and caution.[2] Where the issue arose on an application to enforce a foreign judgment, the enforcement court has the benefit of seeing what actually happened in the foreign proceeding, and can assess whether the standards of natural justice in particular were met. Simply refusing to recognize an entire foreign court system would give rise to serious practical problems,[3] as well as risk violating Cardozo J's famous dictum that courts "are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home."[4]

The judge found that Chinese courts were distinct from the legislative and administrative bodies of the state, and that although there was evidence to suggest that Chinese judges sometimes felt the need to meet the expectations of the local people's congress or branch of the Communist Party, this did not justify refusing to recognize the court system as a whole. In a commercial case resolved according to recognizably judicial processes, where there was no suggestion of actual political interference, the judgment could be recognized.

[1] *Hebei Huaneng Industrial Development Co Ltd v Shi* [2020] NZHC 2992. The decision arose on an application to stay or dismiss the enforcement proceeding at the jurisdictional stage.

[2] *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804.

[3] The judge noted that the House of Lords had rejected the argument that it should not recognize the courts of the German Democratic Republic (*Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853), and the Second Circuit Court of Appeals was not persuaded that justice could not be done in Venezuela (*Blanco v Banco Industrial de Venezuela* 997 F 2d 974 (2nd Cir 1993)). By contrast, a Liberian judgment was refused recognition in *Bridgeway Corp v Citibank* 45 F Supp 2d 276 (SDNY 1999), 201 F 3d 134 (2nd Cir 2000) where there was effectively no functioning court system.

[4] *Loucks v Standard Oil Co* 224 NY 99 (1918).

Changzhou Sinotype Technology Co., Ltd, Hague Service Convention and Judgment Enforcement in China

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Changzhou Sinotype Technology Co, Ltd. v. Rockefeller Technology Investments (Asia) VII is a recent case decided by the Supreme Court of California on April 2, 2020. The *certiorari* to the Supreme Court of the US was denied on 5 October 2020. It is a controversial case concerning the interpretation of the Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters of November 15, 1965 (the "Hague Service Convention") for service of process in China.

1. **Facts:**

Changzhou SinoType Technology Co. (SinoType) is based in China. Rockefeller Technology Investments (Asia) VII (Rockefeller) is an American investment firm. In February 2008, they signed a memorandum of understanding (MOU) which provided that:

> *"6. The parties shall provide notice in the English language to each other at the addresses set forth in the Agreement via Federal Express or similar courier, with copies via facsimile or email, and shall be deemed received 3 business days after deposit with the courier.*
>
> *7. The Parties hereby submit to the jurisdiction of the Federal and State courts in California and consent to service of process in accord with the notice provisions above.*

> *8. In the event of any disputes arising between the Parties to this Agreement, either Party may submit the dispute to the Judicial Arbitration & Mediation Service in Los Angeles for exclusive and final resolution pursuant to according to [sic] its streamlined procedures before a single arbitrator who shall have ten years judicial service at the appellate level, pursuant to California law, and who shall issue a written, reasoned award. The Parties shall share equally the cost of the arbitration. Disputes shall include failure of the Parties to come to Agreement as required by this Agreement in a timely fashion."*

Due to disputes between the parties, in February 2012, Rockefeller brought an arbitration against SinoType. SinoType was defaulted in the arbitration proceeding. According to the arbitrator, SinoType was served by email and Federal Express to the Chinese address listed for it in the MOU. In November 2013, the arbitrator found favorably for Rockefeller.

Instead of enforcing the award in China according to the New York Convention,[1] Rockefeller petitioned to confirm the award in State courts in California. Cal. Civ. Proc. Code § 1290.4(a) provides that a petition to confirm an arbitral award "shall be served in the manner provided in the arbitration agreement for the service of such petition and notice." Therefore, Rockefeller transmitted the summons and its petition to SinoType again through FedEx and email according to paragraph 7 of the MOU. SinoType did not appear and the award was confirmed in October 2014. SinoType then appeared specially and applied to set aside the judgment. It argued that the service of the Californian court proceeding did not comply with the Hague Service Convention; therefore, it had not been duly served and the judgment was void.

2. **Decision**

The California Supreme Court rejected SinoType's argument.

