How Litigation Imports Foreign Regulation

Guest Post by Diego A. Zambrano, Assistant Professor of Law, Stanford Law School

For years now, the concept of a "Brussels Effect" on global companies has become widely accepted. A simple version of the story goes as follows: the European Union sets global standards across a range of areas simply by virtue of its large market size and willingness to construct systematic regulatory regimes. That is true, for instance, in technology where European privacy regulations force American companies (including Facebook, Google, and Apple) to comply worldwide, lest they segment their markets. As Anu Bradford has expertly argued, it is also true in environmental protection, food safety, antitrust, and other areas. When companies decide to comply with European regulations across markets, the European Union effectively "exports" its regulatory regimes abroad, even to the United States.

In a forthcoming article, How Litigation Imports Foreign Regulation, I argue that foreign regulators not only shape the behavior of American companies—they also influence American litigation. From the French Ministry of Health to the Japanese Fair Trade Commission and the European Commission, I uncover how foreign agencies can have a profound impact on U.S. litigation. In this sense, the "Brussels Effect" is a subset of broader foreign regulatory influence on the American legal system.

The intersections are rich and varied. For instance, plaintiffs in dozens of pharmaceutical cases in U.S. court are requesting that multinational defendants disclose documents previously produced to foreign regulators. These plaintiffs base their legal cases around findings by, say, the French Ministry of Health rather than the American Food and Drug Administration (FDA). Similarly, plaintiffs in antitrust cases keep close tabs on enforcement actions by the European Commission, piggybacking on the work of foreign regulators, borrowing foreign theories and documents, and even arguing that foreign regulatory action should bolster cases in U.S. courts. And foreign regulators even submit letters to U.S. district courts, advocating for a particular outcome or objecting to the

production of confidential documents.

Take a recent case, *In re Zofran*, involving allegations that GlaxoSmithKline (GSK) sold the drug Zofran while knowing it caused severe birth defects. GSK argued that "plaintiffs could offer no evidence that the drug caused birth defects" and that "even the FDA had rejected similar claims." Plaintiffs' case was headed for an adverse summary judgment until a key piece of evidence emerged—documents that GSK had produced to the "Japanese Ministry of Health and Welfare, including a series of studies showing potential birth defects that defendants had 'performed specifically to satisfy Japanese regulatory requirements.'" These documents allowed plaintiffs to dodge FDA findings and defeat a motion for summary judgment.

Or take another example, antitrust cases that piggyback on the foreign agencies. In a recent case alleging a conspiracy by American and foreign banks to fix prices for European sovereign bonds, plaintiffs left no doubt that "they remained ignorant of the conspiracy's existence until the European Commission's Statement of Objections put them on notice." In other words, a European Commission report triggered a large antitrust case in U.S. court.

Sometimes, plaintiffs draw on foreign regulators precisely because those foreign agencies disagree with U.S. regulators. In one pharmaceutical case, plaintiffs blamed a company for failing to warn of cancer risks, "citing reports from Health Canada, which they argued uncovered 'new safety information' that the FDA failed to consider."

I argue in my article that this phenomenon of private litigation that borrows foreign regulation is widespread and needs more attention. The trend comes, of course, with costs and benefits. On the one hand, drawing on foreign regulators can serve as a "failsafe" when domestic regulators are incompetent or captured. This could audit the work of our underperforming agencies, allowing litigators to compare the FDA with the Taiwanese health agency or the Environmental Protection Agency against European environmental regulators. Moreover, importing regulation can give litigants and courts access to increased expertise and information gathering. And it may even harmonize U.S. and foreign regulations, promoting coherence and regulatory convergence.

Recent litigation involving the Boeing 737 Max crashes demonstrates the promise

of imported foreign regulation. Many sources have reported a cozy relationship between Boeing and the Federal Aviation Administration, suggesting a classic case of regulatory capture. Private plaintiffs suing Boeing may thus have difficulty relying on reports from the FAA to support their cases. But Boeing does not wield similar influence over the European Aviation Safety Agency. So, plaintiffs could rely on EASA investigations to establish basic facts against Boeing, allowing the court to leverage the work of a relatively unbiased regulator.

While these benefits seem clear, costs also abound. We may worry, for instance, about empowering foreign regulators that have their own political agendas. Europeans, for one, may be protectionist against American tech companies. This could promote inefficient overregulation of activity that U.S. regulators have deemed appropriate. Foreign regulation could also chill essential domestic innovation. What if the FDA approves a COVID vaccine but private plaintiffs sue the manufacturer based on adverse reports in Japan? In a nightmare scenario, companies in the United States would worry not only about complying with America's sprawling regulations, but also about litigants trawling foreign countries for regulatory support.

Because it shows both promise but also risks, I recommend a better way to control the use of foreign regulations: Whenever a plaintiff proposes to use a foreign regulatory finding, courts should solicit the opinions of our domestic regulators. These opinions would help courts determine whether foreign regulations are compatible with America's regulatory regimes. However, agency opinions would not bind courts. Indeed, judges should take these opinions with a grain of salt and be wary of domestic regulatory capture. Even if agencies are unwilling to offer opinions, asking plaintiffs to give notice of their intent to use a foreign regulatory finding would alert domestic regulators of areas where they may be underperforming.

As traditional channels of transnational coordination die out, private parties, courts, and regulators are searching for new ways to promote transnational convergence. Both the Brussels Effect and the phenomenon of regulatory importation are examples of where the legal international order is heading.

