# 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.

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# 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

Xu Huang, Sophia Tang
Wuhan University Institute of International Law

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.

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# New York Court Denies Enforcement of Chinese Judgment on Systemic Due Process Grounds

*Written by William S. Dodge (Professor, University of California, Davis, School of Law)*

*& Wenliang Zhang (Associate Professor, Renmin University of China Law School)*

In Shanghai Yongrun Investment Management Co. v. Kashi Galaxy Venture

Capital Co., the Supreme Court of New York (New York's court of first instance) denied enforcement of a Chinese court judgment on the ground that the judgment "was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law." The decision disagrees with every other U.S. and foreign court to have considered the adequacy of the Chinese judicial system in the context of judgments recognition. In recent years, there has been a growing trend in favor of the recognition of Chinese judgments in the United States and U.S. judgments in China. See William S. Dodge & Wenliang Zhang, Reciprocity in China-U.S. Judgments Recognition, 53 Vand. J. Transnat'l L. 1541 (2020). Unless this recent decision is overturned on appeal, it threatens to reverse the trend, to the detriment of judgment creditors in both countries.

In 2016 Shanghai Yongrun purchased an interest in Kashi Galaxy. In 2017, Kashi Galaxy agreed to repurchase that interest for RMB 200 million, an agreement that Kashi Galaxy allegedly breached by paying only part of the repurchase price. The agreement was governed by Chinese law and provided that suits could be resolved by courts in Beijing. In 2018, Shanghai Yongrun sued Kashi Galaxy, Maodong Xu, and Xu's wife in the Beijing No. 1 Intermediate People's Court. After a trial in which defendants were represented by counsel, the court granted judgment in favor of Shanghai Yongrun. The Beijing Higher People's Court affirmed the judgment on appeal, but it could not be enforced in China because no assets were available within the court's jurisdiction.

In 2020, Shanghai Yongrun brought an action against Kashi Galaxy and Xu in New York state court, seeking to have the Chinese judgment recognized and enforced. Article 53 of New York's Civil Practice Law and Rules (CPLR) has adopted the 1962 Uniform Foreign Money-Judgments Recognition Act (1962 Uniform Act), which provides that final money judgments rendered by foreign courts are enforceable in New York unless one of the grounds for non-recognition set forth in CPLR 5304 is established. These grounds include that the foreign court did not have personal jurisdiction, that the foreign court did not have subject matter jurisdiction, that the defendant did not receive notice of the foreign proceeding, that the judgment was obtained by fraud, that the judgment is repugnant to the public policy of the state, that the judgment conflicts with another final judgment, that the judgment is contrary to a forum selection clause, that personal jurisdiction was based only on service, and that the judgment is for

defamation and provided less protection for speech than would be available in New York. The defendants raised none of these grounds for non-recognition. Instead, they raised the broadest and least frequently accepted ground: that "the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law." CPLR 5304(a)(1).

To find a systemic lack of due process in the Chinese judicial system, the New York court relied entirely on the State Department's Country Reports on Human Rights Practices for 2018 and 2019. In particular, the court quoted the observations that Chinese "[j]udges regularly received political guidance on pending cases, including instructions on how to rule, from both the government and the [Chinese Communist Party], particularly in politically sensitive cases" and that "[c]orruption often influenced court decisions." The court held that these country reports "conclusively establish as a matter of law that the PRC judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law in the United States."

The implications of this ruling are broad. If the Chinese judicial system suffers from a systemic lack of due process, then no Chinese court judgments may ever be recognized and enforced under New York law. What is more, ten other states have adopted the 1962 Uniform Act, and an additional twenty-six states have adopted the updated 2005 Uniform Foreign-Country Money Judgments Recognition Act (2005 Uniform Act), which contains the same systemic due process ground for non-recognition. If followed in other jurisdictions, the New York court's reasoning would make Chinese judgments unenforceable throughout much of the United States.

But it seems unlikely that other jurisdictions will follow suit or that the New York court's decision will be upheld on appeal. U.S. decisions denying recognition on systemic due process grounds are rare. The leading cases have involved extreme and unusual circumstances: a Liberian judgment rendered during that country's civil war when the judicial system had "collapsed," Bridgeway Corp. v. Citibank, 201 F.3d 134, 138 (2d Cir. 2000), and an Iranian judgment against the sister of the former Shah, Bank Melli Iran v. Pahlavi, 58 F.3d 1406 (9th Cir. 1995). Although other courts have considered State Department country reports to be relevant in considering claims of systemic due process, none has found them to be

dispositive. For example, the Fifth Circuit rejected a claim that Moroccan courts suffered from systemic lack of due process notwithstanding a statement in the 2009 country report that "in practice the judiciary . . . was not fully independent and was subject to influence, particularly in sensitive cases." DeJoria v. Maghreb Petroleum Exploration, S.A., 804 F.3d 373, 381 (5th Cir. 2015). This language about Moroccan courts is quite similar to the country report statements about China that the New York court found conclusive.

With respect to China specifically, no U.S. court had previously denied recognition based on a systemic lack of due process. To the contrary, a prior New York state court decision held that "the Chinese legal system comports with the due process requirements," Huizhi Liu v. Guoqing Guan, Index No. 713741/2019 (N.Y. Sup. Ct., Jan. 7, 2020), and a federal court in California concluded that "the Chinese court was an impartial tribunal." Qinrong Qiu v. Hongying Zhang, 2017 WL 10574227, at *3 (C.D. Cal. 2017). Other U.S. decisions have specifically noted that the party resisting enforcement had not alleged systemic lack of due process as a ground for non-recognition. See Global Material Technologies, Inc. v. Dazheng Metal Fibre Co., 2015 WL 1977527, at *7 (N.D. Ill. 2015); Hubei Gezhouba Sanlian Industrial Co. v. Robinson Helicopter Co., 2009 WL 2190187, at *6 (C.D. Cal. 2009).

China has been promoting the rule of law, and its legal system is modernizing to follow internationally accepted standards. The independence of China's judiciary is guaranteed by its Constitution and other laws. To promote international trade and investment, China has emphasized the independence and impartiality of its courts. Other countries have repeatedly recognized and enforced Chinese judgments, including Australia, Canada, Germany, Israel, the Netherlands, New Zealand, Singapore, South Korea, and the United Kingdom. When parties have questioned the integrity of the Chinese judicial system as a whole, courts have rejected those arguments. Recently, in Hebei Huaneng Industrial Development Co. v. Deming Shi, [2020] NZHC 2992, the High Court of New Zealand found that the Chinese court rendering the judgment "was part of the judicial branch of the government of the People's Republic China and was separate and distinct from legislative and administrative organs. It exercised a judicial function. Its procedures and decision were recognisably judicial." When claims of improper interference are raised in the context of judgments recognition, the New Zealand court suggested, "the better approach is to see whether justice was done in the

particular case."

The New York court's decision in Shanghai Yongrun is not only contrary to past decisions involving the enforcement of Chinese judgments in the United States and other countries. It also threatens to undermine the enforceability of U.S. judgments in China. Under Article 282 of the Civil Procedure Law of the People's Republic of China, foreign judgments are recognized and enforced "in accordance with the principle of reciprocity." For U.S. judgments, Chinese courts in cases like Liu v. Tao (Reported on by Ron Brand) and Nalco Co. v. Chen have found China's reciprocity requirement to be satisfied by U.S. decisions that recognized and enforced Chinese judgments. If U.S. courts change course and begin to hold that China's judiciary can never produce enforceable judgments, Chinese courts will certainly change course too and deny recognition to U.S. judgments for lack of reciprocity.

