The Hidden Treasure Trove of Conflicts of Law: the Case Law of the Mixed Courts of the Colonial Era

Guest post by Willem Theus, PhD Researcher (KULeuven, cotutelle with UCLouvain)

The history of private international law (or 'conflict of laws') is incomplete. Private international law textbooks have always referred to the essentials of the history of our discipline.[1] However, these essentials are often solely based on the history of conflict of laws in the West and on the works of western authors such as Huber, Von Savigny and Story. It is undoubtedly true that these authors played an important role and that the "modern" conflict of laws finds it origin in 19thcentury Europe, when the split between private and public international law occurred.[2] This is however only one part of history.

Conflict of laws systems have been around much longer and are definitely not uniquely western. They were already present in the very first civilizations, with some rules of that ancient history still resembling our present-day rules.[3]Conflict of laws is "*the body of law that aims to resolve claims involving foreign elements*".[4] A state or international border is therefore not required to have a conflict of laws system,[5] only different jurisdictions and laws (i.e. legal pluralism[6]) are. A distinction could therefore be made between "external" (i.e. crossing an international State border) conflict of laws or private international law and "internal" conflict of laws (i.e. within one State).[7] Both the historical research and the contemporary study of our field should arguably reflect much more on precolonial and/or non-western conflict of laws systems and on the unique linkage between the national (or "internal") and international (or "external") spheres. This is especially so given that "external" conflict of laws rules seem to sometimes guide "internal" conflict of laws cases.[8] I offer one historical example to highlight the new perspectives that such a widening of scope could offer.

In a not so distant and colonial past, there were multiple “internationalized” or mixed courts in various regions and nations. The last such mixed court only closed its doors in 1980.[9] In general, mixed courts were local courts that employed a mixed (read mostly Western) bench, bar and legal system to deal with legal conflicts that had a mixed or “foreign” element, i.e. conflicts not exclusively related to one local or foreign resident population.[10] Those exclusively local or intra-foreigner -of the same nationality- legal conflicts were often dealt with by various local or consular courts. The mixed or “foreign” element was however often widely interpreted and therefore quickly kicked in, leading to overlapping jurisdictions in many instances and therefore to a conflict of laws system.

An example of such a set-up is the Tangier International Zone (1923-1956), a treaty-based multinational run zone, which remained under the Sovereignty of the Sultan of Morocco. It had various multinational institutions with local involvement. In the Zone, five different legal systems co-existed, each with their own courts. These were the American Consular Court, the Special Tribunal of the State Bank of Morocco, the Moroccan Sharia courts, the Moroccan Rabbinical courts and the Mixed Court. The latter dealt with all cases that had a “foreign” element (except American as they went to the aforementioned American Consular Court).[11] Both “internal” and “external” conflict of law systems in fact overlap here. Indeed the Mixed Court and the two Moroccan courts were “local” courts with the judges being formally appointed by the Sultan, whereas the American Consular Court was in essence an ad hoc American court in Tangier. The Special Tribunal was some sort of early investment protection court with very limited jurisdiction.

Naturally, in such a set-up conflict of laws cases were frequent, as illustrated by the Toledano-case which came before the Mixed Court. In 1949 a dispute between the heirs of the large inheritance of a Tangerine Jew, Isaac Toledano, broke out. The key question concerned the nationality of Isaac – and as such the questions of jurisdiction and applicable law. During his lifetime Isaac had become a Spanish citizen by naturalization, yet he had seemingly always lived in Morocco. Had he somehow lost his Moroccan citizenship? If so, the mixed courts would have jurisdiction and Spanish law would apply, leading his inheritance to be divided under all his children, including his married daughters. If not, the rabbinical courts of Tangier and rabbinical law would apply, leading to his inheritance to only go to his sons and unmarried daughters. On appeal the court overturned the

judgment of first instance that held that he had retained his Moroccan nationality. He was deemed to be Spanish and therefore Spanish law was to be applied.[12]

Such jurisdictional caselaw is only a part of this conflict of laws treasure trove. The caselaw of the mixed courts seemingly encompasses all types of conflict of laws questions and many other legal questions. I have to say seemingly, as the caselaw of the mixed courts has in recent times barely been studied and their archives (if known at all) are scattered throughout the globe. A closer look could undoubtedly open up new perspectives to conflict of laws, and some of these mixed courts' experiences and case-law could perhaps help to guide ever-recurring questions of personal status matters regarding foreigners. The Emirate of Abu Dhabi has for example reintroduced special personal status provisions for non-Muslim foreigners as reported on conflictoflaws recently. The courts also offer new perspectives for public international law as certain mixed courts acted as "true" international courts when interpreting their treaties. An example is the Court of Appeal of Mixed Court of Tangier going against the International Court of Justice in 1954 when it held that it alone had the authority to provide authoritative interpretations of the Zone's constitutive treaties.[13] The Mixed Courts could even open new perspectives to EU-law as many early key EU lawyers and judges have ties to certain Mixed Courts.[14] Much work is therefore still to be done. This piece is a call to arms for just that.

