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

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

The idea of economic integration is not new to Africa. It is a phenomenon that has been conceived as far back as the 1960s when many African countries gained independence. In 1980, the Organisation of African Unity (now African Union) came up a blueprint for the progressive development of Africa: the Lagos Plan of Action for the Economic Development of Africa, 1980–2000. However, the first concrete step towards achieving this objective was taken in 1991 when the African Heads of State and Government (AHSG) signed the treaty establishing the African Economic Community (AEC) (Abuja Treaty) in Nigeria. One of the operational stages of the AEC was the creation of a Continental Free Trade Area by 2028. In 2013, the AHSG further signed a Solemn Declaration during the 50th anniversary of the African Union. The Declaration sets another blueprint for a 50-year development trajectory for Africa (Agenda 2068). Item C of that Declaration is a commitment from the Member States to the speedy implementation of the Continental Free Trade Area. At last, this is now a reality.

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

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

According to the United Nations Economic Commission for Africa, the AfCFTA will be the biggest single market, with a GDP of $2.5 trillion and a whooping population of 2.5 billion people across 55 countries (UNECA, 2020). By 2050, it is also projected that Africa's population will be 2.5 billion; contributing about 26% of the world's working-age population (UNECA, 2020). As expected, AfCFTA has been generating interesting debates. Some legal commentators have penned some thoughts on the Agreement largely from international economic/trade law perspectives (Magwape, 2018; Onyejekwe and Ekhator, 2020; Akinkugbe 2019). Only a few private international scholars have written on the framework (Theunissen, 2020; Uka, 2020).

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

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

For Nigeria, it is time we revamped the Nigerian private international law. As a prominent member of AfCFTA, Nigeria should take a special interest in the progressive development of private international law through multilateral platforms both under the AfCFTA and other global bodies such as the Hague Conference. The current lackadaisical attitude to multilateral private international rules needs to change. For instance, Nigeria has neither joined the Hague Conference nor acceded to any of its conventions. The Evidence and Service Conventions would have delivered a more efficient international civil procedure for Nigeria. Also, the 2005 Choice of Court Convention (and hopefully the 2019 Judgments Convention) would give Nigerian judgments wider circulation and respect. At the Commonwealth level, Nigeria did not pay any significant role in the making of the 2017 Commonwealth Model Law on Judgments and has no intention of domesticating it. The point we are making is that Nigeria needs to be responsive to international calls for the development of private international law, not just from AfCFTA when such is made, but also ongoing global private international law projects.

To reap the benefit of AfCFTA, the Nigerian justice system must be made to be attractive to foreign businesspersons. No doubt, foreign litigants will be more interested in doing business in countries that have in place an efficient, effective and credible legal system that enforce contracts and dispose of cases timeously. Nigeria will be competing with countries such as South Africa, Egypt, Rwanda and Ghana. In one recent empirical research carried out by Prof Yemi Osibajo, the current Vice President of Nigeria, on the length of trial time in civil cases in Lagos State, it takes an average of 3.4 years to resolve a civil and commercial

transaction in Nigeria. A further period of 2.5 and 4.5 years is required if the matter proceeded to the Court of Appeal and the Supreme Court respectively (Osinbajo, 2011). Excessive delays in dispute resolution may make Nigeria unattractive for resolving business disputes. The other side of the coin is the enforcement of contracts, especially jurisdiction agreements. Foreign litigants may be persuaded to trade with Nigeria if they are assured that foreign jurisdiction clauses will be respected by Nigerian courts. The current approach is not too satisfactory as there are some appellate court decisions which suggest that parties' choice may not be enforced in certain situations (Okoli, 2020b). Some of the local statutes like the Admiralty Jurisdiction Act which grants exclusive jurisdiction over a wide range of commercial matters may equally need to be reviewed.

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

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

Lastly, AfCFTA should spark the interest of Nigerian practitioners, judges, academia, policymakers and other stakeholders in private international law matters. Nigeria cannot afford to be a spectator in the scheme of things. It should leverage on its status in Africa to drive an Afrocentric and global private international law agenda. More awareness should be created for the subject in the universities. Government and the business community should fund various programmes and research on the impact of AfCFTA, and subsequent frameworks that will be rolled out to drive AfCFTA, on the Nigerian legal system, its economy and people.

