SUPREME COURT OF INDIA CLEARS THE MURKINESS SURROUNDING THE TERMS ‘VENUE’, ‘SEAT’ AND ‘PLACE’

By Tasha Joseph

The confusion between ‘place’, ‘seat’ and ‘venue’ in International Commercial Arbitration cases was put to rest in the recent judgment of the Supreme Court in Union of India v. Hardy Explorations And Production(India) Inc.1. The decision was given by a three-judge bench which unanimously passed the decision that ‘seat’, ‘venue’ and ‘place’ did not signify the same meaning and could not be used interchangeably. Instead, the three terms denote different meanings and in the absence of express provision for any of the same, there were tests to be met in order to determine the actual ‘place’, ‘venue’ and ‘seat’.

In this case, Kuala Lumpur was selected as the ‘venue’ for the arbitration proceedings in the agreement, with the application of the UNCITRAL model for the same. Upon the Union of India challenging the award under section 342 in the Delhi High Court, the Court had to determine whether Kuala Lumpur was the ‘seat’ and hence if the action in the Indian court was unmaintainable. The Delhi High Court held that the courts did not have jurisdiction and thus refrained from looking into the merits of the case. The matter then went to a division bench and finally a three-judge bench of the Supreme Court.

The court went into the previous decisions such as Sumitomo Heavy Industries Ltd. v. ONGC & Ors. 3, Bhatia International v. Bulk Trading S.A. 4and BALCO case5 to understand the principles that need to be applied for deciding the seat of arbitral proceedings.

The Court observed that the determination of the seat has to be contextually done. Only when the ‘place’ was agreed upon, in the agreement, between the parties,

‘place’ would be equivalent to the seat. Positive action is needed and for ‘place’ to be treated as ‘seat’, a condition precedent (if any) must be met as well. For instance, a ‘place’ can become a ‘seat’ if a condition precedent present (if any) is met. For the ‘venue’ to become ‘seat’ something else was needed
as a concomitant to the provision of ‘venue’ in the agreement. ‘Venue’ and ‘place’ do not ipso facto assume the status of a ‘seat’.

There
were no conditions precedent or any positive act mentioned to determine Kuala Lumpur as the ‘seat’ in the concerned matter and hence Kuala Lumpur could not be treated as the juridical seat. Thus, the matter was maintainable as the courts in India have jurisdiction and the order passed by the Delhi High Court had been set aside.

The SHAPE v Supreme Litigation: The Interaction of Public and Private International Law Jurisdictional Rules

Written by Dr Rishi Gulati, Barrister, Victorian Bar, Australia; LSE Fellow in Law, London School of Economics

The interaction between public and private international law is becoming more and more manifest. There is no better example of this interaction than the Shape v Supreme litigation ongoing before Dutch courts, with the most recent decision in this dispute rendered in December 2019 in *Supreme Headquarters Allied Powers Europe (“SHAPE”) et al v Supreme Site Service GmbH et al (Supreme)*, COURT OF APPEAL OF ‘s-HERTOGENBOSCH, Case No. 200/216/570/01, Ruling of 10 December 2019 (the ‘CoA Decision’). I first provide a summary of the relevant facts. Second, a brief outline of the current status of the litigation is

provided. Third, I make some observations on how public and private international law interact in this dispute.

1 Background to the litigation

In 2015, the Supreme group of entities (a private actor) brought proceedings (the 'Main Proceedings') against two entities belonging to the North Atlantic Treaty Organisation ('NATO') (a public international organisation) before a Dutch district court for alleged non-payments under certain contracts entered into between the parties for the supply of fuel (CoA Decision, para 6.1.12). The NATO entities against whom the claims were brought in question were Shape (headquartered in Belgium) and Allied Joint Force Command Headquarters Brunssum (JFCB) (having its registered office in the Netherlands). JFCB was acting on behalf of Shape and concluded certain contracts (called BOAs) with Supreme regarding the supply of fuel to SHAPE for NATO's mission in Afghanistan carried out for the International Security Assistance Force (ISAF) created pursuant to a Chapter VII Security Council Resolution following the September 11 terrorist attacks in the United States (CoA Decision, para 6.1.8). While the payment for the fuels supplied by Supreme on the basis of the BOAs was made subsequently by the individual states involved in the operations in Afghanistan, 'JFCB itself also purchased from Supreme. JFCB paid Supreme from a joint NATO budget. The prices of fuel were variable. Monitoring by JFCB took place…' (CoA Decision, para 6.1.9. The applicable law of the BOAs was Dutch law but no choice of forum clause was included (CoA Decision, para 6.1.9). There was no provision for arbitration made in the BoAs (CoA Decision, para 6.1.14.1). However, pursuant to a later Escrow Agreement concluded between the parties, upon the expiry of the BoAs, Supreme could submit any residual claim it had on the basis of the BOAs to a mechanism known as the Release of Funds Working Group ('RFWG'). Pursuant to that agreement, an escro account was also created in Belgium. The RFWG comprises of persons affiliated with JFCB and SHAPE, in other words, NATO's representatives (CoA Decision, para 6.1.10). Supreme invoked the jurisdiction of Dutch courts for alleged non-payment under the BOAs. The NATO entities asserted immunities based on their status as international organisations ('IOs') and succeeded before the CoA meaning that the merits of Supreme's claims has not been tested before an independent arbiter yet (more on this at 2).

In a second procedure, presumably to protect its interests, Supreme also levied an interim garnishee order targeting Shape's escrow account in Belgium (the

'Attachment Proceedings') against which Shape appealed (see here for a comment on this issue). The Attachment Proceedings are presently before the Dutch Supreme Court where Shape argued amongst other things, that Dutch courts did not possess the jurisdiction to determine the Attachment Proceedings asserting immunities from execution as an IO (see an automated translation of the Supreme Court's decision here (of course, no guarantees of accuracy of translation can be made)). The Dutch Supreme Court made a reference for a preliminary ruling to the European Court of Justice ('CJEU') (case C-186/19). It is this case where questions of European private international law have become immediately relevant. Amongst other issues referred, the threshold question before the CJEU is:

> *Must Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (OJ 2012 L 351, p. 1 [Brussels Recast] be interpreted as meaning that a matter such as that at issue in the present case, in which an international organisation brings an action to (i) lift an interim garnishee order levied in another Member State by the opposing party, and (ii) prohibit the opposing party from levying, on the same grounds, an interim garnishee order in the future and from basing those actions on immunity of execution, must be wholly or partially considered to be a civil or commercial matter as referred to in Article 1(1) of the Brussels I Regulation (recast)?*

Whether the claims pertinent to the Attachment Proceedings constitute civil and commercial matters within the meaning of Article 1 of the Brussels Recast is a question of much importance. If it cannot be characterised as civil and commercial, then the Brussels regime cannot be applied and civil jurisdiction will not exist. If jurisdiction under the Brussels Recast does not exist, then questions of IO immunities from enforcement become irrelevant at least in an EU member state. The CJEU has not yet ruled on this reference.