[1] Hatzimihail, N.E. (2021) *Preclassical Conflict of Laws*. Cambridge University Press 51-52.

[2] For an overview of this period see: Banu, R. (2018). *Nineteenth Century Perspectives on Private International Law*. Oxford University Press

[3] Yntema, Hessel E. (1953). The Historic Bases of Private International Law. *The American Journal of Comparative Law*, vol. 2, no. 3, 301. Yntema refers to the following text found in a Fayoum Papyri: "*Contracts between Greeks-who had established colonies in Egypt (red.)-and Egyptians, if in Greek form, should be tried before the chrematists, the Greek courts; if in Egyptian form, before the laocrites, the native courts, in accordance with the laws of the country*."

[4] Okoli, C.S.A. (2020). *Private International Law in Nigeria*. Hart, 3.

[5] Okoli, *Op.cit.*, 3-7; Yntema. *Op.cit.*, 299

[6] For a good overview of the different meanings of this term see: Benda-Beckmann, B. & Turner, B. (2018). Legal Pluralism, Social Theory, and the State. *Journal of Legal Pluralism and Unofficial Law*, *50*(3), 255–274

[7] This distinction is not new and is used in legislation. See for example: Non-application of This Regulation to Internal Conflicts of Laws. (2016). In A. Calvo Caravaca, A. Davì, & H. Mansel (Eds.), *The EU Succession Regulation: A Commentary* (pp. 521-529). Cambridge University Press.

[8] Okoli *Op.cit*, 3.

[9] Pacific Manuscripts Bureau, *Collection MS 1145: Judgements of the Joint Court of the New Hebrides*. Retrieved from <https://asiapacific.anu.edu.au/pambu/catalogue/index.php/judgements-of-joint-court-of-new-hebrides> accessed 13 December 2021. It was known as a 'Joint' Court and not 'Mixed' as there were only two powers involved: France and the UK. Although in French it was still referred to as a *Tribunal Mixte*. Mixed Courts mostly existed in countries that were not-directly colonized, yet still under heavy Western influence such as Siam, China and Egypt. They were mostly founded due to western distrust for the local legal systems and build forth on the principle of personal jurisdiction (and the connected later principle of extraterritoriality and the connected Capitulations and Unequal Treaties).

[10] Erpelding, M. (2020). Mixed Courts of the Colonial Era. In Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law*. Oxford University Press.

[11] Erpelding, M & Rherrousse, F. (2019) The Mixed Court of Tangier. In Héne Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law*. Oxford University Press, paras 22-24.

[12] de Radigues de Chenneviere, C. (5 April 1949). 'Procès Toledano'. Tangier, P 452/717, AF-12-A-3 (Diplomatic Archives of the Kingdom of Belgium)

[13] Grawitz, M. (1955). Arrêt du 13 août 1954. *Annuaire français de droit international*, *1*(1), 324–328

[14] Erpelding, M. (2020). International law and the European Court of Justice: the Politics of Avoiding History, *Journal of the History of International Law*,

22(2-3), 446-471.

New civil procedure rules in Singapore

New civil procedure rules in Singapore

New civil procedure rules (Rules of Court 2021) for the General Division of the High Court (excluding the Singapore International Commercial Court ('SICC')) have been gazetted and will be implemented on 1 April 2022. The reform is intended to modernise the litigation process and improve efficiency.[1] New rules for the SICC have also been gazetted and will similarly come into operation on 1 April 2022.

This update focuses on the rules which apply to the General Division of the High Court (excluding the SICC). New rules which are of particular interest from a conflict of laws point of view include changes to the rules on service out. The new Order 8 rule 1 provides that:

'(1) An originating process or other court document may be served out of Singapore with the Court's approval if it can be shown that the Court has the jurisdiction or is the appropriate court to hear the action.

…

(3) The Court's approval is not required if service out of Singapore is allowed under a contract between the parties.

…'

The current rules on service out is to be found in Order 11 of the Rules of Court. This requires that the plaintiff ('claimant' under the new Rules) establish that (1) there is a good arguable case that the action fits within one of the heads of Order 11; (2) there is a serious issue to be tried on the merits; and (3) Singapore is

forum conveniens.[2] The heads of Order 11 generally require a nexus to be shown between the parties or subject-matter of the action to Singapore and are based on the predecessor to the UK Civil Procedure Rules Practice Direction 6B paragraph 3.1. The wording of the new Order 8 rule 1(1) suggests a drastic departure from the current Order 11 framework; however, this is not the case.

There will be two alternative grounds of service out: either the Singapore court 'has the jurisdiction' to hear the action or 'is the appropriate court' to hear the action. The first ground of service out presumably covers situations such as where the Singapore court is the chosen court in accordance with the Choice of Court Agreements Act 2016,[3] which enacts the Hague Convention on Choice of Court Agreements into Singapore law. The second ground of service out i.e. that the Singapore court is the 'appropriate court' to hear the action could, on one view, be read to refer only to the requirement under the current framework that Singapore is *forum conveniens*. However, the Supreme Court Practice Directions 2021, which are to be read with the new Rules of Court, make it clear that the claimant still has to show:[4]

'(a) there is a good arguable case that there is sufficient nexus to Singapore;

(b) Singapore is the *forum conveniens*; and

(c) there is a serious question to be tried on the merits of the claim.'