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

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

1. **Facts:**

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

> *"6. The parties shall provide notice in the English language to each other at the addresses set forth in the Agreement via Federal Express or similar courier, with copies via facsimile or email, and shall be deemed received 3 business days after deposit with the courier.*
>
> *7. The Parties hereby submit to the jurisdiction of the Federal and State courts in California and consent to service of process in accord with the notice provisions above.*
>
> *8. In the event of any disputes arising between the Parties to this Agreement, either Party may submit the dispute to the Judicial Arbitration & Mediation Service in Los Angeles for exclusive and final resolution pursuant to according*

> *to [sic] its streamlined procedures before a single arbitrator who shall have ten years judicial service at the appellate level, pursuant to California law, and who shall issue a written, reasoned award. The Parties shall share equally the cost of the arbitration. Disputes shall include failure of the Parties to come to Agreement as required by this Agreement in a timely fashion."*

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

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

2. **Decision**

The California Supreme Court rejected SinoType's argument.

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

> *"the Convention cannot—and does not—determine which documents need to be served. It is a matter for the lex fori to decide if a document needs to be served*

> *and which document needs to be served. Thus, if the law of the forum states that a notice is to be somehow directed to one or several addressee(s), without requiring service, the Convention does not have to be applied."[2]*

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

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

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

3. **Comments**

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

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

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

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

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

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

[2] Practical Handbook on the Operation of the Service Convention (4th ed. 2016) par. 54, p. 23, fn. Omitted.

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

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

[5] Paragraph 54 of the Handbook.

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

[7] Ibid., paragraph 16.

Workshop 26-27 November: The Development of Private International Law in the UK post Brexit

Professor Paul Beaumont (University of Stirling), Dr Mihail Danov (University of Exeter) and Dr Jayne Holliday (University of Stirling) are delighted to be able to host the final AHRC funded Research Network workshop in partnership with the Journal of Private International Law.

- **Online Workshop via Microsoft teams**

- **The Link to the event will be provided shortly.**
- **The workshop is over two days, Thursday 26th November and Friday 27th November**

Please note that you are welcome to attend as much or as little of the workshop as you are able.

Programme for Thursday 26 November 2020

Chair – Professor Paul Beaumont (University of Stirling and co-editor of the Journal of Private International Law)

10.00-10.30 The Opportunities of Brexit for the development of Private International Law in the Commonwealth

Speaker – Professor Reid Mortensen (University of South Queensland)

10.30-10.45 Questions and discussion

10.45-11.15 Some Reflections to be drawn from the Pilot Study and Future Research Project/s

Speaker – Dr Mihail Danov (University of Exeter)

11.15-11.30 Questions and Discussion

11.30-11.45 Coffee Break

Chair – Dr Jayne Holliday (University of Stirling)

11.45-12.15 Connecting Factors in Private International Law – a global perspective

Speakers – Professor Susanne Goessl (University of Kiel) and Dr Ruth Lamont (University of Manchester)

12.15-12.30 Questions and Discussion

12.30-14.00 Lunch break

Chair – Dr Mihail Danov

14.00-14.45 Pluses and minuses of the UK being a party to the Lugano Convention after Brexit

Speaker – Professor Fausto Pocar (University of Milan)

14.45-15.00 Questions and discussion

Programme for Friday 27 November 2020

Chair – Professor Jonathan Harris QC (King's College London, co-editor of the Journal of Private International Law and Serle Court)

10.30-10.50 Keynote speech by Lord Mance former UK Supreme Court Judge

10.50-11.15 Questions and Discussion and Comments by the Chair

11.15-11.45 Resolving Conflicts of Jurisdiction after Brexit at a global level

Speaker – Dr Ardavan Arzandeh (University of Bristol and soon to be National University of Singapore)

11.45-12.00 Questions and Discussion

Chair – Dr Jayne Holliday

12.00-12.30 The Hague Adults Convention 2000 and the role of the UK and the EU in the Hague Conference after Brexit

Speaker – Professor Pietro Franzina (Catholic University, Milan)

12.30-12.45 Questions and Discussion

Lunch Break

Chair – Dr Mihail Danov

15.00-15.30 Private International Law of Arbitration – a global perspective and the impact of Brexit on arbitration in the UK

Speaker – Professor Giuditta Cordero-Moss (University of Oslo)

15.30-15.45 Questions and Discussion

15.45-16.15 The AHRC Research Network on Private International Law: Some reflections on the way ahead for global private international law.

Speaker – Professor Paul Beaumont

16.15-16.30 Questions and Discussion

The University of Zurich is seeking applications for a Professorship in civil procedure and private law

The University of Zurich, Switzerland, has asked CoL to publish the following:

The University of Zurich is seeking applications for a Professorship in civil procedure and private law to take effect from the beginning of the Fall Semester 2021 (1 August 2021), or by arrangement.