2 The outcome so far

Thus far, the dispute has focused on questions of jurisdiction and IO immunities. These issues arise in somewhat different senses in both sets of proceedings.

The Main Proceedings

Shape and JFCB argue that Dutch courts lack the jurisdiction in public international law to determine the claims brought by Supreme as NATO possesses immunities given its status as an IO (CoA Decision, para 6.1.13). The rules and problems with the law on IO immunities have been much discussed, including by this author in this very forum. Two things need noting. First, in theory at least, the immunities of IOs such as NATO are delimited by the concept of 'functionalism' – IOs can only possess those immunities that are necessary to protect its functional independence. And second, if an IO does not provide for a 'reasonable alternative means' of dispute resolution, then national courts can breach IO immunities to ensure access to justice. According to the district court, as the NATO entities had not provided a reasonable alternative means of dispute resolution to Supreme, the former's immunities could be breached. The CoA summarised the district court's decision on this point as follows (CoA Decision, para 6.1.14):

> *[T]he lack of a dispute settlement mechanism in the BOAs, while a petition to the International Chamber of Commerce was agreed in a similar BOA agreed with another supplier, makes the claim of an impermissible violation of the right to a fair trial justified. The above applies unless it must be ruled that the alternatives available to Supreme comply with the standard in the Waite and Kennedy judgments: there must be "reasonable means to protest effectively rights". The District Court concludes that on the basis of the arguments put forward by the parties and on the basis of the documents submitted, it cannot be ruled that a reasonable alternative judicial process is available.*

The CoA disagreed with the district court. It said that this was not the type of case where Shape and JFCB's immunities could be breached even if there was a complete lack of a 'reasonable alternative means' available to Supreme (CoA Decision, para 6.7.8 and 6.7.9.1). This aspect of the CoA's Decision was made possible because of the convoluted jurisprudence of the European Court of Human rights where that court has failed to provide precise guidance as to when exactly IO immunities can be breached for the lack of a 'reasonable alternative means', thereby giving national courts considerable leeway. The CoA went on to further find that in any event, Supreme had alternative remedies: it could bring suit against the individual states part of the ISAF action to recover its alleged outstanding payments (CoA Decision, para 6.8.1); and could have recourse to the RFWG (CoA Decision, para 6.8.4). This can hardly be said to constitute a

‘reasonable alternative means’ for Supreme would have to raise claims before the courts of multiple states in question creating a risk of parallel and inconsistent judgments; the claims against a key defendant (the NATO entities) remain unaddressed; and the RFWG comprises representatives of the defendant completely lacking in objective independence. Perhaps the CoA’s decision was driven by the fact that Supreme is a sophisticated commercial party who had voluntarily entered into the BOAs where the standards of a fair trial in the circumstances can be arguably less exacting (CoA Decision, para 6.8.3).

On the scope of Shape’s and JFCB’s functional immunities, the CoA said that ‘if immunity is claimed by SHAPE and JFCB in respect of (their) official activities, that immunity must be granted to them in absolute terms’ (CoA Decision, para 6.7.9.1). It went on to find:

> *The purchase of fuels in relation to the ISAF activities, to be supplied in the relevant area of operations in Afghanistan and elsewhere, is directly related to the fulfilment of the task of SHAPE and JFCB within the framework of ISAF, so full functional immunity exists. The fact that Supreme had and has a commercial contract does not change the context of the supplies. The same applies to the position that individual countries could not invoke immunity from jurisdiction in the context of purchasing fuel. What’s more, even if individual countries – as the Court of Appeal understands for the time being before their own national courts – could not invoke immunity, this does not prevent the adoption of immunity from jurisdiction by SHAPE and JFCB as international organisations that, in concrete terms, are carrying out an operation on the basis of a resolution of the United Nations Security Council CoA Decision, para 6.7.9.2).*

Acknowledging that determining the scope of an IO’s functional immunity is no easy task, the CoA’s reasoning is somewhat surprising. The dispute at hand is a contractual dispute pertaining to alleged non-payment under the BOAs. One may ask the question as to why a classical commercial transaction should attract functional immunity? Indeed, other IOs (international financial institutions) have included express waiver provisions in their treaty arrangements where no immunities exist in respect of business relationships between an IO and third parties (see comments on the Jam v IFC litigation ongoing in United States courts by this author here). While NATO is not a financial institution, it should

nevertheless be closely inquired as to why NATO should possess immunities in respect of purely commercial contracts it enters into. This is especially the case as the CoA found that the NATO entities in question did not possess any treaty based immunities (CoA Decision, para 6.6.7), and upheld its functional immunities based on customary international law only (CoA Decision, para 6.7.1), a highly contested issue (see M Wood, 'Do International Organizations Enjoy Immunity Under Customary International Law?' (2013) 10 IOLR 2). It is likely that the CoA Decision would be appealed to the Dutch Supreme Court and any further analysis must await a final outcome.