European and International Civil Procedural Law: Some views on new editions of two leading German textbooks

For German-speaking conflict of law friends, especially those with a strong interest in its procedural perspective (and this seems to apply to almost all of them by now, I guess), the year 2021 has begun beautifully, as far as academic publications are concerned. Two fantastic textbooks were released, one on European civil procedural law, and one on international civil procedural law:



After more than ten years the second edition of Burkhard Hess's 2nd edition of his textbook on „Europäisches Zivilprozessrecht" is now on the table, 1026 pages, a plus of nearly 300 pages and now part of the renowned series „Ius Communitatis" by DeGruyter. It is a fascinating account of the foundations („Grundlegung", Part 1, pp. 3 – 311) of European civil procedure as well as a sharp analysis of the instruments of EU law („Europäisches internationales Zivilprozessrecht", Part 2, pp. 313 – 782). Part 3 focuses on the interplay between autonomous and European procedural law (pp. 783 – 976). Extensive tables of the cases by the ECJ and the ECtHR as well as a large subject index help to access directly the points in question. The foreword rightly points out that European civil procedural law has reached a new phase. Whereas 10 years ago, the execution of the agenda under the then still new competency in (now) Article 81 TFEU was at issue, today enthusiasm and speed have diminished. Indeed, the ECJ had to, and still has to, defend „the fundamental principles of EU law, namely mutual trust and mutual recognition, against populist attacks and growing breaks of taboos by right-wing populist governments in several Member States" (Foreword, p. 1, translation here and all following ones by myself; see also pp. 93 et seq. on the struggle for

securing independence of the national judge in Hungary and Poland as a matter of the EU's fundamental values, Article 2 TEU). At the same time, the EU legislator and the ECJ had shown tendencies towards overstreching the legitimatory potential of the principle of mutual trust before the EU returned to „recognition with open eyes" (as is further spelled out at para. 3.34, at p. 119), as opposed to blind trust – tendencies that worried many observers in the interest of the rule of law and a convincing balancing of the freedom of movement for judgments and other juridical acts. The overall positive view by Hess on the EU's dynamic patterns of judicial cooperation in civil matters, combined with the admirable clarity and comprehensiveness of his textbook, will certainly contribute considerably to address these challenges.



Equally admirable for its clarity and comprehensiveness is Haimo Schack's 8th edition of his textbook on „Internationales Zivilverfahrensrecht", including international insolvency and international arbitration, 646 pp., now elevated from the „short textbook series" to the „large textbook series" at C.H.Beck. The first part addresses foundations of the subject (pp. 1 – 68), the second part describes the limits of adjudicatory authority under public international law (pp. 69 – 90), the third part analyses all international aspects of the main proceedings (pp. 91 – 334), the fourth part recognition and enforcement (pp. 335 – 427), the fifth and sixth part deal with insolvency (pp. 428 – 472) and arbitration (pp. 473 – 544). Again, an extensive table of cases and a subject index are offered as valuable help to the user. Schack is known for rather sceptical positions when it comes to the narrative of mutual trust. In his sharp analysis of the foundations of international procedural law, he very aptly states that the principle of equality („*Gleichheit*") is of fundamental relevance, including the assumption of a principal equivalence of the adminstrations of justice by foreign states, which allows trust in and integration of foreign judicial acts and foreign laws into one's own administration of justice: *„Auf die Anwendung eigenen Rechts und die Durchführung eines Verfahrens im Inland kann man verzichten, weil und soweit man darauf vertraut, dass das ausländische Recht bzw. Verfahren dem inländischen äquivalent ist*" (We may waive the application of our own law and domestic proceedings because and as far as we trust in the foreign law and the foreign proceedings are equivalent to one's own, para. 39, at

p. 12) – a fundamental insight based, inter alia, on conceptual thinking by Alois Mittermaier in the earlier parts of the 19th century (AcP 14 [1831], pp. 84 et seq., at pp. 95, justifying recognition of foreign judgments by the assumption that the foreign judge should, in principle, be considered „as honest and learned as one's own"), but of course also on Friedrich Carl v. Sagigny, which I allowed myself to further substantiate and transcend elsewhere to the finding: to trust or not to trust – that is the question of private international law (M. Weller, RdC, forthcoming). In Schack's view, „the ambitious and radical projects" of the EU in this respect „fail to meet with reality" (para. 126, at p. 50). Equally sceptical are his views on the HCCH 2019 Judgments Convention („*Blütenträume*", para. 141, at p. 57, in translation something like „daydreams").

Perhaps, the truth lies somewhere in the middle, namely in a solid „trust management", as I tried to unfold elsewhere.

European Parliament Resolution on corporate due diligence and corporate accountability

Our blog has reported earlier on the Proposal and Report by the Committee on Legal Affairs of the European Parliament for a Resolution on corporate due diligence and corporate accountability. That proposal contained recommendations to amend the EU Regulations Brussels Ia (1215/2015) and Rome II (864/2007). The proposals were discussed and commented on by Jan von Hein, Chris Tomale, Giesela Rühl, Eduardo Álvarez-Armas and Geert van Calster.

On 10 March 2021 the European Parliament adopted the Resolution with a large majority. However, the annexes proposing to amend the Brussels Ia and Rome II Regulations did not survive. The Resolution calls upon the European Commission to draw up a directive to ensure that undertakings active in the EU respect human rights and the environment and that they operate good governance. The

European Commission has already indicated that it will work on this.

Even if the private international law instruments are not amended, the Resolution touches private international law in several ways.