We are seeking a candidate with an excellent legal track record who is committed to carrying out teaching and research across the whole spectrum of civil procedure law, including from an international and comparative law perspective. Experience in arbitration as well as restructuring and insolvency law is an advantage. This should be reflected in an outstanding dissertation, a habilitation thesis (or equivalent academic achievement) that is complete or at an advanced stage, and additional publications. Depending on the successful candidate's qualifications, the professorship will take the form of a full or associate professorship. A temporary position as assistant professor with tenure track is possible provided that the candidate's habilitation thesis is at an advanced stage. In all cases, the professorship will be a full-time position. If an excellent

application is submitted, particularly from countries or regions (such as French-speaking Switzerland) that do not require a habilitation thesis to be completed, the requirement for habilitation can be waived if comparable achievements are demonstrated. Applicants must be able to teach in English and, ideally, in French. Applicants without a Swiss background must be willing to familiarise themselves with Swiss civil procedure and private law within a reasonable amount of time and, if necessary, attain the level of German required for teaching and examination. The University of Zurich strives to increase the proportion of under-represented groups – in particular women – in its teaching and research staff, and therefore explicitly encourages applications from these candidates. Further information relating to this job profile can be found below. Please submit your application documents as specified in the following job profile by 9 December 2020 via www.recruiting.ius.uzh.ch. You may be requested to submit hard-copy documents separately at a later point. The relevant member of the appointment committee, Professor Tanja Domej (tanja.domej@rwi.uzh.ch), is available to answer any questions and provide further information.

Further information is here.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 6/2020: Abstracts

The latest issue of the „Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)“ features the following articles:

C. Wendehorst: **Digital Assets in Private International Law**

Rights with third party effect (erga omnes rights, rights in rem) in digital assets may exist at four levels: (a) the level of physical manifestation of data on a

medium; (b) the level of data as encoded information; (c) the functional level of data as digital content or services; and (d) the level of data as representation of rival assets. As yet, recognized conflict-of-law rules exist only for level (c), which has always been dealt with under international intellectual property law.

As to rights in physical manifestations of data, these may be dealt with under Art. 43 EGBGB where data is stored and accessed only locally. In the case of remote access to data, especially in the case of data stored in the cloud, the law of the state where the controller is located should apply. In the case of two or more controllers located in different states, the location of the server operator (cloud provider) may decide instead, but neither of these connecting factors applies if the facts of the case indicate a closer connection with the law of another state.

Data as encoded information is a non-rival resource. Should a foreign jurisdiction recognise exclusive data ownership rights, these would have to be dealt with under international intellectual property law. For data access rights, portability rights and similar rights the rules on the territorial scope of the GDPR may provide some helpful indications as to the applicable law. However, where such rights arise within a contractual relationship or other specific framework the law applicable to this framework may prevail.

As to crypto assets, uniform conflict-of-law rules would be highly desirable. Subject to further integration of crypto assets into the existing system for intermediated securities, rights in tokens should primarily be governed by the law referred to by conflict-of-law rules specifically addressing crypto assets, including appropriate analogies to such rules. Where no such rules exist, the closest connection must be ascertained by a connecting factor that is sufficiently certain and clearly visible to third parties, such as the law that has visibly been chosen as the applicable law for the whole ledger (elective situs), the location of the issuer (LIMA), or the place of the central administrator (PROPA) or of the sole holder of a private master key (PREMA).

R. de Barros Fritz: **The new legal tech business model of mass action litigation from the choice of law perspective**

In recent years, courts had to increasingly deal with questions of substantive law concerning a new, but in practice already well-established business model of mass

action litigation, which is offered by companies such as Financialright Claims and Myright. These are often cases that have links to foreign countries. The present article has therefore taken this opportunity to examine the question of the law applicable to this business model in more detail.

P. Hay: **Forum Selection Clauses – Procedural Tools or Contractual Obligations? Conceptualization and Remedies in American and German Law**

German and American law differ methodologically in treating exclusive forum selection clauses. German law permits parties, subject to limitations, to derogate the jurisdiction of courts and, in the interest of predictability, to select a specific court for any future disputes. The German Supreme Court emphasized in 2019 that, as a contract provision, the clause also gives rise to damages in case of breach. American law historically does not permit parties to "oust" the jurisdiction a court has by law. But the parties' wishes may be given effect by granting a party's motion to dismiss for forum non conveniens (FNC) when sued in a different court in breach of the agreement. FNC dismissals are granted upon a "weighing of interests" and in the court's discretion. The clause, even when otherwise valid, is therefore not the kind of binding obligation, enforced by contract remedies, as in German law. The case law does not give effect to its "dual nature," as characterized by the German Supreme Court. The latter's decision correctly awarded attorneys' fees for expenses incurred by the plaintiff when the defendant had sued (and lost) in the United States in breach of a forum selection clause, especially since German jurisdiction and German law had been stipulated. Application of the "American Rule" of costs most probably would not have shifted fees to the losing party had American law been applied, although the rule is far less stringent today than often assumed.