The Attachment Proceedings

The threshold question in the Attachment Proceedings is whether Dutch courts possess civil jurisdiction under the Brussels Recast to determine the issues in that particular case. If the claim is not considered civil and commercial within the meaning of Article 1 of the Brussels Recast, then no jurisdiction exists under the rules of private international law and the claim comes to an end, with the issue of immunities against enforcement raised by the NATO entities becoming superfluous. This is because if a power to adjudicate does not exist, then the question on the limitations to its exercise due to any immunities obviously becomes irrelevant. Perhaps more crucially, after the CoA Decision, the ongoing relevance of the Attachment Proceedings has been questioned. As has been noted here:

> *At the public hearing in C-186/19 held in Luxembourg on 12 December, the CJEU could not hide its surprise when told by the parties that the Dutch Appellate Court had granted immunity of jurisdiction to Shape and JCFB. The judges and AG wondered whether a reply to the preliminary reference would still be of any use. One should take into account that the main point at the hearing was whether the "civil or commercial" nature of the proceedings for interim measures should be assessed in the light of the proceedings on the merits (to which interim measures are ancillary, or whether the analysis should solely address the interim relief measures themselves.*

Given that a Supreme Court appeal may still be filed in the Main Proceeding potentially reversing the CoA Decision, the CJEU's preliminary ruling could still be of practical relevance. In any event, in light of the conceptual importance of

the central question regarding the scope of the Brussels Recast being considered in the Attachment Proceeding, any future preliminary ruling by the CJEU is of much significance for European private international law. Summarising the CJEU's approach to the question at hand, the Dutch Supreme Court said:

> *The concept of civil and commercial matters is an autonomous concept of European Union law, which must be interpreted in the light of the purpose and system of the Brussels I-bis Regulation and the general principles arising from the national legal systems of the Member States. In order to determine whether a case is a civil or commercial matter, the nature of the legal relationship between the parties to the dispute or the subject of the dispute must be examined. Disputes between a public authority and a person governed by private law may also fall under the concept of civil and commercial matters, but this is not the case when the public authority acts in the exercise of public authority. In order to determine whether the latter is the case, the basis of the claim brought and the rules for enforcing that claim must be examined. For the above, see, inter alia, ECJ 12 September 2013, Case C-49/12, ECLI: EU: C: 2013: 545 (Sunico), points 33-35, ECJ 23 October 2014, Case C ? 302/13, ECLI: EU: C: 2014: 2319 (flyLal), points 26 and 30, and CJEU 9 March 2017, case C-551/15, ECLI: EU: C: 2017: 193 (Pula Parking), points 33-34 (see the automated translation of the Supreme Court's decision cited earlier, para 4.2.1).*

There is not the space here to explore the case law mentioned above in any detail. Briefly, if the litigation was taken as a whole with the analysis taking into account the nature of the Main Proceedings as informing the characterisation of the Attachment Proceedings , there would be a close interaction between the scope of functional immunity and the concept of civil and commercial. If an excessively broad view of functional immunity is taken (as the CoA has done), then it becomes more likely that the matter will not be considered civil and commercial for the purposes of the Brussels system as the relevant claim/s can said to arise from the exercise of public authority by the defendants. However, as I said earlier, it is somewhat puzzling as to why the CoA decided to uphold the immunity of the defendants in respect of a purely commercial claim.

However, it is worth noting that in some earlier cases, while the CJEU seem to take a relatively narrow approach to the scope of the Brussels system (CJEU Case

C-29/76, *Eurocontrol*). More recent case law has taken a broader view. For example, in *Pula Parking*, para. 39, the CJEU said 'Article 1(1) of Regulation No 1215/2012 must be interpreted as meaning that enforcement proceedings brought by a company owned by a local authority…for the purposes of recovering an unpaid debt for parking in a public car park the operation of which has been delegated to that company by that authority, which are not in any way punitive but merely constitute consideration for a service provided, fall within the scope of that regulation'. If the true nature and subject of Supreme's claims are considered, it is difficult to see how they can constitute anything but civil and commercial within the meaning of the Brussels system in light of recent case law, with the issue of IO immunities a distraction from the real issues. It will be interesting to see if the CJEU consolidates its recent jurisprudence or prefers to take a narrower approach.

3 The interaction between public and private international law?

In the Main Proceedings, in so far as civil jurisdiction is concerned, already, the applicable law to the BOAs is Dutch law and Dutch national courts are perfectly suited to take jurisdiction over the underlying substantive dispute given the prevailing connecting factors. As the CoA determined that the NATO entities tacitly accepted the jurisdiction of the Dutch courts the existence of civil jurisdiction does not seem to be at issue (CoA Decision, para 6.5.3.4). Clearly, in a private international law sense, Dutch courts are manifestly the suitable forum to determine this claim.

However, on its face, the norms on IO immunities and access to justice require balancing (being issues relevant to both public and private international law). As the district court found, if an independent mechanism to resolve a purely commercial dispute (such as an arbitration) is not offered to the claimant, IO immunities can give way to ensure access to justice. Indeed, developments in general international law require the adoption of a reinvigorated notion of jurisdiction where access to justice concerns should militate towards the exercise of jurisdiction where not doing so would result in a denial of justice. Mills has said:

> *The effect of the development of principles of access to justice in international law also has implications when it comes to prohibitive rules on jurisdiction in the form of the immunities recognised in international law…Traditionally these*

> *immunities have been understood as 'minimal' standards for when a state may not assert jurisdiction — because the exercise of jurisdiction was understood to be a discretionary matter of state right, there was no reason why a state might not give more immunity than required under the rules of international law. The development of principles of access to justice, however, requires a state to exercise its jurisdictional powers, and perhaps to expand those jurisdictional powers as a matter of domestic law to encompass internationally permitted grounds for jurisdiction, or even to go beyond traditional territorial or nationality-based jurisdiction (A Mills, 'Rethinking Jurisdiction in International Law' (2014) British Yearbook of International Law, p. 219).*

The Main Proceedings provide an ideal case where civil jurisdiction under private international law should latch on to public international law developments that encourage the exercise of national jurisdiction to ensure access to justice. Not only private international law should be informed by public international law developments, the latter can benefit from private international law as well. I have argued elsewhere that private international law techniques are perfectly capable of slicing regulatory authority with precision so that different values (IO independence v access to justice) can both be protected and maintained at the same time (see here). Similarly, in the Attachment Proceedings, a reinvigorated notion of adjudicative jurisdiction also demands that the private and public properly inform each other. Here, it is of importance that the mere identity of the defendant as an international public authority or the mere invocation of the pursuit of public goals (such as military action) does not detract from properly characterising the nature of a claim as civil and commercial. More specifically, any ancillary proceeding to protect a party's rights where the underlying dispute is purely of a commercial nature ought to constitute a civil and commercial matter within the meaning of the Brussels system. Once civil jurisdiction in a private international law sense exists, then any immunities from enforcement asserted under public international law ought to give way to ensure that the judicial process cannot be frustrated by lack of enforcement at the end. It remains to be seen what approach the CJEU takes to these significant and difficult questions where the public and private converge.