The Court discerned three principles for the application of the Hague Service Convention. First, the Convention applies only to "service of process in the technical sense" involving "a formal delivery of documents". The Court distinguished "service" and "notice" by referring to the Practical Handbook on the Operation of the Service Convention, published by the Permanent Bureau of the Hague Conference on Private International Law ('Handbook'). The Court cited that

> *"the Convention cannot—and does not—determine which documents need to be served. It is a matter for the lex fori to decide if a document needs to be served and which document needs to be served. Thus, if the law of the forum states that a notice is to be somehow directed to one or several addressee(s), without requiring service, the Convention does not have to be applied."[2]*

Second, the law of the sending forum (i.e. the law of California) should be applied to determine whether "there is occasion to transmit a judicial or extrajudicial document for service abroad."

Third, if formal service of process is required under the law of the sending forum, the Hague Convention must be complied for international transmission of service documents.

The court held that the parties have waived the formal service of process, so the Hague Service Convention was not applicable in this case.[3]

3. **Comments**

The *Changzhou Sinotype Technology Co, Ltd* has a number of interesting aspects and has been commented such as here, here and here.

First, the Hague Service Convention is widely considered as 'non-mandatory' but 'exclusive'.[4] Addressing the non-mandatory nature of the Convention, the Handbook states that "the Convention can not—and does not—determine which documents need to be served. It is a matter for the lex fori to decide if a document needs to be served and which document needs to be served."[5] However, this statement does not necessarily mean, *when judicial documents are indeed transmitted from a member state to another to charge a defendant with notice of a pending lawsuit*, a member state can opt out of the Convention by unilaterally excluding the transmission from the concept of service. *Volkswagen Aktiengesellschaft v Schlunk* decided by the Supreme Court of the US and *Segers and Rufa BV v. Mabanaft GmbH* decided by the Supreme Court of the Netherlands (Hoge Raad) are the two most important cases on the non-mandatory nature of the Convention. Both cases concentrate on which law should be applied to whether a document needed to be transmitted abroad for service.[6] However, *Rockefeller* is different because it is about which law should be applied to determine the concept of service when the transmission of judicial documents

takes place in the soil of another member state. The Handbook provides that the basic criterion for the Convention to apply is "transmission abroad" and "place of service is determining factor".[7] When judicial documents are physically transmitted in the soil of a member state, allowing another member state to unilaterally determine the concept of service in order to exclude the application of the Convention will inappropriately expand the non-mandatory character of the Convention. This will inevitably narrow the scope of the application of the Convention and damage the principle of reciprocity as the foundation of the Convention. The Hague Convention should be applied to *Rockefeller* because the summons and petitions were transmitted across border for service in China.

Second, as part of its accession to the Hague Convention, China expressly stated that it does not agree to service by mail. Indeed, the official PRC declarations and reservations to the Hague Convention make it clear that, with the limited exception of voluntary service on a foreign national living in China by his country's own embassy or consulate, the ***only*** acceptable method of service on China is through the Chinese Central Authority. Therefore, although China has recognized monetary judgments issued in the US according to the principle of reciprocity, the judgment of *Changzhou Sinotype Technology Co, Ltd* probably cannot be recognized and enforced in China.

The California Supreme Court decision has important implications. For Chinese parties who have assets outside of China, they should be more careful in drafting their contracts because *Changzhou Sinotype Technology Co, Ltd* shows that a US court may consider their agreement on service by post is a waiver of China's reservation under the Hague Service Convention. For US parties, if Chinese defendants only have assets in China for enforcement, *Changzhou Sinotype Technology Co, Ltd* is not a good case to follow because the judgment probably cannot be enforced in China.

[1] China is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 ("New York Convention").

[2] Practical Handbook on the Operation of the Service Convention (4th ed. 2016)

par. 54, p. 23, fn. Omitted.

[3] The Court emphasized that their conclusions should be limited to Section 1290.4, subdivision (a): “Our conclusions as to California law are narrow. When parties agree to California arbitration, they consent to submit to the personal jurisdiction of California courts to enforce the agreement and any judgment under section 1293. When the agreement also specifies the manner in which the parties “shall be served,” consistent with section 1290.4, subdivision (a), that agreement supplants statutory service requirements and constitutes a waiver of formal service in favor of the agreed-upon method of notification. If an arbitration agreement fails to specify a method of service, the statutory service requirements of section 1290.4, subdivisions (b) or (c) would apply, and those statutory requirements *would* constitute formal service of process. We express no view with respect to service of process in other contexts.”

[4] Martin Davies et al., Nygh’s Conflict of Laws in Australia 36 (10th ed. 2020).

[5] Paragraph 54 of the Handbook.

[6] Ibid., paragraphs 31-45, and 47.

[7] Ibid., paragraph 16.