Tort Choice of Law Rules in Cross-border Multi-party Litigation under European and Chinese Private International Law



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By Zhen Chen, PhD Researcher, University of Groningen

This blog post is part of the article 'Tort Conflicts Rules in Cross-border Multi-party Litigation: Which Law Has a Closer or the Closest Connection?' published by the Maastricht Journal of European and Comparative Law with open access, available at https://doi.org/10.1177/1023263X211034103. A related previous post is 'Personal Injury and Article 4(3) of Rome II Regulation', available here https://conflictoflaws.net/2021/personal-injury-and-article-43-of-rome-ii-regulation/

This article compares Owen v. Galgey under Article 4 Rome II Regulation and YANG Shuying v. British Carnival Cruise under Article 44 Chinese Conflicts Act in the context of cross-border multi-party litigation on tort liability. As to the interpretation of tort conflicts rules, such as lex loci delicti, the notion of 'damage', lex domicilii communis and the closer/closest connection test, these two cases demonstrate different approaches adopted in European and Chinese private international law. This article does not intend to reach a conclusion which law is better between Rome II Regulation and Chinese Conflicts Act, but rather highlights on a common challenge faced by both Chinese courts and English courts in international tort litigation and how to tackle such challenge in an efficient way.

I. Tort conflicts rules in China and the EU

It is widely accepted rule that lex loci delicti will be the applicable law for cross-border tort liability in private international law. This is also the case in China and the EU. The application of lex loci delicti, as a general rule, is stipulated in Article 44 Chinese Conflicts Act and Article 4(1) Rome II Regulation. However, Article 4(1) Rome II Regulation explicitly refers to the place of damage, namely 'the law of the country in which the damage occurs' (lex loci damni), and expressly excludes the place of wrong ('the country in which the event giving rise to the damage occurred') and the place of consequential loss ('the country or countries in which the indirect consequences of that event occur'). By contrast, it remains unclear whether lex loci delicti in Article 44 Chinese Conflicts Act merely refers to lex loci damni, as such provision does not expressly state so.

The application of lex loci delicti in China and the EU is subject to several exceptions. Specifically, lex loci delicti is superseded by the law chosen by the parties under Article 44 Chinese Conflicts Act and Article 14 Rome II Regulation, while lex domicilii communis takes precedence over lex loci delicti under Article 44 Chinese Conflicts Act and Article 4(2) Rome II Regulation. Moreover, the escape clause enshrined in Article 4(3) Rome II Regulation gives priority to the law of the country which has a 'manifestly closer connection' with the tort/delict, of which the pre-existing relationship between the parties might be a contract. By contrast, Article 44 Chinese Conflicts Act does not provide an escape clause, but the closest connection principle, which is comparable to the closer connection test in Article 4(3) Rome II, is stipulated in several other provisions.

The questions raised in YANG Shuying v. British Carnival Cruise and Owen v. Galgey were how to determine the applicable law to tort liability in multiparty litigation under Article 44 Chinese Conflicts Act and Article 4 Rome II Regulation and what are the criteria for the closer/closest connection test.

II. Owen v. Galgey under Article 4 Rome II Regulation

In case Owen v. Galgey , a British citizen Gary Owen domiciled in England, fell into an empty swimming pool which was undergoing renovation works at a villa in France owned by the Galgey Couple, domiciled in England, as a holiday home. The British victim sued the British couple, their French public liability insurer, the French contractor carrying out renovation works on the swimming pool and its French public liability insurer for personal injury compensation. As regards which law is applicable, the British victim contended that French law should be applied by virtue of Article 4(3) Rome II Regulation, since the tort was manifestly more

closely connected with France than it was with England. The British defendants held that English law should be applicable law under Article 4(2) Rome II Regulation, because the claimant and the defendants were habitually resident in England. The English High Court held the case was manifestly more closely connected with France, because France was the country where the centre of gravity of the situation was located.

III. YANG Shuying v. British Carnival Cruise under Article 44 Chinese Conflicts Act

In case YANG Shuying v. British Carnival Cruise, a Chinese tourist domiciled in China, sued the British Carnival Cruise Company, incorporated in the UK, for personal injury sustained in a swimming pool accident happened in the cruise when it was located on the high seas. The plaintiff signed an outbound travel contract with Zhejiang China Travel Agency for such cruise tour. The plaintiff held that English law, as the lex loci delicti, should be applicable since the parties did not share common habitual residence in China and the accident occurred on the cruise, which can be regarded as the territory of the UK according to the floating territory theory. The place of wrong and the place of damage were both on the cruise under Article 44 Chinese Conflicts Act. The defendant and the third party argued that Chinese law should be applied since the parties had common habitual residence in China, the floating territory theory was inapplicable and the (indirect) damage of the tort took place in China.

The Shanghai Maritime Court adopted a strict interpretation of the term 'the parties' by excluding the third party and denied the application of floating territory theory in this case. The court held that the application of the lex loci delicti leads to neither English law nor Chinese law. Instead, it is advisable to apply the closest connection principle to determine the applicable law. Based on a quantitative and qualitative analysis ofTort Choice of Law Rules in Cross-border Multi-party Litigation under European and Chinese Private International Law

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The Shanghai Maritime Court adopted a strict interpretation of the term 'the parties' by excluding the third party and denied the application of floating territory theory in this case. The court held that the application of the lex loci delicti leads to neither English law nor Chinese law. Instead, it is advisable to apply the closest connection principle to determine the applicable law. Based on a quantitative and qualitative analysis of all connecting factors, the court concluded that China had the closest connection with the case and Chinese law applied accordingly.

IV. Comments

Both Article 44 Chinese Conflicts Act and Article 4 Rome II Regulation apply to multi-party litigation on tort liability. Article 4(1) Rome II merely refers to lex loci damni and limits the concept 'damage' to direct damage, whilst Article 44 Chinese Conflicts Act can be interpreted broadly to cover the law of the place of wrong and the term 'damage' include both direct damage and indirect damage or consequential loss. As to lex domicilii communis, the law of the country of the common habitual residence of some of the parties, instead of all parties, should not be applicable in accordance with Article 4(2) Rome II and Article 44 Chinese Conflicts Act. The exercise of the closest connection principle or the manifestly closer connection test under 44 Chinese Conflicts Act and Article 4(3) Rome II Regulation requires the the consideration of all relevant factors or all the circumstances in the case. When conducting a balancing test, the factor of the place of direct damage should not be given too much weight to the extent that all other relevant factors are disregarded. A quantitive and qualitative analysis should be conducted to elaborate the relevance or weight of each factor to determine the centre of gravity of a legal relationship.
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Professor Burkhard Hess on “Reforming the Brussels Ibis Regulation: Perspectives and Prospects”

A thought-provoking and much welcome contribution was posted by Prof. Dr. Dres. h.c. Burkhard Hess on SSRN, setting the stage for the discussion on the status quo in the application and the prospects of the Brussels IbisRegulation.

The article, titled “Reforming the Brussels Ibis Regulation: Perspectives and Prospects”, may be retrieved here.

The abstract reads as follows:

> According to article 79 of Regulation (EU) 1215/2012, the EU Commission shall present a report on the application of the Brussels Ibis Regulation by 11 January 2022. This paper intends to open the discussion about the present

state of affairs and the necessary adjustments of the Regulation. Although there is no need to change its basic structure, the relationship of the Brussels Ibis Regulation with other EU instruments (as the General Data Protection Regulation) should be reviewed. There is also a need to address third-State relationships and cross-border collective redress. In addition, the paper addresses several inconsistencies within the present Regulation evidenced by the case law of the CJEU: such as the concept of contract (article 7 no 1), the place of damage (article 7 no 2), the protection of privacy and the concept of consumers (articles 17 – 19). Finally, some implementing procedural rules of the EU Member States should be harmonised, i.e. on the assessment of jurisdiction by national courts, on judicial communication and on procedural time limits. Overall, the upcoming review of the Brussels Ibis Regulation opens up an opportunity to improve further a central and widely accepted instrument of the European law of civil procedure.