To conclude, only a decision on the merits after a full consideration of the evidence can help determine whether Supreme's (which itself is accused of fraud) claims against Shape et al can be in fact substantiated. In the absence of an

alternative remedy offered by the NATO entities, if the Dutch courts do not exercise jurisdiction, we may never know whether its claims are in fact meritorious.

Venezuela and the Conventions of the Specialized Conferences on Private International Law (CIDIP)

written by Claudia Madrid Martínez

On 28 April 2017, the government of Nicolás Maduro deposited with the General Secretariat of the Organization of American States (OAS), a document whereby he expressed his "irrevocable decision to denounce the Charter of the Organization of American States (OAS) pursuant to Article 143 thereof, thereby initiating Venezuela's permanent withdrawal from the Organization."

Before the two years of the transition regime that the OAS Charter provides for cases of retirement from the Organization (art. 143), on 8 February 2019, Juan Guaidó, president of the National Assembly and interim president of the Republic, wrote to the OAS to "reiterate and formally express the decision of the Venezuelan State to annul the supposed denunciation of the OAS Charter, for Venezuela to be able to remain a member state of the Organization."

In its session of 9 April 2019, the OAS Permanent Council accepted the representation appointed by the National Assembly of Venezuela. However, on 27 April of the same year, the Foreign Ministry, representing Nicolás Maduro, issued a statement informing that "With the denunciation of the OAS Charter made by the government of the Bolivarian Republic of Venezuela on 27 April 2017, within the framework of what is contemplated in article 143; as of this date, no instrument signed and / or issued by the OAS will have a political or legal effect on the Venezuelan State and its institutions".

This political situation has impacted the practical application of the Inter-American Conventions issued by the Specialized Conferences on Private International Law (CIDIP, by its acronym in Spanish). Remember that within the framework of CIDIP, Venezuela has ratified fourteen instruments on bills of exchange, promissory notes and bills, international commercial arbitration, letters rogatory, taking of evidence abroad, powers of attorney to be used abroad, checks, commercial companies, extraterritorial enforcement of foreign judgments and arbitral awards, information on foreign law, general rules, international child abduction, and international contracts.

For Venezuela these conventions entered into force once the requirements for their validity established in the Constitution and the Vienna Convention on the Law of Treaties had been met. The rules of this convention are considered customary, since Venezuela has not ratified this instrument.

We must consider that the Inter-American Conventions are open conventions, which allow the accession of States not party to the OAS. Spain, for example, has accessed to conventions on letters rogatory and on information on foreign law.

Besides that, none of the Conventions has been denounced or incurred in causes of nullity or suspension, nor has there been an impossibility for performance, nor has therebeen a fundamental change in the circumstances, in the terms of articles 53, 57, 58, 60, 61, 62 of the Vienna Convention.

Although Venezuela has broken diplomatic relations with some States parties of the OAS, such relations are not indispensable for the application of Inter-American Conventions, even though in some cases cooperation is regulated through central authorities.

Another important issue is the independence of the Inter-American Conventions. Since the OAS is not an integration system, its treaties must pass the approval and ratification or accession process, because they are not covered by the characteristics of supranationality or its equivalent, such as occurs in the Andean Community or the European Union.

In any case, the situation is not clear. Article 143 of the OAS Charter provides that when “the General Secretariat receives a notice of denunciation, the present Charter shall cease to be in force with respect to the denouncing State, which shall cease to belong to the Organization after it has fulfilled the obligations

arising from the present Charter". There is no reference to the treaties approved within it.

Unfortunately, this situation has been reflected in the decisions of our courts. So far there have been two decisions of the highest court in which the Inter-American codification is set aside. In both, exequatur decisions, the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards was not applied.

"Although, our Republic has signed the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards with the Republic of Ecuador, it is no less true that, the Bolivarian Republic of Venezuela formalized its final retirement from the OAS, by letter of 27 April 2019, as a result, the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, approved in Montevideo, Uruguay in 1979, endorsed by the Department of International Law of the Organization of American States, ceased to have its effects in our country.

The Civil Chamber of the Supreme Court of Justice issued the first one, under number 0187 on 30 May 2019 (see also here). This decided the exequatur of an Ecuadorian divorce judgment and stated:

Therefore, this exequatur will be reviewed in the light of the Private International Law Act, according to the requirements set forth in article 53 as this is the rule of Private International Law applicable in the specific case".

In this case, the Chamber bases its decision on the fact that in the preamble of the Inter-American Convention, the States parties to the OAS are indicated as participants and that the deposit of the instrument of ratification was made before the OAS. It should be noted that neither this nor any other Inter-American Convention has been denounced by Venezuela.

In the second decision, issued by the Social Chamber of the Supreme Court under number 0416, on 5 December 2019 (see also here) on the occasion of the exequatur of a Mexican divorce judgment, there is not even an argument as to why not apply the Inter-American Convention. In it, the Social Chamber only asserted:

"In this case, it is requested that a judgment issued by a court in the United

Mexican States, a country with which the Bolivarian Republic of Venezuela has not signed international treaties on the recognition and enforcement of judgments, be declared enforceable in the Bolivarian Republic of Venezuela through the exequatur procedure; for this reason, and following the priority order of the sources in the matter, the rules of Venezuelan Private International Law must be applied".

The fundamental role of Venezuela in Inter-American codification through the work of Gonzalo Parra-Aranguren and Tatiana B. de Maekelt is not a secret to anyone. It is unfortunate that a political decision attempts to weaken the Venezuelan system of Private International Law. We insist that ignoring the Inter-American Conventions not only constitutes a breach of the obligation of the State to comply with existing treaties, but also of the internal rules that, like article 1 of the Venezuelan Private International Law Act, require the preferential application of the Public International Law rules, in particular those established in international treaties.

International Business Courts – open access book

International Business Courts: A European and Global Perspective (eds. Xandra Kramer & John Sorabji), Eleven International Publishing 2019.

Following our previous post announcing the publication of a special issues of Erasmus Law Review on International Business Courts (ELR 2019/1) as well as a book expanding on the topic, we bring to the attention of the readers that the book is open access available here. A paper copy can be ordered here *(order form)* .

