Granting asylum to family members with multiple nationalities – the choice-of-law implications of the CJEU-Judgment of 9th November 2021, Case C-91/20

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From a PIL-perspective, granting asylum to the family members of a recognised asylum-seeker or refugee is relevant regarding the determination of an individual's personal status and, more specifically, concerning the question of the relation between the individual's political status (*status politicus*) and his or her personal status (*status privatus*). Whereas the personal status of an individual is ususally determined according to her or his own protection status, it is disputed with regard to *personae coniunctae* – meaning relatives of a protected person who do not (yet) possess a protection status of their own –, whether their personal status may be derived from the status of the already protected family member or whether it has to be determined by the person's individual status. This is decisive as to the applicability of Art. 12(1) of the Convention relating to the Status of Refugees signed in Geneva on 28th July 1951 (Geneva Convention), according to which all conflict rules leading to the law of the persecuting state are modified by substituting habitual residence for nationality.

In Germany, § 26 of the Asylum Act (Asylgesetz) – with only few exemptions made in its para. 4 – grants family asylum to people who themselves do not satisfy the conditions for receiving asylum (Art. 16a of the German Basic Law), but whose spouse or parent has been granted this status. According to § 26(5) Asylgesetz, this also comprises international protection within the meaning of the refugee

status as defined by the Geneva Convention as well as the EU-specific subsidiary protection status (§ 4 Asylgesetz, implementing Art. 15 et seq of the EU-Directive No. 2004/83). The close relative's protection is thus a derived right from the family member's political status. However, by this – even though the opposite might be implied by the misleading terminology of "derived" – the spouse or child of the protected person acquire a protection status of their own. § 26 Asylgesetz is meant to support the unity of the family and aims to simplify the asylum process by liberating family members from the burdensome task of proving that they individually satisfy the conditions (e.g. individual religious or political persecution) for benefitting from international protection or asylum.

While the exemptions made in § 26(4), (5) and § 4(2) Asylgesetz correspond to Art. 1D of the Geneva Convention as well as to Art. 12(2) of the EU-Directive No. 2011/95 (Qualification Directive), the non-exemption of people with multiple nationalities, who could also be granted protection in one of the states of which they are nationals, goes further than the Geneva Convention and the Qualification Directive (see Art. 1A(no. 2) of the Geneva Convention and Art. 4(3)(e) of the Qualification Directive).

This discrepancy was the subject of a preliminary question asked by the German Federal Administrative Court (*Bundesverwaltungsgericht*) and was decided upon by the CJEU on 9th November 2021 (Case C-91/20). The underlying question was whether the more favourable rule of § 26 Asylgesetz is compatible with EU law.

The CJEU in general affirmed this question. For doctrinal justification, it referred to Art. 3 of the Qualification Directive, which allows more favourable rules for granting international protection as long as they do "not undermine the general scheme or objectives of that directive" (at [40]). According to the CJEU, Art. 23(2) of the Qualification Directive leads to the conclusion that the line is to be drawn where the family member is "through his or her nationality or any other element characterising his or her personal legal status, entitled to better treatment in […] [the host] Member State than that resulting from the grant of refugee status" (at [54]). For example, this could be the case if the close relative is a national of their spouse's or parent's host country or one of their nationalities entitles them to a better treatment there (like a Union citizenship). This interpretation also corresponds to the UNHCR's guidelines in respect to the Geneva Convention (see [56] et seq.).

The CJEU's judgment strengthens the right to family life guaranteed by human rights, namely Art. 8 ECHR as well as Art. 7 and Art. 24 of the Charter of Fundamental Rights of the EU (see [55]). Disrupting a family unit can have a negative impact on the individual integration process (see *Corneloup et al.*, study PE 583.157, p. 11), which should be neither in the interest of the individual nor the host state. This right to family unity, according to the CJEU, exists irrespective of the fact that the concerned families could alternatively take residence in one of the family member's home states, because otherwise the person who had already been granted a protection status in a different country could not make use of his or her own protection (see [59] et seq.). In so far, the judgment is to be welcomed. On the other hand, opening the doors to more favourable domestic laws on a derivative protection of family members will lead to more situations where the law applicable to a family relationship between a person applying for family asylum and the person who had already been granted international protection must be determined under prior consideration of domestic PIL rules. However, PIL rules in this regard are frequently inconsistent among the EU Member States.

In practice, the CJEU's judgment discussed here is particularly relevant in the overall picture that is characterised by the CJEU's recent judgment of 19th November 2020 (C-238/19), according to which – contrary to the previous German Federal Administrative Court's practice – the refugee status according to the Geneva Convention may be granted to individuals who are eligible to be drafted for military service in Syria, which potentially means all Syrian men of a certain age. However, the precise implementation of this judgment in current German judicial and administrative practice remains controversial (see here). In cases where Syrian men actually are granted a protective status, their spouses and children are entitled to receive family asylum as well. In Germany, this is the case even if they possess multiple nationalities, but, according to the CJEU judgment discussed here, only as long as they are not entitled to a better treatment in the host Member State through a different legal status in this country, e.g. nationality or Union citizenship. As a matter of fact, there will be most probably very few people among those seeking protection in a Member State who have a Union

citizenship, so that the CJEU's restriction to the scope of § 26 Asylgesetz will only be practically relevant in very few cases.

The Nigerian Court of Appeal declines to enforce an Exclusive English Choice of Court Agreement

The focus of this write-up is a case note on a very recent decision of the Nigerian Court of Appeal that declined to enforce an exclusive English choice of court agreement.[1] In this case the 1st claimant/respondent was an insured party while the defendant/appellant was the insurer of the claimant/respondent. The insurance agreement between the 1st claimant/respondent and defendant/appellant provided for both an exclusive choice of court and choice of law agreement in favour of England. The claimants/respondents issued a claim for significant compensation before the High Court of Cross Rivers State, Nigeria for breach of contract and negligence on the part of the defendant/appellant for failure to fully perform the terms of the insurance contract during the period the 1st claimant/respondent was sick in Nigeria. The defendant/appellant challenged the jurisdiction of the High Court of Cross Rivers State, and asked for a stay of proceedings on the basis that there was an exclusive choice of court agreement in favour of England. The 1st claimant/respondent in a counter affidavit stated mainly at the trial court that he was critically ill, and the 2nd claimant/respondent (the employer of the 1st claimant/respondent) had serious financial difficulties in paying the 1st claimant/respondent's salaries, so in the interest of justice a stay should not be granted.

Both opposing parties were in agreement throughout the case that it was the Brandon test,[2] as applied by the Nigerian Supreme Court[3] that was applicable in this case to determine if a stay should be granted in the enforcement of a foreign choice of court agreement. Now the Brandon test (named after an English judge called Brandon J, who formulated the test) as applied in the Nigerian context is as follows:

"1. Where plaintiffs sue in Nigeria in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the Nigerian court, assuming the claim to be otherwise within the jurisdiction is not bound to grant a stay but has a discretion whether to do so or not. 2. The discretion should be exercised by granting a stay unless strong cause for not doing it is shown. 3. The burden of proving such strong cause is on the plaintiffs. 4. In exercising its discretion the court should take account of all the circumstances of the particular case. 5. In particular, but without prejudice to (4), the following matters where they arise, may be properly regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the Nigerian and foreign courts. (b) Whether the law of the foreign court applies and, if so, whether it differs from Nigerian law in any material respects. (c) With what country either party is connected and how closely (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiff s would be prejudiced by having to sue in the foreign country because they would (i) be deprived of security for that claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in Nigeria; or (iv) for political, racial, religious, or other reasons be unlikely to get a fair trial (v) the grant of a stay would amount to permanently denying the plaintiff any redress."