* It specifies that the "Member States shall ensure that relevant provisions of this Directive are considered overriding mandatory provisions in line with Article 16 of Regulation (EC) No 864/2007" (Art. 20). It is a bit strange that this is left to national law and not made an overriding mandatory provision of EU law in line with the CJEU's Ingmar judgment (on the protection of commercial agents – also a Directive). Perhaps the legislator decides otherwise.

* It proposes a broad scope rule covering undertakings "operating in the internal market" and encompassing activities of these undertakings or "those directly linked to their operations, products or services by a business relationship or in their value chains" (Art 1(1)). It thus imposes duties on undertakings to have due diligence strategies and communicate these even if the undertakings do not have their seat in an EU Member State. In this way it moves away from traditional seat theories and place of activities tests.

ILA "Kyoto Guidelines on Intellectual Property and Private International Law" published with comments

Written by Toshiyuki Kono, Pedro de Miguel Asensio and Axel Metzger

The International Law Association's Committee on "Intellectual Property and



Private International Law" has finished its work with the adoption and publication of the "Kyoto Guidelines on Intellectual Property and Private International Law". The Guidelines are the outcome of an international cooperation of a group of 36 scholars from 19 jurisdictions lasting for ten years under the auspices of ILA. The Kyoto Guidelines have been approved by the plenary of the ILA 79th Biennial Conference, held (online) in Kyoto on December 13, 2020. The Guidelines provide soft-law principles on the private international law aspects of intellectual property, which may guide the interpretation and reform of national legislation and international instruments, and may be useful as source of inspiration for courts, arbitrators and further research in the field. Different from older regional projects, the Kyoto Guidelines have been prepared by experts from different world regions. The Guidelines have now been published with extended comments as a special issue of the Open Access journal JIPITEC: https://www.jipitec.eu.

The ILA Committee on "Intellectual Property and Private International Law" was created in November 2010. Its aim was to examine the legal framework concerning civil and commercial matters involving intellectual property rights that are connected to more than one State and to address the issues that had emerged after the adoption of several legislative proposals in this field in different regions of the world. The work of the Committee was built upon the earlier projects conducted by the Hague Conference of Private International Law as well as several academic initiatives intended to develop common standards on jurisdiction, choice of law and recognition and enforcement of judgments in intellectual property matters.

In the initial stages of the activities of the Committee it was agreed that its overall objective should be to draft a set of model provisions to promote a more efficient resolution of cross-border intellectual property disputes and provide a blueprint for national and international legislative initiatives in the field. Therefore, the focus of its activities has been the drafting of a set of guidelines with a view to provide a valuable instrument of progress concerning private international law aspects raised by intellectual property. Furthermore, the Committee conducted a

number of comparative studies and monitored the developments in different jurisdictions around the world. The Committee also worked in collaboration with several international organizations, particularly the World Intellectual Property Organization and the Hague Conference on Private International Law.

The final text of the Guidelines consists of 35 provisions, which are divided in four sections: General Provisions (Guidelines1-2), Jurisdiction (3-18), Applicable Law (19-31) and Recognition and Enforcement of Judgments (Guidelines 32-35). As suggested by the term "Guidelines", this instrument contains a set of provisions intended to guide the application or reform of private international laws in this field. The Guidelines restate certain well-established foundational principles such as the *lex loci protectionis* rule and aspire to provide concrete solutions for pressing contemporary problems, in areas such as multi-state infringements and cross-border collective copyright management. In order to make explicit the influence of the previous projects in the field and to facilitate the comparison with them, the short comments are preceded by the reference to the similar provisions adopted previously in the ALI Principles[1], CLIP Principles[2], Transparency Proposal[3] and Joint Korean-Japanese Principles[4]. As an additional instrument to facilitate the uniform interpretation of the Guidelines, the Committee has prepared a set of extended comments to all the provisions.

The Guidelies have now been published together with extended comments written by members of the ILA Committee which explain the background and application of the Guidelines.

[1] American Law Institute, *Intellectual Property: Principles Governing Jurisdiction, Choice of Law and Judgments in Transnational Disputes*, ALI Publishers, 2008.

[2] European Max Planck Group on Conflict of Laws in Intellectual Property, *Conflict of Laws in Intellectual Property (Text and Commentary)*, OUP, 2013.

[3] Japanese Transparency Proposal on Jurisdiction, Choice of Law, Recognition and Enforcement of Foreign Judgments in Intellectual Property, see the English text in J. Basedow, T. Kono and A. Metzger (eds.), *Intellectual Property in the Global Arena – Jurisdiction, Applicable Law, and the Recognition of Judgments in Europe, Japan and the US*, Mohr Siebeck, 2010, pp. 394-402.

[4] Joint Proposal by Members of the Private International Law Association of Korea and Japan, see *The Quarterly Review of Corporation Law and Society*, 2011, pp. 112-163.

CJEU on the EU-third State child abduction proceedings under article 10 of the Brussels IIA Regulation

This post was written by Vito Bumbaca, PhD candidate/ Assistant Lecturer, University of Geneva

The EAPIL blog has also published a post on this topic, click here.

Introduction:

The Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels IIA Regulation) still applies to the United Kingdom in EU cross-border proceedings dealing with parental responsibility and/ or child civil abduction commenced prior to the 31 December 2020 (date when 'Brexit' entered into force). Moreover, the Court of Justice of the European Union (CJEU) is entitled to exercise its jurisdiction over such proceedings involving the UK.