Happy New Year's reading!

Both publications result from and are financed by the ERC Consolidator

project Building EU Civil Justice at the Erasmus School of Law in Rotterdam.

The blurb reads:

> *In recent years there has been significant growth in international business courts in Europe and across the world. They have been established as expert dispute resolution forums offering procedures in English for international commercial parties. Governments have promoted their development as an integral aspect of broader public policy agendas with the aim to enhance the rule of law and the attractiveness of their jurisdictions as legal and economic hubs. While these courts can be lauded for facilitating international commercial dispute resolution and boosting justice innovation, the development of competition in the international litigation market is a remarkable trend that merits discussion.*
>
> *International Business Courts provides a comprehensive critical evaluation of the institutional design and procedural rules of established and emerging international business courts. It focuses on major European and global centres. It assesses to what extent these courts, the competition between them and their inter relationship with arbitration, contribute to justice innovation. It considers their impact on access to justice and the global litigation market, as well as their effect on the rule of law.*
>
> *This book is of interest to legal practitioners, academics and policy makers in the area of civil justice and international business litigation.*

ASADIP Annual Conference 2019: Report

written by Veronica Ruiz Abou-Nigm

ASADIP (American Association of Private International Law)

13th Annual Conference – Punta del Este, URUGUAY, 21-22 November 2019

TRANSNATIONAL EFFECTIVENESS OF LAW: Recognition and enforcement of foreign judgments, arbitral awards and other acts

On 21 and 22 November 2019, the 13th ASADIP Annual Conference took place in Punta del Este (Uruguay) with the participation of more than 30 international speakers from several jurisdictions and over 130 attendees, mostly from the Latin American region, but also from North America and Europe. The theme of the conference was the *Transnational Effectiveness of Law:Recognition and Enforcement of Foreign Judgments, Arbitral Awards and other Acts;*

The then President of ASADIP, Eduardo Vescovi (Uruguay), delivered the welcome speech followed by the inaugural conference on the "Pro-effectiveness principle and transnational access to justice" by Didier Opertti Badán (Uruguay). Following from there, the conference included eight panels (each including several short presentations), a round-table debate (with several participant speakers), and four keynotes (special conferences). Presentations in these various formats were followed by lively discussions with the audience.

In its thirteenth iteration, the ASADIP annual conference brought together an enthusiastic group of established private international law scholars and practitioners. There were also specific activities catered for the younger generation of scholars, practitioners and research students: these were the ASADIP-CLAEH (Young ASADIP) Conference that took place at the University CLAEH of Punta del Este, on 20th November in the afternoon, including panel presentations and a debate; and, as it has been happening for many years at the ASADIP annual conference, a poster contest that took place on the second day of the conference. Several young researchers from Peru, Argentina, Brazil, and France presented their research in front of the evaluation committee, with three of them being awarded prices. For the full list of all the activities, including the specific topics of the panels and keynote addresses, and the names and profiles of all the international speakers and research students presenting, see the full report (in Spanish) here.

Furthermore, on 23 November 2019 the annual ASADIP General Assembly was held, during which the ASADIP Council for the period 2019-2022 was elected. For further information on the new Council members see further here.

The detail:

First Panel: “Circulation of public documents globally”. Speakers: Paula María All (Argentina), Carmen González (Uruguay), Renata Alvares Gaspar (Brazil) and José Manuel Canelas (Bolivia), mooderated by Eduardo Vescovi (Uruguay).

Second Panel: “International cooperation in transnational family situations”. Speakers: Nieve Rubaja (Argentina), Luciana B. Scotti (Argentina) and Daniel Trecca (Uruguay), moderated by Elizabeth Villalta Vizcarra (El Salvador).

Third Panel: “Transnational Efficacy of Foreign Judgments – Flexibilization of Requirements” Speakers: Claudia Madrid Martínez (Colombia), Taydit Peña Lorenzo (Cuba), Carolina D. Iud (Argentina) and Eduardo Tellechea (Uruguay), moderated Adriana Fernández (Uruguay).

These morning panels were followed by the first Keynote Speech: “New Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters ”by João Ribeiro-Bidaoui (HCCH).

Fourth Panel: “The Hague Convention on Recognition and Enforcement of Foreign Judgments and its impact on Latin American countries”. Speakers: Marcos Dotta (Uruguay), Verónica Ruiz Abou-Nigm (UK), Fabricio Bertini Pasquot Polido (Brazil) and Juan Carlos Guerrero (Mexico), moderated by Inez Lopes (Brazil).

Fifth Panel: The last Panel of the first day on “Transnational Effectiveness of Provisional Measures” was moderated by Sebastián Paredes (Argentina), presenting on the subject Cecilia Fresnedo de Aguirre (Uruguay), Eugenio Hernández-Bretón (Venezuela) andThiago Paluma (Brasil).

The second day of the Conference began with the Sixth Panel moderated by Mercedes Albornoz (Mexico). Speakers: Gonzalo Lorenzo Idiarte (Uruguay), María Blanca Noodt Taquela (Argentina) and Roberto Ruiz Díaz Labrano (Paraguay) reflected around the question of “Is it desirable to abolish the exequatur?

After that, the second keynote speech on the “New OAS Guide on the Law Applicable to International Commercial Contracts in the Americas” was delivered by the Rapporteur of the Guide, José A. Moreno Rodríguez (Paraguay) and Jeannette Tramhel (OAS).

Panel Seven: “Transnational Efficacy of Foreign Arbitral Awards -Impact of the new international arbitration laws in the Río de la Plata”. Speakers: Paul F. Arrighi (Uruguay), María Laura Capalbo (Uruguay), Soledad Díaz (Uruguay), Alejandro Menicocci (Argentina), Guillermo Argerich (Argentina) and Juan Jorge (Argentina), moderated by Juan José Cerdeira (Argentina).

Debate: “Execution of foreign arbitral awards – something to change?”. Participants: Francisco A. Amallo (Argentina), João Bosco Lee (Brazil), Diana Giraldo Montoya (Colombia), Francisco Grob (ICSID) and Jaime Vintimilla (Ecuador), being the moderator María Laura Capalbo (Uruguay).