Epic's Fight to #freefortnite: Challenging Exclusive Foreign Choice of Court Agreements under Australian Law

By Sarah McKibbin, University of Southern Queensland

Epic Games, the developer of the highly popular and lucrative online video game *Fortnite*, recently won an appeal against tech juggernaut, Apple, in Australia's Federal Court.[1] *Fortnite* is played by over three million Apple iOS users in Australia.[2] In April 2021, Justice Perram awarded Apple a temporary three-month stay of proceedings on the basis of an exclusive foreign choice of court agreement in favour of the courts of the Northern District of California. Despite awarding this stay, Justice Perram was nevertheless 'distinctly troubled in acceding to' Apple's application.[3] Epic appealed to the Full Court.

On 9 July, Justices Middleton, Jagot and Moshinsky found three errors of principle in Justice Perram's consideration of the 'strong reasons' given by Epic for the proceedings to remain in the Federal Court — despite the exclusive foreign choice of court agreement.[4] Exercising its own discretion, the Full Court then found 'strong reasons' for the proceedings to remain in the Federal Court, particularly because enforcement of the choice of court agreement would 'offend the public policy of the forum.'[5] They discerned this policy from various statutory provisions in Australia's competition law as well as other public policy considerations.[6] The appeal highlights the tension that exists between holding parties to their promises to litigate abroad and countenancing breaches of contract where 'serious issues of public policy' are at play.[7]

1 Exclusive Choice of Foreign Court Agreements in Australia

Australians courts will enforce an exclusive choice of court agreement favouring a foreign court either by granting a stay of local proceedings or by awarding damages for breach of contract. The usual approach is for the Australian court to enforce the agreement and grant a stay of proceedings '*unless* strong reasons are shown why it should not.'[8] As Justice Allsop observed in *Incitec v Alkimos Shipping Corp*, 'the question is one of the exercise of a discretion in all the circumstances, but recognising that the starting point is the fact that the parties have agreed to litigate elsewhere, and should, absent some strong countervailing circumstances, be held to their bargain.'[9] The burden of demonstrating strong reasons rests on the party resisting the stay.[10] Considerations of inconvenience and procedural differences between jurisdictions are unlikely to be sufficient as strong reasons.[11]

Two categories of strong reasons predominate. The first category is where, as stated in *Akai Pty Ltd v The People's Insurance Co Ltd*, enforcement 'offends the public policy of the forum whether evinced by statute or declared by judicial decision'.[12] This includes the situation 'where the party commencing proceedings in the face of an exclusive jurisdiction clause seeks to take advantage of what is or may be a mandatory law of the forum'.[13] The prohibition in Australian law against misleading and deceptive conduct is an example.[14] The second category justifying non-enforcement is where litigation in the forum

concerns issues beyond the scope of the choice of court agreement or concerns third parties to the agreement.[15] Where third parties are concerned, it is thought that 'the court should not start with the prima facie disposition in favour of a stay of proceedings'.[16]

2 Factual Background

The successful appeal represents the latest decision in an ongoing international legal battle between Apple and Epic precipitated by *Fortnite*'s removal from the Apple App Store in August last year. Epic released a software update for Apple iOS devices on 13 August 2020 making the *Fortnite*'s virtual currency (called V-Bucks) available for purchase through its own website, in addition to Apple's App Store, at a 20 per cent discount. Any new game downloads from the App Store 'came equipped with this new feature'.[17] While *Fortnite* is free to download, Epic's revenue is generated by players purchasing in-app content, such as dance moves and outfits, through a digital storefront. After the digital storefront takes a commission (usually 30 per cent), Epic receives the net payment.

App developers only have one avenue if they wish to distribute their apps for use on Apple iOS devices: they must use the Apple App Store and Apple's in-app payment system for in-app purchases from which Apple takes a 30 per cent revenue cut. Epic's co-founder and CEO Tim Sweeney has singled out Apple and Google for monopolising the market and for their 'terribly unfair and exploitative' 30 per cent commission for paid app downloads, in-app purchases and subscriptions.[18] While a 70/30 revenue split has been industry standard for many years, the case for an 88/12 revenue model is building.[19] Sweeney argues that 'the 30% store tax usually exceeds the entire profits of the developer who built the game that's sold'.[20]

3 Apple's App Developer Agreement

Epic's relationship with Apple is regulated by the Apple Developer Program License Agreement ('DPLA') under which Apple is entitled to block the distribution of apps from the iOS App Store 'if the developer has breached the App Store Review Guidelines'.[21] These Guidelines include the obligation to exclusively use Apple's in-app payment processing system. Clause 14.10 contains Epic's contractual agreement with Apple to litigate in the Northern District of

California:

Any litigation or other dispute resolution between You and Apple arising out of or relating to this Agreement, the Apple Software, or Your relationship with Apple will take place in the Northern District of California, and You and Apple hereby consent to the personal jurisdiction of and exclusive venue in the state and federal courts within that District with respect any such litigation or dispute resolution.

By introducing a custom payment facility, the August update breached the App Store Review Guidelines. Apple swiftly removed *Fortnite* from its App Store. There were three consequences of this removal: first, *Fortnite* could not be downloaded to an Apple device; secondly, previously installed iOS versions of *Fortnite* could not be updated; and, thirdly, Apple device users could not play against players who had the latest version of *Fortnite*.[22]

4 The Proceedings

On the same day as Apple removed *Fortnite* from the App Store, Epic commenced antitrust proceedings in the United States District Court for the Northern District of California, alleging Apple's 'monopolisation of certain markets' in breach of the United States' *Sherman Act* and other California legislation. The judgment in the US trial is expected later this year. Epic also sued Apple in United Kingdom, the European Union and Australia on competition grounds. In February, the United Kingdom's Competition Appeal Tribunal refused permission to serve Epic's claim on Apple in California because the United Kingdom was not a suitable forum (forum non conveniens).[23] Together with these legal actions, Epic commenced a marketing campaign urging the game's worldwide fanbase to 'Join the fight against @AppStore and @Google on social media with #FreeFortnite'.[24] Epic also released a video parodying Apple's famous 1984 commercial called 'Nineteen Eighty-Fortnite'.[25]

The Australian proceedings were brought in the Federal Court in November 2020. Epic's complaint against Apple is the same as in the US, the EU and the UK, but with the addition of a territorial connection, ie developers of apps for use on Australian iOS devices must only distribute their apps through Apple's Australian App Store and only use Apple's in-app payment processing system. As a

consequence, Epic alleges that Apple has contravened three provisions of Part IV of the *Competition and Consumer Act 2010* (Cth) concerning restrictive trade practices and the *Australian Consumer Law* for unconscionable conduct. In addition to injunctive relief restraining Apple from continuing to engage in restrictive trade practices and unconscionable conduct, Epic seeks ancillary and declaratory relief.

Apple applied for a permanent stay of the Federal Court proceedings, relying on the choice of court agreement in the DPLA and the doctrine of forum non conveniens. Epic unsuccessfully argued that its claims under Australian law did not 'relate to' cl 14.10 of the DPLA.[26] More critically, Justice Perram did not think Epic had demonstrated strong reasons. He awarded Apple a temporary three-month stay of proceedings 'to enable Epic to bring this case in a court in the Northern District of California in accordance with cl 14.10.'[27] Where relevant to the appeal, Justice Perram's reasoning is discussed below.

5 The Appeal: Three Errors of Principle

The Full Court distilled Epic's 17 grounds of appeal from Justice Perram's decision into two main arguments. Only the second argument — turning on the existence of 'strong grounds'[28] — was required to determine the appeal. Justices Middleton, Jagot and Moshinsky identified three errors of principle in Justice Perram's evaluation of 'strong reasons', enabling them to re-evaluate whether strong reasons existed.