The reported cases where the plaintiff(s) have successfully relied on the Brandon test to oppose the enforcement of a foreign jurisdiction clause are where their claim is statute barred in the forum chosen by the parties.[4] Indeed, the burden is on the plaintiff to show strong cause as to why Nigerian proceedings should be stayed in breach of a choice of court agreement; if not, Nigerian courts will give effect to the foreign choice of court agreement.[5]

The High Court (Ayade J) relying on the Nigerian Supreme Court's decision on the application of the Brandon tests declined to uphold the exclusive choice of court agreement in the interest of justice. It is fair to say that the trial judge applied a very flexible approach on the issue of whether the exclusive English choice of court agreement should be enforced. Indeed, he was very focused on substantial justice (rather than the strong cause test), thereby stretching the criteria provided in the Brandon test.[6] Ayade J's judgment is worth quoting thus:

"This Court is fully aware of the principles of party autonomy, freedom and sanctity of contract, the doctrine that parties should be held to their contract (pacta sunt servanda) and this puts the burden on the plaintiff to show why the proceedings should continue in Nigeria inspite of the foreign jurisdiction clause, which in the opinion of this Court, the plaintiff has rightly done."[7]

He also interestingly remarked that:

"Let it be remarked that this Court is not unmindful, and there is no doubt that in an area of globalization, the issue of foreign jurisdiction clause and the subject of conflict of laws has a future and one of growing importance, see MORRIS: The conflict of laws, 7th Edition, Sweet and Maxwell, 2010 page 16. This is reflected in the expanded membership of the specialist international bodies such as the Hague Conference on Private International Law: Rome Convention on Contractual Obligations 1980, Convention on Choice of Court, 1965, Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 1971, Convention on International Access to Justice, The Brussel Convention and the Lugano Convention, Convention on the Law Applicable to Contractual Obligation, Organization for the Harmonization of Business Law in Africa (OHADA), and the various efforts at Harmonization and Unification of Law are still in the inchoate stage in this part of the world. We shall get there at a time when there shall be one law, one forum and one world.
It is for the above reasons that I am of the view that the current attitude of the Nigerian Courts to foreign jurisdiction clauses remains as stated in the Norwind. Thus, I am inclined to agree that Courts are not bound to stay its proceedings on account of a foreign jurisdiction clause in a Court."[8]

In the final analysis, he held as follows:

"Applying the law as declared above to the instant case and after due consideration of all the circumstances of this case, and in the exercise of discretion as to whether or not to do so in this case and this Court, which endeavoured always to do substantial justice between the parties. The sole issue raised by the claimants/respondents is therefore resolved in their favour against the defendant/applicant. Accordingly, this application is hereby dismissed."[9]

On appeal, the defendant/appellant argued that in reality the test the High Court (Ayade J) applied was one of balance of convenience, and did not properly follow the strong cause test as stipulated by the Nigerian Supreme Court in applying the Brandon test.

The claimant/respondent brilliantly filed a respondent's notice to justify the High Court's decision on other grounds. The core argument was that the action will be statute-barred in England if the action was stayed before the Nigerian Court. This argument was clearly supported by the Brandon test as applied by the Nigerian Supreme Court.[10]

The Court of Appeal unanimously dismissed the appeal. Shuaibu JCA in his leading judgment held that:

"In exercising its discretion to grant a stay of proceedings in a case filed in breach of an agreement to refer disputes to a foreign country, the Court would take into consideration a situation where the granting would spell injustice to the plaintiff as where the action is already time barred in the foreign country and the grant of stay would amount to permanently denying the plaintiff any redress."[11]

In analysing the Brandon test, as applied by the Nigerian Supreme Court he held that:

"It is imperative to state here that the Brandon Test is basically a guideline to judges in exercising their discretionary power to order a stay of proceedings where as in the present case, there is a foreign jurisdiction clause in the contract. It is to be noted however that like every discretion, the judge must exercise it judicially and judiciously based on or guided by

law and discretion according to sound and well considered reason. Perhaps, the most noticeable guideline which I consider more novel is that the Brandon Test enjoins Court to exercise its discretion in favour of the applicant unless strong cause for not doing so is shown which places the burden of showing such strong cause for not granting the application on the respondent (claimant)."[12]

After referring to the counter-affidavit of the claimant/respondent where they mainly alleged at the trial court that the 1st claimant/respondent was sick and had financial difficulties, Shuaibu JCA adopted a similar flexible approach to the Brandon tests as Ayade J. He held that:

"What is discernible from the above is that the evidence on the issues of fact is situated and more readily available, in Nigeria and the lower Court, was therefore right in refusing to adhere to foreign jurisdiction clause on the basis that the case is more closely connected to Nigeria. In effect, the trial Court has taken into account the peculiar circumstances of the case vis-à-vis the guidelines in the Brandon Test and thus exercised its discretion judicially and judiciously in refusing to grant stay of proceedings."[13]

Owoade JCA in his concurring judgment held that:

"In the instant case, more particularly by paragraphs 6, 7 and 8 of the Respondents counter-affidavit in opposition to the Appellant's motion for an order for stay, the Respondents have established that they would suffer injustice if the case is stayed. This is more so in the instant case where the Plaintiffs/1st Respondent action was statute barred in the foreign Court and the grant of stay would amount to permanently denying the Plaintiff/1st Respondent any redress."[14]

It is difficult to fault the decision of the High Court and Court of Appeal in this case, except for Shuaibu JCA's occasional confusion of choice of court with choice of law (a conceptual mistake some Nigerian judges make). An additional observation is that this procedural issue on foreign choice of court agreement took over 5 years to resolve so far. The issue of delay is something to look into in the Nigerian legal system – a topic for another day.

The standard test for determining if a stay should be granted in breach of a foreign jurisdiction clause is the Brandon test as applied by the Nigerian Supreme Court.[15] I am in total agreement with Shuaibu JCA that the Brandon test is a guideline. In other words, it must not be followed slavishly by Nigerian courts or indeed courts of other common law countries in Africa. A judge should be able to consider the facts of the instant case and decide if there is a strong cause for not granting a stay in breach of a foreign jurisdiction clause. In this case, the fact that the action will be statute-barred was a strong ground not to grant a stay in breach of the exclusive choice of court agreement in favour of England. The financial difficulties and sickness of the claimant/respondent were also factors that could be taken into account in the interest of justice, although they are not as strong as the claim that the action was statute-barred in a foreign forum. Indeed, I have argued elsewhere that the test of the interest of justice should not be excluded from the Brandon test analysis.[16] Of course, I agree this might create uncertainty and undermine party autonomy in some cases, but this problem can be curtailed if the burden is firmly placed at the door steps of the claimant as to why a foreign jurisdiction clause should not be enforced.

Nigeria is a growing economy, and its lawyers, arbitrators and judges should be able to benefit from international commercial litigation and arbitration business like developed countries such as England. Of course, the best way to do this is to make Nigeria attractive for litigation in matters of speed, procedural rules, content of applicable laws, honesty of judges, and competence of judges to handle cases etc. However, Nigerian courts should not blindly apply party autonomy in the enforcement of choice of court agreements despite the certainty and predictability it offers to international commercial actors.

This brings me to an even more important issue. This case involved an insurance contract. The insured party – the 1st claimant/respondent – was obviously the weaker party in this case. The traditional common law in Nigeria has not created a clear exception for the protection of weaker parties in the enforcement of foreign choice of court agreements. The European Union has done that in the case of employees, consumers and insured persons.[17] Nigeria and the rest of common law Africa's legal system is not an island of its own. We can learn from the EU experience and borrow some good things from them. Indeed, the Nigerian Supreme Court had held that there is nothing wrong with borrowing from another legal system.[18] I will add there should be good reasons for borrowing from

another legal system especially former colonial powers.

In this connection, it is proposed that in the case of weaker parties such as insured, consumers and employees, a party domiciled or habitually resident in Nigeria should be able to sue in Nigerian courts in breach of a foreign jurisdiction clause. In addition, the common law concept of undue influence could be applied so that cases where a party is presumably weak in the contractual relationship, such a party should not be bound by the foreign jurisdiction clause. Of course, there is a danger that this could create uncertainty. So I propose that in cases of business to business contracts, Nigerian and African courts should be more willing to enforce foreign choice of court agreements strictly.

Back to the case at hand, it is not unlikely that this case might come before the Nigerian Supreme Court on appeal. The Nigerian Court of Appeal has applied varied approaches to the enforcement of foreign choice of court agreements in Nigeria. Indeed, I noted three inconsistent decisions of the Nigerian Court of Appeal in this area of the law as recent as 2020.[19] On the one extreme hand, there is the contractual approach that strictly treats a choice of court agreement like any ordinary commercial contract.[20] This approach is good in that it promotes party autonomy, but the problem with this approach is that it ignores the procedural context of a choice of court agreement and might spell injustice due to its rigid approach. On the other extreme hand, there is the ouster clause approach that strictly refuses to enforce a foreign choice of court agreement.[21] Though this approach might favour litigation in Nigeria and other African countries, it dangerously undermines party autonomy, and international commercial actors are likely to lose confidence in a legal system that does not uphold party autonomy. The other approach is the middle ground of the Brandon test, which upholds a choice of court agreement except strong reason is demonstrated to the contrary. This is standard approach the Nigerian Supreme Court has applied.[22]

It is recommended that if this case goes to the Nigerian Supreme Court, it should continue its endorsement of the Brandon test. It should also consider the addition of the interest of justice approach as was utilised by some of the High Court and Court of Appeal judges in this case. What is missing in the Nigerian Supreme Court’s jurisprudence is a common law test that protects weaker parties like insured, consumers, and employees, as can be utilised in this case to protect the insured party (the 1st claimant/respondent). The time to act is now.

[1]*BUPA Insurance v Chakraverti* & *Anor* (2021) LPELR-55940 (CA).

[2] *The Owners of Cargo Lately Laden on Board the Ship or Vessel ' Elftheria ' v ' The Elftheria ' (Owners), ' The Elftheria '* [1969] 1 Lloyd ' s Rep 237 (Brandon J).

[3] *Sonnar (Nig) Ltd v Norwind* (1987) 4 NWLR 520; *Nika Fishing Company Ltd v Lavina Corporation* (2008) 16 NWLR 509.