The Practice Directions go on to give as examples of a sufficient nexus to Singapore factors which are substantively identical to the current Order 11 heads.[5] As these are non-exhaustive examples, the difference between the current rules and this new ground of service out is that the claimant may still succeed in obtaining leave to serve out even though the action does not fit within one of the heads of the current Order 11. This is helpful insofar as the scope of some of the heads are uncertain; for example, it is unclear whether an action for a declaration that a contract does not exist falls within the current contractual head of service out[6] as there is no equivalent to the UK CPR PD 6B paragraph 3.1(8).[7] Yet at the same time, the Court of Appeal had previously taken a wide interpretation of Order 11 rule 1(n), which reads: 'the claim is made under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap. 65A), the Terrorism (Suppression of Financing Act (Cap. 325) or any other written law'.[8] The phrase 'any written law' was held not to be read

ejusdem generis[9] and would include the court's powers, conferred by s 18 of the Supreme Court of Judicature Act read together with paragraph 14 of the First Schedule, to 'grant all reliefs and remedies at law and in equity, including damages in addition to, or in substitution for, an injunction or specific performance.'[10] This interpretation of Order 11 rule 1(n) arguably achieves much the same effect as the new 'appropriate court' ground of service out.

The new Order 8 rule 1(3) is to be welcomed. However, it is important to note that a choice of court agreement for the Singapore court which is unaccompanied by an agreement to permit service out of Singapore will still require an application for leave to serve out under the 'has jurisdiction' ground (if the Choice of Court Agreements Act is applicable) or the 'appropriate court' ground (if the Choice of Court Agreements Act is not applicable).

Other provisions in the new Rules of Court 2021 which are of interest deal with a challenge to the jurisdiction of the court. A defendant may challenge the jurisdiction of the court on the grounds that the court has no jurisdiction to hear the action or the court should not exercise jurisdiction to hear the action. A challenge on either ground 'is not treated as a submission to jurisdiction'.[11] This seemingly contradicts the established common law understanding that a jurisdictional challenge which attacks the existence of the court's jurisdiction (a setting aside application) does not amount to a submission to the court's jurisdiction, whereas a jurisdictional challenge which requests the court not to exercise the jurisdiction which it has (a stay application) amounts to a submission to the court's jurisdiction.[12] Further to that, the provisions which deal with challenges to the exercise of the court's jurisdiction are worded slightly differently depending on whether the action is commenced by way of an originating claim or an originating application. For the former, Order 6 rule 7(5) provides that 'The challenge to jurisdiction may be for the reason that – … (b) the Court should not exercise jurisdiction to hear the action.' For the latter, Order 6 rule 12(4) elaborates that 'The challenge to jurisdiction may be for the reason that – … (b) the Court should not exercise jurisdiction because it is not the appropriate Court to hear the action.' The difference in wording is puzzling because one assumes that the same types of challenges are possible regardless of whether the action is commenced by way of an originating claim or originating application – eg, challenges based on *forum non conveniens*, abuse of process or case management reasons. Given use of the word 'may' in both provisions though, it

ought to be the case that the different wording does not lead to any substantive difference on the types of challenges which are permissible.

[1] See media release here.

[2] *Zoom Communications v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 (CA).

[3] Cap 39A.

[4] Supreme Court Practice Directions 2021 (To be read with Rules of Court 2021), p 72.

[5] *Ibid*, pp 72-73.

[6] Rules of Court, Order 11 rule 1(d).

[7] 'A claim is made for a declaration that no contract exists …'.

[8] *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 (CA).

[9] *Ibid*, [168]-[170].

[10] *Ibid*, [161].

[11] Rules of Court 2021, Order 6 rule 7(6) (originating claim); Order 6 rule 12(5) (originating application.

[12] *Zoom Communications v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 (CA).

CJEU Rules on the interplay between Brussels IIA and Dublin

III

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In a ruling of 2 August 2021 (*A v. B*, C-262/21 PPU), the Court of Justice of the European Union (CJEU) clarified that a child who is allegedly wrongfully removed, meaning without consent of the other parent, should not return to his/her habitual residence if such a removal took place as a consequence of the ordered transfer determining international responsibility based on the Dublin III Regulation. The judgment is not available in English and is the first ever emanating from this Court concerning the Brussels IIA-Dublin III interplay.

The Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels IIA Regulation) complements the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, and is applicable to 26 EU Member States, including Finland and Sweden. The Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Dublin III), is pertinent for asylum seekers' applications commenced at least in one of the 31 Dublin Member States (EU/EFTA), comprising Finland and Sweden, bound by this Regulation.