The first error was Justice Perram's failure to cumulatively weigh up the reasons adduced by Epic that militated against the granting of the stay. Justice Perram had grudgingly granted Apple's stay application without evaluating the five concerns he had expressed 'about the nature of proceedings under Part IV which means they should generally be heard in this Court',[29] as he was required to do. The five concerns were:[30]

1. The public interest dimension to injunctive proceedings under the *Competition and Consumer Act*;
2. The 'far reaching' effect of the litigation on Australian consumers and Australian app developers as well as the nation's 'interest in maintaining

the integrity of its own markets';
3. The Federal Court's exclusive jurisdiction over restrictive trade practices claims;
4. '[D]icta suggesting that [restrictive trade practices] claims are not arbitrable'; and
5. That if the claim in California 'complex questions of [Australian] competition law will be litigated through the lens of expert evidence'.

The second error was Justice Perram's 'failure to recognise juridical disadvantages of proceeding in the US Court'.[31] The judge had accepted that litigating the case in California would be 'more cumbersome' since 'expert evidence about the content of Australian law' would be needed.[32] There was a risk that a California court 'might decline to hear the suit on forum non conveniens grounds.'[33] Despite that, he concluded that '[a]ny inconvenience flows from the choice of forum clause to which Epic has agreed. It does not sit well in its mouth to complain about the consequences of its own bargain'.[34] However, the Full Court viewed the inapplicability of 'special remedial provisions' of the Australian *Competition and Consumer Act* in the California proceedings as the loss of a legitimate juridical advantage.[35]

The third error concerned a third party to the exclusive jurisdiction clause. In *Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd*, Justice Bell observed that the default enforcement position was inapplicable in cases where 'not all parties to the proceedings are party to an exclusive jurisdiction clause'.[36] Apple Pty Limited, an Australian subsidiary of Apple, was not a party to the DPLA. Yet it was responsible 'for the distribution of iOS-compatible apps to iOS device users' within the Australian sub-market in a manner consistent with Apple's worldwide conduct.[37] Moreover, Epic's proceedings included claims under the *Competition and Consumer Act* and the *Australian Consumer Law* against the Australian subsidiary 'for conduct undertaken in Australia in connection with arrangements affecting Australian consumers in an Australian sub-market.'[38] In this light, the Full Court rejected Justice Perram's description of the joinder of Apple Pty Limited as 'ornamental and 'parasitic on the claims Epic makes against Apple'.[39]

6 The Appeal: Strong Reasons Re-evaluated

The stay should have been refused. The Full Court found a number of public policy considerations that cumulatively constituted strong reasons not to grant a stay of Epic's proceedings. The judges discerned 'a legislative policy that claims pursuant to [the restrictive trade practices law] should be determined in Australia, preferably in the Federal Court' — although it was not the only court that could hear those claims.[40] Essentially, the adjudication of restrictive trade practices claims in the Federal Court afforded legitimate forensic advantages to Epic — benefits which would be lost if Epic were forced to proceed in California. These benefits included the availability of 'specialist judges with relevant expertise' in the Federal Court, the potential for the Australian Competition and Consumer Commission to intervene, and the opportunity for private litigants (as in this case) to 'develop and clarify the law'.[41] Indeed, the Federal Court has not yet interpreted the misuse of market power provision in the *Competition and Consumer Act* relied upon by Epic, which came into effect in 2017.[42] The litigation will also impact millions of Australians who play *Fortnite* and the state of competition in Australian markets.[43]

[1] *Epic Games, Inc v Apple Inc* [2021] FCAFC 122.

[2] *Epic Games, Inc v Apple Inc (Stay Application)* [2021] FCA 338, [7] (Perram J).

[3] Ibid, [64] (Perram J).

[4] *Epic Games, Inc v Apple Inc* (n 1) [48].

[5] Ibid.

[6] Ibid, [90].

[7] Ibid, [97]. See James O'Hara, 'Strategies for Avoiding a Jurisdiction Clause in International Litigation' (2020) 94(4) *Australian Law Journal* 267. *Compare* Mary Keyes, 'Jurisdiction under the Hague Choice of Courts Convention: Its Likely

Impact on Australian Practice' (2009) 5(2) *Journal of Private International Law* 181; Richard Garnett, 'Jurisdiction Clauses since *Akai*' (2013) 87 *Australian Law Journal* 134; Brooke Adele Marshall and Mary Keyes, 'Australia's Accession to the *Hague Convention on Choice of Court Agreements*' (2017) 41 *Melbourne University Law Review* 246.

[8] *A Nelson & Co Ltd v Martin & Pleasance Pty Ltd (Stay Application)* [2021] FCA 754, [10] (Perram J) (emphasis added). See also *Huddart Parker Ltd v Ship 'Mill Hill'* (1950) 81 CLR 502, 508–9 (Dixon J); *The Eleftheria* [1970] P 94, 99 (Brandon J); *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418, 427–9 (Dawson and McHugh JJ), 445 (Toohey, Gaudron and Gummow JJ).

[9] *Incitec Ltd v Alkimos Shipping Corp* (2004) 138 FCR 496, 505 [43].

[10] There was some argument about onus in *Epic Games (Stay Application)* (n 2) [35]–[40] (Perram J).

[11] *Incitec* (n 9) [49]; Andrew S Bell, 'Jurisdiction and Arbitration Agreements in Transnational Contracts: Part I' (1996) 10 *Journal of Contract Law* 53, 65. See generally O'Hara (n 7).

[12] (1996) 188 CLR 418, 445 (Toohey, Gaudron and Gummow JJ). See also Marshall and Keyes (n 7) 257.

[13] *Australian Health and Nutrition Association Ltd v Hive Marketing Group Pty Ltd* (2019) 99 NSWLR 419, 438 [80] (Bell P).

[14] Australian Consumer Law s 18.

[15] *Incitec* (n 9) 506 [47], [49] (Allsop J); Marshall and Keyes (n 7) 258.

[16] *Australian Health* (n 13) 423 [1] (Bathurst CJ and Leeming JA), 442 [90] (Bell J).

[17] *Epic Games (Stay Application)* (n 2) [6] (Perram J).

[18] @TimSweeneyEpic (Twitter, 29 July 2020, 1:29 pm AEDT) <https://twitter.com/TimSweeneyEpic/status/1288315775607078912>.

[19] See, eg, Nick Statt, 'The 70-30 Revenue Split is Causing a Reckoning in the Game Industry', *protocol* (Web Page, 4 May 2021)

<https://www.protocol.com/newsletters/gaming/game-industry-70-30-reckoning?rebelltitem=1#rebelltitem1>.

[20] @TimSweeneyEpic (Twitter, 26 June 2019, 10.13 am AEDT) <https://twitter.com/TimSweeneyEpic/status/1143673655794241537>.

[21] *Epic Games* (n 1) [5].

[22] *Epic Games (Stay Application)* (n 2) [7].

[23] *Epic Games, Inc v Apple Inc* [2021] CAT 4.

[24] '#FreeFortnite', *Epic Games* (Web Page, 13 August 2020) <https://www.epicgames.com/fortnite/en-US/news/freefortnite>.

[25] Fortnite, 'Nineteen Eighty-Fortnite – #FreeFortnite' (YouTube, 13 August 2020) <https://youtu.be/euiSHuaw6Q4>.

[26] *Epic Games (Stay Application)* (n 2) [11]–[12].

[27] Ibid, [66].

[28] *Epic Games* (n 1) [41], [47].

[29] Ibid, [57].

[30] *Epic Games (Stay Application)* (n 2) [59]–[63].

[31] *Epic Games* (n 1) [58].

[32] *Epic Games (Stay Application)* (n 2) [53].

[33] Ibid, [44].