The decision of the High Court of England and Wales (Family Division, 6 November 2020, EWHC 2971 (Fam)), received at the CJEU on 16 November 2020 for an urgent preliminary ruling (pursuant to article 19(3)(b) of the Treaty of the European Union, art. 267 of the Treaty of the Functioning of the European Union, and art. 107 of the Rules of Procedure of the Court of Justice), and the CJEU judgment (*SS v. MCP*, C-603/20, 24 march 2021) are taken as reference in this

analysis.

Question for a CJEU urgent preliminary ruling:

'Does Article 10 of [Regulation No 2201/2003] retain jurisdiction, without limit of time, in a Member State if a child habitually resident in that Member State was wrongfully removed to (or retained in) a non-Member State where she, following such removal (or retention), in due course became habitually resident?'

Contents of the EWHC (Family Division) judgment:

This judgment involved an Indian unmarried couple with a British daughter, born in England (2017), aged more than three (almost four at the time of the CJEU proceedings). Both parents held parental responsibility over their daughter, the father being mentioned as such in the birth certificate. The mother and the child left England for India, where the child has lived continuously since 2019. The father applied before the courts of England and Wales seeking an order for the return of the child and a ruling on access rights. The mother contested the UK jurisdiction (EWHC 2971, § 19).

The father claimed that his consent towards the child's relocation to India was temporary for specific purposes, mainly to visit the maternal grandmother (§ 6). The mother contended that the father was abusive towards her and the child and, on that basis, they moved to India (§ 8). Consequentially, she had requested an order (Form C100 'permission to change jurisdiction of the child', § 13). allowing the child's continuous stay in India. Accordingly, the mother wanted their daughter to remain in India with her maternal grandmother, but also to spend time in England after the end of the pandemics.

In the framework of article 8, Brussels IIA, the Family Division of the Court of England and Wales held that the habitual residence assessment should be fact-based. The parental intentions are not determinative and, in many circumstances, habitual residence is established against the wishes of the persons concerned by the proceedings. The Court further maintained, as general principles, that habitual residence should be stable in nature, not permanent, to be distinguished from mere temporary presence. It concluded that, apart from British citizenship, the child did not have factual connections with the UK. Therefore, according to the Court, the child was habitually resident in India at the time of the proceedings concerning access rights initiated in England (§ 16).

The Family Division extended its analysis towards article 12(3) of the Regulation concerning the prorogation of jurisdiction in respect of child arrangements, including contact rights. For the Court, there was no express parental agreement towards the UK jurisdiction, as a prerogative for the exercise of such jurisdiction, at the time of the father's application. It was stated that the mother's application before the UK courts seeking the child's habitual residence declaration in India could not be used as an element conducive to the settlement of a parental agreement (§ 32).

Lastly, the Court referred to article 10 of Brussels IIA in the context of child abduction while dealing with the return application filed by the father. In practice, the said provision applies to cross-border proceedings involving the EU26 (excluding Denmark and the United Kingdom (for proceedings initiated after 31 December 2020)). Accordingly, article 10 governs the 'competing jurisdiction' between two Member States. The courts of the Member State prior to wrongful removal/ retention should decline jurisdiction over parental responsibility issues when: the change of the child's habitual residence takes place in another Member State; there is proof of acquiescence or ultra-annual inaction of the left-behind parent, holding custody, since the awareness of the abduction. In these circumstances, the child's return would not be ordered in principle as, otherwise provided, the original jurisdiction would be exercised indefinitely (§ 37).

In absence of jurisdiction under Brussels IIA, as well as under the Family Law Act 1986 for the purposes of inherent jurisdiction (§ 45), the High Court referred the above question to the CJEU.

CJEU reasoning:

The Luxembourg Court confirmed that article 10, Brussels IIA, governs intra-EU cross-border proceedings. The latter provision states that jurisdiction over parental responsibility issues should be transferred to the courts where the child has acquired a new habitual residence and one of the alternative conditions set out in the said provision is satisfied (*SS v. MCP*, C-603/20, § 39). In particular, the Court observed that article 10 provides a special ground of jurisdiction, which should operate in coordination with article 8 as a ground of general jurisdiction over parental responsibility (§ 43, 45).

According to the Court, when the child has established a new habitual residence in a third State, following abduction, by consequently abandoning his/ her former 'EU habitual residence', article 8 would not be applicable and article 10 should not be implemented (§ 46-50). This interpretation should also be considered in line with the coordinated activity sought between Brussels IIA and the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (§ 56).

Ultimately, the Court maintained that article 10 should be read in accordance with recital 12 of the Regulation, which provides that, as one of its fundamental objectives, parental responsibility issues should be decided by the courts that better suit the principle of factual proximity in the child's best interests (§ 58). Accordingly, the courts that are closest to the child's situation should exercise general jurisdiction over parental responsibility. To such an extent, article 10 represents a balance between the return procedure, avoiding benefits in favour of the abductor parent, and the evoked proximity principle, freezing jurisdiction at the place of habitual residence.

The Court further held that if the courts of the EU Member State were to retain jurisdiction unconditionally, in case of acquiescence and without any condition allowing for account to be taken concerning the child's welfare, such a situation would preclude child protection measures to be implemented in respect of the proximity principle founded on the child's best interests (§ 60). In addition, indefinite jurisdiction would also disregard the principle of prompt return advocated for in the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (§ 61).