A. Stadler/C. Krüger: **International jurisdiction and the place where the damage occurred in VW dieselgate cases**

Once again the European Court of Justice had to deal with the question of where to locate the place where the harm or damage occurred ("Erfolgsort", Article 7 no. 2 Brussels Ibis Regulation) which is particularly difficult to define in case of

pure economic loss tort cases. Previous case law of the ECJ resulted in a series of very specific judgments and a high unpredictability of the international jurisdiction. In the Austrian "Dieselgate" case the referring court had doubts whether the Austrian car purchasers who had bought and received their cars in Austria suffered a "primary loss" or only an irrelevant "secondary loss". The ECJ rightly rejects the idea of a secondary loss and concludes that the place where the (primary) damage occurred is to be located in Austria. The authors criticise that the ECJ – without an obvious reason – emphasises that the case at hand is not about pure economic loss. Although they agree with the court's finding that the place where the damage occurred was in Austria as the place of acquisition of the cars, they discuss whether in future cases one might have to distinguish between the place where the sales contract was entered into or the place where the defective object became part of the purchasers' property. The authors reject any detailed approach and advocate in favour of abandoning the principle of ubiquity in cases of pure economic loss. Alternatively, the only acceptable solution is an entire consideration of all relevant facts of the individual case.

P.F. Schlosser: **Jurisdiction agreements binding also third beneficiaries in contracts?**

Even in the context of jurisdiction agreements, the European Court applies the rules protecting the policy holder for the benefit of the "insured". In this respect the Court's methodology and result must be approved of. The restriction of the holding as to the consent of the insured and the qualification of the insured as an insurance company are of no practical impact and due to the narrow question referred to the Court. The holding may, however, not be transferred by a reverse argumentation to assignments of rights against consumers or employees to commercial entities.

B. Heiderhoff: **Article 15 Brussels IIbis Regulation, the Child's best interests, and the recast**

Article 15 Brussels IIbis Regulation provides that the court competent under Article 8 et seq Brussels IIbis Regulation may, under certain prerequisites, transfer the case to a court in another Member State. In the matter of EP./. FO

(ECJ C-530/18) the ECJ once more explains the central notion of this rule, being the best interest of the child. The ECJ holds that the competent court must not initiate the transfer on the basis that the substantive law applied by the foreign court is more child friendly – which is, by the way, a rather unrealistic scenario for various reasons. Concerning procedural law, the ECJ points out that different rules may only be taken into account if they "provide added value to the resolution of the case in the interests of the child". Notwithstanding the ECJ's fundamental and recurrent statement that the transfer is never mandatory, it still seems reasonable for the competent court to apply a well-balanced, comprehensive approach towards the transfer. Should it deny the transfer to a court that is "better placed to hear the case" on the grounds that the foreign law is "different" or maybe that it even seems to be less in the interest of the child? According to the principle of mutual trust, the author suggests to use the public policy standard and to ignore any differences in the substantive and procedural law, as long as they do not threaten to add up to a public policy infringement. The paper also points out some changes in the new Articles 12 and 13 Brussels IIbis Recast which aim at further specifying the transfer mechanism. The resulting deletion of the comprehensive evaluation of the child's best interests by the transferring court in para 1 seems unintentional. Thus, the author recommends to keep up the current handling.

F. Koechel: **Article 26 of the Brussels Ibis Regulation as a Subsidiary Ground of Jurisdiction and Submission to Jurisdiction Through Eloquent Silence**