Maintaining reciprocity with China does not require U.S. courts to enforce every Chinese judgment. U.S. courts have denied recognition and enforcement of Chinese judgments when the Chinese court lacked personal jurisdiction, Folex Golf Indus., Inc. v. O-Ta Precision Industries Co., 603 F. App'x 576 (9th Cir. 2015), or when the Chinese judgment conflicted with another final judgment, UM Corp. v. Tsuburaya Prod. Co., 2016 WL 10644497 (C.D. Cal. 2016). But so far, U.S. courts have treated Chinese judgments the same as judgments from other countries, applying the case-specific grounds for non-recognition in an evenhanded way. The systemic due process ground on which the New York court relied in Shanghai Yongrun is fundamentally different because it holds Chinese judgments to be categorically incapable of recognition and enforcement.

New York may be on the verge of expanding the case-specific ground for non-recognition by adopting the 2005 Uniform Act to replace the 1962 version that is currently in place. A bill to adopt the 2005 Act has passed both the Assembly and the Senate in New York. The 2005 Act adds two grounds for non-recognition not found in the 1962 Act: (1) that "the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment"; and (2) that "the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law." These grounds, already found in the laws of twenty-six other states that have adopted the 2005 Uniform Act, would allow New York courts to review foreign judgments for corruption and for lack of due process in the specific case without

having to condemn the entire foreign judiciary as incapable of producing recognizable judgments. It is worth noting that the defendants in Shanghai Yongrun did not claim that there was any defect in the Chinese proceedings that led to the judgment against them.

Many court systems around the world are imperfect. The case-specific grounds for non-recognition found in the 1962 and 2005 Uniform Acts allow U.S. courts to refuse enforcement to foreign judgments on a range of case-specific grounds from lack of jurisdiction or notice, to public policy, to corruption or lack of due process. These case-specific grounds largely eliminate the need for U.S. courts to declare that an entire judicial system is incapable of producing valid judgments.

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# Territorial Jurisdiction for Disputes between Members of a Political Party in Nigeria

Election or political party disputes often feature before Nigerian courts. In Nigeria jurisdiction in matters of conflict of laws (called "territorial jurisdiction" by many Nigerian judges) also applies to matters of disputes between members of a political party in the inter-state context.[1]

In *Oshiomhole v Salihu (No. 1)*[2] (reported on June 7, 2021), one of the issues for determination was whether the High Court of the Federal Capital Territory, Abuja possessed territorial jurisdiction to handle a dispute between members of Nigeria's ruling political party. The 1st defendant/appellant was at the time the National Chairman of the 2nd defendant/appellant (the ruling party in Nigeria). It was alleged by some Members of the party that he had been suspended at the ward level in Edo State and he was thus disqualified from holding the position of National Chairman. The 1st defendant/appellant, inter alia, filed a preliminary

objection to the suit and argued that the High Court of the Federal Capital Territory did not possess territorial jurisdiction because the cause of action arose in Edo State where he was alleged to have been suspended as the National Chairman. The Court of Appeal (per Onyemenam JCA in his leading judgment) dismissed the preliminary objection and held as follows:

"The issue herein is straightforward. Order 3 rule 4 of the High Court of Federal Capital Territory (Civil Procedure) Rules 2018 provides that:

"All other suits shall where the defendant resides or carries on business or where the cause of action arose in the Federal Capital Territory, be commenced and determined in the High court of Federal Capital Territory, Abuja."

By this Rule, apart from the matters that fall under Order 3 Rules 1 & 2 of the High Court of Federal Capital Territory (Civil Procedure) Rules 2018, the High Court of Federal Capital Territory, Abuja shall have territorial jurisdiction where:

1. The defendant resides within the Federal Capital Territory or
2. The defendant carries on business within the Federal Capital Territory or
3. The cause of action arose within the Federal Capital Territory or

In either of the three circumstances stated above, the High Court of Federal Capital Territory, Abuja shall have territorial jurisdiction to hear and determine the suit. The appellants' contention herein is that the cause of action arose in Edo State and not in the Federal Capital Territory, Abuja and as such the High court of Federal Capital Territory, Abuja lacks the jurisdiction to hear the suit. This argument is one third percent correct for the simple fact that, where cause of action arose is not the sole source of territorial jurisdiction of the High court of Federal Capital Territory, Abuja. In the instant case, the office of the 1st appellant as National Chairman of the 2nd appellant; as well as the Registered office and Secretariat of the 2nd appellant are both within the Federal Capital Territory, Abuja. This makes the High court of Federal Capital Territory, Abuja, have territorial jurisdiction over the suit filed by the respondents under Order 3 rule 4(1) of the High Court of Federal Capital Territory(Civil Procedure) Rules, 2018…

I therefore hold that the trial court has the territorial jurisdiction to hear the respondent's suit and resolve the issue in favour of the 1st – 6th respondents."[3]

The above rationale for the Court of Appeal's decision of Onyemenam JCA in his leading judgment is clearly wrong. Order 3 rule 4 of the High Court of Federal Capital Territory (Civil Procedure) Rules 2018 is a choice of venue rule for allocating jurisdiction as between the judicial division of the Federal Capital Territory for the purpose of geographical and administrative convenience. It cannot and should not be used to resolve inter-state matters of conflict of laws. It is submitted that the better view is stated by the Court of Appeal in *Ogunsola v All Nigeria Peoples Party,*[4] where Oduyemi JCA in his leading judgment at the Court of Appeal, rightly held that:

"Where the dispute as to venue is not one between one division or another of the same State High Court or between one division or the other of the F.C.T. Abuja High Court, but as between one division or the other of the F.C.T Abuja High Court, but as between the High Court of one State in the Federation and the High Court of the F.C.T. then the issue of the appropriate or more convenient forum is one to be determined under the rules of Private International Law formulated by courts within the Federation."[5]

In *Oshiomhole* (*supra*) the opportunity was missed to apply and develop jurisdictional conflict of law rules for disputes between members of a political party in Nigeria. The result of the decision reached in *Oshiomhole* (*supra*) in applying choice of venue rules through Order 3 rule 4 of the High Court of Federal Capital Territory (Civil Procedure) Rules 2018 will conflate with the principles of Nigerian private international as the defendants were resident in the State they were sued. So the Court of Appeal in *Oshiomhole* (*supra*) incorrectly reasoned its way to the right conclusion – the High Court of the Federal Capital Territory had jurisdiction in this case.

Unfortunately, in recent times the Supreme Court of Nigeria has held that the High Court of a State cannot establish jurisdiction over a cause of action that occurs in another State – the strict territorial jurisdiction approach.[6] This approach has also been applied to disputes between members of a political party.[7] This approach is also wrong as it ignores the principles of traditional Nigerian common law conflict of laws. It also leads to injustice and unduly circumscribes the jurisdiction of the Nigerian court, which ultimately makes Nigerian courts inaccessible and unattractive for litigation. Nigerian courts

should have jurisdiction as of right once a defendant is resident or submits to the jurisdiction of the Nigerian court. In *Oshiomhole* (*supra*), if the strict territorial jurisdiction approach was applied, the High Court of the Federal Capital Territory, Abuja would not have had jurisdiction because the cause of action arose in Edo State.