[4]*Sonnar (Nig) Ltd v Norwind* (1987) 4 NWLR 520. See also *Hull Blyth (Nig) Ltd v Jetmove Publishing Ltd* (2018) LPELR-44115 (CA).

[5]*Nika Fishing Company Ltd v Lavina Corporation* (2008) 16 NWLR 509. See also *Captain Tony Nso v Seacor Marine* (*Bahamas*) *Inc* (2008) LPELR-8320 (CA); *Beaumont Resources Ltd & Anor v DWC Drilling Ltd* (2017) LPELR-42814 (CA).

[6]Compare *Adesanya v Palm Lines Ltd* (1967) NCLR 133, which is one of the earliest cases where the balance of convenience and interest of justice test was applied in enforcing a foreign choice of court agreement.

[7]Cited in *BUPA Insurance v Chakraverti* & *Anor* (2021) LPELR-55940 (CA) 3.

[8]Cited in *BUPA Insurance v Chakraverti* & *Anor* (2021) LPELR-55940 (CA) 3-4.

[9] Cited in *BUPA Insurance v Chakraverti* & *Anor* (2021) LPELR-55940 (CA) 5.

[10] *Sonnar (Nig) Ltd v Norwind* (1987) 4 NWLR 520.

[11]*BUPA Insurance v Chakraverti* & *Anor* (2021) LPELR-55940 (CA).21.

[12]*BUPA Insurance v Chakraverti* & *Anor* (2021) LPELR-55940 (CA).

[13] *BUPA Insurance v Chakraverti* & *Anor* (2021) LPELR-55940 (CA) 28.

[14] *BUPA Insurance v Chakraverti* & *Anor* (2021) LPELR-55940 (CA) 30.

[15] *Sonnar (Nig) Ltd v Norwind* (1987) 4 NWLR 520; *Nika Fishing Company Ltd v Lavina Corporation* (2008) 16 NWLR 509.

[16]CSA Okoli, "Analysis of Choice of Court Agreements in Nigeria in the Year 2020" (2021) 21 *Dutch Journal of Private International Law* 292, 305.

[17]See Article 10 – 23 of Brussels I Regulation Recast (Council Regulation (EU)

No 1215/2012 of the European Parliament and of the Council of 12 December 2012 [2012] OJ L351/1.). See also recital 19 to Brussels I Regulation Recast.

[18]*Caribbean Trading & Fidelity Corporation v Nigerian National Petroleum Corporation* (2002) 34 WRN 11 (Ayoola JSC, Mohammed JSC (as he then was), Ejiwunmi JSC).

[19]CSA Okoli, "Analysis of Choice of Court Agreements in Nigeria in the Year 2020" (2021) 21 *Dutch Journal of Private International Law* 292 – 305.

[20] *Damac Star Properties LLC v Profitel Limited* (2020) LPELR-50699(CA). See also *Conoil Plc v Vitol SA* (2018) 9 NWLR 463, 489 (Nweze JSC), 500-501 (Okoro JSC), 502 (Eko JSC).

[21]*A.B.U. v VTLS* (2020) LPELR-52142 (CA). See also *Conoil Plc v Vitol SA* (2018) 9 NWLR 463, 489 (Nweze JSC); *Sonnar (Nig) Ltd v Partenreedri MS Norwind* (1987) 4 NWLR 520, 544-5 (Oputa JSC); *LAC v AAN Ltd* (2006) 2 NWLR 49, 81 (Ogunbiyi JCA as she then was); *Ventujol v Compagnie Française De L'Afrique Occidentale* (1949) 19 NLR 32; *Allied Trading Company Ltd v China Ocean Shipping Line* (1980) (1) ALR Comm 146.

[22]*Sonnar (Nig) Ltd v Norwind* (1987) 4 NWLR 520; *Nika Fishing Company Ltd v Lavina Corporation* (2008) 16 NWLR 509.

Save the date: University of Bonn/HCCH Conference "The HCCH 2019 Judgments

Convention: Cornerstones – Prospects – Outlook", 9 and 10 September 2022, Bonn University, Germany

Dear Friends and Colleagues,

During the ongoing pandemic, the University of Bonn has remained very careful and did not allow on-site events of a larger scale so far. We have therefore once again made the decision to reschedule our Conference (originally planned for the 25/26 September 2020, and postponed to 13/14 September 2021) now to **Friday and Saturday, 9 and 10 September 2022**. Let's hope the best that the pandemic will have withdrawn to an extent that allows our conference taking place as now planned.

As there are reasonable expectations for the HCCH 2019 Judgments Convention to enter into force by the end of 2022 or early 2023, we are confident – especially with a view to the latest Proposal of the European Commission – that we will experience an even more focused and rewarding discussion of our topic.

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The Organizers kindly ask participants to contribute with EUR 200.- to the costs of the event and with EUR 50.- to the conference dinner, should they wish to participate. There is a limited capacity for young scholars to contribute with EUR 100.- to the conference (the costs for the dinner remain unchanged).

Please register with sekretariat.weller@jura.uni-bonn.de. Clearly indicate whether you want to benefit from the young scholars' reduction of the conference

fees and whether you want to participate in the conference dinner. You will receive an invoice for the respective conference fee and, if applicable, for the conference dinner. Please make sure that we receive your payment at least two weeks in advance. After receiving your payment we will send out a confirmation of your registration. This confirmation will allow you to access the conference hall and the conference dinner.

Please note: Access will only be granted if you are fully vaccinated against Covid-19. Please confirm in your registration that you are, and attach an e-copy of your vaccination document. Please follow further instructions on site, e.g. prepare for producing a current negative test, if required by University or State regulation at that moment. We will keep you updated. Thank you for your cooperation.

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Dates: **Friday, 9 September 2022, and Saturday, 10 September 2022**

Venue: **Universitätsclub Bonn, Konviktstraße 9, D – 53113 Bonn**

Registration: **sekretariat.weller@jura.uni-bonn.de**

Registration fee: **€ 200.-**

Young Scholars rate (limited capacity): **€ 100.-**

Dinner: **€ 50.-**

Programme

Friday, 9 September 2022

8.30 a.m. Registration

9.00 a.m. Welcome notes

Prof Dr Wulf-Henning Roth, Director of the Zentrum für Europäisches Wirtschaftsrecht, Rheinische Friedrich-Wilhelms-Universität Bonn, Germany

Dr Christophe Bernasconi, Secretary General of the HCCH

Part I: Cornerstones

1. **Scope of application**

Prof Dr Xandra Kramer, Erasmus University Rotterdam, Utrecht University, Netherlands

2. **Judgments, Recognition, Enforcement**

Prof Dr Wolfgang Hau, Ludwig-Maximilians-Universität Munich, Germany

3. **Indirect jurisdiction**

Prof Dr Pietro Franzina, Catholic University of Milan, Italy

4. **Grounds for refusal**

Dr Marcos Dotta Salgueiro, Adj. Professor of Private International Law, Law Faculty, UR, Uruguay; Director of International Law Affairs, Ministry of Foreign Affairs, Uruguay

5. **Trust management: Establishment of relations between Contracting States**

Dr João Ribeiro-Bidaoui, First Secretary, HCCH / Dr Cristina Mariottini, Senior Research Fellow at the Max Planck Institute for International, European and Regulatory Law Luxemburg

1.00 p.m. **Lunch Break**

Part II: Prospects for the World

1. **The HCCH System for choice of court agreements: Relationship of the HCCH Judgments Convention 2019 to the HCCH 2005 Convention on Choice of Court Agreements**

Prof Dr Paul Beaumont, University of Stirling, United Kingdom

2. **The HCCH System and the Brussels System: Relations to the Brussels and Lugano Regime**

Prof Dr Marie-Élodie Ancel, Université Paris-Est Créteil, France

3. **European Union**

Dr Andreas Stein, Head of Unit, DG JUST – A1 "Civil Justice", European Commission

4. **Canada, USA**

Professor Linda J. Silberman, Clarence D. Ashley Professor of Law, Co-Director, Center for Transnational Litigation, Arbitration, and Commercial Law, New York University School of Law, USA / Professor Geneviève Saumier, Peter M. Laing Q.C. Professor of Law, McGill Faculty of Law, Canada

5. **Southeast European Neighbouring and EU Candidate Countries**

Prof Dr Ilija Rumenov, Associate Professor at Ss. Cyril and Methodius University, Skopje, Macedonia

8.00 p.m. **Conference Dinner (€ 50.-)**

Saturday, 10 September 2022

9.00 a.m. **Part II continued: Prospects for the World**

6. **Middle East and North Africa (including Gulf Cooperation Council)**

Prof Dr Beligh Elbalti, Associate Professor at the Graduate School of Law and Politics at Osaka University, Japan

7. **Sub-Saharan Africa (including Commonwealth of Nations)**

Prof Dr Abubakri Yekini, University of Manchester, United Kingdom / Prof Dr Chukwuma Okoli, Postdoctoral Researcher in Private International Law at the T.M.C. Asser Institute, Netherlands

8. **Southern Common Market (MERCOSUR)**

Prof Dr Verónica Ruiz Abou-Nigm, Director of Internationalisation, Senior Lecturer in International Private Law, School of Law, University of Edinburgh, United Kingdom

9. **Association of Southeast Asian Nations (ASEAN)**

Prof Dr Adeline Chong, Associate Professor of Law, Yong Pung How School of Law, Singapore Management University, Singapore

10. **China (including Belt and Road Initiative)**

Prof Dr Zheng (Sophia) Tang, University of Newcastle, United Kingdom

1.00 p.m. **Lunch Break**

Part III: Outlook

1. **Lessons from the Genesis of the Judgments Project**

Dr Ning Zhao, Senior Legal Officer, HCCH

2. **International Commercial Arbitration and Judicial Cooperation in civil matters: Towards an Integrated Approach**

José Angelo Estrella-Faria, Principal Legal Officer and Head, Legislative Branch, International Trade Law Division, Office of Legal Affairs, United Nations; Former

Secretary General of UNIDROIT

3. **General Synthesis and Future Perspectives**

Hans van Loon, Former Secretary General of the HCCH

Please also consult our Repository HCCH 2019 Judgments Convention for the latest publications and materials on our subject-matter.