[34] Ibid, [58].

[35] *Epic Games* (n 1) [62].

[36] *Australian Health* (n 13) 442 [90] (Bell P).

[37] *Epic Games* (n 1) [74].

[38] Ibid, [78].

[39] Ibid.

[40] Ibid, [99]. The Full Court clarified that 'other Australian courts may determine Pt IV claims, but within a limited compass and for specific reasons': [116].

[41] Ibid, [104], [107], [122].

[42] Ibid, [107].

[43] Ibid, [97].

HCCH First Secretary Ribeiro-Bidaoui's response re the debate surrounding the 2005 HCCH Choice of Court Convention

Dr. João Ribeiro-Bidaoui (First Secretary at the Hague Conference on Private International Law) has posted a compelling answer on the Kluwer Arbitration Blog to the debate sparked by Prof. Gary Born's criticism in a series of posts published on the same Blog (see Part I, Part II, and Part III). First Secretary Ribeiro-Bidaoui's response is masterfully crafted in drawing the boundaries between equally valuable and essential instruments, and certainly constitutes a most welcome contribution.

For further commentary on these exchanges, see also on the EAPIL Blog, here.

Red-chip enterprises' overseas listing: Securities regulation and conflict of laws

Written by Jingru Wang, Wuhan University Institute of International Law

1.Background

Three days after its low-key listing in the US on 30 June 2021, Didi Chuxing (hereinafter "Didi") was investigated by the Cyberspace Administration of China (hereinafter "CAC") based on the Chinese National Security Law and Measures for Cybersecurity Review.[1] Didi Chuxing as well as 25 Didi-related APPs were then banned for seriously violating laws around collecting and using personal information,[2] leading to the plummet of Didi's share. On 16 July 2021, the CAC, along with other six government authorities, began an on-site cybersecurity inspection of Didi.[3] The CAC swiftly issued the draft rules of Measures for Cybersecurity Review and opened for public consultation.[4] It proposed that any company with data of more than one million users must seek the Office of Cybersecurity Review's approval before listing its shares overseas. It also proposed companies must submit IPO materials to the Office of Cybersecurity Review for review ahead of listing.

It is a touchy subject. Didi Chuxing is a Beijing-based vehicle for hire company. Its core business bases on the accumulation of mass data which include personal and traffic information. The accumulated data not only forms Didi's unique advantage but also is the focus of supervision. The real concern lays in the possible disclosure of relevant operational and financial information at the request of US securities laws and regulations, which may cause data leakage and threaten national security. Therefore, China is much alert to information-based companies trying to list overseas.

The overseas listing of China-related companies has triggered regulatory conflicts long ago. The Didi event only shows the tip of an iceberg. This note will focus on two issues: (1) China's supervision of red-chip companies' overseas listing; (2) the

conflicts between the US's demand for disclosure and China's refusal against the US's extraterritorial jurisdiction.

2. Chinese supervision on red-chip companies' overseas listing

A red-chip company does most of its business in China, while it is incorporated outside mainland China and listed on the foreign stock exchange (such as New York Stock Exchange). Therefore, it is expected to maintain the filing and reporting requirements of the foreign exchange. This makes them an important outlet for foreign investors who wish to participate in the rapid growth of the Chinese economy. When asking Chinese supervision on red-chip companies listed overseas, such as Didi, the foremost question is whether the Chinese regulatory authority's approval is required for them to launch their shares overseas. It is uneasy to conclude.

One reference is the Chinese Securities Law. Article 238 of the original version of the Chinese Securities Law provides that "domestic enterprises issuing securities overseas directly or indirectly or listing their securities overseas shall obtain approval from the securities regulatory authority of the State Council following the relevant provisions of the State Council." This provision was amended in 2019. The current version (Art. 224 of the Chinese Securities Law) only requires the domestic enterprises to comply with the relevant provisions of the State Council. The amendment indicated that China has adopted a more flexible approach to addressing overseas listing. Literally, the securities regulatory authority's approval is no longer a prerequisite for domestic enterprises to issue securities overseas.

When it comes to Didi's listing in the US, a preliminary question is the applicability of such provision. Art. 224 is applied to "domestic enterprise" only. China adopts the doctrine of incorporation to ascertain company's nationality.[5] According to Article 191 of the Chinese Company Law, companies established outside China under the provisions of foreign law are regarded as foreign companies. Didi Global Inc. is incorporated in the state of Cayman Islands, and a foreign company under the Chinese law. In analogy, Alibaba Group Holding Ltd., another representative red-chip enterprise, had not obtained and not been required to apply for approval of the Chinese competent authority before its

overseas listing in 2014. A Report published by the Chinese State Administration of Foreign Exchange specifically pointed out that “domestic enterprises” were limited to legal persons registered in mainland China, which excluded Alibaba Group Holding Ltd., a Cayman Islands-based company with a Chinese background.[6]

In summary, it is fair to say that preliminary control over red-chip enterprise’s overseas listing leaves a loophole, which is partly due to China’s changing policy. That’s the reason why Didi has not been accused of violating the Chinese Securities Law but was banned for illegal accumulation of personal information, a circumvent strategy to avoid the possible information leakage brought by Didi’s public listing. Theoretically, depends on the interpretation of the aforementioned rules, the Chinese regulatory authority may have the jurisdiction to demand preliminary approval. Based on the current situation, China intends to fill the gap and is more likely to strengthen the control especially in the field concerning data security.

3. The conflict between the US’s demand for audit and China’s refusal against the US’s extraterritorial jurisdiction

Another problem is the conflict of supervision. In 2002, the US promulgated the Sarbanes-Oxley Act, under which the Public Company Accounting Oversight Board (hereinafter “PCAOB”) was established to oversee the audit of public companies. Under the Sarbanes-Oxley Act, wherever its place of registration is, a public accounting firm preparing or issuing, or participating in the preparation or issuance of, any audit report concerning any issuer, shall register in the PCAOB and accept the periodic inspection.[7] The PCAOB is empowered to investigate, penalize and sanction the accounting firm and individual that violate the Sarbanes-Oxley Act, the rules of the PCAOB, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants. Opposed to this provision (although not intentionally), Article 177 of the Chinese Securities Law forbids foreign securities regulatory authorities directly taking evidence in China. It further stipulates that no organization or individual may arbitrarily provide documents and materials relating to securities business activities to overseas parties without the consent of the securities regulatory authority of the State Council and the relevant State

Council departments. Therefore, the conflict appears as the US requests an audit while China refused the jurisdiction of PCAOB over Chinese accountant companies.

It is suspected that despite the PCAOB's inofficial characteristic, information (including the sensitive one) gathered by the PCAOB may be made available to government agencies, which may threaten the national security of China.[8] Consequently, China prevents the PCAOB's inspection and some of Chinese public accounting firm's application for registration in the PCAOB has been suspended.[9] In 2013, the PCAOB signed a Memorandum of Understanding with Chinese securities regulators that would enable the PCAOB under certain circumstances to obtain audit work papers of China-based audit firms. However, the Memorandum seems to be insufficient to satisfy the PCAOB's requirement for supervision. The PCAOB complained that "we remain concerned about our lack of access in China and will continue to pursue available options to support the interests of investors and the public interest through the preparation of informative, accurate, and independent audit reports."[10] After the exposure of Luckin Coffee's accounting fraud scandal, the US promulgated the Holding Foreign Companies Accountable Act in 2020. This act requires certain issuers of securities to establish that they are not owned or controlled by a foreign government. Specifically, an issuer must make this certification if the PCAOB is unable to audit specified reports because the issuer has retained a foreign public accounting firm not subject to inspection by the PCAOB. If the PCAOB is unable to inspect the issuer's public accounting firm for three consecutive years, the issuer's securities are banned from trade on a national exchange or through other methods.