The Court concluded that insofar as the child's habitual residence changes to a third State, which is thus competent over parental responsibility, and article 12 of the Regulation is not applicable, the EU courts seised of the matter should apply the rules provided in the bilateral/multilateral instruments in force between the States in question or, on a subsidiary basis, the national Private International Law rules as indicated under article 14, Brussels IIA (§ 64).

Comment:

Considering the findings of fact, the CJEU reasoning and, prior to it, the EWHC

judgment, are supported in that the daughter's habitual residence at the time of the parental *de facto* separation (EWHC 2971, § 6-10) was in India; and remained there at the relevant date of the father's application for return and access rights. If we assume, as implicitly reported in the decisions, that the child was aged less than one at the time of the first relocation from England to India, and that she lived more than two years (18 months between 2017-2018 and almost fully 2019-2020, (EWHC 2971, § 25)) within the maternal family environment in India, including prior to the wrongful act, her place of personal integration should be located in India at the above relevant date. Such a conclusion would respect the factual proximity principle enshrined in recital 12 of Brussels IIA, according to which habitual residence is founded on the child's best interests. Recital 12 constitutes a fundamental objective applicable to parental responsibility, including access rights, and child abduction proceedings. As a result, the courts of the EU26 should be bound by it as a consequence of the Brussels IIA direct implementation.

The CJEU has not dealt with specific decisive elements that, in the case under analysis, would determine the establishing of the child's habitual residence in India at a relevant time (the seisin under art. 8 and the period before abduction under art. 10 of the Regulation). Considering the very young age (*cf.* CJEU, *SS v. MCP*, C-603/20, § 33: 'developmentally sensitive age') of the daughter at the time of the relocation, the child's physical presence corresponding to the mother's and grandmother's one as the primary carers prior to the wrongful act (retention) and to the return application, as well as the Indian social and family environment at the time of the seisin, highlighted by the EWHC, should be considered determinative (*cf.* CJEU, *UD v. XB*, C-393/18, 17 October 2018, § 57) – the Family Division instead excluded the nationality of the child as a relevant factor. The regularity of the child's physical presence at an appreciable period should be taken into account, not as an element of *temporal* permanent character, but as an indicator of *factual* personal stability. In this regard, the child's presence in one Member State should not be artificially linked to a limited duration. That said, the appreciable assessment period is relevant in name of predictability and legal certainty. In particular, the child's physical presence after the wrongful act should not be used as a factor to constitute an unlawful habitual residence (Opinion of Advocate General Rantos, 23 February 2021, § 68-69).

Again, in relation to the child's habitual residence determination in India, the

child's best interests would also play a fundamental role. The father's alleged abuse, prior to the relocation, and his late filing for return, following the wrongful retention, should be considered decisive elements in excluding the English family environment as suitable for the child's best interests. This conclusion would lead us to retain India as the child-based appropriate environment for her protection both prior to the wrongful retention, for the return application, as well as at the seisin, for access rights.

In sum, we generally agree with the guidance provided by the CJEU in that factual proximity should be considered a fulfilling principle for the child's habitual residence and best interests determination in the context of child civil abduction. In this way, the CJEU has confirmed the principle encapsulated under recital 12, Brussels IIA, overcoming the current debate, which is conversely present under the Hague Convention 1980 where the child's best interests should not be assessed [comprehensively] for the return application (HCCH, Guide to Good Practice Child Abduction Convention: Part VI – Article 13(1)(b); a *contrario*, European Court of Human Rights, *Michnea v. Romania*, no. 10395/19, 7 October 2020). However, it is argued (partly disagreeing with the CJEU statement) that primary focus should be addressed to the mutable personal integration in a better suited social and family environment acquired within the period between the child's birth and the return application (*cf.* CJEU, *HR*, C-512/17, 28 June 2018, § 66; *L v. M*, 2019, EWHC 219 (Fam), § 46). The indefinite retention of jurisdiction, following abduction, should only be a secondary element for the transfer of jurisdiction in favour of the child's new place of settlement after the wrongful removal/ retention to a third State. In practice, it is submitted that if the child had moved to India due to forced removal/ retention by her mother, with no further personal integration established in India, or with it being maintained in England, founded on the child's best interests, the coordinated jurisdictional framework of articles 8 and 10 (and possibly article 12.4) of the Brussels IIA Regulation might have still been retained as applicable (*cf.* Opinion of Advocate General Rantos, § 58-59; as a comparative practice, see also *L v. M*, and to some extent Cour de cassation, civile, Chambre civile 1, 17 janvier 2019, 18-23.849, 5°). That said, from now on the CJEU reasoning should be binding for the EU26 national courts. Therefore, article 10 shall only apply to intra-EU26 cross-border proceedings, unlike articles 8 and 12 governing EU26-third State scenarios.

New book on International Negotiable Instruments by Benjamin Geva & Sagi Peari

(published by Oxford University Press, 2020)

The authors kindly provided the following summary:

The book marries two fields of law: negotiable instruments and choice-of-law. Bills of exchange, cheques and promissory notes are the main classical negotiable instruments. For centuries, these instruments have played a vital role in the smooth operation of domestic and international commerce, including in transactions between distantly located parties. Through their evolution, fusion, and sophistication, they have remained one of the primary tools for everyday commercial activity, serving as one of the primary methods of payment and credit and one of the cornerstones of the contemporary bank-centred system. The rapid technological progress of payment mechanisms has embraced the traditional institution of negotiable instruments leading to their further adaptation and sophistication in order to meet the challenges of the contemporary reality of frequent mobility of people, goods, and high daily volumes of cross-border transactions and international commerce.