Appeal on Merits in Commercial Arbitration?–An Overview

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

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

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

In legal practice, there are some legislations or arbitration institutions provide

approaches allowing for the parties to apply for reconsideration of the award, which can be summarized into 3 categories: 1. The appellate mechanism conducted by state courts; 2. Appellate mechanism within the arbitration proceedings and; 3. Alternative to appellate mechanism by arbitration society.

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

1.Appealing mechanism before the court

1.1 Appellate Mechanism in England

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

(1) The appellate mechanism serves as a default rule rather than a mandatory one, which allows parties to contract out of it. Apart from an agreement which explicitly excludes the appellate system, such consensus can be reached by other means. One of the methods is the parties' agreement on dispensing with reasons for the arbitral award, which is overall a rare practice in the field of international commercial arbitration while frequently used within some jurisdictions and sectors. Another way is the designation of arbitration rules containing provisions eliminating any appeal system, such as arbitration rules of most world renowned arbitration institutions. For instance, Article 26.8 of London Court of International Arbitration Rules(The LCIA Rules) explicitly stipulates that parties waive "irrevocably" their right to appeal, review or recourse to any state court or other legal authority in any form.[iii] Therefore, parties may easily dispense with the right to appeal by reference of arbitration before The LCIA Rules or under its rules.

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

public importance regarding the debating question.

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

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

1.2 Appellate Mechanism Outside England

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

Appeal in the court is somehow incompatible with the minimal intervene principle as set out in legislations like UNCITRAL Model Law. Further, it will not only enormously undermine efficiency of arbitration but also make the already-clogged state courts more burdensome. The important consideration about the appeal against question of law in the court is the development of law through cases,[vii] while it is not suitable for all jurisdictions.

2.Internal appellate of arbitration institution

Apart from state courts, some arbitration institutions may have the authority to act as appellate bodies under their institutional rules, which can be summarized as "institutional appellate mechanism". While such system can be observed in the arbitration concerning certain sectors such as the appeal board of The Grain and

Feed Trade Association, it is rarely used by institutions open for all kinds of commercial disputes, with exceptions such as The Institute of Conflict Prevention and Resolution (CPR) and Judicial Arbitration & Mediation Services, Inc (JAMS).[viii]

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

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

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

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

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

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

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

3.Alternatives to appealing mechanism

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

With all that said, a few institutions have set up a special system called "pre-decision notification"??????as an alternative to mirror the function of appeal mechanism, which is said to be credited to Deyang Arbitration Commission of Sichuan Province dated back to 2004, according to a piece of news in August 2005 reported by Legal Daily, a nationwide legal professional newspaper run by

the Supreme People's Court.[xiii] Pre-decision notification allows for tribunal to notice parties their preliminary opinions about the case before rendering the final decision, and ask for parties' comments within fixed duration. Tribunal's preliminary opinions can be revised by the final award based on comments by parties, occurrence of new fact after deliberation, or merely on the tribunal's own initiative.

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

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

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

the tribunal's mind by intervening tribunal's autonomy (even by taking irregular or illegal measures).

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

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

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

4.Comments

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

4.1 Legitimacy Perspective

According to leading legislations across the world, the competence of state court confined to procedural issues in respect of judicial review over arbitration award, with rare and narrow exceptions such as the public policy set out in UNCITRAL Model Law and New York Convention. With this respect, even though some

commentators argue that an appeal on merits is not necessarily a breach of finality and minimal intervene principles set out in UNCITRAL Model Law,[xviii] a mandatory and all-catching appealing system encompassing both factual and legal issues conducted by state court is undeniably incompatible with modern arbitration legislation.

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

4.2 Efficiency and Fairness

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

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

4.3 Preference of Parties

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

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

had selected “lack of appeal mechanism on the meritss” as one of the three worst characteristics of arbitration.[xxi]

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

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

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

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

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

[v] Ben Sanderson et al.,*Appeals under the English Arbitration Act 199*6?available at https://www.dlapiper.com/en/uk/insights/publications/2018/05/appeals-under-the-english-arbitration-act-1996/#:~:text=Section%2069%2C%20meanwhile%2C%20is%20a%20non-*mandatory%20provision%20of,the%20English%20courts%20on%20a%20point%20of%20law.*

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

[vii] Ibid.

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

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

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

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

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

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

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

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

[xvi] Per the common practice and well established principle, tribunals are free to delivery query to parties in respect of both factual finding and ascertaining law (Jura Novit Curia), while it shall be conducted in a manner that being prepared to consider legal positions advanced by the parties, irrespective of questions well known to the tribunal. See: Revista Brasileira de Arbitragem, *International Law*

Association Committee on International Commercial Arbitration Ascertaining the Contents of the Applicable Law in International Commercial Arbitration Report for the Biennial Conference in Rio de Janeiro, August 2008,

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

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

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

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

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

Virtual Hearing in China's Smart

Court

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Mr Ting Liao, PhD candidate at the Wuhan University Institute of International Law, published a note on the Chinese Smart Court, which attracted a lot of interest and attention. We have responded a few enquires and comments, some relating to the procedure and feasibility of virtual/remote hearing. Based on the questions we have received, this note provides more details on how the virtual hearing is conducted in China.

1. Background

The fast development of virtual hearing and its wide use in practice in China are attributed to the Covid-19 pandemic. The pandemic causes serious disruption to litigation. China is a country that has adopted the toughest prevention and controlling measures. Entrance restriction, lockdown, quarantine and social distancing challenge the court process and case management. In the meantime, this challenge offers the Chinese courts a chance to reform and modernize their judicial systems by utilizing modern technology. Since suspending limitation period may lead to backlog and delay, more Chinese courts favour the virtual proceedings. This strategy improves judicial efficiency and helps parties' access to justice in the unusual circumstances.

Before the pandemic, Chinese courts have already started their exploration of online proceedings. In 2015, the Provisions of the SPC on Several Issues Concerning Registration and Filling of Cases provides the People's courts should provide litigation services including online filing.[1] In the same year, the SPC published the Civil Procedural Law Interpretation, which states that the parties can make agreement on the form of hearing, including virtual hearing utilizing visual and audio transfer technology. The parties can make application and the court can decide whether to approve.[2] Although online trial from filing to hearing is permitted by law, but it was rarely used in practice due to the tradition and social psychology. The adoption of virtual proceedings for cases with large value was even rarer. The relevant procedure and technology were also taking time to progress and maturase.

Because the pandemic and the controlling measures make serious disruption to

traditional form of litigation, online trial becomes more frequently used and develops to a more advanced stage. The SPC provids macro policy instructions that Chinese courts should actively utilize online litigation platform, such as China Movable Micro Court, which allows the parties to conduct litigation through mobile, and Litigation Service Website to carry out comprehensive online litigation activities, including filing, mediation, evidence exchange, hearing, judgment, and service of procedure.[3] While more administrative and technological efforts have been put in, and the pandemic made no better alternatives, more trials were done online. For example, between Feb and Nov 2020, 959 hearings (16.42%) and 5020 mediations were carried out online in the Qianhai Court. Between Feb and July 2020, courts in Beijing conducted average 1,300-1,500 virtual hearings per day.

Some important cases were also tried online. For example, Boa Barges As v Nanjing Yichun Shipbuilding concerned a dispute worth nearly $50,000,000.[4] The contract originally included a clause to resolve disputes in London Court of International Arbitration (LCIA) and to apply English law. However, the pandemic outbroke in the UK in March 2020. The parties entered into a supplementary agreement in May 2020 to submit the dispute to Nanjing Maritime Court and apply Chinese law. Chinese commentators believe the change of chosen forum and governing law demonstrates the parties' trust on Chinese international judicial system and courts' capacity. Nanjing Maritime Court followed the SPC instruction by allowing the foreign party to postpone submitting authorization notarization and authentication, and conducted online mediation. In China, mediation is part of the formal litigation procedure. The parties settled by mediation within 27 days.