According to the CJEU's decision, a court may assume jurisdiction based on the entering of an appearance of the defendant only if Articles 4 ff. of the Brussels Ibis Regulation do not already provide for a concurrent ground of jurisdiction in the forum state. This restrictive interpretation complicates the assessment of jurisdiction and limits the scope of the Brussels Ibis Regulation without any substantial justification. On the contrary, a subsidiary application of Article 26 of the Brussels Ibis Regulation is systematically inconsistent with Article 25, which generally privileges the jurisdiction agreed by the parties over any concurrent ground of jurisdiction. In this decision, the CJEU confirms its previous interpretation according to which Article 26 Brussels Ibis Regulation may not be employed as a ground of jurisdiction vis-à-vis a defendant who chooses not to

enter an appearance. However, the CJEU does not sufficiently take into account that in the main proceedings the court had requested the defendant to state whether or not he wanted to challenge jurisdiction. The question therefore was not simply if a defendant submits to a court's jurisdiction by not reacting at all after having been served with the claim. Rather, the CJEU would have had to answer whether a defendant enters an appearance within the sense of Article 26 of the Brussels Ibis Regulation if he does not comply with the court's express request to accept or challenge jurisdiction. The article argues that the passivity of the defendant may only exceptionally be qualified as a submission to jurisdiction if he can be deemed to have implicitly accepted the court's jurisdiction.

C. Lasthaus: **The Transitional Provisions of Article 83 of the European Commission's Succession Regulation**

The European Commission's Succession Regulation 650/2012 aims to facilitate cross-border successions and intends to enable European citizens to easily organise their succession in advance. In order to achieve this goal, the regulation – inter alia – facilitates the establishment of bilateral agreements as to succession. This is the case not only for agreements made after 17/8/2015 but – under the condition that the testator dies after this date – according to the transitional provisions in Article 83 also for those made prior. Due to these transitional provisions, some formerly invalid agreements made prior to the effective date of the regulation turned valid once the regulation applied. In its judgment, the German Federal Court of Justice ("BGH") ruled on the legal validity of a formerly invalid bilateral agreement as to succession between a German testator and her Italian partner. This legal review inter alia deals with the distinction between Article 83 para. 2 and Article 83 para. 3 of the Regulation as well as legal aspects concerning the retroactive effect of the transitional provisions.

P. Kindler: **The obligation to restore or account for gifts and advancements under Italian inheritance law: questions of applicable law and international civil procedure, including jurisdiction and the law applicable to pre-judgment interest**

The present decision of the Higher Regional Court of Munich deals with the

obligation to restore or account for gifts and advancements when determining the shares of different heirs under Italian law (Article 724 of the Italian Civil Code). Specifically, it addresses a direct debit from the bank account held by husband and wife and payed to the wife alone a few days before the husband's death. The husband was succeeded on intestacy by his wife and three descendants one of which sued the deceased's wife in order to obtain a declaratory judgment establishing that half of the amount payed to the wife by the bank is an advancement, received from the deceased during his lifetime, and that such advancement has to be adjusted in the partitioning between the heirs. The article presents the related questions of applicable law under both the European Succession Regulation and the previous conflict rules in Germany and Italy. Side aspects regard, inter alia, the law applicable to interest relating to the judicial proceedings (Prozesszinsen) and how the Court determined the content of the foreign substantive law.

P. Mankowski: **Securing mortgages and the system of direct enforcement under the Brussels Ibis Regulation**

On paper, the Brussels Ibis Regulation's turn away from exequatur to a system of direct enforcement in the Member State addressed was a revolution. In practice, its consequences have still to transpire to their full extent. The interface between that system and every-day enforcement practice is about to become a fascinating area. As so often, the devil might be in the detail, and in the minute detail at that. The Sicherungshypothek (securing mortgage) of German law now stars amongst the first test cases.

E. Jayme: **Registration of cultural goods as stolen art: Tensions between property rights and claims of restitution – effects in the field of international jurisdiction and private international law**

In 1999, the plaintiff, a German art collector had acquired a painting by the German painter Andreas Achenbach in London. In 2016 the painting was registered in the Madgeburg Lost Art Database according to the request of the defendant, a (probably) Canadian foundation. The painting was owned, between 1931 and 1937, by a German art dealer who had to leave Germany and was forced

to close his art gallery in Düsseldorf. The plaintiff based his action on a violation of his property rights. The court dismissed the action: the registration, according to the court, did not violate the plaintiff's property rights. The case, at first, involves questions of international civil procedure. The court based jurisdiction, according to para. 32 of the German Code of Civil Procedure, on the place of the pretended violation of property, i.e. the seat of the German foundation, which had registered the painting in its lost art register. The European rules were not applicable to a defendant having its seat outside the European community. The author follows the Magdeburg court as to the question of jurisdiction, but criticises the outcome of the case and the arguments of the court for generally excluding the violation of property rights. A painting registered as lost art loses its value on the art market, it cannot be sold. In addition, the registration of a painting as lost art may perhaps violate property rights of the German plaintiff in situations where there has been, after the Second World War, a compensation according to German public law, or where the persons asking for the registration did not sufficiently prove the legal basis of their claim. However, the Magdeburg registration board has developed some rules for cancelling registration based on objective arguments. Thus, the question is still open.