The cross-disciplinary partnership between the authors, one specializing in negotiable instruments and the other in choice-of-law, aims to offer a comprehensive and thorough analysis of the choice-of-law rules applicable to negotiable instruments. The internal structure of negotiable instruments' law is complex, which has given rise to a popular view favouring the mythological 'law merchant',[1] the exclusion of negotiable instruments from the scope of general contract and property law doctrines, and their subsequent exclusion from ordinary choice-of-law analysis.

The central thesis of the book is to challenge this common view. Indeed, the complex structure of negotiable instruments creates a significant challenge for

traditional contract and property doctrine and the choice-of-law analysis applicable to them. Yet, in contrast to the common view, the authors argue that the complex case of international negotiable instruments should be analyzed through the lens of traditional contract & property choice-of-law doctrines rather than by crafting new specially designed rules for negotiable instruments.

In order to illustrate this point, consider the – well-known in choice-of-law literature – *Giuliano & Lagarde* Report ('The Report'),[2] which has served as a basis for contemporary European Rome Regulations[3] on the question of applicable law. The Report excludes negotiable instruments law from the scope of ordinary choice-of-law analysis.[4]However, one can reassess the three rationales mentioned in the Report to justify negotiable instruments' law exclusion. *First*, it makes a point that a negotiable instrument is not a contract.[5] In this book, the authors argue the opposite – from their very origin to their present-day doctrinal analysis, negotiable instruments are very much contracts and carefully follow the essentials of contract law doctrine, alongside the basic elements of tangible property law.[6]

Second, the Report characterizes a negotiable instrument as a 'complex contract'.[7] Indeed, in their study the authors provide a precise demarcation of the special nature of the negotiable instrument as a 'special' contract to delineate its divergence from the 'ordinary' contract; its relation to basic elements of tangible property transfer; and how this divergence affects (if at all) the choice-of- law rules of negotiable instruments, comparatively to choice-of-law rules of 'ordinary' contracts and tangible property. While throughout their book the authors show that negotiable instruments present 'complicated special rules' that should be analyzed, modified and distinguished from 'ordinary' contract law/property law rules, they are very much based on them.

Finally, the Report makes a reference to the existing harmonization processes.[8] In this book, the authors provide a detailed comparative analysis of the various rules in diverse legal systems and they show that they are far from uniform.[9] The authors discuss the various harmonization processes of negotiable instruments,[10] and make some suggestions for possible reforms within the process of international harmonization of the choice-of-law rules,[11] which would capture the challenges of the digital age.[12] In contrast to the Report, the authors argue that the traditional choice-of-law rules in the areas of contract law and tangible property can serve as a model for such reform of choice-of-law rules

of negotiable instruments.

In effect, authors' call for a redesign of the present choice-of-law rules relating to negotiable instruments finds traces in contemporary literature. The commentators of one of the leading textbooks in the field have framed the need for a reconsideration of the choice-of-law rules of negotiable instruments in the following terms:

…it must be noted that the Bills of Exchange Act 1882 and much of the case referred to in the following paragraphs is now more than a century old. In that time, the role and significance of bills of exchange in commercial intercourse and the approach of the conflict of laws to freely incurred obligations such as these has changed radically. As the following commentary makes clear, the rules contained in the 1882 Act are neither comprehensive nor easy to understand and apply. A radical overhaul of the law in this area, whether by legislation or international convention, seems long overdue.[13]

In this book, the authors are indeed willing to take up the challenge of a 'radical overhaul'. In line with the above-stated quotation, they suggest a radical reorientation of choice-of-law rules. They argue that choice-of-law rules in the area of international negotiable instruments need to be dramatically amended and harmonized.

The contemporary choice-of-law rules within this area of law have originated from flawed premises about the nature of the subject. Further, contemporary rules have left behind the modern development of choice-of-law doctrine. Relying on the foundation of negotiable instruments' law within the traditional ordinary doctrines of contract and movable property and invoking developments within modern choice-of-law thought, the authors endeavour to challenge the traditional orthodoxy and offer a complete re-examination of the choice-of-law rules of negotiable instruments.

[1] See Chapter II.

[2] Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I, Official Journal C 282, 31/10/1980 P. 0001 – 0050.

[3] Commission Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6 (EU); Commission Regulation 864/2007, on the Law Applicable to Non-Contractual Obligations (Rome II), 2007 O.J. (L 199) 40 (EC)

[4] *Giuliano & Lagarde* Report, sec. 4.

[5] Ibid.

[6] See Chapter I & Chapter II.

[7] Report, sec. 4.

[8] Ibid.

[9] See Chapter I.

[10] See Chapter I & Chapter III.

[11] See Chapters V-VII.

[12] See Chapter VIII.

[13] Lawrence Collins (ed) *Dicey, Morris and Collins on the Conflict of Laws* (15th edn Sweet & Maxwell 2012) 2077.

Foreign law illegality and non-contractual claims

Written by Marcus Teo (Sheridan Fellow (Incoming), National University of Singapore)

Since *Foster v Driscoll* [1929] 1 KB 470, common law courts have recognised that contracts made with the intention to commit a criminal offence in a foreign state are unenforceable, even if the contract contemplated an alternative mode or place of performance. However, recent developments in domestic law illegality have sparked debate on whether foreign law illegality too should be reformed in a similar light (see *Ryder Industries Ltd v Chan Shui Woo* [2016] 1 HKC 323, [36], [52]-[55]; *cf Magdeev v Tsvetkov* [2020] EWHC 887 (Comm), [331]-[332]). The debate, however, has thus far not considered whether foreign law illegality should expand to bar certain *non*-contractual claims – a question which the Singapore Court of Appeal's recent decision in *Jonathan Ang v Lyu Yan* [2021] SGCA 12 raises.