In 2021, the SPC published the Online Litigation Regulations for the People's Courts, including detailed rules for how online litigation should be conducted.[5] This Regulations provides five principles for online litigation, including fairness and efficiency, freedom of choice, protection of rights, convenience and security.[6] This Regulations provides further clarification of certain key procedural issues and provide unified micro-guidance which helps the local courts to operate in the same standards and according to the same rule.

2. Initiation of virtual hearing

Virtual proceedings may lead to several controversies. Firstly, how are the virtual

proceedings initiated? Could the court propose by its own motive, or should the parties reach agreement? What if a physical trial is not possible due to the pandemic control, both the court and the claimant want a virtual trial, but the defendant refuse to consent? In such a case, would a virtual trial in the absence of the defendant an infringement of the defendant's due process right and should not be enforced abroad? What if the defendant and the court agree to go ahead with a virtual trial, but the claimant refuses? Would a default judgment in the absence of the claimant infringe the claimant's due process right?

The Online Litigation Regulations provides clear guidance. Online litigation should follow the principle of freedom of choice. In other words, parties should give consent to the online procedure and cannot be forced by the court.[7] If a party voluntarily chooses online litigation, the court can conduct litigation procedure online. If all the parties agree on online litigation, the relevant procedure can be conducted online. If some parties agree on online litigation while others not, the court can conduct the procedure half online for parties who give consent and half offline for other parties.[8] However, what if a party cannot physically participate in the offline litigation because of the pandemic, and this party also refuses online litigation? This party certainly can apply for suspension or postponement of procedure. However, if this party has no legitimate reason to refuse online litigation like technical problems or the lack of computer literacy, would not the court consider such a refusal unreasonable? Does it mean a person may use the refusal rights to delay otherwise legitimate procedure to the detriment of the other party? Would the refusal turn to be a torpedo action? Does this strict autonomy approach meet the purpose of good faith and judicial efficiency? Although the freedom of choice is important, would it necessary to provide some flexibility by allowing the court to assess special circumstances of a case? It seems that this strict consent condition is based on the traditional attitude against online litigation. This attitude makes offline litigation a priority and online litigation an exception, which will only be used by parties' choice. This approach does not provide online litigation true equal footing as offline litigation, and still reflect the social psychological concern over the use of modern technology in the court room. Although the pandemic speed the development of online litigation in China, it is treated as an exceptional emergency measure and the emphasis on it may fade away gradually after the pandemic is ending, unless the social psychology is also changed after a longer period of successful use of online litigation.

3. Public hearing

Would virtual hearing satisfy the standard of public hearing? Certainly, there is no legal restriction preventing public access to the hearing.[9] Furthermore, the Online Litigation Regulations provides that online litigation must be made public pursuant to law and judicial interpretation, unless the case concerns national security, state secrets, individual privacy, or the case concerns a minor, commercial secrets and divorce where the parties apply for the hearing not be made public.[10] However, how to make online hearing public is a technical question. If the virtual hearing is organised online, without an openly published "link", no public will be able to access the virtual court room and the trial is "secret" as a matter of fact. This may practically evade the public hearing requirement.

Chinese online litigation has taken into account the public hearing requirement. Both SPC litigation service website and the Movable Micro Court make open hearing an integral part of the platform. The public can register and create an account for free to log in the platform. After log in, the public can find all available services in the webpage, including Hearing Livestream. After click in, the pubic can find the case that they want to watch by searching the court or browse the "Live Courtroom Today". There are also recorded hearing for the public to watch. In contrast to traditional hearing, the only extra requirement for the public to access to the court is registration, which requires the verification of ID through triple security check: uploading the scan/photo of an ID card, verifying the mobile number via security code and facial recognition.

It shows that Chinese virtual hearing has been developed to a mature stage, which meets the requirement of due process protection and public hearing. Chinese virtue hearing has been systematically updated with the quick equipment of modern technologies and well-established online platform. This platform is made available to the local courts to use through the institutional power of the centre. Virtual hearing in China, thus, will not cause challenge in terms of public hearing.

4. Evidence

Although blockchain technology can prove the authenticity of digital evidence, many original evidence exists offline. The parties need to upload an electronic

copy of those evidence through the “Exchange evidence and cross-examination” session of the smart court platform, and other parties can raise queries and challenges. During trial, the litigation parties display the original evidence to the court and other parties through the video camera. If the court and other parties raise no challenges in the pre-trial online cross-examination stage and in the hearing, the evidence may be admitted. It, of course, raises issues of credibility, because electronic copy may be tempered with and the image displayed by video may not be clear and cannot be touched, smelled and felt for a proper evaluation. Courts may adopt other measures to tackle this problem. For example, some courts require original evidence to be posted to the court if the court and other parties are not satisfied of the distance examination of evidence. Other courts may organise offline cross-examination of the evidence by convening a pre-trial meeting. However, in doing so, the value of the online trial will be reduced, making the trial process lengthier and more inefficient.

The practical difficulty also exists in witness sequestration. Article 74 of the “Several Provisions of the Supreme People’s Court on Evidence in Civil Litigations” provides witnesses in civil proceedings shall not be in court during other witnesses’ testimony, so they cannot hear what other witnesses say.[11] This is a measure to prevent fabrication, collusion, contamination and inaccuracy. However, in virtual hearings, it is difficult for judges to completely avoid witnesses from listening to other witnesses’ testimony online. There is no proper institutional and technical measure to address this problem and it remains one of the fallbacks in the virtual litigation.

[1] Provisions of the SPC on Several Issues Concerning Registration and Filling of Cases, Fa Shi [2015] No8, Art 14.

[2] The SPC Interpretation of the Application of the PRC Civil Procedure Law, Art 295.

[3] Notice of the SPC about Strengthening and Regulating Online Litigation during the Prevention and Controlling of the Covid-19 Pandemic, Fa [2020] 49, Art 1.

[4] The Supreme People's Court issued the sixth of ten typical cases of national maritime trials in 2020: BOABARGESAS v Nanjing Yichun Shipbuilding Co., Ltd. Ship.

[5] SPC, Online Litigation Regulations for the People's Court, Fa Shi [2021] No 12.

[6] Art 2.

[7] Art 2(2).

[8] Art 4.

[10] Art 27.

[11] Fa Shi [2019] 19.

How Emerging Technologies Shape the Face of Chinese Courts?

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A. Technology in the Context of Judicial Reform

According to Max Weber, "the modern judge is a vending machine into which the pleadings are inserted together with the fee, and which then disgorges the judgment together with the reasons mechanically derived from the code." [1]Max Weber's conjecture is a metaphor for the vital connotation of intelligence. The key elements of intelligence are people, data and technology. So, how these elements are utilized in the judicial system?

Generally, a significant number of courts are experimenting with the use of internet, artificial intelligence and blockchain for case filling, investigation and

evidence obtaining, trials and the initiation of ADR procedures. The so-called smart justice projects are commenced in many countries. China has also made significant progress in this domain. In addition to accelerating the use of the internet technology, the Supreme People's Court of China has demonstrated its ambition to use AI and blockchain to solve problems in the judicial proceedings.[2]

B. Smart Court in China: An Overview

In China, the smart justice is a big project contains smart court, smart judicial administration and smart procuratorate. The smart court is the core of the entire smart justice project. "The Opinions of the Supreme People's Court on Accelerating the Construction of Smart Courts" encourages people's courts around the country to apply AI to provide smarter litigation and legal literacy services to the public, while reducing the burden of non-judicial matters for court staff as much as possible.

The construction of China's smart courts involves more than 3,000 courts, more than 10,000 detached tribunals and more than 4,000 collaborative departments, containing tens of thousands of information systems such as information infrastructure, application systems, data resources, network security and operation and maintenance, etc. The entire smart court information system is particularly big and complex.

The smart court is a functional service platform for the informatization of the people's courts. The platform integrates several cutting-edge technological capabilities, including face recognition identity verification, multi-way audio and video call functions, voice recognition functions and non-tax fee payment functions. These functions are tailor-made capability packages for courts, and they can be used in a variety of scenarios such as identity verification, online documents accessing, remote mediation, remote proceedings, enforcement, court hearing records and internal things. Through the smart platform, any court can easily access to the capabilities, and quickly get successful experiences from any other courts in China.

C. Examples of Good Practice

1. **Provide Litigation Information and Services**

Peoples' Courts in nine provinces or municipalities, including Beijing, Shanghai and Guangdong, have officially launched artificial intelligence terminals in their litigation service halls. Through these AI terminals, the public can access information about litigation and judicial procedures, as well as basic information about judges or court staff. The AI terminals can also automatically create judicial documents based on the information provided by the parties. More importantly, the AI can provide the parties risk analysis before filing a lawsuit. For example, artificial intelligence machines in courts in Beijing, Shanghai and Jiangsu can assess the possible outcome of litigation for the parties. The results are based on the AI's analysis of more than 7,000 Chinese laws and regulations stored in its system, as well as numerous judicial precedents. At the same time, the AI machine can also suggest alternative dispute resolution options. For example, when an arbitration clause is present, the system will suggest arbitration, in divorce cases, if one of the parties unable to appear in people's court, then the smart system shall advise online mediation.