In summation, applying the right principle of private international law, the Court of Appeal in *Oshiomhole* (*supra*) reached the right decision (residence of the defendant) through an incorrect reasoning of relying on Order 3 rule 4 of the High Court of Federal Capital Territory (Civil Procedure) Rules 2018, which is choice of venue rule for judicial divisions within a State. If the recent Supreme Court cases, which apply the strict territorial jurisdiction approach was applied in this case, *Oshiomhole (supra*) would be *per incuriam* and, the High Court of the Federal Capital Territory, Abuja would not have had jurisdiction because the cause of action arose in Edo State.

[1]*Ogunsola v All Nigeria Peoples Party* (2003) 9 NWLR (Pt. 826) 462, 480.

[2] (2021) 8 NWLR (Pt. 1778) 237.

[3]*Oshiomhole v Salihu (No. 1*) (2021) 8 NWLR (Pt. 1778) 237, 275-6.

[4](2003 ) 9 NWLR (Pt. 826) 462, 480 .

[5] *Ogunsola v All Nigeria Peoples Party* (2003 ) 9 NWLR (Pt. 826) 462, 480 .

[6] *Capital Bancorp Ltd v Shelter Savings and Loans Ltd* (2007) 3 NWLR 148; *Dairo v Union Bank of Nigeria Plc* (2007) 16 NWLR (Pt 1059) 99,

[7]*Mailantarki v Tongo & Ors* (2017) LPELR-42467; *Audu v. APC & Ors* (2019) LPELR – 48134.

# The Supreme Court of Japan on Punitive Damages…

*Written by Béligh Elbalti (Associate Professor, Graduate School of Law and Politics – Osaka University)*

1. **Introduction**

Assume that you successfully obtained a favourable judgment from a foreign court that orders the losing party to pay punitive damages in addition to compensatory damages. Assume also that, later, you could obtain a partial satisfaction of the amount awarded by the court by way of compulsory execution in the rendering state. Happy with the outcome and knowing that punitive damages cannot be enforced in Japan, you confidently proceed to enforce the remaining part before a Japanese court arguing that the payment you would like to obtain now corresponds to the compensatory part of the award. Could the judgment be enforced in Japan where punitive damages are considered as contrary to public policy? In other words, to what part of the damages the paid amount corresponds: the compensatory part or the punitive part?

This is the question that the Supreme Court of Japan answered in its recent judgment rendered on 25 May 2021.

The present case has already yielded an important Supreme Court decision rendered on 18 January 2019 (decision available here). The main issue that was addressed therein concerned the compatibility of the foreign judgment with the procedural public policy of Japan. The summary below will however be limited to the issue of punitive damages as this was the main issue the Supreme Court has addressed in its decision reported here.

2. **Facts:**

In 2013, the Xs (Appellees) filed an action with a Californian court seeking damages against the Y (appellant) and several other persons for illegally obtaining their trade secrets and business models. In 2015, the Californian court rendered a default judgment against Y ordering him to pay about USD 275,500, including punitive damages (USD 90,000) and compensatory damages (USD

184,990) as well as other related additional fees. Soon after the decision became final and binding, Xs petitioned for the compulsory execution of the said decision in the US and could obtain partial payment of the awarded damages (USD 134,873). Thereafter, Xs moved to claim the payment of the remaining part (i.e. USD 140,635) by seeking the enforcement of the Californian judgment after deducting the part of the payment already made. Xs argued that the judgment did not violate public policy as the amount they were seeking to obtain in Japan was anyway confined within the scope of the compensatory damages. Y challenged the petition for enforcement, *inter alia*, on the ground that punitive damages were incompatible with Japanese public policy and therefore had no effect in Japan; accordingly, the payment made in the US should be appropriated to the satisfaction of the compensatory part of the foreign judgment. Thus the question above.

3. **Rulings**

The first instance court (Osaka District Court) considered that the punitive damages ordered by the Californian court were effectively punitive in nature and as such against public policy and had no effect in Japan. The court then considered that the payment made abroad could not correspond to the payment of the punitive damages part, because this would result in enlarging the scope of the enforcement of the other part of the judgment and consequently lead to a result that did not substantially differ from the recognition of the effect of the punitive award. The court stated that the payment made abroad corresponded to the part *other than* the punitive portion of the damages. It finally ruled that the enforcement petition was to be admitted to the extent of the remaining amount (i.e. only USD 50,635), after deducting both the payment already made (USD 134,873) and the punitive damages part (USD 90,000).

On appeal, the issue of punitive damages was not addressed by the second Instance Court (Osaka High Court). The Court decided to reject the enforcement of the Californian default judgment on the ground of violation of procedural public policy of Japan because Y was deprived of an opportunity to file an appeal as the notice of entry of judgment was sent to a wrong address. However, unsatisfied with the ruling of the High Court as to whether Y was actually deprived of an opportunity to file an appeal, the Supreme Court quashed the High Court ruling and remanded the case to the same court for further examination. Again, the issue of punitive damages was not raised before the Supreme Court.

Before the Osaka High Court, as the court of remand, the issue of the enforceability of punitive damages was brought back to the center of the debate. In this respect, like the Osaka District Court, the Osaka High Court considered that the USD 90,000 award was punitive in nature and therefore incompatible with public policy in Japan. However, unlike the Osaka District Court, the High Court considered that since the obligation to pay punitive damages *in* California could not be denied, the payment made abroad through the compulsory execution procedure should be appropriated to the satisfaction of the amount ordered by the Californian court as a whole. Therefore, the since the remaining part (i.e. USD 140,635) did not exceed the total amount of the foreign judgment excluding the punitive damages part (i.e. USD 185,500), the High Court considered that its enforcement was not contrary to public policy. Unhappy with this ruling, Y appealed to the Supreme Court.

The Supreme Court disagreed (decision available here, in Japanese only). According to the Supreme Court, "if payment was made with respect to an obligation resulting from a foreign judgment including a part ordering the payment of monies as punitive damages, which do not meet the requirements of Art. 118(iii) CCP, it should be said that the foreign judgment cannot be enforced as if the said payment was appropriated to the satisfaction of the punitive damages part, even when such payment was made in the compulsory execution procedure of the foreign court" (translation by author).

The Supreme Court considered that the payment made should be appropriated to the satisfaction of the parts of the foreign judgment other than punitive damages. According to the Supreme Court, punitive damages had no effect in Japan and therefore, there could be no obligation to pay punitive damages when deciding the effect of a payment of an obligation resulting from a foreign judgment. The Supreme Court finally agreed with the Osaka District Court in considering that, since there was no obligation on the part of Y to pay punitive damages due to their incompatibility with Japanese public policy, Y's obligation under the foreign judgment was limited to USD 185,500. Therefore, since Y had already paid USD 134,873 in the compulsory execution procedure in rendering state, Xs were entitled to claim only the difference of USD 50,635.

4. **Comments:**

The ruling of the Supreme Court is interesting in many regards. First, the

Supreme Court reiterated its earlier categorical position on the incompatibility of punitive damages with Japanese public policy. This position is in line with the prevailing opinion in Japan according to which punitive damages are *in principle* contrary to Japanese public policy due to the fundamental difference in nature (civil v. criminal) and function (compensatory v. punitive/sanction) (For a general overview on the debate in Japan, see Béligh Elbalti, "Foreign Judgments Recognition and Enforcement in Civil and Commercial Matters in Japan", *Osaka University Law Review*, Vol. 66, 2019, pp. 7-8, 24-25 available here).