Lyu Yan wanted to transfer money from China to Singapore. Her bank in Singapore introduced her to Joseph Lim for assistance. Joseph proposed that Lyu transfer Renminbi from Lyu's Chinese bank account to the Chinese bank accounts of two other individuals, Jonathan Ang and Derek Lim. Jonathan and Derek would then transfer an equivalent sum in Singapore Dollars from their Singapore bank accounts to Lyu's Singapore bank account. Lyu performed the transfer in China, but received no money in Singapore. She then sued Joseph for breach of contract; and sued Joseph, Jonathan and Derek in tort and unjust enrichment. At first instance, the Singapore High Court ruled against all three defendants. Joseph did not appeal, but Jonathan and Derek did, arguing, *inter alia*, that *Foster* barred Lyu's non-contractual claims against them because Chinese law prohibited their transaction.

Andrew Phang JCA, who delivered the Court's judgment, dismissed Jonathan and Derek's appeal. It was undisputed that the transaction, if performed, would have violated Chinese law (See *Lyu Yan v Lim Tien Chiang* [2020] SGHC 145, [15]-[16]). However, Lyu did not intend to break Chinese law – the facts at their "highest" showed that she thought the transaction contravened *Singapore* law rather than Chinese law (*Jonathan Ang*, [18], [20]). Thus, since *Foster* does not apply if the claimant does not intend to contravene a specific foreign law, it was inapplicable.

Of interest, though, were Phang JCA's *obiter* comments: if Lyu had known the transaction contravened Chinese law, would her *non-contractual* claims be barred? *Foster*, he noted, was "not applicable in relation to non-contractual claims" ([26]). This was contrasted with the position in domestic law illegality,

where an illegality affecting a contract could sometimes also bar other non-contractual claims arising from the contractual relationship ([27]-[28]). Here, Phang JCA referenced *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363, where the Court of Appeal had held that claims in unjust enrichment (and, potentially, tort) arising from a contractual relationship would be barred if it stultified the policy underlying the law which rendered the contract unenforceable (*Ochroid Trading* [145]-[159], [168])

Phang JCA then considered whether *Foster* and *Ochroid Trading* could be "read together" (*Jonathan Ang*, [30]) – *i.e.*, whether foreign and domestic law illegality, as *separate* doctrines, could apply on the same facts. This could only happen when Singapore law was the *lex contractus*, because, while *Foster* barred contract claims "regardless of their governing laws", *Ochroid Trading* barred only claims governed by Singapore law. If indeed *Foster* and *Ochroid Trading* were "read together", however, "possible difficulties" arose, because it would put a plaintiff with a Singapore law contract in a worse position than a plaintiff with a foreign law contract: the former would potentially have *both* his contractual and non-contractual claims barred, while the latter would have *only* his contractual claim barred ([33]). To Phang JCA, this was undesirable, because there was "no principled reason" for this distinction ([34]). While Phang JCA did not attempt to resolve these "difficulties", he concluded by noting that for both foreign law and domestic law illegality "the concept of *policy* serves as a limiting factor to ensure that the illegality involved does not inflexibly defeat recovery where such recovery is justified" ([34]) – presumably, then, Phang JCA was noting tentatively that recourse to public policy arguments might help ameliorate the differences between the two classes of plaintiffs he identified.

Phang JCA's comments in *Jonathan Ang* raise more questions than answers; this was of course by design, given their tentative and exploratory nature. However, with respect, the correctness of some of the assumptions Phang JCA relied on may be doubted. First, one may only conclude that there is no "principled reason" for treating plaintiffs with Singapore law contracts differently from plaintiffs with foreign law contracts if one accepts that domestic and foreign law illegality share the same "principled" basis. However, *Foster*'s principled basis remains shrouded in uncertainty: courts and commentators have variously called it a doctrine of public policy, comity and international jurisdiction, but only the first conception of *Foster* aligns it with domestic law illegality. Second, while it is true that the

public policies of the forum limit both domestic and foreign law illegality, those public policies perform that function in different ways in those two contexts. In domestic law illegality, courts ask whether *barring* the plaintiff's claim would give effect to the forum's public policies; but in foreign law illegality, courts ask whether denying recognition of the relevant foreign law, and thus *allowing* the plaintiff's claim, would give effect to the forum's public policies. It follows that public policy arguments may not consistently resolve differences between the two classes of plaintiffs identified by Phang JCA.