In addition to parties, as to the service for the court proceeding itself, the new generation of technology[3] is used in the smart proceeding and is deeply integrated with it. These technologies provide effective support for judges' decision making, and provide accurate portraits of natural persons, legal persons, cases, lawyers and other subjects. They also provide fast, convenient and multi-dimensional search and query services and automatic report services for difficult cases.

2. **Transfer of Case Materials**

Some People's Courts in Shenzhen, Shanghai and Jiangsu have set up artificial intelligence service terminals for parties to scan and submit electronic copies of materials to the court. This initiative can speed up the process of evidence submission and classification of evidence. In addition, digital transmission can also speed up the handover of case materials between different courts, especially in appellate cases where the court of first instance must transfer the case materials to the appellate court.

3. **Evidence Collection and Preservation**

Technically speaking, the blockchain and its extensions can be used to secure electronic data and prevent tampering during the entire cycle of electronic data

production, collection, transfer and storage, thus providing an effective means of investigation for relevant organizations. Comparing to traditional investigation methods, blockchain technology is suitable as an important subsidiary way to electronic data collection and preservation. This is because the blockchain's timestamp can be used to mark the time when the electronic data was created, and the signature from the person's private key can be used to verify the party's genuine intent. The traceable characteristics of blockchain can facilitate the collection and identification of electronic data.[4]

In judicial practice, for example, the electronic evidence platform is on the homepage of Court's litigation services website of Zhengzhou Intermediate People's. It is possible to obtain evidence and make preservation on judicial blockchain of the court. This platform providing services such as evidence verification, evidence preservation, e-discovery and blockchain-based public disclosure. The evidence, such as electronic contracts, can be uploaded directly via the webpage, and the abstract of electronic data can be recorded in the blockchain in real time. Furthermore, this judicial blockchain has three tiers (pictured below). The first tier is the client side, which helps parties submit evidence, complaints and other services. The second tier is the server side, which provides trusted blockchain services such as real-name certification, timestamping and data storage. The third tier is the judicial side, which uses blockchain technology to form a consortium chain of judicial authentication, notaries and the court itself as nodes to form a comprehensive blockchain network of judicial proceedings.[5] In other words, people's court shall be regarded as the key node on the chain, which can solve the contradiction between decentralization and the concentration of judicial authority, and this kind of blockchain is therefore more suitable for electronic evidence preservation.

Secondly, for lawyers, the validity of electronic lawyer investigation orders can be verified through judicial blockchain, a technology that significantly enhances the credibility of investigation orders and the convenience of investigations. For example? in Jilin Province, the entire process of application, approval, issuance, utilization and feedback of an investigation order is processed online. Lawyers firstly apply for an investigation order online, and after the judge approves it, the platform shall create an electronic investigation order and automatically uploads it to the judicial blockchain for storage, while sending it to lawyers in the form of electronic service. Lawyers shall hold the electronic investigation order to target

entities to collect evidence. Those entities can scan the QR code on the order, and login to the judicial blockchain platform to verify the order. Then they shall provide the corresponding investigation evidence materials in accordance with the content of the investigation order.[6]

In addition, it should be noted that Article 11 of the "Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases by Internet Courts", which came into force in 2018, explicitly recognizes data carriers on the blockchain as evidence in civil proceedings for the first time, but their validity needs to be verified by the courts.

The issue of blockchain evidence has already caused discussion among judges, particularly regarding the use of blockchain-based evidence in cases. For instance, what criteria should courts adopt to read such data? Approaches in judicial practice vary. Currently, there is no consistent approach in people's court as to whether blockchain evidence needs to be submitted as original evidence. In certain recent cases, such as (2019) Jing 0491 Min Chu No. 805 Case and (2020) Jing 04 Min Zhong No. 309 Case, the court's considerations for the determination of blockchain evidence are inconsistent.

4. **Case Management**

People's Courts in Shanghai and Shenzhen are piloting an artificial intelligence-assisted case management system that can analyze and automatically collate similar judicial precedents for judges to refer to. The system is also able to analyze errors in judgments drafted by judges by comparing the evidence in current cases with that in precedent cases. This will help maintain uniformity in judicial decisions. Currently, the system for criminal cases has been put into use, while the system for civil and administrative cases is still being tested in pilot stage.

5. **Online Proceedings**

Chinese courts had already adopted online proceedings in individual cases before 2018. The Supreme People's Court had released the Provisions of the Supreme People's Court on Certain Issues Concerning the Hearing of Cases in Internet Courts. From 1 January 2020 to 31 May 2021, 12.197 million cases were filed online by courts nationwide, with online filing accounting for 28.3% of all cases filed; 6.513 million total online mediation, 6.142,900 successful mediation cases

before litigation; 1.288 million online court proceedings 33.833 million electronic service of documents.[7]

Recently, the Supreme Court, some provincial courts and municipal courts have also issued rules on “online proceedings”. The Supreme People’s Court has issued the Online Litigation Regulations for the People’s Court 2021 which stipulates online litigation should follow the five principles, namely fairness and efficiency, legitimate and voluntary principle, protection of rights, principle of safety and reliability. This regulation emphasizes the principles of application of technology, strictly adhere to technology neutrality, to ensure that technology is reliable.[8]Furthermore, in 2021 the Supreme People’s Court has issued the Several Regulations on Providing Online Filing Services for Cross-border Litigants, relying on the provision of online filing for cross-border litigants through the China mobile micro court. Based on Tencent’s cloud technology, the Micro Court can also be linked to the most used communication tool in China, namely WeChat. Using the micro courts mini programs allows for a dozen functions such as public services, litigation, enforcement and personal case management.[9]

6. **Framework of the Litigation Services Network**

The litigation service network is an important carrier for the court to conduct business and litigation services on the Internet, providing convenient and efficient online litigation services for parties and litigation agents, greatly facilitating the public’s litigation, while strengthening the supervision and management of the court’s litigation services, enhancing the quality of litigation services and improving the standardization of litigation services. The picture shows the functioning and operation mechanism of a litigation services network.[10]

[1] See Max Weber, On Law in Economy and Society (Edward Shils and Max Rheinstein trans., Harvard University Press 1954).

[2] For example, in 2019, the Supreme People’s Court of China approved several documents such as “The Report on the Promotion of China Mobile Micro Courts”, “The Report on the Construction of the Smart Court Laboratory”, and “The General Idea of Comprehensively Promoting the Construction of Judicial Artificial Intelligence”.

[3] Including big data, cloud computing, knowledge mapping, text mining, optical character recognition (OCR), natural language processing (NLP) etc.

[4] See Trusted Blockchain Initiatives, White Paper on Blockchain Preservation of Judicial Evidence (2019).

[5] See Zhengzhou Court Judicial Service Website < http://www.zzfyssfw.gov.cn/zjy/> accessed 09 Nov. 2021; A consortium chain is a blockchain system that is open to a specific set of organizations, and this licensing mechanism then brings a potential hub to the blockchain, and The node access system in a consortium chain means that it already grants a certain level of trust to the nodes.. see also Internet court of Hangzhou < https://blockchain.netcourt.gov.cn/first>accessed 09 Nov. 2021.

[6] See e.g., a pilot project of the Supreme People's Court of China, the Jilin Intermediate People's Court proposed the Trusted Operation Application Scene: Full Process Assurance for Litigation Services (Electronic Lawyer Investigation Order); see also People's Court Daily, Piloting the "judicial chain" and multipions practice of Jilin's smart court construction< http://legal.people.com.cn/n1/2020/1124/c42510-31942250.html>accessed 08 Nov. 2021.

[7] See Chinanews < https://www.chinanews.com/gn/2021/06-17/9501170.shtml>accessed 08 Nov. 2021.

[8] SPC of PRC, Report about Online Litigation Regulation for the People's Court< http://www.court.gov.cn/zixun-xiangqing-317061.html>accessed 08 Nov. 2021.

[9] See e.g., Xinhuanet < http://www.xinhuanet.com/legal/2020-05/07/c_1125953941.htm>accessed 08 Nov. 2021.

[10] Xu Jianfeng et.al., *Introduction to Smart Court System Engineering* (People's Court Press 2021).

Ducking the Ricochet: The Supreme Court of Canada on Foreign Judgments

Written by Stephen G.A. Pitel, Western University

The court's decision in *HMB Holdings Ltd v Antigua and Barbuda*, 2021 SCC 44 (available here) is interesting for at least two reasons. First, it adds to the understanding of the meaning of "carrying on business" as a test for being present in a jurisdiction. Second, it casts doubt on the application of statutory registration schemes for foreign judgments to judgments that themselves recognize a foreign judgment (the so-called ricochet).