China has made "national security" its core interest and is very prudent in opening audit for foreign supervisors. From the perspective of the US, however, it is necessary to strengthen financial supervision over the public listing. As a result, Chinese enterprises have to make a choice between disappointing the PCAOB and undertaking domestic penalties. Under dual pressure of China and the US, sometimes Chinese companies involuntarily resort to delisting. This may not be a result China or the US long to see. In this situation, cooperation is a better way out.

4. Conclusion

China’s upgrading of its cybersecurity review regulation is not aimed at burning down the whole house. Overseas listing serves China’s interest by opening up channels for Chinese companies to raise funds from the international capital market, and thus contribute to the Chinese economy. The current event may be read as a sign that China is making provisions to strengthen supervision on red-chip companies’ overseas listing. It was suggested that the regulatory authority may establish a classified negative list. Enterprises concerning restricted matters must obtain the consent of the competent authority and securities regulatory authority before listing.[11] It is not bad news for foreign investors because the listed companies will undertake more stringent screening, which helps to build up an orderly securities market.

[1] http://www.cac.gov.cn/2021-07/02/c_1626811521011934.htm

[2] http://www.cac.gov.cn/2021-07/04/c_1627016782176163.htm; http://www.cac.gov.cn/2021-07/09/c_1627415870012872.htm.

[3] http://www.cac.gov.cn/2021-07/16/c_1628023601191804.htm.

[4] Notice of Cyberspace Administration of China on Seeking Public Comments on the Cybersecurity Review Measures (Draft Revision for Comment), available at: http://www.cac.gov.cn/2021-07/10/c_1627503724456684.htm

[5] The real seat theory is recommended by commentators, but not accepted by law. Lengjing, Going beyond audit disputes: What is the solution to the crisis of China Concept Stocks?, Strategies, Volume 1, 2021, p. 193.

[6] 2014 Cross-border capital flow monitoring report of the People’s Republic of China, available at: http://www.gov.cn/xinwen/site1/20150216/43231424054959763.pdf

[7] Sarbanes-Oxley Act, §102(a), §104 (a) & (b).

[8] Sarbanes-Oxley Act, §105 (b)(5)(B).

[9] https://pcaobus.org/Registration/Firms/Documents/Applicants.pdf

[10] China-Related Access Challenges, available at: https://pcaobus.org/oversight/international/china-related-access-challenges.

[11] https://opinion.caixin.com/2021-07-09/101737896.html.

The Latest Development on Anti-suit Injunction Wielded by Chinese Courts to Restrain Foreign Parallel Proceedings

(This post is provided by Zeyu Huang, who is an associate attorney of Hui Zhong Law Firm based in Shenzhen. Mr. Huang obtained his LLB degree from the Remin University of China Law School. He is also a PhD candidate & LLM at the Faculty of Law in University of Macau. The author may be contacted at the e-mail address: huangzeyu@huizhonglaw.com)

When confronted with international parallel proceedings due to the existence of a competent foreign court having adjudicative jurisdiction, the seized foreign court located in common law jurisdictions seems to see it as no offence to Chinese courts by granting anti-suit injunctions to restrain Chinese proceedings. This is because the common law court believes that "An order of this kind [anti-suit injunction] is made in personam against a party subject to the court's jurisdiction by way of requiring compliance with agreed terms. It does not purport to have direct effect on the proceedings in the PRC. This court respects such proceedings as a matter of judicial comity". [1] However, the fact that the anti-suit injunction is not directly targeted at people's courts in the PRC does not prevent Chinese judges from believing that it is inappropriate for foreign courts to issue an anti-

suit injunction restraining Chinese proceedings. Instead, they would likely view such interim order as something that purports to indirectly deprive the party of the right of having access to Chinese court and would unavoidably impact Chinese proceedings.

The attitude of Chinese courts towards the anti-suit injunction – a fine-tuning tool to curb parallel proceedings – has changed in recent years. In fact, they have progressively become open-minded to resorting to anti-suit injunctions or other similar orders that are issued to prevent parties from continuing foreign proceedings in parallel. Following that, the real question is whether and how anti-suit injunction is compatible with Chinese law. Some argued that Article 100 of the PRC CPL provides a legal basis for granting injunctions having similar effects with anti-suit injunction at common law. [2] It provides that:

"The people's court may upon the request of one party to issue a ruling to preserve the other party's assets or compel the other party to perform certain act or refrain from doing certain act, in cases where the execution of the judgment would face difficulties, or the party would suffer other damages due to the acts of the other party or for other reasons. If necessary, the people's court also could make a ruling of such preservative measures without one party's application." [3]

Accordingly, Chinese people's court may make a ruling to limit one party from pursuing parallel foreign proceedings if such action may render the enforcement of Chinese judgment difficult or cause other possible damages to the other party.

In maritime disputes, Chinese maritime courts are also empowered by special legislation to issue maritime injunctions having anti-suit or anti-anti-suit effects. Article 51 of the PRC Maritime Special Procedure Law provides that the maritime court may upon the application of a maritime claimant issue a maritime injunction to compel the respondent to do or not to do certain acts in order to protect the claimant's lawful rights and interests from being infringed. [4] The maritime injunction is not constrained by the jurisdiction agreement or arbitration agreement as agreed upon between the parties in relation to the maritime claim. [5] In order to obtain a maritime injunction, three requirements shall be satisfied – firstly, the applicant has a specific maritime claim; secondly, there is a need to rectify the respondent's act which violates the law or breaches the contract; thirdly, a situation of emergency exists in which the damages would be caused or increased if the maritime injunction is not issued immediately. [6] Like the provision of the PRC CPL, the maritime injunction issued by the Chinese maritime court is mainly directed to mitigate the damages caused by the party's behaviour to the other parties' relevant rights and interests.

In Huatai P&C Insurance Corp Ltd Shenzhen Branch v Clipper Chartering SA, the Maritime Court of Wuhan City granted the maritime injunction upon the claimant's application to oblige the respondent to immediately withdraw the anti-suit injunction granted by the High Court of the Hong Kong SAR to restrain the Mainland proceedings. [7] The Hong Kong anti-suit injunction was successfully sought by the respondent on the grounds of the existence of a valid arbitration agreement. [8] However, the respondent did not challenge the jurisdiction of the Mainland maritime court over the dispute arising from the contract of carriage of goods by sea. Therefore, the Maritime Court of Wuhan City held that the respondent had submitted to its jurisdiction. As a result, the application launched by the respondent to the High Court of the Hong Kong SAR for the anti-suit injunction to restrain the Mainland Chinese proceedings had infringed the legitimate rights and interests of the claimant. In accordance with Article 51 of the PRC Maritime Special Procedure Law, a Chinese maritime injunction was granted to order the respondent domiciled in Greece to withdraw the Hong Kong anti-suit injunction (HCCT28/2017). [9] As the maritime injunction in the Huatai Property case was a Mainland Chinese ruling issued directly against the anti-suit injunction granted by a Hong Kong court, it is fair to say that if necessary Chinese people's court does not hesitate to issue a compulsory injunction "which orders a party not to seek injunction relief in another forum in relation to proceedings in the issuing forum". [10] This kind of compulsory injunction is also called 'anti-anti-suit injunction' or 'defensive anti-suit injunction'. [11]