Questions for a CJEU urgent preliminary ruling:

The CJEU was referred five questions, but only addressed the first two.

'(1) Must Article 2(11) of [Regulation No 2201/2003], relating to the wrongful removal of a child, be interpreted as meaning that a situation in which one of the parents, without the other parent's consent, removes the child from his or her place of residence to another Member State, which is the Member State responsible under a transfer decision taken by an authority in application of Regulation [No 604/2013], must be classified as wrongful removal?

(2) If the answer to the first question is in the negative, must Article 2(11) [of

Regulation No 2201/2003], relating to wrongful retention, be interpreted as meaning that a situation in which a court of the child's State of residence has annulled the decision taken by an authority to transfer examination of the file, and to take no further action since the mother and child have left the State of residence, but in which the child whose return is ordered, no longer has a currently valid residence document in his or her State of residence, or the right to enter or to remain in the State in question, must be classified as wrongful retention?'

Contents of the CJEU judgment:

In 2019, a married couple, third-State nationals (Iran), both with regard to Brussels IIA and Dublin III respective Member States, moved from Finland to settle in Sweden. Since 2016, the couple had lived in Finland for around three years. In 2019, a child was born in Sweden. The couple was exercising joint custody over the child in conformity with Swedish law. The mother was holding a family residency permit, in both Finland and Sweden, through the father's employment rights. The approved duration of the mother's residency right in Finland was around one year longer than in Sweden.

Two months after the child's birth, the latter and the mother were placed under Swedish residential care (hostel). Essentially, the Swedish administrative decision to uphold this *care protective measure* was the result of the father's violence against the mother, so to protect the child from the risks against his development and health, as well as to prevent his wrongful removal to Iran possibly envisaged by his father. Limited contact rights were granted to the father. A residency permit was requested, individually, by the father and the mother based on the *family lien* – request respectively filed on 21 November and 4 December 2019.

In August 2020, the mother submitted an asylum request, for the child and herself, before the Swedish authorities. The same month, the Finnish authorities declared themselves internationally responsible over the mother's and child's asylum request by virtue of article 12(3) of Dublin III – based on the longer duration of the residency permit previously delivered according to Finnish law. In October 2020, the Swedish authorities dismissed the father's and rejected the mother's respective residency and asylum requests, and ordered the transfer of the child and his mother to Finland. Taking into account the father's presence as a threat against the child, the limited contacts established between them, and the

father's residency right in Finland, the Swedish authorities concluded that the child's separation from his father was not against his best interests and that the transfer was not an obstacle to the exercise of the father's visitation right in Finland. In November 2020, the mother and the child moved to Finland pursuant to article 29(1) of Dublin III. In December 2020, the father filed an appeal against the Swedish court's decisions, which was upheld by the Swedish Immigration Tribunal ('*Migrationsdomstolen i Stockholm*'), although it resulted later to be dismissed by the Swedish Immigration Authorities, and then rejected by the Immigration Tribunal, due to the child's relocation to Finland (CJEU ruling, § 23-24).

In January 2021, the father filed a new request before the Swedish authorities for family residency permit on behalf of the child, which was *still ongoing at the time of this judgment* (CJEU ruling, § 25). During the same month, the mother deposited an asylum application before the Finnish authorities, which was *still ongoing at the time of this judgment – the mother's and child's residency permits were withdrawn by the Finnish authorities* (CJEU ruling, § 26). In April 2021, the Swedish Court ('*Västmanlands tingsrätt*'), notwithstanding the mother's objection to their jurisdiction, granted divorce, sole custody to the mother and refused visitation right to the father – upheld in appeal ('*Svea hovrätt*'). Prior to it, the father filed an application for child return before the Helsinki Court of Appeal ('*Helsingin hovioikeus*'), arguing that the mother had wrongfully removed the child to Finland, on the grounds of the 1980 Hague Convention. The return application was rejected. On the father's appeal, the Finnish authorities stayed proceedings and requested an urgent preliminary ruling from the CJEU, in line with article 107 of the Luxembourg Court's rules of procedure.

CJEU reasoning:

The Court reiterated that a removal or retention shall be wrongful when a child holds his habitual residence in the requesting State and that a custody right is attributed to, and effectively exercised by, the left-behind parent consistently with the law of that State (§ 45). The primary objectives of the Brussels IIA Regulation, particularly within its common judicial space aimed to ensure mutual recognition of judgments, and the 1980 Hague Convention are strictly related for abduction prevention and immediate obtainment of effective child return orders (§ 46).

The Court stated that, pursuant to articles 2 § 11 and 11 of the Brussels IIA

Regulation, the child removal to a Member State other than the child's habitual residence, essentially performed by virtue of the mother's right of custody and effective care while executing a transfer decision based on article 29 § 1 of the Dublin III Regulation, should not be contemplated as wrongful (§ 48). In addition, the absence of 'take charge' request following the annulment of a transfer decision, namely for the purposes of article 29 § 3 of Dublin III, which was not implemented by the Swedish authorities, would lead the retention not to being regarded as unlawful (§ 50). Consequently, as maintained by the Court, the child's relocation was just a consequence of his *administrative situation* in Sweden (§ 51). A conclusion opposing the Court reasoning would be to the detriment of the Dublin III Regulation objectives.