In this litigation HMB obtained a Privy Council judgment and then sued to enforce it in British Columbia. Antigua did not defend and so HMB obtained a default judgment. HMB then sought to register the British Columbia judgment in Ontario under Ontario's statutory scheme for the registration of judgments (known as *REJA*). An important threshold issue was whether the statutory scheme applied to judgments like the British Columbia one (a recognition judgment). In part this is a matter of statutory interpretation but in part it requires thinking through the aim and objectives of the scheme.

Regrettably for academics and others, the litigants conducted the proceedings on the basis that the scheme DID apply to the British Columbia judgment. Within the scheme, Antigua relied on one of the statutory defences to registration. The defence, found in section 3(b), requires that "the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court". Three of the elements of this defence were easily established by Antigua, leaving only the issue of whether Antigua could be said to have been carrying on business in British Columbia. If not, the decision could not be registered in Ontario.

On the facts, Antigua had very little connection to British Columbia. What it did have was "contracts with four 'Authorized Representatives' with businesses, premises and employees in British Columbia for the purposes of its Citizenship by

Investment Program [which] … aims to encourage investments in Antigua's real estate, businesses and National Development Fund by granting citizenship to investors and their families in exchange for such investments" (para 7). HMB argued this was sufficient to be carrying on business in British Columbia. The courts below had disagreed, as did all five judges of the Supreme Court of Canada (paras 47-49, 52).

Confirming this result on these facts is not overly significant. What is of more interest is the court, in its decision written by Chief Justice Wagner, offering some comments on the relationship between how the meaning of carrying on business in the context of taking jurisdiction relates to the meaning of that same phrase in the context of determining whether to recognize or register a foreign judgment. Below, one judge of the Court of Appeal for Ontario had held the meanings to be quite different in those different contexts, with a much lower threshold for carrying on business in the latter (para 18). The Supreme Court of Canada rejects this view. When considering presence in a jurisdiction by means of carrying on business there, the analysis is the same whether the court is assessing taking jurisdiction on that basis or is determining whether to give effect to a foreign judgment (and so engaging with the defence in section 3(b)) (paras 35, 41). This is welcome clarification and guidance.

One smaller wrinkle remains, not germane to this dispute. At common law the phrase "carrying on business" is used for two distinct aspects of taking jurisdiction: presence, where it grounds jurisdiction (see *Chevron*), and assumed jurisdiction, where it gives rise to a "presumptive connecting factor" linking the dispute to the forum (see *Club Resorts*). If you think that distinction seems odd, you are not alone (see para 39). Anyway, does the phrase also have the same meaning in these two contexts? The court expressly leaves that issue for another day, noting only that if there is a difference, the threshold for carrying on business would be lower in the assumed jurisdiction cases than the presence cases (para 40).

Returning to the issue not pursued by the parties: the status of ricochet judgments under registration schemes. The court could have said nothing on this given the position of the parties and the conclusion under section 3(b). However, Chief Justice Wagner and three of his colleagues expressly note that this is an "open question" and leave it for the future (paras 25-26). Saying the question is open is significant because there is *obiter dicta* in *Chevron* that these judgments

are caught by the schemes (para 25). Indeed, Justice Cote writes separate reasons (despite concurring on all of the section 3(b) analysis) in order to set out her view that a recognition decision is caught by the scheme, and she points specifically to *Chevron* as having already made that clear (para 54). Her analysis of the issue is welcome, in part because it is a reasonably detailed treatment. Yet the other judges are not persuaded and, as noted, leave the matter open.

I find powerful the argument that the drafters of these statutory schemes did not contemplate that they would cover recognition judgments, and so despite their literal wording they should be read as though they do not. This would avoid subverting the purpose of the schemes (see para 25). On this see the approach of the Court of Appeal for England and Wales in 2020 in *Strategic Technologies Pte Ltd*, a decision Justice Cote criticizes for being "unduly focused" on what the statutory scheme truly intended to achieve and lacking fidelity to the actual language it uses (paras 67-68). I also find Justice Cote's distinctions (paras 60-64) between foreign recognition judgments (which she would include) and foreign statutory registrations (which she would not include) unpersuasive on issues such as comity and judicial control.

In any event, unless this issue gets resolved by amendments to the statutory schemes to clarify their scope, this issue will require a conclusive resolution.

Indonesia deposits its instrument of accession to the HCCH 1961 Apostille Convention

Guest post by Priskila P. Penasthika, Ph.D. Researcher at Erasmus School of Law – Rotterdam and Lecturer in Private International Law at Universitas Indonesia.

Indonesian Accession to the HCCH 1961 Apostille Convention

After almost a decade of discussions, negotiations, and preparations, Indonesia

has finally acceded to the HCCH 1961 Apostille Convention. In early January this year, Indonesia enacted Presidential Regulation Number 2 of 2021, signed by President Joko Widodo, as the instrument of accession to the HCCH 1961 Apostille Convention. The HCCH 1961 Apostille Convention is the first HCCH Convention to which Indonesia became a Contracting Party.

In its accession to the HCCH 1961 Apostille Convention, Indonesia made a declaration to exclude documents issued by the Prosecutor Office, the prosecuting body in Indonesia, from the definition of public documents whose requirements of legalisation have been abolished in accordance with Article 1(a) of the HCCH 1961 Apostille Convention.

In accordance with Article 12 of the Convention, Indonesia deposited its instrument of accession to the HCCH 1961 Apostille Convention with the Ministry of Foreign Affairs of the Netherlands on 5 October 2021. The ceremony was a very special occasion because it coincided with the celebration of the 60th anniversary of the Convention. Therefore, the ceremony was part of the Fifth Meeting of the Special Commission on the practical operation of the HCCH 1961 Apostille Convention and witnessed by all Contracting Parties of the Convention.

The Minister of Law and Human Rights of the Republic of Indonesia, Yasonna H. Laoly, joined the ceremony and delivered a speech virtually via videoconference from Jakarta. Minister Laoly voiced the importance of the HCCH 1961 Apostille Convention for Indonesia and underlined Indonesia's commitment to continue cooperating with the HCCH.

Indonesia's accession to the HCCH 1961 Apostille Convention brings good news for the many parties concerned. The current process of public document legalisation in Indonesia still follows a traditional method that is highly complex, involves various institutions, and is time-consuming and costly. Because of the accession to the Convention, the complicated and lengthy procedure will be simplified to a single step and will involve only one institution – the designated Competent Authority in Indonesia. Referring to Article 6 of the HCCH 1961 Apostille Convention, in its accession to the Convention, Indonesia designated the Ministry of Law and Human Rights as the Competent Authority. When the HCCH 1961 Apostille Convention enters into force for Indonesia, this Ministry will be responsible for issuing the Apostille certificate to authenticate public documents in Indonesia for use in other Contracting Parties to the Convention.

A Reception Celebrating the 60th Anniversary of the HCCH 1961 Apostille Convention and Indonesian Accession

To celebrate the 60th anniversary of the HCCH 1961 Apostille Convention and Indonesia's accession to it, an evening reception was held on 5 October 2021 at the residence of the Swiss ambassador to the Kingdom of the Netherlands in The Hague. The reception was organised at the invitation of His Excellency Heinz Walker-Nederkoorn, Swiss Ambassador to the Kingdom of the Netherlands, His Excellency Mayerfas, Indonesian Ambassador to the Kingdom of the Netherlands, and Dr Christophe Bernasconi, Secretary-General of the HCCH. Representatives of some Contracting Parties to the HCCH 1961 Apostille Convention attended the reception; among other attendees were the representatives from recent Contracting Parties such as the Philippines and Singapore, as well as some of the earliest signatories, including Greece, Luxembourg, and Germany.

The host, Ambassador Walker-Nederkoorn, opened the reception with a welcome speech. It was followed by a speech by Ambassador Mayerfas. He echoed the statement of Minister Laoly on the importance of the HCCH 1961 Apostille Convention for Indonesia, especially as a strategy to accomplish the goals of Vision of Indonesia 2045, an ideal that is set to commemorate the centenary of Indonesian independence in 2045. Ambassador Mayerfas also emphasised that Indonesia's accession to the HCCH 1961 Apostille Convention marked the first important step for future works and cooperation with the HCCH.

Thereafter, Dr Christophe Bernasconi warmly welcomed Indonesia as a Contracting Party to the HCCH 1961 Apostille Convention in his speech at the reception. He also voiced the hope that Indonesia and HCCH continue good cooperation and relations, and invited Indonesia to accede to the other HCCH Conventions considered important by Indonesia.