Second, the solution in the present decision can be regarded as a logical consequence of the absolute rejection of punitive damages. In effect, in deciding as it did, the Supreme Court showed its intention to discharge the judgment debtor from his/her obligation to pay punitive damages resulting from a foreign judgment even in the case where a partial payment has been made as a consequence of a compulsory procedure before the foreign court. Indeed, since there can be no obligation to pay punitive damages resulting from a foreign judgment, any payment made abroad should be appropriated to the satisfaction of the parts of the awarded damages other than the punitive portion.

Third, after the first Supreme Court decision on punitive damages, a practice has been established based on which judgment creditors who seek the enforcement of a foreign judgment containing punitive damages, usually, content themselves with the request for the enforcement of the compensatory part to the exclusion of the punitive part of the foreign judgment. (See for example, the Supreme Court judgment of 24 April 2014, available here). For a comment on this case from the perspective of indirect jurisdiction, see Béligh Elbalti, "The Jurisdiction of Foreign Courts and the Recognition of Foreign Judgments Ordering Injunction – The Supreme Court Judgment of April 24, 2014, *Japanese Yearbook of International Law*, vol. 59, 2016, pp. 295ss, available here). This practice is expected to continue after the present decision as well. However, in this respect, the solution of the Supreme Court raises some questions. Indeed, what about the situation where the judgment creditor initiates a procedure in Japan seeking the enforcement of compensatory part of the judgment first? Would it matter if the judgment creditor shows the intention to claim the payment of the punitive part later so that he/she ensures the satisfaction of the whole amount of the award? More importantly, if the judgment debtor was obliged to pay for example the full award including the punitive part in the rendering state (or in another state

where punitive damages are enforceable), would it be entitled to claim in Japan the payment back of the amount that corresponds to the punitive part of the foreign judgment? Only further developments will provide answers to these questions.

In any case, one can somehow regret that the Supreme Court missed the chance to reevaluate its position with respect to punitive damages. In effect, the court ruled as it did without paying the slightest heed to the possibility of declaring punitive damages enforceable be it under certain (strict) conditions. In this regard, the court could have adopted a more moderate approach. This approach can consist in admitting that punitive damages are not *per se* contrary to public policy, and that the issue should be decided on a case by case basis taking into account, for example, the evidence produced by the judgment creditor to the effect that the awarded amount would not violate public policy (see in this sense, Toshiyuki Kono, "Case No. 67" *in* M Bälz *et al.* (ed.)*, Business Law in Japan – Cases and Comments – Intellectual Property, Civil, Commercial and International Private Law* (Wolters Kluwer Law & Business, 2012), p. 743s); or when the amount awarded is not manifestly disproportionate with the damages actually suffered (for a general overview, see Béligh Elbalti, "Spontaneous Harmonization and the Liberalization of the Recognition and Enforcement of Foreign Judgments, *Japanese Yearbook of Private International Law*, Vol. 16, 2014, pp. 274-275 available here).

In this respect, it is interesting to note that such an approach has started to find its way into the case law in some jurisdictions, although the methods of assessment of compatibility of punitive damages with the public policy of the recognizing state and the outcome of such an assessment differed from one jurisdiction to another (for a general overview, see Csongor I Nagy, Recognition and Enforcement of US Judgments Involving Punitive Damages in Continental Europe, 30 *Nederlands Internationaal Privaatrecht* 1 2012, pp. 4ss). For example, the Greek Supreme Court has refused to enforce punitive damages but after declaring that punitive damages may not violate public policy if they are not excessive (judgment No. 17 of 7 July 1999, decision available at the Greek Supreme Court homepage). The French *Cour de cassation* has also refused to enforce a foreign judgment awarding punitive damages, but – again – after declaring that punitive damages were not *per se* contrary to French *ordre public*, and that that should be treated as such only when the amount award was

disproportionate as compared with the sustained damages (judgment No. 09-13.303 of 1 December 2010, on this case, see Benjamin West Janke and François-Xavier Licari, "Enforcing Punitive Damages Awards in France after Fountaine Pajot", 60 *AJCL* 2012, pp. 775ss). On the other hand, the Spanish Supreme Court accepted the full enforcement of an American judgment including punitive damages (judgment of No. 1803/2001 of 13 November 2001; on this case see Scott R Jablonski, "Translation and Comment: Enforcing U.S. Punitive Damages Awards in Foreign Courts – A Recent Case in the Supreme Court of Spain" 24 *JLC* 2005, pp. 225ss). Finally, the recent extraordinary *revirement jurisprudentiel* of the Italian Supreme Court deserves to be highlighted. Indeed, in its judgment No. 16601 of 5 July 2017, the *Corte Suprema di Cassazione* declared that punitive damages could be enforced under certain conditions after it used to consider, as Japanese courts still do, that punitive damages as such were contrary to Italian public policy (on this case see, Angelo Venchiarutti, "The Recognition of Punitive Damages in Italy: A commentary on *Cass Sez Un 5 July 2017, 16601, AXO Sport, SpA v NOSA Inc*" 9 *JETL* 1, 2018, pp.104ss). It may take some time for Japanese courts to join this general trend, but what is sure is that the debate on the acceptability of punitive damages and their compatibility with Japanese public policy will certainly be put back in the spotlight of doctrinal discussions in the coming days.

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# Territorial Jurisdiction for Breach of Contract in Nigeria or whatever

Jurisdiction is a fundamental aspect of Nigerian procedural law. In Nigerian judicial parlance, we have become accustomed to the principle that the issue of jurisdiction can be raised at any time, even at the Nigerian Supreme Court – the highest court of the land – for the first time.[1] The concept of jurisdiction in Nigerian conflict of laws (often called "territorial jurisdiction" by many Nigerian judges) is the most confusing aspect of Nigerian conflict of laws. This is because the decisions are inconsistent and not clear or precise. The purpose of this write

up is to briefly highlight the confusion on the concept of jurisdiction in Nigerian conflict of laws through the lens of a very recently reported case (reported last week) of *Attorney General of Yobe State v Maska* & *Ano*r. ("*Maska*").[2]

In *Maska* the 1st claimant/respondent instituted an action for summary judgment against the defendant/appellant and the 2nd respondent at the High Court of Katsina State for breach of contract. The 1st claimant/respondent alleged that the defendant/appellant purchased some trucks of maize from the 1st claimant/respondent and promised to pay for it. The 1st claimant/respondent also alleged that the defendant/appellant failed to pay for the goods, which resulted in the present action. It was undisputed that the place of delivery (or performance) was in Kastina State, the 1st claimant/respondent's place of business, where the defendant/appellant took delivery of the goods. However, the defendant/appellant challenged the jurisdiction of the Kastina State High Court to hear the case on the basis that the contract in issue was concluded in Yobe State, where it claimed the cause of action arose, which it argued was outside the jurisdiction of Kastina State. On this basis the defendant/appellant argued that the court of Yobe State had exclusive jurisdiction.

The High Court of Kastina State assumed jurisdiction and rejected the argument of the defendant/appellant. The defendant/appellant appealed but it was not successful. The Court of Appeal held that the concept of territorial jurisdiction for breach of contract is based on any or a combination of the following three factors – (a) where the contract was made (*lex loci contractus)*; (b) where the contract is to be performed (*lex loci loci solutions)***;**.and (c) where the defendant resides. In the instant case, the place of performance – particularly the place of delivery – was in Kastina State – so the High Court of Kastina State could assume jurisdiction in this case.[3]

*Maska* adds to the confusion on the concept of jurisdiction in Nigerian conflict of laws. In *Maska,* the focus was on what it labeled as "territorial jurisdiction for breach of contract" in inter-state matters. In international and inter-state matters, Nigerian judges apply at least four approaches in determining whether or not to assume jurisdiction in cases concerned with conflict of laws.