Some insights from national precedents:

In the case ATF 5A_121/2018, involving a similar scenario (cf. FamPra.ch 1/2019), the Swiss Federal Court maintained that a child born in Greece, who had lived for more than a year with his mother in Switzerland, had to be returned to Greece (place of the left-behind parent's residence) based on the established child's habitual residence prior to the wrongful removal to Switzerland, notwithstanding his pending asylum application in the latter State. Indeed, the Greek authorities had been internationally responsible over the child's asylum request on the basis of his father's residence document. However also in that case it was alleged that the father had been violent against the mother and that a judgment ordering the child's return to Greece, *alone or without his mother* (§ 5.3), would not have caused harm to the child under the 1980 Hague Convention, art. 13.

In the case G v. G [2021] UKSC 9, involving a slightly different scenario in that no multiple asylum requests were submitted, the UKSC judged that a child, of eight years old born in South Africa, should not be returned – *stay of proceedings* – until an asylum decision, based on an asylum application filed in England, had been taken by the UK authorities. The UKSC considered that, although an asylum claim might be tactically submitted to frustrate child return to his/ her country of habitual residence prior to wrongful removal or retention, it is vital that an asylum claim over an applicant child, accompanied or not by his/ her primary carer, is brought forward while awaiting a final decision – in conformity with the 'non-refoulement' principle pursuant to article 33 of the 1951 Geneva Convention relating to the Status of Refugees.

Comment:

The CJEU ruling is momentous dictum in that it holds the *not any longer uncommon intersection* of private international law and vulnerable migration, especially with regard to children in need of international protection in accordance with both Brussels IIA and Dublin III Regulations (cf. Brussels IIA, § 9, and Dublin III, article 2 lit. b). The Luxembourg Court clarifies that a child who is allegedly wrongfully removed, meaning without consent of the other parent, should not return to his/ her habitual residence if such a removal took place as a consequence of the ordered transfer determining international responsibility based on the Dublin III Regulation. It is emphasised that, contrary to the Swiss judgment, the child in the instant case did not have any personal attachments with Finland at the time of the relocation – *neither by birth nor by entourage* – country of destination for the purposes of the Dublin III transfer. Moreover, the 'transfer of responsibility' for the purposes of Dublin III should be contemplated as an *administrative decision only*, regardless of the child's habitual residence.

It is observed as a preamble that, according to a well-known CJEU practice, a child should not be regarded as to establish a habitual residence in a Member State in which he or she has never been physically present (CJEU, *OL v. PQ*, 8 June 2017, C-111/17 PPU; CJEU, *UD v. XB*, 17 October 2018, C-393/18 PPU). Hence, it appears procedurally just that the Swedish courts retained international jurisdiction over custody, perhaps with the aim of Brussels IIA, article 8 – the child's habitual residence at the time of the seisin, which occurred *prior to the transfer to Finland*. On that procedural departure, the Swedish courts custody judgment is *substantially fair* in that the father's abuse against the mother is indeed an element that should be retained for parental responsibility, including abduction, merits (CJEU ruling, § 48; UKSC judgment, § 62).

However, it is argued here that, particularly given that at the relevant time Sweden was the child's place of birth where he lived for around 14 months with his primary carer, the Swedish and the Finnish authorities might have '*concentrated*' jurisdiction and responsibility in one Member State, namely Sweden, ultimately to *avoid further length and costs related to the asylum procedures* in line with the same Dublin III objectives evoked by the CJEU – namely "*guarantee effective access to the procedures for granting international protection and not to compromise the objective of the rapid processing of applications for international protection*" (§ 5, Dublin III). Conversely, provided

that the *child's relocation was not wrongful* as indicated by the Finnish authorities, and confirmed by the CJEU ruling, the Swedish authorities may have opted for the 'transfer of jurisdiction' towards the Finnish authorities on the basis of Brussels IIA, article 15(1) lit. b, indicating the *child's new habitual residence* (cf. Advocate General's opinion, § 41) following the lawful relocation (cf. article 15.3., lit. a).

Importantly, concentration of jurisdiction-responsibility over a child seeking international protection in one Member State, in light of the Brussels IIA-Dublin III interplay, would essentially determine a coordinated interpretation of the child's best interests (cf. Brussels II, § 12, and Dublin III, § 13), avoiding two parallel administrative-judicial proceedings in two Member States whose authorities may not always come to similar views, as opposed to the present case, over such interests (AG's opinion, § 48). This is particularly true, if the child (non-)return to his/ her habitual residence might likely be influenced, as stated in the CJEU ruling, by his/ her administrative situation, which would potentially have an impact on the international custody jurisdiction determination. An example of controversial outcome, dealing with child abduction-asylum proceedings, is the profoundly divergent opinion arising from the UK and Swiss respective rulings, to the extent of child return in a situation where the mother, primary carer, *is or could* be subject to domestic violence in the requesting State.