The third keynote speech on the “New Singapore Convention and the execution of international agreements resulting from cross-border mediation ” was delivered by Luis Ernesto Rodríguez Carrera (Venezuela) and María Verónica Duarte (Uruguay).

Panel Eight: “The transnational effectiveness of arbitral awards versus that of foreign judgments”. Speakers: María Susana Najurieta (Argentina), Julio César Rivera (Argentina), Carlos Odriozola (Mexico) and María Macarena Fariña (Uruguay), moderated by Nicolás Etcheverry (Uruguay).

The conference closed with a keynote speech from Diego P. Fernández Arroyo (France) on the “Role of Private International Law in the Global Era”.

Private International Law in Africa: Comparative Lessons

Written by Chukwuma Okoli, TMC Asser Institute, The Hague

About a decade ago, Oppong lamented a “stagnation” in the development of private international law in Africa. That position is no longer as true as it was then – there is progress. Though the African private international law community is small, the scholarship can no longer be described as minimal (see the

bibliograhy at the end of this post). There is a growing interest in the study of private international law in Africa. Why is recent interest on the study of private international law [in Africa] important to Africa? What lessons can be learn't from other non-African jurisdictions on the study of private international law?

With increased international business transactions and trade with Africa, private international law is a subject that deserves a special place in the continent. Where disputes arise between international business persons connected with Africa, issues such as what court should have jurisdiction, what law should apply, and whether a foreign judgment can be recognized and enforced are keys aspects of private international law. Thus, private international law is indispensable in regulating international commercial transactions.

Currently, there is no such thing as an "African private international law" or "African Union private international law" that is akin to, for example, "EU private international law". It could, however, be argued that there is such a thing as "private international law in Africa". The current private international law in Africa is complicated as a consequence of a history of foreign rule, and the fact that Africa has diverse legal traditions (common law, Roman-Dutch law, civil law, customary law and religious law). Many countries in Africa still hang on to what they inherited during the period of colonialism. As colonialism breeds dependence, there has not been sufficient conscious intellectual effort to generate a private international law system that responds to the socio-economic, cultural, and political interests of countries in Africa.

Drawing from comparative experiences, it is opined that a systematic academic study of private international law might create the required strong political will and institutional support (which is absent at the moment) that is necessary to give private international law its true place in Africa.

There has always been private international law in Africa from time immemorial. Africans, like any other persons, migrated from one territory to another (especially within Africa), where the clash of socio-cultural, political, and economic interests among persons in Africa gave rise to private international law problems as we know them today. Some of these disputes between private parties of different nation states may have likely been resolved through war or diplomacy.

The systematic study of private international law as we know it today has largely

been academically developed by the Member States of the European Union (EU) and the United States of America ("USA"). The period of industrialization in the 19th century, and the rise of capitalism gave birth to a variety of solutions that could respond to globalization. Indeed, the firm entrenchment of the principle of party autonomy in international dispute settlement in the 20th century was a way of securing the interest of the international merchant who does their business in many jurisdictions. The *privatization* of international law dispute settlement is what gave birth to the name *private* international law.

In the international scene, the study of private international law is currently dominated by two major powers: the EU and the US, but the EU wields more influence internationally. The EU operates an integrated private international law system with its judicial capital in Luxembourg. The EU can be described as a super-power of private international law in the world, with The Hague as its intellectual capital. Many of the ideas in the Hague instruments (a very important international instrument on private international law) were originally inspired by the thinking of European continental scholars. As a result of colonization, many countries around the world currently apply the private international law methodology of some Member States of the EU. The common law methodology is applied by many Commonwealth countries that were formerly colonized by the United Kingdom; the civil law methodology is applied by many countries (especially in French-speaking parts of Africa) that were formerly colonized by France and Belgium; and the Roman-Dutch law methodology is applied by many countries that were formerly colonized by Netherlands.

Asia appears to have learnt from the EU and USA experience. Since 2015 till date, private international academics from Asia and other regions around the world have held many conferences and meetings with the purpose of drawing up the principles of private international law on civil and commercial matters, known as "Asian Principles of Private International Law"). The purpose of the principles is to serve as a non-binding model that legislators and judges (or decision makers) in the Asian region can use in supplementing or reforming their private international law rules.

It is important to stress that it is the systematic study of private international law by scholars over the years in the US and Member States in the EU and Asia that created the required political will and institutional support to give private international law it's proper place in these countries. In Africa, such systematic

study becomes especially important in an environment of growing international transactions both personal and commercial. This is what propels the study of private international. It is seldom an abstract academic endeavor given the nature and objectives of the subject

Professor Oppong – a leading authority on the subject of private international law in Africa – has rightly submitted in some of his works that private international law can play a significant role in Africa in addressing issues such as: "regional economic integration, the promotion of international trade and investment, immigration, globalization and legal pluralism." A systematic study of private international law in Africa will address these some of these challenges that are significant to Africa. Indeed, a solid private international law system in African States can create competition among countries on how to attract litigation and arbitration. This in turn can lead to economic development and the strengthening of the legal systems of such African countries

What should private international law in Africa look like in the future? Is it possible to have a future "African Union private international law" comparable to that of the European Union? Should it operate in an intra-African way to the exclusion of international goals such as conflicts between non-African countries, and the joint membership or ratification of international instruments such as The Hague Conventions? Should it take into account internal conflicts in individual African states, where different applicable customary or religious laws may clash with an enabling statute or the constitution, or different applicable religious or customary laws may clash in cross-border transactions? In the alternative, should it focus primarily on diverse solutions among countries in Africa, and promote international commercial goals, with less attention placed on African integration?

These questions are not easy to answer. It is opined that private international law in Africa deserves to be systematically studied, and solutions advanced on how the current framework of private international law in Africa can be improved. If such study is devoted to this topic, the required political will and institutional support can be created to give [private international law] proper significance in Africa.