I. Bach/H. Tippner: The penalty payment of § 89 FamFG: a wanderer between two worlds

For the second time within only a few years, the German Federal Supreme Court (BGH) had to decide on a German court's jurisdiction for the enforcement of a (German) judgment regarding parental visitation rights. In 2015, the BGH held that under German law the rule regarding the main proceedings (§ 99 FamFG) is to be applied, because of the factual and procedural proximity between main and enforcement proceedings. Now, in 2019, the BGH held that under European law the opposite is true: The provisions in Articles 3 et seq. Brussels IIbis Regulation are not applicable to enforcement proceedings. Therefore, the question of jurisdiction for enforcement proceedings is to be answered according to the national rules, i.e. in the present case: according to § 99 FamFG.

D.P. Fernández Arroyo:**Flaws and Uncer tain Effectiveness of an Anti-**

Arbitration Injunction *à l'argentine*

This article deals with a decision issued by an Argentine court in the course of a dispute between an Argentine subsidiary of a foreign company and an Argentine governmental agency. The court ordered the Argentine company to refrain from initiating investment treaty arbitration against Argentina. This article addresses the conformity of the decision with the current legal framework, as well as its potential impact on the ongoing local dispute. Additionally, it briefly introduces some contextual data related to the evolution of Argentine policies concerning arbitration and foreign investment legal regime.

Overriding Mandatory Rules in the Law of the EU Member States: Webinar of the EAPIL Young EU Private International Law Research Network

On Monday, 16 November 2020, starting at 9.15 am CET, the Young EU Private International Law Research Network of the European Association of Private International Law (EAPIL), organizes a webinar on "Overriding Mandatory Rules in the Law of the EU Member States".

In two sessions, Young PIL researchers from various EU Member States will discuss *selected issues related to overriding mandatory rules*, such as their explicit legislative characterization in recent EU directives and their application by arbitral tribunals.

Subsequently, the *General Report of the second Young EU PIL project*, namely "The Application of Overriding Mandatory Norms outside the Scope of Application of the EU Private International Law Regulations" as well as some national

perspectives will be presented. The concluding discussion of the webinar is dedicated to *future initiatives and projects* of the Research Network.

All young PIL researchers who are interested in joining the webinar and/or the Young EU Private International Research Network are cordially invited to send an e-mail to youngeupil@gmail.com. Attendance is free of charge. Details regarding the virtual attendance will be sent to all registered participants.

The programme reads as follows:

9.15 am Opening of the conference – Tamás SZABADOS (ELTE)

Session I – Chair: Florian HEINDLER (Sigmund Freund University Vienna)

9.20 am Ennio PIOVESANI (University of Turin/University of Cologne): Overriding Mandatory Rules in the Context of the Covid-19 Pandemic

9.35 am Martina MELCHER (University of Graz): Substantive EU Regulations as Overriding Mandatory Provisions?

9.50 am Johannes UNGERER (University of Oxford): Explicit Legislative Characterization of Overriding Mandatory Provisions in EU Directives

10:05 am Uglješa GRUŠI? (University College London): Some Recent Developments Regarding the Treatment of Mandatory Rules of Third Countries

10.20-10:35 am Discussion

Session II – Chair: Dr. Eduardo Alvarez-Armas (Brunel University London)

10.45 am Katarzyna BOGDZEVI? (Mykolas Romeris University): Overriding Mandatory Provisions in Family Law and Personal Status Issues

11.00 am Markus PETSCHE (Central European University): The Application of Mandatory Rules by Arbitral Tribunals

11.15 am István ERD?S (ELTE): Imperative Rules in Investment Arbitration

11.30-11.45 am Discussion

Young EU PIL Project: The Application of Overriding Mandatory Norms outside the Scope of Application of the EU Private International Law Regulations

2.00 pm Tamás SZABADOS (ELTE): Presentation and Discussion of the General Report

2.15 pm Stefano DOMINELLI (University of Genoa) and Ennio PIOVESANI (University of Turin/University of Cologne): Italian Perspective

Holger JACOBS (University of Mainz): German Perspective

Dora ZGRABLJI? ROTAR (University of Zagreb): Croatian Perspective. Overriding Mandatory Rules and the Proposal on the Law Applicable to the Third-party Effects of Assignments of Claims