Similarly, the UKSC guidance, in '*G v. G*', affirmed: "Due to the time taken by the in-country appeal process this bar is likely to have a devastating impact on 1980 Hague Convention proceedings. I would suggest that this impact should urgently be addressed by consideration being given as to a *legislative solution* […] However, whilst the court does not determine the request for international protection *it does determine the 1980 Hague Convention proceedings so that where issues overlap the court can come to factual conclusions on the overlapping issues* so long as the prohibition on determining the claim for international protection is not infringed […] First, as soon as it is appreciated that there are related 1980 Hague Convention proceedings and asylum proceedings *it will generally be desirable that the Secretary of State be requested to intervene in the 1980 Hague Convention proceedings*" (UKSC judgment, § 152-157). Clearly, the *legislative solution* on a more efficient coordination of child abduction-asylum proceedings, invoked by the UK courts, may also be raised with the EU [and Swiss] legislator, considering their effects on related custody orders.

– *Cross posted at the* EAPIL blog*.*

The Tango Between Brussels Ibis Regulation and Rome I Regulation under the Beat of Package Travel Directive

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The article titled 'The Tango Between Art.17(3) Brussels Ibis and Art.6(4)(b) Rome I under the Beat of Package Travel Directive' is published on Maastricht Journal of European and Comparative Law with open access, available at https://doi.org/10.1177%2F1023263X211048595

In the field of European private international law, Brussels Ibis Regulation and Rome I Regulation are dancing partners that work closely with different roles. When it comes to consumer protection, Brussels Ibis Regulation is the leader and Rome I Regulation is the follower, since special protective rules over consumer contracts were first introduced in Articles 13–15 Brussels Convention[1] and then followed by Article 5 Rome Convention.[2]

1. **Package travel in Article 17(3) Brussels Ibis and Article 6(4)(b) Rome I**

Package travel tourists are explicitly protected as consumers under Article 6(4)(b) Rome I, but not under Article 17(3) Brussels Ibis since it does not expressly mention the term 'package travel'. Instead, the term used in Article 17(3) Brussels Ibis is the same as that in Article 5(5) Rome Convention, which has been abandoned by its successor Article 6(4)(b) Rome I. Such discrepancy is widened with the replacement of Directive 90/314 by Directive 2015/2302 with the

enlarged notion of package travel. This means that when Article 6(4)(b) Rome I Regulation is dancing under the beat of Directive 2015/2302, Article 17(3) Brussels Ibis Regulation is still dancing under the beat of Article 5(5) 1980 Rome Convention.

2. A uniform concept of package travel under Directive 2015/2302

The CJEU clarified in the *Pammer* judgment that the concept 'a contract which, for an inclusive price, provides for a combination of travel and accommodation' in Article 15(3) Brussels I should be *interpreted in line with* Article 6(4)(b) Rome I by reference to Directive 90/314.[3] The CJEU did not follow the opinion of the Advocate General, according to which the concept prescribed in Article 15(3) Brussels I *has to be interpreted in exactly the same way as* the term 'package' enshrined in Article 2(1) Directive 90/314.[4] The court stated that the concept in Article 15(3) Brussels I is 'close to'[5] the notion package in Directive 90/314. The wording 'close to', instead of 'identical' or 'the same as', indicates that the CJEU did not intend to interpret such two terms as having exactly the same meaning.

Since Article 15(3) Brussels I remains unchanged in its successor Article 17(3) Brussels Ibis, this article argues that Art.17(3) Brussels Ibis Regulation has been two steps behind Art.6(4)(b) Rome I when it comes to the protection of consumers in package travel contracts. In order to close the gap, a uniform concept of package travel should be given. It is suggested that Art.17(3) Brussels Ibis should adopt the concept of package travel provided in Directive 2015/2302.

3. Deleting package travel contracts from the exception of transport contracts

Despite the adoption of a uniform concept, Article 17(3) Brussels Ibis and Article 6 Rome I only cover packages containing transport, as an exception of transport contracts. Packages not including transport do not fall under the exception of transport contracts. Since all package travel contracts should be protected as consumer contracts, regardless of containing transport or not, it is more logical to delete package travel contracts from the exception of transport contracts in Art.6(4)(b) Rome I as well as Art.17(3) Brussels Ibis and establish a separate provision to regulate package travel contracts.

To this end, Article 17(3) Brussels Ibis and Article 6(4)(b) Rome I can be

simplified as 'This Section/article shall not apply to a contract of transport/carriage', whereas package travel contracts are expressly regulated as consumer contracts in a separate provision. In this regard, the framework in Article 5 Rome Convention is a better solution, according to which package travel contracts can be expressly included in Article 17 Brussels Ibis/Article 6 Rome I as follows:

Notwithstanding Article 17(3) Brussels Ibis/Article 6(4)(b) Rome I, this Section/article shall apply to a contract relating to package travel within the meaning of Council Directive 2015/2302/EU of 25 November 2015 on package travel and linked travel arrangements.