First, some Nigerian judges apply the traditional common law rules on private international law to determine issues of jurisdiction.[4] This approach is based as of right on the residence and/or submission of the defendant to the jurisdiction of the Nigerian court. Where the defendant is resident in a foreign country and does not submit to the jurisdiction of the Nigerian court, then leave of court is required in accordance with the relevant civil procedure rules to bring a foreign defendant before the Nigerian Court. This is all subject to the principle of *forum non conveniens* – the appropriate forum where the action should be brought in the interest of the parties and the ends of justice. In *Maska,* the common law approach of private international law was not applied. If it was applied the High Court of Kastina State would not have had jurisdiction as of right because the defendant/appellant was neither resident in Kastina State nor submitted to the jurisdiction of the Kastina State High Court. In recent times, the common law approach to conflict of laws appears to be witnessing a steady decline among Nigerian appellate judges except for Abiru JCA (a Nigerian Court of Appeal judge) who has vehemently supported this approach by submitting that the concept of territorial jurisdiction in Nigeria is one of the misunderstood concepts of Nigerian conflict of laws.[5]

Second, some Nigerian judges apply choice of venue rules to determine conflict of law rules on jurisdiction.[6] This is wrong. Indeed, some Nigerian judges have rightly held that choice of venue rules are not supposed to be used to determine matters of jurisdiction in Nigerian conflict of laws.[7] Choice of venue rules are used to determine which judicial division within a State (in the case of the State High Court) or judicial division within the Nigerian Federation (in the case of the Federal High Court) has jurisdiction. Choice of venue rules are mainly utilised for geographical and administrative convenience. Unfortunately, it appears that in *Maska* choice of venue rules were utilised to determine the jurisdiction of the Kastina State High Court in matters of conflict of laws. Order 10 rule 3 of the Kastina State High Court Civil Procedure Rules provides that all suits for breach of contract "shall be commenced and determined in the Judicial Division in which such contract ought to have been performed or in which the defendant resides or carries on business." Although *Maska* did not explicitly refer to Order 10 rule 3, it referred to some previous decisions of Nigerian appellate judges that were influenced by choice of venue rules to determine which court has jurisdiction in matters of conflict of laws.[8] *Maska* makes the confusion more problematic because it did not cite the wrong choice of venue rules in question (Order 10 rule

3 of the Kastina State High Court Civil Procedure Rules) but wrongly created the impression that this represents the position on Nigerian conflict of laws on jurisdiction.

Third, some Nigerian judges apply the strict territorial jurisdiction approach.[9] This approach is that a Nigerian court cannot assume jurisdiction where the cause of action arose in one State, or another foreign country. I label this approach as "strict" because my understanding of the Nigerian Supreme Court decisions on this point is that based on constitutional law a Nigerian court is confined to matters that arose within its territory, so that one State High Court cannot assume jurisdiction over a matter that occurs within another territory. This approach is also wrong as it ignores the principles of traditional Nigerian common law conflict of laws. There is no provision of the Nigerian constitution that states that a court's jurisdiction is limited to matters that occur within its territory. It also leads to injustice and unduly circumscribes the jurisdiction of the Nigerian court, which ultimately makes Nigerian courts inaccessible and unattractive for litigation. Nigerian courts should have jurisdiction as of right once a defendant is resident or submits to the jurisdiction of the Nigerian court. In *Maska*, even if the strict territorial jurisdiction approach was applied, the Kastina State High Court would have had jurisdiction because the cause of action for breach of contract arose in Kastina State where the defendant/appellant took delivery of the goods.

Fourth some Nigerian judges apply the mild territorial jurisdiction approach.[10] This approach softens the strict territorial jurisdiction approach. This is an approach that has mainly been applied by the Nigerian Court of Appeal probably as a way of ameliorating the injustice of the strict territorial approach applied in some Nigerian Supreme Court decisions. This approach is that more than one court can have jurisdiction in matters of conflict of laws where the cause of action is connected to such States. With this approach, all the plaintiff needs to do is to tailor its claim to show that the cause of action is also connected to its claim. The danger with this approach is that it can lead to forum shopping and unpredictability – the plaintiff can raise the slightest grounds on why the cause of action is connected with its case to institute the action in any court of the Nigerian federation. The mild territorial jurisdiction approach was applied in *Maska* because the Court of Appeal held either the Kastina State High Court or Yobe State High Court could assume jurisdiction as the cause of action was

connected with both of them.

In conclusion, in very recent times the Nigerian traditional common law principle of conflict of laws (based on English common law conflict of laws without EU influences) on jurisdiction is beginning to witness a steady decline among Nigerian judges and lawyers. The concept of strict territorial jurisdiction, mild territorial jurisdiction, and choice of venue rules appears to be the current norm despite criticism from some Nigerian academics and even a Court of Appeal judge (Justice Abiru).[11] *Maska* is just another case that demonstrates why the principle of private international law should feature more in the parlance of Nigerian lawyers and judges. I have argued for judicial decisions and academic works in private international law in Africa to be intellectually independent and creative. This means that in Nigeria we should not blindly follow English common law rules. It could be that the common law approach might be an inadequate basis of jurisdiction for Nigerian private international law especially in inter-state matters. For example in *Maska*, if the Kastina State High Court had applied the common law private international law rules, it would not have had jurisdiction despite being the place of performance, since the defendant was neither resident nor submitted to the jurisdiction of the court! Should there be a reformulation of the principle of jurisdiction in Nigerian conflict of laws in international and inter-state matters so that it is clear, consistent and predictable? This is a discussion for another day.

[1]*Madukolu v Nkemdilim* ( 1962) 2 SCNLR 341; *Drexel Energy and Natural Resources Ltd v Trans International* Bank Ltd ( 2008 ) 18 NWLR (Pt. 1119) 388, 424 – 27, 437 – 38 *Dangote General Textiles Products Ltd v Hascon Associates (Nig) Ltd* ( 2013 ) 16 NWLR (Pt. 1379) 60, 91*; B Apugo & Sons Ltd v Orthopaedic Hospitals Management Board* ( 2016 ) 13 NWLR 206, 240. In principle, what can be raised for the first time on appeal is substantive jurisdiction as prescribed by the Constitution or enabling statute and not procedural jurisdiction. This is a point that has been stressed by Abiru JCA in recent cases such as *Khalid v Ismail (* 2013 ) LPELR-22325 (CA); *Alhaji Hassan Khalid v Al-Nasim Travels & Tours Ltd* ( 2014 ) LPELR-22331 (CA) 23 – 25 ; *Nigerian National Petroleum Corporation v Zaria* ( 2014 ) LPELR-22362 (CA) 58 – 60; *Obasanjo Farms (Nig)*

*Ltd v Muhammad* ( 2016 ) LPELR-40199 (CA).

[2](2021) 7 NWLR (Pt. 1776) 535.

[3] *Attorney General of Yobe State v Maska* & *Ano (2021) 7 NWLR (Pt. 1776)* 535, 548-9.

[4]See generally *British Bata Shoe Co v Melikan* (1956) SCNLR 321; *Nigerian Ports Authority v Panalpina World Transport (Nig) Ltd* (1973) 1 ALR Comm 146, 172; *Muhammed v Ajingi* (2013) LPELR-20372 (CA); *Barzasi v Visinoni* (1973) NCLR 373.