For recent monographs on the subject see generally
CSA Okoli and RF Oppong, *Private International Law in Nigeria* (Hart, 2020-forthcoming)

P Okoli, *Promoting Foreign Judgments; Lessons in Legal Convergence from South Africa and Nigeria* (Wolters Kluwer, Alphen aan den Rijn, 2019)

AJ Moran and AJ Kennedy, *Commercial Litigation in Anglophone Africa: The law relating to civil jurisdiction, enforcement of foreign judgments, and interim remedies* (Juta, Cape Town, 2018)

RF Oppong, *Private International Law in Ghana* (Wolters Kluwer Online, Alphen aan den Rijn, 2017)

M Rossouw, *The Harmonisation of Rules on the Recognition and Enforcment of Foreign Judgments in Southern African Customs Union* (Pretoria University Law Press, Pretoria, 2016)

E Schoeman *et. al.*, *Private International Law in South Africa* (Wolters Kluwer Online, Alphen aan den Rijn, 2014)

RF Oppong, *Private International Law in Commonwealth Africa* (Cambridge University Press, Cambridge, 2013)

C Forsyth, *Private International Law – the Modern Roman Dutch Law including the Jurisdiction of the High Courts* (5th edition, Juta, Landsowne, 2012).

Ssangyong Engineering & Construction Co. Ltd. *v.* National Highways Authority of India (NHAI) 2019 SCC OnLine SC 677

By Mohak Kapoor

The recent decision of the apex court of Ssangyong Engineering & Construction Co. Ltd. v. NHAI, has led to three notable developments: (1) it clarifies the scope of the "public policy" ground for setting aside an award as amended by the Arbitration and Conciliation (Amendment) Act 2015, (2) affirms the prospective applicability of the act and (3) adopts a peculiar approach towards recognition of minority decisions.

FACTS

The dispute arose out of a contract concerning the construction of a four-lane bypass on a National Highway in the State of Madhya Pradesh, that was entered into by the parties. Under the terms of the contract, the appellant, Ssangyong Engineering, was to be compensated for inflation in prices of the materials that were required for the project. The agreed method of compensation for inflated prices was the Wholesale Price Index ("WPI") following 1993 – 1994 as the base year. However, by way of a circular, the National Highways Authority of India ("NHAI") changed the WPI to follow 2004 – 2005 as the base year for calculating the inflated cost to the dismay of Ssangyong. Hence, leading to the said dispute. .

After the issue was not resolved, the dispute was referred to a three member arbitral tribunal. The majority award upheld the revision of WPI as being within the terms of the contract. The minority decision opined otherwise, and held that the revision was out of the scope the said contract. Due to this, Ssangyong challenged the award as being against public policy before Delhi High Court and upon the dismissal of the same, the matter was brought in front of the apex court by way of an appeal.

LEGAL FINDINGS

The Supreme Court ruled on various issues that were discussed during the proceedings of the matter. The Court held that an award would be against justice and morality when it shocks the conscience of the court. However, the same would be determined on a case to case basis.

The apex court interpreted and discussed the principles stipulated under the New York convention. Under Para 54 of the judgement, the apex court has discussed the necessity of providing the party with the appropriate opportunity to review the evidence against them and the material is taken behind the back of a party, such an instance would lead to arising of grounds under section 34(2)(a)(iii) of the Arbitration and Conciliation (Amendment) Act, 2015. In this case, the SC applied the principles under the New York convention of due process to set aside an award on grounds that one of the parties was not given proper chance of hearing. The court held that if the award suffers from patent illegality, such an award has to be set aside.

However, this ground may be invoked if (a) no reasons are given for an award, (b)

the view taken by an arbitrator is an impossible view while construing a contract, (c) an arbitrator decides questions beyond a contract or his terms of reference, and (d) if a perverse finding is arrived at based on no evidence, or overlooking vital evidence, or based on documents taken as evidence without notice of the parties.

Out now: Yearbook of Private International Law, Vol. XX (2018/19)

The XXth volume of the Yearbook of Private International Law has just been published. Ilaria Pretelli, who has edited this volume together with Andrea Bonomi and Gian Paolo Romano, has been so kind as to provide not only the following teaser but also the Table of Contents and Foreword to *conflictoflaws.net*.

The new 20th volume (2018/2019) of the Yearbook of Private International Law contains over 30 articles on the most important aspects of private international law by authors from all over the world. You will find inspiring articles on the law of non-recognised states, the American restatement on international arbitration, the recognition of so-called marriage for all in Europe and, highly topical, a contribution to the Hague Judgments Convention and the reform of the Brussels IIa Regulation.

As always, the National Reports with information on relevant legal developments worldwide, News from the Hague, the case law section and also the forum are highly interesting and unique.

Out now: RabelsZ 4/2019

The latest issue of RabelsZ has just been published. It contains the following articles:

Olaf Meyer, Parteiautonomie bei Mehrrechtsstaaten (Party Autonomy in States with More than One Legal System), pp. 721 et seq

> *Where parties' choice of law in private international law is limited to states with which they have reasonably close ties, similar restrictions usually apply to their choice of local law in states having more than one legal system. However, applying the same limits to both contexts is not mandatory. On the international level there is already a connecting factor that has designated the applicability of the law of a multi-law state. At the local level it is then a question of fine-tuning within that state's legal order. To undertake this fine-tuning exercise on the basis of purely objective criteria is, however, more difficult within a single non-unified legal system than it is between two different states. This is because the relevant facts are packed more densely together and people are more mobile within the same state. Hence, the habitual residence of a person or the closest connection to the facts of a case tends to be more difficult to localise than in cases with connections to different states. Here lies an essential difference between international and inter-local conflicts of laws, which would justify a different approach to resolving them.*

Zufall, Frederike, Shifting Role of the "Place": From *locus delicti* to Online Ubiquity in EU, Japanese and U.S. Conflict of Tort Laws, pp. 760 et seq

> *This article examines the evolution of conflict rules in their perception of "place": the basis for determining jurisdiction and the applicable law. To examine this topic from a global perspective, the legal systems of the EU, Japan, and the U.S. are analyzed and contrasted as representative legal systems from around the world (I.). Europe can be seen as the cradle of the concept of locus delicti, upholding it, albeit with reinterpretation, until today. Like other Asian countries, Japan received locus delicti as a legal transplant, implementing*

and adapting it in its own way. Finally, the U.S. is known for pursuing a different approach and different connecting places as a result of its conflicts revolution. This study, then, aims to combine a comparative approach with conceptual analysis, tracing the evolution of locus delicti as first received from Roman law (II.), through its reinterpretation to address cross-border and multi-state torts (III.), and the adoption of different connecting approaches (IV.), to questions arising from the ubiquity raised by the Internet (V.). To ensure a comprehensive approach, this paper will cover aspects of both the applicable law and jurisdiction, while at the same time having cognizance of their conceptual differences. It will be shown that in seeking "connecting factors", "contacts", or "interests", connection to a place is increasingly lost, blurring territoriality and provoking the question of whether pursuing a fair balance between the parties should, instead, lead our legal reasoning (VI.).