[1] The predecessor of Articles 17-19 Brussels Ibis Regulation.

[2] The predecessor of Article 6 Rome I Regulation.

[3] Joined cases C-585/08 and C-144/09 *Pammer and Hotel Alpenhof*, ECLI:EU:C:2010:740, para. 43

[4] Joined cases C-585/08 and C-144/09 *Pammer and Hotel Alpenhof*, ECLI:EU:C:2010:273, opinion of advocate general, para. 49.

[5] Case C-585/08 Pammer, ECLI:EU:C:2010:740, para. 36.

Chinese Court Enforces Singaporean Judgment based on De Jure Reciprocity

By Zheng Sophia Tang, Wuhan University Institute of International Law and Academy of International Law and Global Governance

Chinese courts recognize and enforce foreign civil and commercial judgments under two circumstances: the existence of treaty obligations and the existence of reciprocity. In the past, Chinese courts relied solely on de facto reciprocity to enforce foreign judgments, which requires evidence to prove the courts in the foreign country enforced Chinese judgments in previous cases. Some courts have adopted an even tougher approach and rejected enforcing foreign judgments even though one positive precedent exists in the foreign country, arguing one case is not enough to prove reciprocity. The application of de facto reciprocity causes difficulty to enforce foreign judgments in Chinese courts. It makes enforcement impossible if no application was made to the foreign court to enforce Chinese judgment in the past, and if the other country also adopts the de facto reciprocity. It also makes proving reciprocity difficulty, especially if the foreign country has no comprehensive case report system.

After China commenced the One-Belt-One-Road initiative, efforts were made to relax the threshold to prove reciprocity. The Supreme Court has proposed, in two OBOR opinions, that China should adopt a presumed reciprocity approach, which presumes reciprocity exists if the other country demonstrates intention to establish judicial cooperation with China and no negative precedence exists.[1] However, since these opinions are not legally binding, they are not enough to reverse court practice. Although more Chinese courts enforce foreign judgments after 2013, they still need the proof of one positive case in the foreign country.

20 July, 2021, Shanghai No 1 Intermediate Court decided to recognize and enforce the Singaporean monetary judgment.[2] Although de facto reciprocity already exists between China and Singapore and Chinese courts enforced Singaporean judgments based on de facto reciprocity in the past,[3] this case justifies the decision based on de jure reciprocity. The judgment states: “The reciprocal relationship exists between China and Singapore, because Chinese judgments can be recognized and enforced in Singapore under the same conditions. On the other hand, Singaporean High Court recognized and enforced Chinese judgments in the past, and precedents to recognize and enforce Singaporean judgments also exist in Chinese courts. It shows de facto reciprocal relationship also exists between China and Singapore.”

It is clear that this judgment discusses both de facto and de jure reciprocity. The

court considers whether Chinese judgments may be recognized and enforced in Singapore as a matter of law. However, proving de jure reciprocity is not easy. Unless the foreign law completely prohibits enforcing foreign judgments in the absence of treaty obligations, most law will provide conditions for foreign judgments enforcement. The conditions would allow foreign judgments enforced in certain circumstances and not others. In other words, no law would say foreign judgments can be recognized in all circumstances. How to assess if these conditions are enough to make enforcement possible in law? What if the foreign law provides different conditions to enforce foreign judgments from Chinese law? What if the foreign law require de facto reciprocity and China has not yet enforced judgments from this country, rendering enforcement of Chinese judgments practically impossible in the foreign court?

The Shanghai court adopts the equivalent condition test. It takes the seat of Singaporean court and imagine what may happen if this application is a Chinese judgment seeking Singaporean enforcement. It concludes that as far as Singaporean court can enforce Chinese judgments under the same condition, de jure reciprocity exists. In other words, it applies the Singaporean standard to assess enforceability of this judgment. The problem is it may lead to the result that between two countries de jure reciprocity exits in some cases but not others. As reciprocity refers to the relationship between two countries, it should be a systematic status, and not variable according to the different fact of a case.

Another difficulty is that it is usually hard for Chinese courts to know exactly how judicial decision of a foreign court may be made, especially how judicial discretion is going to be exercised in a foreign country. The assessment of the potential enforceability of Chinese judgments in the foreign court in the same condition can only be based on black-letter law which may not be so precise to test de jure reciprocity. Of course, it is arguable that de jure reciprocity only needs a general possibility for a foreign court to enforce Chinese judgments, but not specific Chinese judgments are definitely enforceable in the foreign country. If so, the equivalent condition test is not appropriate to assess de jure reciprocity.

One may suggest the legal comparability test. It argues that de jure reciprocity depends on whether the foreign law provide legally comparable conditions for FJR as Chinese law. This suggestion is also problematic, because many countries' law provide much lower threshold to enforce foreign law than Chinese law. For example, they do not require reciprocity as a pre-condition. These laws are not

comparable to Chinese law, but it is hard to argue that Chinese judgments cannot be enforced in those countries as a matter of law.