[5]*Muhammed v Ajingi* (2013) LPELR-20372 (CA) 23-5; Foreword to CSA Okoli and RF Oppong, *Private International Law in Nigeria* (1st edition, Hart, Oxford, 2020); 'The Concept of Territorial Jurisdiction' in IO Smith (ed), *Law and Developments in Nigeria: Essays in Honour of Alhaji Femi Okunnu, SAN, CON* ( Ecowatch Publications (Nig) Ltd , 2004).

[6]See generally the Supreme Court cases of; *Dangote General Textiles Products Ltd v Hascon Associates (Nig) Ltd* (2013) 16 NWLR (Pt. 1379) 60; *First Bank of Nigeria Plc v Kayode Abraham* (2008) 18 NWLR (Pt. 1118) 172; *Arjay Ltd v Airline Management Support Ltd* (2003) 7 NWLR (Pt. 820) 57.

[7]*British Bata Shoe Co v Melikian* (1956 ) SCNLR 321, 325 – 26, 328; *Muhammed v Ajingi* (2013) LPELR-20372 (CA); *Zabusky v Israeli Aircraft Industries* (2008) 2 NWLR (Pt. 109) 109, 133-6; *Ogunsola v All Nigeria Peoples Party* (2003) 9 NWLR (Pt. 826) 462, 480

[8]*A.-G. Abia State v. Phoenix Environmental Services Nig. Ltd* (2015) LPELR-25702

[9] See the Supreme Court cases of *Capital Bancorp Ltd v Shelter Savings and Loans Ltd* (2007) 3 NWLR 148; *Dairo v Union Bank of Nigeria Plc* (2007) 16 NWLR (Pt 1059) 99; *Mailantarki v Tongo & Ors* (2017) LPELR-42467; *Audu v. APC & Ors* (2019) LPELR – 48134.

[10]*Sarki v Sarki & Ors* (2021) LPELR – 52659 (CA).; *Onyiaorah v Onyiaorah* (2019) LPELR-47092 (CA).

[11]See generally Abiru JCA in *Muhammed v Ajingi* (2013) LPELR-20372 (CA) 23

– 25, 25 – 26; CSA Okoli and RF Oppong, *Private International Law in Nigeria* (1st edition, Hart, Oxford, 2020) 95-103; AO Yekini, "Comparative Choice of Jurisdiction Rules in Cases having a Foreign Element: are there any Lessons for Nigerian Courts?" (2013) 39 *Commonwealth Law Bulletin* 333; Bamodu O., "In Personam Jurisdiction: An Overlooked Concept in Recent Nigerian Jurisprudence" (2011) 7 *Journal of Private International Law* 273.

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# Foreign Judgments: The Limits of Transnational Issue Estoppel, Reciprocity, and Transnational Comity

*Written by Professor Yeo Tiong Min, SC (honoris causa), Yong Pung How Chair Professor of Law, Yong Pung How School of Law, Singapore Management University*

In *Merck Sharp & Dohme Corp v Merck KGaA* [2021] SGCA 14, a full bench of the Singapore Court of Appeal addressed the limits of transnational issue estoppel in Singapore law, and flagged possible fundamental changes to the common law on the recognition and enforcement of foreign judgments in Singapore. The litigation involves multiple parties spread over different jurisdictions. The specific facts involved in the appeal are fairly straightforward, centring on what has been decided in a judgment from the English court, and whether it could be used to raise issue estoppel on the interpretation of a particular term of the contract between the parties. The Court of Appeal affirmed the decision of the High Court that it could. What makes the case interesting are the wide-ranging observations on the operation of issue estoppel from foreign judgments, and more fundamentally on the basis of the recognition and enforcement of foreign judgments in the common law of Singapore.

The Court of Appeal affirmed the case law in Singapore that so far have ruled that

a foreign judgment is capable of raising issue estoppel in Singapore proceedings. It upheld the uncontroversial requirements that the judgment must first be recognised under the private international law of Singapore, and that there must be identity of issues and parties. It is the first Singapore case, however, to discuss and affirm the need for the foreign judgment to be final and conclusive (under the law of the originating state) not just on the merits, but also on the issue forming the basis of the issue estoppel. The Court also highlighted the caution that needs to be exercised when determining what has actually been conclusively decided under a foreign legal system, especially where the foreign courts operate under different procedural rules.

The Court discussed the outer limits of transnational issue estoppel without reaching a conclusion because they were not in issue on the facts of the case. It accepted that issue estoppel raises a question of *lex fori* procedure, and that as a starting point, the same principles of issue estoppel apply whether the previous judgment is a local or foreign one. It made a number of important observations on the limitations of transnational issue estoppel. First, it affirmed that issue estoppel from a foreign judgment would not be applicable if: (a) there is a mandatory law of the forum that applies irrespective of the foreign elements of the case and irrespective of any applicable choice of law rules; (b) the issue in question engages the public policy of the forum; or (c) where the issue that is the subject of the estoppel is procedural for the purpose of the conflict of laws. Second, it noted that that transnational issue estoppel should be applied with due consideration of whether the foreign decision is territorially limited in its application. Third, the Court highlighted the possibility that it may not apply issue estoppel to a defendant in circumstances where the defendant did not, and was not reasonably expected to, argue the point, or argue the point fully, in answer to the claim brought against it in the foreign jurisdiction.

Fourth, issue estoppel effect may be denied to a foreign judgment if it conflicts with the public policy of the forum. This last point is generally uncontroversial. However, what is notable in the judgment is that the Court left open the question whether an error made by the foreign court regarding the content or application of Singapore law would provide a defence based on public policy, or as a standalone limitation. As a standalone limitation, it would be inconsistent with the conclusiveness principle in *Godard v Gray* (1870) LR 6 QB 139, as well as the Hague Convention on Choice of Court Agreements. Thus, it may be that foreign

judgments could be reviewed on the merits at least in respect of some types of errors of Singapore law, at least under the common law. Further clarification will be needed on this issue from the Court of Appeal in the future.

Fifth, the Court discussed the exception to issue estoppel. A distinctive feature of Singapore law on issue estoppel is the rejection of the broadly worded "special circumstances" exception to issue in English common law (*Arnold v National Westminster Bank plc* [1991] 2 AC 93). Singapore law (*The Royal Bank of Scotland NV v TT International Ltd* [2015] 5 SLR 1104) has instead a narrow exception based on the satisfaction following cumulative requirements:

(a) the decision said to give rise to issue estoppel must directly affect the future determination of the rights of the litigants;

(b) the decision must be shown to be clearly wrong;

(c) the error in the decision must be shown to have stemmed from the fact that some point of fact or law relevant to the decision was not taken or argued before the court which made that decision and could not reasonably have been taken or argued on that occasion;

(d) there can be no attempt to claw back rights that have accrued pursuant to the erroneous decision or to otherwise undo the effects of that decision; and

(e) it must be shown that great injustice would result if the litigant in question were estopped from putting forward the particular point which is said to be the subject of issue estoppel – in this regard, if the litigant failed to take advantage of an avenue of appeal that was available to him, it will usually not be possible for him to show that the requisite injustice nevertheless exists.

The Court noted the difficulty in applying requirement (b) to a foreign judgment because the principle of conclusiveness (*Godard v Gray* (1870) LR 6 QB 139) prohibits re-opening the merits of the foreign decision (note that this is potentially challenged above but only in respect of Singapore law matters). It considered four possible approaches to this issue: (1) leave things as they are, with the consequence that foreign judgments may have stronger issue estoppel effect than local judgments; (2) do not apply the conclusiveness principle to issue estoppel; (3) apply the broader "special circumstances" exception to foreign judgments rather than the narrow approach in domestic law; or (4) apply the law of the

originating state to the issue whether an exception can be made to issue estoppel. The Court was troubled by all four suggested solutions, and it left the question, to be considered further in a future case which raises the issue squarely.