When it comes to civil and commercial matters, including preserving intellectual property rights, the people's court in Mainland China is also prepared to issue procedural orders or rulings to prevent the parties from pursuing foreign proceedings, similar to anti-suit injunctions or anti-anti-suit injunction in common law world. In Guangdong OPPO Mobile Telecommunications Corp Ltd and its Shenzhen Branch v Sharp Corporation and ScienBiziP Japan Corporation, the plaintiff OPPO made an application to the seized Chinese court for a ruling to preserve actions or inactions.[12] Before and after the application, the defendant Sharp had brought tort claims arising from SEP (standard essential patent) licensing against OPPO by commencing several parallel proceedings before German courts, a Japanese court and a Taiwanese court. [13] In the face of foreign parallel proceedings, the Intermediate People's Court of Shenzhen City of Guangdong Province rendered a ruling to restrain the defendant Sharp from pursing any new action or applying for any judicial injunction before a Chinese final judgment was made for the patent dispute. [14] The breach of the ruling

would entail a fine of RMB 1 million per day. [15] Almost 7 hours after the Chinese 'anti-suit injunction' was issued, a German 'anti-anti-suit injunction' was issued against the OPPO. [16] Then, the Shenzhen court conducted a court investigation to the Sharp's breach of its ruling and clarified the severe legal consequences of the breach. [17] Eventually, Sharp choose to defer to the Chinese 'anti-suit injunction' through voluntarily and unconditionally withdrawing the anti-anti-suit injunction granted by the German court. [18] Interestingly enough, Germany, a typical civil law country, and other EU countries have also seemingly taken a U-turn by starting to issue anti-anti-suit injunctions in international litigation in response to anti-suit injunctions made by other foreign courts, especially the US court. [19]

In some other IP cases involving Chinese tech giants, Chinese courts appear to feel more and more comfortable with granting compulsory rulings having the same legal effects of anti-suit injunction and anti-anti-suit injunction. For example, in another seminal case publicized by the SPC in 2020, Huawei Technologies Corp Ltd ("Huawei") applied to the Court for a ruling to prevent the respondent Conversant Wireless Licensing S.A.R.L. ("Conversant") from further seeking enforcement of the judgment rendered by the Dusseldorf Regional Court in Germany. [20] Before the application, a pair of parallel proceedings existed, concurrently pending before the SPC as the second-instance court and the Dusseldorf Regional Court. On the same date of application, the German regional court delivered a judgement in favour of Conversant. Within 48 hours after receiving the Huawei's application for an anti-suit injunction, the SPC granted the injunction to prohibit Conversant from applying for enforcement of the German judgment; if Conversant failed to comply with the injunction, a fine (RMB 1 million per day) would be imposed, accumulating day by day since the date of breach. [21] Conversant applied for a reconsideration of the anti-suit injunction, and it was however rejected by the SPC eventually. [22] The SPC's anti-suit injunction against the German regional court's decision compelled both parties to go back to the negotiating table, and the dispute between the two parties striving for global parallel proceedings was finally resolved by reaching a settlement agreement. [23]

The SPC's injunction in Huawei v. Conversant is commended as the very first action preservation ruling having the "anti-suit injunction" nature in the field of intellectual property rights litigation in China, which has prematurely established the Chinese approach to anti-suit injunction in judicial practice. [24] It is believed by the Court to be an effective tool to curb parallel proceedings concurrent in

various jurisdictions across the globe. [25] We still wait to see Chinese court's future approach in other civil and commercial matters to anti-suit injunction or anti-anti-suit injunction issued by itself as well as those granted by foreign courts.

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1. See Impala Warehousing and Logistics (Shanghai) Co Ltd v Wanxiang Resources (Singapore) Pte Ltd [2015] EWHC 811, para.144.
2. See Liang Zhao, 'Party Autonomy in Choice of Court and Jurisdiction Over Foreign-Related Commercial and Maritime Disputes in China' (2019) 15 Journal of Private International Law 541, at 565.
3. See Article 100, para.1 of the PRC CPL (2017).
4. See Article 51 of the PRC Special Maritime Procedure Law (1999).
5. See Article 53 of the PRC Special Maritime Procedure Law (1999).
6. See Article 56 of the PRC Special Maritime Procedure Law (1999).
7. See Huatai Property & Casualty Insurance Co Ltd Shenzhen Branch v Clipper Chartering SA (2017) E 72 Xing Bao No.3 of the Maritime Court of Wuhan City.
8. See HCCT 28/2017 of the High Court of the Hong Kong SAR.
9. See (2017) E 72 Xing Bao No.3.
10. See Andrew S. Bell, Forum Shopping and Venue in Transnational Litigation (Oxford University Press 2003), at 196.
11. See ibid.
12. See (2020) Yue 03 Min Chu No.689-1.
13. See ibid.
14. See ibid.
15. See ibid.
16. See ibid.
17. See ibid.
18. See ibid.
19. See Greta Niehaus, 'First Anti-Anti-Suit Injunction in Germany: The Costs for International Arbitration' Kluwer Arbitration Blog, 28 February 2021.
20. See Huawei Technologies Corp Ltd and Others v Conversant Wireless Licensing S.A.R.L. (2019) Zui Gao Fa Zhi Min Zhong No.732, No.733, No.734-I.
21. See ibid.
22. See Conversant Wireless Licensing S.A.R.L. v Huawei Technologies Corp Ltd and Others, (2019) Zui Gao Fa Zhi Min Zhong No.732, No.733, No.734-II.
23. See Case No.2 of the "10 Seminal Intellectual Property Right Cases before

Chinese Courts", Fa Ban [2021] No.146, the General Office of the Supreme People's Court.
24. See ibid.
25. See ibid.

A Conflict of Laws Companion – Adrian Briggs Retires from Oxford

By Tobias Lutzi, University of Cologne

There should be few readers of this blog, and few conflict-of-laws experts in general, to whom Adrian Briggs will not be a household name. In fact, it might be impossible to find anyone working in the field who has not either read some of his academic writings (or Lord Goff's seminal speech in *The Spiliada* [1986] UKHL 10, which directly credits them) or had the privilege of attending one of his classes in Oxford or one of the other places he has visited over the years.



Adrian Briggs has taught Conflict of Laws in Oxford for more than 40 years, continuing the University's great tradition in the field that started with Albert Venn Dicey at the end of the 19th century and had been upheld by Geoffrey Cheshire, John Morris, and Francis Reynolds* among others. His writings include four editions of *The Conflict of Laws* (one of the most read, and most readable, textbooks in the field), six editions of *Civil Jurisdiction and Judgments* and his *magnus opus Private International Law in English Courts*, a perfect snapshot of the law as it stood in 2014, shortly before the UK decided to turn back the clock. His scholarship has been cited by courts across the world. Still, Adrian Briggs has managed to maintain a busy barrister practice in London (including well-known cases such as Case

C-68/93 *Fiona Shevill*, *Rubin v Eurofinance* [2012] UKSC 46, and *The Alexandros T* [2013] UKSC 70) while also remaining an active member of the academic community regularly contributing not only to parliamentary committees but also, on occasion, to the academic discussion on this blog.

To honour his impact on the field of Conflict of Laws, two of Adrian's Oxford colleagues, Andrew Dickinson and Edwin Peel, have put together a book, aptly titled 'A Conflict of Laws Companion'. It contains contributions from 19 scholars, including four members of the highest courts of their respective countries, virtually all of whom have been taught by (or together with) the honorand at Oxford. The book starts with a foreword by Lord Mance, followed by three short notes on Adrian Briggs as a Lecturer at Leeds University (where he only taught for about a year), as a scholar at Oxford, and as a fellow at St Edmund Hall. Afterwards, the authors of the longer academic contributions offer a number of particularly delightful 'recollections', describing Adrian Briggs, *inter alia*, as "the one time wunderkind and occasional *enfant terrible* of private international law" (Andrew Bell), "the perfect supervisor: unfailingly generous with his time and constructive with his criticism" (Andrew Scott), and "a tutor, colleague and friend" (Andrew Dickinson).