3.00 -3.30 pm Future of the Young EU Private International Law Network (Chair: Martina MELCHER and Tamás SZABADOS)

Final Call: The HCCH 2019 Judgments Convention: Prospects for Judicial Cooperation in Civil and Commercial Matters between the EU and Third Countries — Pre-Conference Video Roundtable University of Bonn / HCCH on 29 October 2020

The HCCH 2019 Judgments Convention:

Prospects for Judicial Cooperation in Civil and Commercial Matters between the EU and Third Countries

Pre-Conference Video Roundtable
University of Bonn / HCCH

Thursday, 29 October 2020, 6.30 p.m. (UTC+1) (via Zoom)

Speakers:

Dr Christophe Bernasconi, Secretary General of the HCCH

Colin Brown, Unit Dispute Settlement and Legal Aspects of Trade Policy, DG Trade, European Commission

Dr Alexandra Diehl, White & Case LLP, Frankfurt, Chair of the Arbitration/Litigation/Mediation ("ALM") Working Group of the German-

American Lawyers Association (DAJV)

Dr Veronika Efremova, Senior Project Manager GIZ, Open Regional Funds for South East Europe-Legal Reform

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

Dr Jan Teubel, German Federal Ministry of Justice and Consumer Protection

Moderators:

Dr João Ribeiro-Bidaoui, First Secretary, HCCH

Prof Dr Matthias Weller, University of Bonn

The largest proportion of EU economic growth in the 21st century is expected to arise in trade with third countries. This is why the EU is building up trade relations with many states and other regional integration communities in all parts of the world. The latest example is the EU-MERCOSUR Association Agreement concluded on 28 June 2019. With the United Kingdom's exit of the Union on 31 January 2020, extra-EU trade with neighbouring countries will further increase in importance. Another challenge for the EU is China's "Belt and Road Initiative", a powerful global development strategy that includes overland as well as sea routes in more than 100 states around the globe. The USA are currently the largest trade partner of the EU. The increasing volume of trade with third states will inevitably lead to a rise in the number and importance of commercial disputes. This makes mechanisms for their orderly and efficient resolution indispensable. China is already setting up infrastructures for commercial dispute resolution alongside its belts and roads. In contrast, the EU still seems to be in search of a strategy for judicial cooperation in civil matters with countries outside the Union. The HCCH 2019 Judgments Convention may be a valuable tool to establish and implement such a strategy, in particular alongside the EU's external trade relations. These prospects will be discussed by the speakers and a global audience in this Pre-Conference Video Roundtable.

We warmly invite you to participate and discuss with us. In order to do so, please register with sekretariat.weller@jura.uni-bonn.de. You will receive

the access data for the video conference via zoom per email, including our data protection concept, the day before the event.

If you have already registered and received a confirmation from our office (please allow us a couple of days for sending it back to you), your registration is valid and you do not need to re-register.

Please do not hesitate to forward our invitation to friends and colleagues if you wish.

Main Conference "The HCCH 2019 Judgments Convention", 13 and 14 September 2021

Our event intends to prepare the main conference on the HCCH 2019 Judgments Convention at the University of Bonn (Professors Moritz Brinkmann, Nina Dethloff, Matthias Lehmann, Wulf-Henning Roth, Philipp Reuss, Matthias Weller), co-hosted by the HCCH (Dr Chistophe Bernasconi, Dr João Ribeiro-Bidaoui), on 13 and 14 September 2021 (originally scheduled for 25 and 26 September 2020, but rescheduled to avoid Covid-19 risks). At this conference on the campus of the University of Bonn, leading experts will present on the legal concepts and techniques of the Convention, and policy issues will be further developed.

Speakers will include (listed chronologically):

Hans van Loon (key note), Former Secretary General of the Hague Conference on Private International Law, The Hague;

Prof Dr Xandra Kramer, Erasmus University Rotterdam;

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

Prof Dr Pietro Franzina, Catholic University of Milan;

Prof Dr Francisco Garcimartín Alférez, Autonomous University of Madrid;

Dr Ning Zhao, Senior Legal Officer, HCCH;

Prof Paul Beaumont, University of Stirling;

Prof Dr Marie-Elodie Ancel, University Paris 2 Panthéon-Assas;

Dr Pippa Rogerson, Reader in Private International Law, Faculty of Law, Cambridge;

Ass. Prof Dr Ilija Rumenov, Ss. Cyril and Methodius University, Skopje, Macedonia;

Dr Veronica Ruiz Abou-Nigm, Director of Internationalisation, Senior Lecturer in International Private Law, School of Law, University of Edinburgh;

Prof Zheng (Sophia) Tang, University of Newcastle;

Jose 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.