The Court also endorsed the principle that issue estoppel from a foreign judgment will be defeated by an inconsistent prior foreign judgment or by an inconsistent prior or subsequent local judgment. However, it left open the question whether a foreign judgment obtained after the commencement of local proceedings can be used to raise issue estoppel in the local proceedings. In response to a submission that the foreign judgment should nevertheless be recognised unless there was an abuse of process in the way it was obtained, the Court thought that it was equally plausible to take the view that the commencement of local proceedings could be a defence unless the commencement of local proceedings amounted to an abuse of process.

The most interesting aspects of the decision, with possible far-reaching implications, are two-fold. First, the Court of Appeal cast serious doubt on the obligation theory of the common law and preferred to rest the basis of the recognition and enforcement of foreign judgments on "considerations of transnational comity and reciprocal respect among courts of independent jurisdictions". Second, it left open the question whether reciprocity should be a precondition to the recognition of foreign judgments at common law. A precondition of reciprocity was said to be entirely consistent with the rationale of transnational comity, and with the position under the statutory registration regimes as well as the Hague Convention on Choice of Court Agreements. These two aspects of the decision are discussed in the public lecture, "The Changing Global Landscape for Foreign Judgments", Yong Pung How Professorship of Law Lecture, Yong Pung How School of Law, Singapore Management University, 6 May 2021 (available here).

# Shell litigation in the Dutch courts – milestones for private international law and the fight against climate change

*by Xandra Kramer (Erasmus University Rotterdam/Utrecht Univeristy) and Ekaterina Pannebakker (Leiden University), editors*

## 1. Introduction

As was briefly announced earlier on this blog, on 29 January 2021, the Dutch Court of Appeal in The Hague gave a ruling in a long-standing litigation launched by four Nigerian farmers and the Dutch *Milieudefensie*. The Hague Court held Shell Nigeria liable for pollution caused by oil spills that took place in 2004-2007; the UK-Dutch parent company is ordered to install equipment to prevent damage in the future. Though decided almost four months ago, the case merits discussion of several private international law aspects that will perhaps become one of the milestones in the broader context of liability of parent companies for the actions of their foreign-based subsidiaries.

Climate change and related human rights litigation is undoubtedly of increasing importance in private international law. This is also on the radar of the European institutions as evidenced among others  by the ongoing review of the Rome II Regulation (point 6). Today, 26 May 2021, another milestone was reached, both for for private international law but for the fight against global climate change, with the historical judgment (English version, Dutch version) by the Hague District Court ordering Shell to reduce Co2 emissions (point 7). This latter case is discussed more at length in today's blogpost by Matthias Weller.

## 2. Oil spill in Nigeria and litigation in The Hague courts



As is well-known Shell and other multinationals have been extracting oil in Nigeria since a number of decades. Leaking oil pipes have been causing environmental damage in the Niger Delta, and consequently causing health damage and social-economic damage to the local population and farmers. Litigation has been ongoing in the Netherlands and the United Kingdom for years (see Geert van Calster blog for comments on a recent ruling by the English Supreme Court). At stake in the present case are several oil spills that occurred between 2004-2007 at the underground pipelines and an oil well near the villages Oruma, Goi and Ikot Ada Udo. The spilled oil pollutes agricultural land and water used by the farmers for a living.

Shortly after the oil spills, four Nigerian farmers instituted proceedings in the Netherlands, at the District Court of The Hague. The farmers are supported by the Dutch foundation *Milieudefensie*, which is also a claimant in the procedure. The claimants submit that the land and water, which the Nigerian farmers explored for living, became infertile. They claim compensation for the damage caused by the Shell's wrongful acts and negligence while extracting oil and maintaining the pipelines and the well. Furthermore, they claim to order Shell to secure better cleaning of the polluted land and to take appropriate measures to prevent oil leaks in the future.

The farmers summon both the Shell's Nigerian subsidiary and the parent company at the Dutch court. To be precise, they institute proceedings against the Shell's Nigerian subsidiary – Shell Petroleum Development Company of Nigeria Ltd and against the British-Dutch Shell parent companies – Royal Dutch Shell Plc (UK), with office in The Hague; Shell Petroleum N.V. (a Dutch company) and the 'Shell' Transport and Trading Company Ltd (a British company). It is this corporate structure that brings the Nigerian farmers to the court in The Hague and paves the way for the jurisdiction of Dutch courts.

## 3. Jurisdiction of Dutch courts: anchor defendant in the Netherlands and sufficient connection

Both the first instance court (in 2009) and the court of appeal at The Hague (in appeal in 2015) hold that the Dutch courts have jurisdiction. The ruling of the

Court of Appeal is available in English and contains a detailed motivation of the grounds of jurisdiction of the Dutch courts. See in particular at [3.3] – [3.9].

*Claim against Shell parent company/companies*. Dutch courts have jurisdiction to hear the claim against Shell Petroleum based on art. 2(1) Brussels I Regulation, as the company has its registered office in the Netherlands. Furthermore, the jurisdiction of Dutch courts to hear the claims against Royal Dutch Shell is based on art. 2(1) in conjunction with art. 60(1) Brussels I Regulation and the jurisdiction over claims to Shell Transport and Trading Company – on art. 6(1) and art. 24 Brussels I Regulation.

*Claim against Shell's Nigerian subsidiary*. The jurisdiction of the Dutch courts to hear the claim against Shell's Nigerian subsidiary is based on art. 2(1) in conjunction with art. 60(1) Brussels I Regulation and on art. 7(1) of the Dutch Code of civil procedure (DCCP). Art. 7(1) deals with multiple defendants. By virtue of art. 7(1) DCCP, if the Dutch court with jurisdiction to hear the claim against one defendant (in this case this is the Royal Dutch Shell), has also the jurisdiction to hear the claims against co-defendant(s), 'provided the claims against the various defendants are connected to the extent that reasons of efficiency justify a joint hearing'. The jurisdiction on the claim against the so-called 'anchor defendant' (for instance, the parent company) can thus carry with itself the jurisdiction on the other, connected, claims against other defendants.

Both the first instance court and the court in appeal found that the claims were sufficiently connected, despite the contentions of Shell. The Shell's contentions were twofold. First, Shell stated that the claimants abused procedural law, because the claims against Royal Dutch Shall were 'obviously bound to fail and for that reason could not serve as a basis for jurisdiction as provided in art. 7(1) DCCP' (at [3.1] in the 2015 ruling). According to Shell, the claim was bound to fail, because the oil leaks were caused by sabotage, in which case Shell would be exempt from liability under the applicable Nigerian law. This contention was dismissed: the claim was not necessarily bound to fail, according to the first instance court. The appellate court added that it was too early to assume that the oil spill was caused by sabotage. Second, Shell contested the jurisdiction of the Dutch courts because the parent companies could not reasonably foresee that they would be summoned in the Netherlands for the claims as the ones in the case. Dismissing this contention the court of appeal at The Hague stated in the 2015 ruling that 'in the light of (i) the ongoing developments in the field of *foreign*

*direct liability claims* (cf. the cases instituted in the USA against Shell for the alleged involvement of the company in human rights violations; *Bowoto v. Chevron Texaco* (09-15641); *Kiobel v Royal Dutch Petroleum Co*., 133 S. Ct. 1659 (2013), as well as *Lubbe v. Cape Plc*. [2000] UKHL 41), added to (ii) the many oil spills that occurred annually during the extraction of oil in Nigeria, (iii) the legal actions that have been conducted for many years about this (for over 60 years according to Shell), (iv) the problems these oil spills present to humans and the environment and (v) the increased attention for such problems, it must have been reasonably foreseeable' for the parent companies taken to court with jurisdiction with regard to Royal Dutch Shell (see the 2015 ruling at [3.6].