The academic essays that follow are conventionally organised into four categories: 'Jurisdiction', 'Choice of Law', 'Recognition and Enforcement of Foreign Judgments', and 'Conflict of Laws within the Legal System'. They rise to the occasion on at least two accounts. First, they all use an aspect of Adrian Briggs' academic *oeuvre* as their starting point. Second, they are of a quality and depths worthy of the honorand (possibly having profited from the prospect of needing to pass his critical eye). While they all are as insightful as inspiring, Ed Peel's contribution on 'How Private is Private International Law?' can be recommended with particular enthusiasm as it picks up Adrian Briggs' observation (made in several of his writings) that, so far as English law is concerned, "a very large amount of the law on jurisdiction, but also on choice of law, is dependent on the very private law notions of consent and obligation" and critically discusses it from the perspective of contract-law expert. Still, there is not one page of this book that does not make for a stimulating read. It is a great testament to one of the greatest minds in private international law, and a true Conflict of Laws companion to countless students, scholars, colleagues, and friends.

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* corrected from an earlier version

Enforcement of Foreign Judgments about Forum Land

By Stephen G.A. Pitel, Western University

In common law Canada, it has long been established that a court will not recognize and enforce a foreign judgment concerning title to land in the forum. The key case in support is *Duke v Andler,* [1932] SCR 734.

The ongoing application of that decision has now been called into question by the British Columbia Court of Appeal in *Lanfer v Eilers*, 2021 BCCA 241 (available here). In the court below the judge relied on *Duke* and refused recognition and enforcement of a German decision that determined the ownership of land in British Columbia. The Court of Appeal reversed and gave effect to the German decision. This represents a significant change to Canadian law in this area.

The Court of Appeal, of course, cannot overturn a decision of the Supreme Court of Canada. It reached its result by deciding that a more recent decision of the Supreme Court of Canada, that in *Pro Swing Inc v Elta Golf Inc*, 2006 SCC 52, had overtaken the reasoning and result in *Duke* and left the Court of Appeal free to recognize and enforce the German decision (see paras 44-45 and 74). This is controversial. It has been questioned whether *Pro Swing* had the effect of superseding *Duke* but there are arguments on both sides. In part this is because *Pro Swing* was a decision about whether to recognize and enforce foreign non-monetary orders, but the orders in that case had nothing to do with specific performance mandating a transfer or title to land in the forum.

I find it hard to accept the decision as a matter of precedent. The title to land aspect of the foreign decision seems a significantly different element than what is

at issue in most non-monetary judgment decisions, such that it is hard to simply subsume this within *Pro Swing*. What is really necessary is detailed analysis of whether the historic rule should or should not be changed at a normative level. How open should courts be to recognizing and enforcing foreign judgments concerning title to land in the forum? This raises related issues, most fundamentally whether the *Mocambique* rule itself should change. If other courts now know that British Columbia is prepared to enforce foreign orders about land in that province, why should foreign courts restrain their jurisdiction in cases concerning such land?

In this litigation, the defendant is a German resident and by all accounts is clearly in violation of the German court's order requiring a transfer of the land in British Columbia (see para 1). Why the plaintiff could not or did not have the German courts directly enforce their own order against the defendant's person or property is not clear in the decision. Indeed, it may be that the German courts only were prepared to make the order about foreign land precisely because they had the power to enforce the order *in personam* and that it thus did not require enforcement in British Columbia (analogous to the *Penn v Baltimore* exception to *Mocambique*).

Given the conflict with *Duke*, there is a reasonable likelihood that the Supreme Court of Canada would grant leave to appeal if it is sought. And if not, a denial of leave would be a relatively strong signal of support for the Court of Appeal's decision. But the issue will be less clear if no appeal is sought, leaving debate about the extent to which the law has changed.

The EAPO Regulation: An unexpected interpretative tool of

the French civil procedural system

Carlos Santaló Goris, Researcher at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law and Ph.D. candidate at the University of Luxembourg, offers an analysis of some aspects of a judgment rendered by the Paris Court of Appeals.

Regulation No 655/2014, establishing a European Account Preservation Order ("EAPO Regulation") introduced not only the first uniform provisional measure at the EU level but also the first European specific system to search for the debtors' bank accounts. The so-called information mechanism is, though, less accessible than the EAPO itself. According to Article 5 of the EAPO Regulation, creditors can apply for an EAPO *ante demandam*, during the procedure on the substance of the matter; or when they have already a title (a judgment, a court settlement, or an authentic document). However, only creditors with a title can submit a request for information. Furthermore, in case the title is not yet enforceable, creditors are subject to specific additional prerequisites.

In broad terms, the information mechanism operates following a traditional scheme of cross-border cooperation in civil matters within the EU. A court in a Member State sends a request for information to an information authority in the same or other Member State. The information authority then searches for the bank accounts and informs the court of origin about the outcome of that search.

Member States have a wide margin of discretion in implementing the information mechanism. They can freely pick the national body appointed as information authority. They also have the freedom to choose whichever method they consider more appropriate to search for the debtors' bank accounts as long as it is "effective and efficient" and "not disproportionately costly or time-consuming" (Article 14(5)(d) EAPO Regulation).

France assigned the role of information authority to its national enforcement authority, the bailiffs ("huissiers"). Information about the debtors' bank accounts is obtained by filing an application with FICOBA ("Fichier national des comptes bancaires et assimilés"). FICOBA is a national register hold by the French tax authority containing data about all the bank accounts existing in France. Other Member States, such as Poland or Germany, have also relied on similar domestic

registers.

This is where the paradox emerges. In France, creditors without an enforceable title who apply for a French domestic preservation order do not have access to FICOBA; conversely, creditors without an enforceable title who apply for an EAPO do. Article L151 A of the French Manual on Tax Procedures ("Livre des procédures fiscales") expressly indicates that bailiffs can access FICOBA for the purpose of ensuring the execution of an enforceable title ("aux fins d'assurer l'exécution d'un titre exécutoire"). The only exception is found, precisely, when they have to search for information in an EAPO procedure. This situation generates an imbalance between creditors who can access the EAPO Regulation and those who cannot.

In a judgment rendered by the Paris Court of Appeal on 28 January 2021 (Cour d'appel de Paris, Pôle 1 – chambre 10, 28 janvier 2021, n° 19/21727), the court found that such a difference of treatment between creditors with and without access to the EAPO Regulation "constitutes an unjustified breach of equality and discrimination between creditors" ("cette différence de traitement constitue une rupture d'égalité injustifiée et une discrimination entre créanciers"). Relying on the principle of equality, the court decided to extend access to FICOBA, beyond the context of the EAPO Regulation, to those creditors without an enforceable title.

The relevance of this judgment lies in the French court's use of the EAPO Regulation to interpret a national domestic procedure. The influence of the national civil procedures system on the European procedure is well known. Uniform European civil procedures, such as the EAPO Regulation, contain numerous references to the Member States' national law. Furthermore, courts tend to read these instruments through the lens of the national civil procedural systems, even with regard to those aspects that should apply uniformly (here is an example concerning the EAPO Regulation kindly offered by Prof. Requejo Isidro). The Paris Court of Appeal shows us that the European civil procedures can also be a source of inspiration when it comes to interpreting domestic procedural law.

The irony behind this judgment is that, during the *travaux préparatoires* of the EAPO Regulation, the French delegation expressly requested to restrain access to the information mechanism to those creditors who had "an enforceable title to support [their] application". One of the reasons argued by the delegation was that

“in French law, access to information is only given if the creditor possesses an enforceable title”. Ultimately, it is the French civil procedural system that is being influenced by the EAPO Regulation, and not the other way around.

China Enacts the Anti-Foreign Sanctions Law

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1. Background

On 10 June 2021, China’s Standing Committee of the National People’s Congress (hereinafter “NPC”) issued “Anti-Foreign Sanctions Law of the People’s Republic of China” (hereinafter “CAFSL”), which entered into force on the date of the promulgation. This is a reaction in response to the current tension between China and some western countries, in particular, the US and the EU that have imposed a series of sanctions on Chinese officials and entities. For example, in August 2020, the Trump administration imposed sanctions on 11 individuals for undermining Hong Kong’s autonomy and restricting the freedom of expression or assembly of the citizens of Hong Kong. In June 2021, President Biden issued Executive Order 14032 to amend the ban on US persons purchasing securities of certain Chinese companies. In March 2021, the EU imposed unilateral sanctions on relevant Chinese individuals and entity, based on the human rights issues in Xinjiang. China has responded by imposing counter sanctions, which were issued by the Ministry of Foreign Affairs as administrative orders. The Anti-Foreign Sanctions Law provides the legal basis for China’s further action and counter measures. This law was enacted after only two readings rather than the normal three demonstrating China’s urgent need to defend itself against a growing risk of foreign hostile measures.