The third suggestion is the no higher threshold test. It suggests that if the foreign law does not make it more difficult to enforce Chinese judgments, de jure reciprocity exists. However, what if the foreign law adopts de facto reciprocity like most Chinese courts do in practice? Can we argue the foreign law provide higher threashold because one Chinese court uses de jure reciprocity? Or we consider these two laws provide simialr threshold and treat de jure reciprocity exists, even though the foreign court actually cannot enforce Chinese judgments because Chinese courts did not enforce judgments from this country before?

Anyway, although the test for de jure reciprocity is not settled, the Shanghai judgment shows a laudable progress. This is the first case that de jure reciprocity has been applied in a Chinese court. It shows a serious attempt to deviate from de facto reciprocity. Of course, since de facto reciprocity also exists between China and Singapore, this judgment does not bring significant difference in result. It is curious to see whether the Chinese court will apply de jure reciprocity alone to enforce foreign judgments in the future, and whether any new tests for de jure reciprocity may be proposed in the future judgments.

[1] Several Opinions of the Supreme People's Court Concerning Judicial Services and Protection Provided by People's Courts for the Belt and Road Initiative], [2015] Fa Fa No. 9, para 6; The Opinions of the SPC Regarding the People's Court's Further Provision of Judicial Services and Guarantees for the Construction of the Belt and Road, Fa Fa [2019] 29, para 24.

[2] (2019) Hu 01 Xie Wai Ren No 22.

[3] Singaporean case, Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte ltd [2014] 2 SLR 545; Chinese case, Kolmar Group AG v. Jiangsu Textile Industry Import and Export Corporation, (2016) Su 01 Xie Wai Ren No 3.

The German Federal Court of Justice on the validity of a proxy marriage concluded in Mexico

Written by Greta Siegert, doctoral candidate at the University of Freiburg.

In a recent decision of 29 September 2021 – case XII ZB 309/21, the German Federal Court of Justice (BGH) once again confirmed the validity of proxy marriages concluded abroad under the condition that they met the formal requirements of the applicable foreign law.

The parties, a German woman and a male citizen of Syria, had concluded a proxy marriage in Baja California Sur (Mexico). At the time of the marriage, neither of them was present in Mexico nor had ever met their respective representatives. The declarations of proxy had been prepared by a German notary both in English and Spanish. When the couple applied for a marriage name declaration in Germany, the responsible registry office denied such an entry, invoking the marriage's formal invalidity.

Reviewing this case, the German Federal Court ruled that there were no doubts regarding the marriage's formal validity, hence holding it valid in absence of other issues of concern.

The judges followed the line of argument brought forward by the higher regional court of Jena (Oberlandesgericht Jena), stating that the formal aspects of the marriage in question were ruled by Art. 11(1) of the Introductory Act to the Civil Code (EGBGB). Art. 11(1) EGBGB provides that a legal transaction is formally valid if it either complies with the formal requirements of the law governing the legal relationship forming the subject matter of the legal act (so-called *lex actus*) or with the legal formalities of the state where the transaction takes place (so-called *lex loci*).

The German Federal Court confirmed that, in this case, the proxy was merely a question of the marriage's formal validity: since the parties had already – prior to

the creation of their declaration of proxy – made their decision about the marriage and their respective spouse, the proxy solely served as a matter of representation in making the declarations of intention.

However, the judges acknowledged that, in other cases, proxies may also affect the substantive aspects of a marriage. This would be the case if the representation affected the substance of the partners' decision, i.e. if the future spouses had not decided about the marriage or their spouse themselves but had instead transferred the decision to their respective agent.

Since Mexican law – as the relevant *lex loci* – allows proxy marriages, the German Federal Court concluded that the marriage in question was formally valid. The court added that this result was compatible with German public policy (Art. 6 EGBGB). When drafting Art. 11(1) EGBGB more than 30 years ago, the German legislature recognized and accepted the possibility of marriages concluded abroad according to the rules of the respective *lex loci*. Though there were repeated calls for a revision of this legislation afterwards, especially regarding proxies in the context of forced marriages, the legislature held on to the *lex loci* principle. Against this backdrop, the German Federal Court found no evidence that the marriage in dispute violated fundamental principles of the German legal system.

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

Written by Marie-Luisa Loheide, doctoral candidate at the University of Freiburg.

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.

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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.

The list of speakers includes internationally leading scholars, practitioners and experts from the most excellent Universities, the Hague Conference on Private International Law (HCCH), the United Nations Commission on International Trade Law (UNCITRAL), and the European Commission (DG Trade, DG Justice). The Conference is co-hosted by the Permanent Bureau of the HCCH.

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.

Further information: https://www.jura.uni-bonn.de/professur-prof-dr-weller/the-hcch-2019-judgments-convention-cornerstones-prospects-outlook-conference-on-9-and-10-september-2022

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