Oliver Mörsdorf, Private enforcement im sekundären Unionsprivatrecht: (k)eine klare Sache? (Private Enforcement under Secondary EU Private Law: (Not) a Clear Matter?), pp. 797 et seq

National private law is increasingly determined by EU legislation which either directly establishes standards of conduct between individuals or obliges Member States to do so. However, such legislation often lacks clarity as to whether private law remedies are granted in cases of non-compliance. In Van Gend & Loos the EJC held that the EEC (now EU) creates individual rights that are directly enforceable before national courts. The Court later developed this principle of direct effect into a far-reaching duty for Member States to ensure the enforcement of individual rights by providing remedies such as a right to invoke the nullity of legal provisions or contract clauses and a right to claim damages from public authorities and private persons. Most legal writers take a functional approach to the question of which EU laws contain individual rights, arguing that the involvement of individuals in enforcement of EU law calls for over-all recognition of individual rights. This private enforcement approach might fit primary law but cannot be transferred to secondary law, where the ECJ's recognition of individual rights goes along with a reduction of EU lawmakers' prerogative to decide on the enforcement standard. The question of whether a secondary law provision contains an individual right thus must be answered strictly by interpreting that provision, taking into account not only its wording and context but also the legislative process preceding its adoption. A

prerogative to decide autonomously on the creation of individual rights should be rejected, however, regarding EU provisions that give specific expression to individual rights deriving from primary law. Even if one accepts EU lawmakers' power to define the scope of primary law to some extent, this power cannot include the very character of provisions as individual rights.

Leon Theimer, The End of Consumer Protection in the U.S.? –Mandatory Arbitration and Class Action Waivers, pp. 841 et seq

Historically, in the early twentieth century, mandatory arbitration was almost non-existent due to the judiciary's widespread refusal to enforce arbitration agreements. This began to change slowly when Congress passed the Federal Arbitration Act (FAA) in order to provide a forum for merchants to settle fact-based contractual disputes. […] The sweeping change towards individual arbitration in consumer disputes is underpinned by the Supreme Court's jurisprudence, which over the last forty years has overwhelmingly favoured the party seeking to arbitrate. While it is beyond the scope of this article to analyse the entirety of the Supreme Court's FAA jurisprudence, Part II will trace arbitration's ascent from the enactment of the FAA in 1925 to the prominent status it enjoys today, particularly focusing on and critically analysing key decisions rendered in the last four decades. Part III will discern some of the most important implications of the status quo and discuss what is left of consumer protection in the arbitration context in the United States today. Lastly, Part IV will explore some approaches that would enhance consumer protection in arbitration along with their prospects, criticisms and justifications.

3rd IBA Litigation Committee

Conference on Private International Law

On 24 and 25 October, the 3rd IBA Litigation Committee Conference on Private International Law will take place in Palazzo Turati, Milan, Italy. It will deal with Brexit, International Commercial Courts and Sanctions. More information are available on the IBA conference website.

The programme reads as follows:

Welcome remarks

- Angelo Anglani *NCTM, Rome; Co-Chair, IBA Litigation Committee*
- Vinicio Nardo *Chairman, Consiglio dell'Ordine degli Avvocati di Milano, Milan*

Keynote address
International dispute resolution in turbulent times – is there a role for private international law?

Professor Fausto Pocar *Università degli Studi di Milano, Milan*

Session One

Brexit – the impact on jurisdiction and private international law

With just one week until the deadline, we will check the status of the most controversial event in the history of the European Union. The session will focus on the impact of Brexit on jurisdiction and private international law and look at the possible effects on solutions and perspectives in international commercial disputes.

Session Chair
Carlo Portatadino *Weigmann, Milan; Secretary, IBA Litigation Committee*

Speakers

- Professor Stefania Bariatti *Università degli Studi di Milano, Milan*
- Alexander Layton QC *Twenty Essex, London*

Session Two

The mushrooming of International Commercial Courts throughout Europe – reasons and perspectives

In 2016, on the occasion of the 2nd IBA Litigation Committee Conference on Private International Law, we explored the new phenomenon of the International Commercial Courts and discussed whether the 2005 Hague Convention on Choice of Court Agreements could enhance their role in international commercial dispute resolution. Since that time, and also in light of Brexit we have been assessing the mushrooming of International Commercial Courts throughout Europe. This session will examine the experiences of several jurisdictions and focus on the future perspective on the phenomenon in Europe.

Session Chair
Jacques Bouyssou *Alerion, Paris; Treasurer, IBA Litigation Committee*

Speakers

- Martin Bernet *Bernet Arbitration / Dispute Management, Zurich*
- Hakim Boularbah *Loyens & Loeff, Brussels*
- Jean Messinesi *Honorary President, Tribunal de Commerce de Paris, Paris*
- Duco Oranje *President, NCC Court of Appeal, Amsterdam*
- Professor Giesela Rühl *Friedrich-Schiller-Universität Jena, Jena*
- Mathias Wittinghofer *Herbert Smith Freehills, Frankfurt*

Session Three

Sanctions – politics, procedures and private international law

This session will consider the increasing impact of sanctions on politics and economics. The panellists will present the workings of the European and US sanctions systems and illustrate the resulting consequences on international trade and cross-border disputes. The session will also focus on how clients approach and deal with the matter.

Session Chair
Christopher Tahbaz *Debevoise & Plimpton, New York*

Speakers

- Shannon Lazzarini *Group Deputy General Counsel & Head of Group Litigation, Unicredit, Milan*
- Richard Newcomb *DLA Piper, Washington DC*
- Michael O'Kane *Peters & Peters, London*
- Marco Piredda *Senior Vice-President, International Affairs, ENI, Rome*
- Professor Hans van Houtte *KU Leuven, Leuven, Belgium*

Closing remarks

Tom Price *Gowling WLG, Birmingham; Co-Chair, IBA Litigation Committee*