2. The main content

Competent Authority: All relevant departments under the State Council have been authorized to involve issuing the anti-sanction list and anti-sanction measures (Art. 4 and Art. 5). The "Ministry of Foreign Affairs" and "other relevant departments under the State Council" are authorized to issue orders of announcement (Art. 9). Reviewing from the current practice of China's response to foreign sanctions, the Ministry of Foreign Affairs has always issued sanctions lists against foreign individuals and organizations, so it is likely that the China's Ministry of Foreign Affairs will still lead the movement of announcing and countering the foreign sanctions. However, other departments now also have the authority to sanction relevant individuals and entities. This provides flexibility if the foreign sanctions relate to a particular issue that is administrated by the particular department and when it is more efficient or appropriate for the particular department to handle it directly.

Targeted measures: Circumstances under which China shall have the right to take corresponding anti-sanction measures are as follows: (1) a foreign country violates international law and basic norms of international relations; (2) contains or suppresses China on various pretexts or in accordance with its own laws; (3) adopts discriminatory, restrictive measures against any Chinese citizen or organization; (4) meddles in China's internal affair (Art. 3).The CAFSL does not expressly specify whether the circumstances should be satisfied simultaneously or separately. From the perspective of legislative intent, it is obvious that the full text of the CAFSL is intended to broaden the legal authority for taking anti-sanctions measures in China, so it may not require the fulfillment of all four conditions.

It does not clarify the specific meanings of "violates international law and the basic norms of international relations", "contains or suppresses", and "meddles in China's internal affairs", which vary in different states and jurisdictions. But considering the sanctions issued by China and answers by the NPC spokesman, the key targeted circumstances are meddling China's internal affairs. It is reasonable to assume that these circumstances, mainly aimed at unilateral sanctions suppressing China under the pretexts of so-called sea-based, epidemic-based, democracy-based and human rights-based issues in Xinjiang, Tibet, Hong Kong and Taiwan. Therefore, other issues may not be included.

Art. 3 aims against the sanctions imposed by foreign states, for example the US and the EU. But from the text of the law, the concept of "sanctions" is not used, instead the concept of "discriminatory, restrictive measures" is adopted, which is very vague and broad. Discriminatory restrictive measures can be interpreted as foreign unilateral sanctions directly targeting Chinese individuals and organizations, which are the so-called "primary sanctions", different from the "secondary sanctions" restricting Chinese parties from engaging in normal economic, trade and related activities with directly sanctions third state's parties. In a press conference, the NPC spokesman stated that "the main purpose of the CAFSL is to fight back, counter and oppose the unilateral sanctions against China imposed by foreign states." It should only apply to tackle the primary sanctions against China.

Targeted entities: The targeted entities of the anti-sanction list and anti-sanction measures are vague and broad. The targeted entities of anti-sanctions list include individuals and organizations that are directly involved in the development, decision-making, and implementation of the discriminatory restrictive measures (Art. 4). What means involvement in the development or decision-making or implementation is ambiguous. And the indirect involvement is even vaguer, which may broaden the scope of the list. Besides, following entities may also be targeted: (1) spouses and immediate family members of targeted individuals; (2) senior executives or actual controllers of targeted organizations; (3) organizations where targeted individuals serve as senior executives; (4) organizations that are actually controlled by targeted entities or whose formation and operation are participated in by targeted entities (Art. 5).

Anti-sanction measures: The relevant departments may take four categories of anti-sanction measures: (1) travel ban, meaning that entry into China will not be allowed and deportation will be applied;(2) freezing order, namely, all types of property in China shall be seized, frozen or detained; (3) prohibited transaction, which means entities within the territory of China will not be allowed to carry out transactions or other business activities with the sanctioned entities; (4) the other necessary measures, which may include measures like "arms embargoes" or "targeted sanctions" (Art. 6). Former three anti-sanction measures have been taken by the Ministry of Foreign Affairs in practice. For example, on 26 March 2021, China decided to sanction relevant UK individuals and entities by prohibiting them from entering the mainland, Hong Kong and Macao of China,

freezing their property in China, and prohibiting Chinese citizens and institutions from doing business with them.

Relevant procedure: The decisions made by the competent authorities shall be final and not subject to judicial review(Art. 7).The counterparty shall not file an administrative lawsuit against anti-sanction measures and other administrative decisions. The counterparty can change the circumstance causing anti-sanction measures, and request the relevant department for the modification and cancellation of anti-sanction measures. If any change in the circumstances based on which anti-sanction measures are taken happens, the competent authorities may suspend, change or cancel the relevant anti-sanction measures (Art. 8). The transparency requirement stipulates the relevant orders shall be announced (Art. 9).

A coordination mechanism for the anti-foreign sanctions work shall be established by the state to coordinate the relevant work. Coordination and cooperation, and information sharing among various departments shall be strengthened. Determination and implementation of the relevant anti-sanction measures shall be based on their respective functions and division of tasks and responsibilities (Art. 10).

Legal consequences of violation: There are two types of legal consequences for violating the obligation of "implementation of the anti-sanction measures". Entities in the territory of China will be restricted or prohibited from carrying out relevant activities (Art. 11). Any entities, including foreign states' parties, will be held legally liable (Art. 14).

Besides, a party suffering from the discriminatory, restrictive measures may be entitled to bring a civil action against the entities that comply with the foreign discriminatory measures against China (Art. 12). The defendant, in theory, includes any entities in the world, even entities that are the nationals or residents of the country imposing sanctions against China. It is curious how this can be enforced in reality. In particular, if a foreign entity has no connections with China, it is hard for a Chinese court to claim jurisdiction, and even taking jurisdiction, enforcing judgments abroad can also be difficult, if not impossible. Because enforcement jurisdiction must be territorial, without assets and reputation in China, a foreign party may disregard the Chinese anti-sanction measure.

3. Impact of the CAFSL

The CAFSL is a higher-level legislation in the Chinese legal system than the relevant departmental rules, such as the Chinese Blocking Rules and “unreliable entity list”. It is a much more powerful legal tool than former departmental rules as it directly retaliates against the primary sanction on China. It provides a legal basis and fills a legal gap. However, it may not be good news for international businesses that operate in both the US and China. Those companies may have to choose between complying with US sanctions or Chinese laws, which may probably force some enterprises to make strategic decisions to accept the risk of penalty from one country, or even to give up the Chinese or US market. The CAFSL is vaguely drafted and likely to create unpredictable results to the commercial transaction and other interests. The application and enforcement of the CAFSL and Chinese subsequent rules and regulations may give detailed interpretations to clarify relevant issues to help parties comply with the CAFSL. However, to China, the CAFSL serves a political purpose, which is more important than the normal functioning of a law. It is a political declaration of China’s determination to fight back. Therefore, the most important matter for Chinese law-makers is not to concern too much of the detailed rules and enforcement to provide predictability to international business, but to send the warning message to foreign countries. International businesses, at the same time, may find themselves in a no-win position and may frequently face the direct conflict of overriding mandatory regulations in China and the US. By placing international businesses in the dilemma may help to send the message and pressure back to the US that may urge the US policy-makers to reconsider their China policy. After all, the CAFSL is a counter-measure, which serves defensive purposes, and would not be triggered in the absence of sanctions against Chinese citizens and entities.