For the full programme see https://www.jura.uni-bonn.de/professur-prof-dr-weller/conference-on-the-hcch-2019-judgments-convention-on-13-and-14-september-2021/. You will receive an invitation for registration in due time. A registration fee of € 100.- will be asked for participating.

October 2020 Issue of International and Comparative Law Quarterly

The October 2020 issue of ***International and Comparative Law Quarterly*** was recently published. It features two articles on private international law:

S Donelly, "**Conflicting Forum-Selection Agreements in Treaty and**

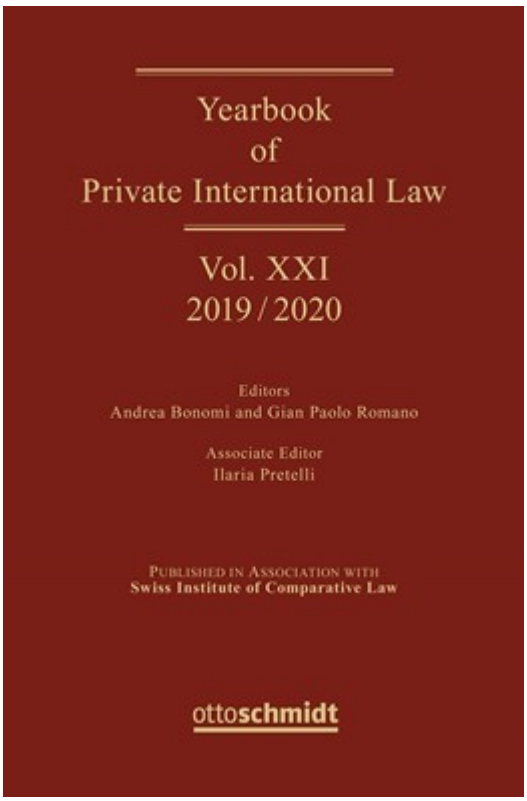
Contract" (2020) 69 *International and Comparative Law Quarterly* 759 – 787.

When an investor submits a claim to arbitration under a treaty that falls within the scope of an existing, contractual forum-selection clause between it and the host State, which prevails: the agreement to arbitrate under the treaty or the contractual clause? This is a vexed and commonly arising question. This article argues that by placing it in the context of both private and public international law and reasoning from first principles it is possible to arrive at a coherent, reliable and satisfactory approach. The true question is whether the contractual clause is a waiver of the investor's right to recourse to an investment tribunal.

TC Hartley, ""Recent Developments under the Brussels I Regulation" (2020) 69 *International and Comparative Law Quarterly* 779 – 790.

This article considers recent CJEU case law on the Brussels I Regulation. Two aspects of Article 7(1) (which applies to matters relating to a contract) are considered: the first is whether the contract must be between the parties to the case; the second is whether membership of an association should be regarded as constituting implied consent to be bound by decisions of the association so that jurisdiction to enforce them may be taken under Article 7(1). The article also discusses recent case law on who counts as a 'consumer' in terms of Article 17.

Out now: Yearbook of Private International Law XXI (2019/2020)



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

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

Chinese courts have issued two anti-suit injunctions recently in cross-border patent cases. The first is the Supreme Court's ruling in *Huawei v Conversant,*

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

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

2 Innovative Judicial 'Law Making' to Transplant Foreign Law

These two cases are interesting in that they open the door for the courts to 'make law' by providing Chinese legislation innovative interpretation. Chinese law does

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

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

other equitable considerations. (*Zapata Off-Shore Company v. Unterweser Reederei GMBH*, 428 F.2d 888 (United States Court of Appeals, Fifth Circuit, 1970))

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

3 Comity, Pragmatism and Rule of Law

Anti-suit injunction is a controversial instrument in that it may infringe foreign judicial sovereignty and comity. Even if it is technically directed to the respondent not a foreign court, it makes judgment on the appropriateness of foreign proceedings, which, in normal circumstances, should be judged by the foreign court. No matter how indirect the interference is, an interference is there. Such an approach is fundamentally incompatible with Chinese jurisprudence and diplomatic policy, which emphasise on the principle of sovereign equality and non-interference. China usually considers parallel proceedings tolerable which

concern the judicial sovereignty of two countries and each could continue jurisdiction pursuant to their domestic law. (Art 533 of Civil Procedural Law Judicial Interpretation by SPC) Adopting anti-suit injunction to tackle foreign parallel proceedings or related proceedings directly contradicts this provision.

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

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