## 4. Application of (substantive) Nigerian law

*Substantive law.* All claims addressed in the Court of Appeal ruling of 29 January 2021 are assessed according to Nigerian law. This is the law of the state where the spill occurred, the ensuing damage occurred and where the Shell's Nigerian subsidiary (managed and monitored by Shell) has its registered office. The events that are the subject of litigation occurred in 2004-2007 and fall outside the temporal scope of Rome II. Applicable law is defined based on the Dutch conflict of laws rules on torts, namely art. 3(1) and (2) *Wet Conflictenrecht Onrechtmatige Daad* (see the first instance ruling at [4.10]).

*Procedural matters*. Perhaps because the case of damage to environment as the one in the discussed case, the application of substantive law is strictly tied to the evidence, the court goes on to specify private international law with further finesse. It mentions explicitly that procedural matters are regulated by the Dutch code of civil procedure. In the meantime, the substantive law aspects of the procedure, including the question which sanctions can be imposed, are governed by the *lex causae* (Nigerian law). The same holds true for substantive law of evidence, including the specific rules on the burden of proof relating to a particular legal relationship. The other, general matters relating to the burden of proof and evidence are regulated by the *lex fori*, thus the Dutch law of civil procedure (at [3.1]).

## 5. The ruling of The Hague Court of Appeal

In its the ruling, the Dutch court holds Shell Nigeria liable for damage resulting from the leaks of pipelines in Oruma and Goi. Nigerian law provides for a high threshold of burden of proof that rests on the one who invokes sabotage of the pipelines (in this case, Shell). The fact of sabotage must be (evidenced to be) beyond reasonable doubt. Shell could not provide for such evidence for the pipelines in Oruma and Goi. Furthermore, Shell has not undertaken sufficient steps for the cleaning and limiting environmental damage. Shell Nigeria is therefore liable for the damage caused by the leaks in the pipelines. The amount of the damage to be compensated is still to be decided. The relevant procedure will follow up. The ruling is, however, not limited to this. Shell is also ordered to build at one of the pipelines (the Oruma-pipeline) a Leak Detection System (LDS), so that the future possible leaks could be swiftly noticed and future damage to the environment can be limited. This order is made to Shell Nigeria and to the parent companies.

Spills at Oruma and Goi are are two out of three oil spills. The procedure on the third claim – the procedure regarding the well at Ikot Ada Udo will continue: the reason for the oil spill is not yet clear and the next hearing has been scheduled.

## 6. Human rights litigation and Rome II

This Shell case at the Dutch court is one in a series of cases where human rights and corporate responsibility are central. Increasingly, it seems, victims of environmental damage and foundations fighting for environmental protection can celebrate victories. In the introduction we mentioned the English Supreme Court ruling in Okpaby v Shell [2021] UKSC 3 of February 2021. In this case the Supreme Court reversed judgments by the Court of Appeal and the High Court in which the claim by Nigerian farmers brought against Shell's parent company and its subsidiary in Nigeria had been struck out (see also Geert van Calster's blog, guest post by Robert McCorquodale). Also there is a growing body of doctrinal work on human right violations in other countries, corporate social responsibility, due diligence and the intricacies of private international law, as a quick search on the present blog also indicates.

From a European private international law perspective, as also the discussion above shows, the Brussels I*bis* Regulation and the Rome II Regulation are key. The latter Regulation has been subject of an evaluation study commissioned by

the European Commission over the past year, and the final report is expected in the next months. Apart from evaluating ten years of operation of this Regulation, one of the focal points is the issue of cross-border corporate violations of human rights. The question is whether the present rules provide an adequate framework for assessing the applicable law in these cases. As discussed in point 5 above, in the Dutch Shell case the court concluded that Nigerian law applied, which may not necessarily be in the best interest of environmental protection. This was based on Dutch conflict rules applicable before the Rome II Regulation became applicable, but Art. 4 Rome II would in essence lead to the same result. For environmental protection, however, Art. 7 Rome II may come to the rescue as it enables victims to make a choice for the law of the country in which the event giving rise to damage occurred instead of having the law of the country in which the damage occurs of Art. 4 applied. In a similar vein, the European Parliament in its draft report with recommendations to the Commission on corporate due diligence and corporate accountability, dated 11 September 2020, proposes to incorporate a general ubiquity rule in art. 6a, enabling a choice of law for victims of business-related human rights violations. In such cases a choice could be made for the law of the country in which the event giving rise to the damage occurred, or the law of the country in which the parent company has its domicile, or, where it does not have a domicile in a Member State, the law of the country where it operates. This draft report, which also addresses the jurisdiction rules under the Brussels I*bis* Regulation was briefly discussed on this blog in an earlier blogpost by Jan von Hein.

## 7. Shell and climate continued: The Hague court strikes again

Today, all eyes were on the next move of The Hague District Court in an environmental claim brought against Royal Dutch Shell Plc (RDS). It concerns a collective action under the (revised) Dutch collective action act (see earlier on this blog by Hoevenaars & Kramer, and extensively Tzankova & Kramer 2021), brought – once again by *Milieudefensie*, also on behalf of 17,379 individual claimants, and by six other foundations (among others *Greenpeace*). The claim boils down to requesting the court to order Shell to reduce emissions. First, the court extensively deals with the admissibility and representativeness of the claimants as part of the new collective action act (art. 3:305a Dutch Civil Code). Second, the court assesses the international environmental law, regulation and

policy framework, including the UN Climate Convention, the IPCC, UNEP, the Paris Agreement as well as European law and policy and Dutch law and policy.

Third, and perhaps most interesting for the readers of this blog, the court assesses the applicable law, as the claim concerns the global activities of Shell. As Weller has highlighted in his blogpost that discussion mostly evolves around Art. 7 Rome II. Milieudefensie pleaded that Art. 7 should, pursuant to its choice, lead to the applicability of Dutch law and, should this provision not lead to Dutch law, on the basis of Art. 4(1) Rome II. In establishing the place where the event giving rise to the damage occurs the court states that 'An important characteristic of the environmental damage and imminent environmental damage in the Netherlands and the Wadden region, as raised in this case, is that every emission of CO2 and other greenhouse gases, anywhere in the world and caused in whatever manner, contributes to this damage and its increase.' Milieudefensie holds RDS liable in its capacity as policy-setting entity of the Shell group. RDS pleads for a restrictive interpretation and argues that corporate policy is a preparatory act that falls outside the scope of Art. 7 as 'the mere adoption of a policy does not cause damage'. However, The Hague Court finds this approach too narrow and agrees with the claimants that Dutch law applies on the basis of Art. 7 and that, in so far as the action seeks to protect the interests of Dutch residents, this also leads to the applicability of Dutch law on the basis of Art. 4.

The judgment of the court, and that's what has been all over the Dutch and international media, is that it orders 'RDS, both directly and via the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell group, to limit or cause to be limited the aggregate annual volume of all CO2 emissions into the atmosphere (Scope 1, 2 and 3) due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels'.

To be continued – undoubtedly.