The Entry into Force of the HCCH 1961 Apostille Convention for Indonesia

Referring to Articles 12 and 15 of the HCCH 1961 Apostille Convention, upon the deposit of the instrument of accession, there is a period of six months for other Contracting Parties to the Convention to raise an objection to the Indonesian accession. The HCCH 1961 Apostille Convention will enter into force for Indonesia on the sixtieth day after the expiration of this six-month period. With

great hope that Indonesia's accession will not meet any objection from the existing Contracting Parties to the Convention, any such objection would affect only the entry into force of the Convention between Indonesia and the objecting Contracting Party. The HCCH 1961 Apostille Convention will therefore enter into force for Indonesia on 4 June 2022.

A more in-depth analysis (in Indonesian) concerning the present procedure of public document legalisation in Indonesia and the urgency to accede to the HCCH 1961 Apostille Convention can be accessed here. An article reporting the Indonesian accession to the HCCH 1961 Apostille Convention earlier this year can be accessed here.

United Kingdom Supreme Court confirms that consequential loss satisfies the tort gateway for service out of the jurisdiction

This post is written by Joshua Folkard, Barrister at Twenty Essex.

In *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2021] UKSC 45 ("***Brownlie* II**"), the Supreme Court held as a matter of *ratio* by a 4:1 majority that consequential loss satisfies the 'tort gateway' in Practice Direction ("**PD**") 6B, para. 3.1(9)(a).

Background

PD 6B, para. 3.1(9)(a) provides that tort claims can be served out of the

jurisdiction of England & Wales where "damage was sustained, or will be sustained, within the jurisdiction". *Brownlie* concerned a car accident during a family holiday to Egypt, which tragically claimed the lives of Sir Ian Brownlie (Chichele Professor of Public International Law at the University of Oxford) and his daughter Rebecca: at [1], [10] & [91]. On her return to England, however, Lady Brownlie suffered consequential losses including bereavement and loss of dependency in this jurisdiction: at [83].

The question whether mere consequential loss satisfies the tort gateway had been considered before by the Supreme Court in the very same case: *Brownlie v Four Seasons* [2017] UKSC 80; [2018] 2 All ER 91 ("***Brownlie* I**"). By a 3:2 majority expressed "entirely *obiter*" (*Brownlie II*, at [45]) the Court had answered affirmatively: [48]-[55] (Baroness Hale), [56] (Lord Wilson) & [68]-[69] (Lord Clarke). However, the *obiter* nature of that holding combined with a forceful dissent from Lord Sumption (see [23]-[31]) had served to prolong uncertainty on this point.

Majority's reasoning

When asked the same question again, however, a differently-constituted majority of the same Court gave the same answer. Lord Lloyd-Jones (with whom Lords Reed, Briggs, and Burrows agreed: see [5] & [7])) concluded that there was "no justification in principle or in practice, for limiting 'damage' in paragraph 3.1(9)(a) to damage which is necessary to complete a cause of action in tort or, indeed, for according any special significance to a place simply because it was where the cause of action was completed": at [49]. The 'consequential' losses suffered in England were accordingly sufficient to ground English jurisdiction for the tort claims.

Three main reasons were given. First, Lord Lloyd-Jones held that there had been no "assimilation" of the tests at common law and under the Brussels

Convention/Regulation, which would have been "totally inappropriate" given the "fundamental differences between the two systems": at [54]-[55]. Second, his Lordship pointed to what he described as an "impressive and coherent line" of (mostly first-instance) authority to the same effect: at [64]. Third, it was said that the "safety valve" of *forum conveniens* meant that there was "no need to adopt an unnaturally restrictive reading of the domestic gateways": at [77].

Economic torts?

What is now the position as regards pure economic loss cases? Although Lord Lloyd-Jones concluded that the term "damage" in PD 6B, para. 3.1(9)(a) "simply refers to actionable harm, direct or indirect, caused by the wrongful act alleged" (at [81]), his Lordship expressly stated that:

- "I would certainly not disagree with the proposition, supported by the economic loss cases, that to hold that the mere fact of any economic loss, however remote, felt by a claimant where he or she lives or, if a corporation, where it has its business seat would be an unsatisfactory basis for the exercise of jurisdiction": at [76].

- "The nature of pure economic loss creates a need for constraints on the legal consequences of remote effects and can give rise to complex and difficult issues as to where the damage was suffered, calling for a careful analysis of transactions. As a result, the more remote economic repercussions of the causative event will not found jurisdiction": at [75].

The status of previous decisions on the meaning of PD 6B, para. 3.1(9)(a) in economic tort cases appears to have been called into doubt by *Brownlie II* because (as noted by Lord Leggatt, dissenting: at [189]) those decisions had relied upon an "inference" that PD 6B, para. 3.1(9)(a) should be interpreted

consistently with the Brussels Convention/Regulation. That approach was, however, rejected by both the majority and minority of the Supreme Court: at [74] & [189]. It therefore appears likely that the application of *Brownlie II* to economic torts will be the subject of significant future litigation.

Which law governs disputes involving corporations?

Guest post by Dr Sagi Peari, Senior Lecturer/Associate Professor at the University of Western Australia

When it comes to the question of the applicable law that governs disputes involving corporations: one must make a sharp distinction between two principal matters: (1) matters relating to external interactions of corporation (such as disputes between a corporation and other external actors, such as other business entities or individuals); and (2) matters relating to the internal interactions of a corporation (such as disputes within the corporate structure or litigation between a corporation and its directors). A claim of a corporation against another in relation to a breach of contract between the two is an example of a dispute related to external affairs of a corporation. A claim of a corporate shareholder against a director in the firm is an example of a dispute concerning corporate internal affairs.

The division between external and internal affairs of corporation is an important one for the question of applicable law. A review of the case law suggests a strong tendency of the courts to apply the same choice-of-law rules applicable to private individuals. Thus, the general rule of the place of tort applies equally to corporations and private individuals.[1] In similar, the advancing principle of party autonomy[2] does not distinguish between corporations and other litigants on its operational level. The very fact that litigation involves a corporation does not seem *prima facie* to affect the identity of the applicable law rules.

The situation becomes dramatically different in cases concerning the internal

affairs of a corporation. These are the situations involving claims between the corporate actors (i.e. executives, shareholders and directors) and claims between those actors and the corporation itself. Here, different considerations seem to apply. *First*, internal affairs of corporations tend to be excluded by the various international statutes aiming to harmonise the applicable law rules.[3] *Second*, there is a clear tendency of the rules to adhere to a single connecting factor (such as the place of incorporation or corporate headquarters with some further constitutional implications[4]) to determine the question of the applicable law. *Thirdly*, there is a clear tendency of rejecting the party autonomy principle in this sphere according to which corporate actors are not free to determine the applicable law to govern their dispute.[5]

One of the neglected frameworks for addressing the external/internal affairs distinction relates to the classical corporate law theory on the nature of corporations and the relationships within the corporate structure. Thus, the classical vision of corporations perceives a corporation as an artificial entity that places the state at the very centre of the corporate creation, existence and activity.[6] Another, perhaps contradictory vision, challenges the artificial nature of corporation. It views corporation as an independent moral actor what dissects its existence from the originating act of incorporation.[7] Lastly, the third vision of corporation evaluates the corporate existence from the internal point of view by focusing on the bundle/nexus of contracts within the corporate structure.[8]

One could argue that an exercise of tackling the various theories of corporations could provide an invaluable tool for a better understanding of the internal/external division and subsequently shed light on the question of applicable law rules. Thus, for example, the traditional insistence of choice-of-law to equalise between corporations and private individuals seems to correlate with the 'personality' vision of corporation. On a related note, the insistence of the choice-of-law doctrine on a single connecting factor that denies party autonomy seems to be at odds with the nexus-contract theory and aligns with the traditional artificial entity theory of the corporation.

From this perspective, placing this question within the conceptual framework of corporate law could enable us to grasp the paradigmatic nature of the division and contemplate on whether the various suggestions for reform in the area of choice-of-law rules applicable to corporations do not just correlate with the underlying concerns and rationales of private international law/conflict of laws,

but also those of corporate law.

I have tackled these (and other) matters in my recent article published in the 45 (3) *Delaware Journal of Corporate Law* 469-530 (2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3905751.

[1] See eg Regulation 864/2007, on the Law Applicable to Non-Contractual Obligations (Rome II), 2007 O.J. (L 199) 40 (EC), art 4 (1).

[2] See eg Hague Principles on Choice of Law in International Commercial Contracts, 2015.

[3] See eg Regulation 864/2007, on the Law Applicable to Non-Contractual Obligations (Rome II), 2007 O.J. (L 199) 40 (EC), art 1 (2) (f).

[4] See eg Case C-212/97, *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*, 1999 E.C.R. I-1459, 2 C.M.L.R. 551 (1999).

[5] See eg Hague Principles, Commentaries, 1.27-1.29.

[6] See eg *Dartmauth College v Woodward* 17 U.S. 518, 636 (1819)

[7] See eg Peter A French, 'Responsibility and the Moral Role of Corporate Entities', in *Business as Humanity* (Thomas J Donaldson and RE Freeman eds, 1994) 90.

[8] Of course, the distinction between the above-mentioned three theories is not sharp and variations and overlaps have been suggested over the years in the corporate law literature.