At base, the questions posed in *Jonathan Ang* (and the assumptions they relied on) were only relevant because of Phang JCA's continued acceptance of one central proposition: that foreign law illegality bars *only* contractual claims. Yet, this proposition is doubtful; in *Brooks Exim Pte Ltd v Bhagwandas Naraindas* [1995] 1 SLR(R) 543, Singapore's Court of Appeal considered *Foster* in relation to a claim for "money had and received", and found it inapplicable only because parties there did not intend to breach foreign law (*Brooks Exim*, [1], [14]). Moreover, the justification for limiting *Foster*'s rule to contractual claims remains unclear: in *Jonathan Ang* Phang JCA cited the English High Court's decision in *Lilly Icos LLC v 8PM Chemists Ltd* [2010] FSR 4 for it, but there that proposition was simply accepted without argument (*Lilly Icos*, [266]). A possible justification might be that only in contract claims may parties, by virtue of their ability to choose the governing law, avoid the applicability of the (criminal) law of a foreign state objectively connected to their relationship. This, however, would be a poor justification, since parties have the autonomy to choose the governing law for various non-contractual claims as well. An expressly chosen law, for example, may govern not just parties' contract, but also claims in unjust enrichment arising from that contractual relationship by virtue of a characterization sub-rule, and potentially also tort claims under an exception to the *lex loci delicti* rule (or, in Singapore's context, the double actionability rule). If foreign law illegality exists to prevent parties from avoiding the law of a state objectively connected to their contractual relationship, it should bar all claims arising from that contractual relationship governed by parties' chosen law, regardless of whether those claims are "contractual" or "non-contractual".

Just released: Opinion of the US Supreme Court regarding the consolidated Ford Motor cases – A victory for consumers in two defective-product cases

Written by Mayela Celis

On 25 March 2021, the US Supreme Court rendered its opinion on the consolidated Ford Motor cases, which deals with personal jurisdiction (in particular, specific jurisdiction) over Ford Motor Company. These cases deal with a malfunctioning 1996 Ford Explorer and a defective 1994 Crown Victoria vehicles, which caused the death of a passenger in Montana and the injury of another passenger in Minnesota, respectively. The consolidated cases are: Ford Motor Co. v. Montana Eighth Judicial District Court et al. and Ford Motor Co. v. Bandemer.

The opinion is available here. We have previously reported on this case here.

The question presented was:

The Due Process Clause permits a state court to exercise specific personal jurisdiction over a nonresident defendant only when the plaintiff's claims "arise out of or relate to" the defendant's forum activities. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (internal quotation marks omitted). The question presented is: Whether the "arise out of or relate to" requirement is met when none of the defendant's forum contacts caused the plaintiff's claims, such that the plaintiff's claims would be the same even if the defendant had no forum contacts.

As noted in our previous post, it can be argued that besides jurisdictional matters

relating to the defendant, these cases deal with fundamental notions of access to justice for consumers. Fortunately, the US Supreme Court sided with the victims of the car accidents. As a result, buyers of Ford vehicles are able to sue in their home State / the place of injury (instead of chasing up the defendant). Undoubtedly, this promotes access to justice as it decreases the litigation costs of suing a giant company elsewhere, as well as it avoids the hardship of suing in a remote place.

For a summary of the facts, see the syllabus of the opinion. We also include the facts here:

> *"Ford Motor Company is a global auto company, incorporated in Delaware and headquartered in Michigan. Ford markets, sells, and services its products across the United States and overseas. The company also encourages a resale market for its vehicles. In each of these two cases, a state court exercised jurisdiction over Ford in a products-liability suit stemming from a car accident that injured a resident in the State. The first suit alleged that a 1996 Ford Explorer had malfunctioned, killing Markkaya Gullett near her home in Montana. In the second suit, Adam Bandemer claimed that he was injured in a collision on a Minnesota road involving a defective 1994 Crown Victoria.* ***Ford moved to dismiss both suits for lack of personal jurisdiction.*** *It argued that each state court had jurisdiction only if the company's conduct in the State had given rise to the plaintiff's claims.* ***And that causal link existed, according to Ford, only if the company had designed, manufactured, or sold in the State the particular vehicle involved in the accident****. In neither suit could the plaintiff make that showing. The vehicles were designed and manufactured elsewhere, and the company had originally sold the cars at issue outside the forum States.* ***Only later resales and relocations by consumers had brought the vehicles to Montana and Minnesota.*** *Both States' supreme courts rejected Ford's argument. Each held that the company's activities in the State had the needed connection to the plaintiff's allegations that a defective Ford caused instate injury" (Our emphasis).*

Ford alleged that the Court should follow a causation-only approach. That means that as stated in the syllabus of the opinion that "In Ford's view, due process requires a causal link locating jurisdiction only in the State where Ford sold the car in question, or the States where Ford designed and manufactured the vehicle.

And because none of these things occurred in Montana or Minnesota, those States' courts have no power over these cases."

Fortunately, the Court did not follow that interpretation and stated that:

> *"To see why Ford is subject to jurisdiction in these cases (as Audi, Volkswagen, and Daimler were in their analogues), consider first the business that the company regularly conducts in Montana and Minnesota. See generally 395 Mont., at 488, 443 P. 3d, at 414; 931 N. W. 2d, at 748; supra, at 3?4. Small wonder that Ford has here conceded "purposeful availment" of the two States' markets. See supra, at 7-8.* ***By every means imaginable—among them, billboards, TV and radio spots, print ads, and direct mail— Ford urges Montanans and Minnesotans to buy its vehicles, including (at all relevant times) Explorers and Crown Victorias****. Ford cars—again including those two models—are available for sale, whether new or used, throughout the States, at 36 dealerships in Montana and 84 in Minnesota. And apart from sales, Ford works hard to foster ongoing connections to its cars' owners. The company's dealers in Montana and Minnesota (as elsewhere) regularly maintain and repair Ford cars, including those whose warranties have long since expired. And the company distributes replacement parts both to its own dealers and to independent auto shops in the two States. Those activities, too, make Ford money.* ***And by making it easier to own a Ford, they encourage Montanans and Minnesotans to become lifelong Ford drivers****" (our emphasis).*
>
> *[…]*
>
> *"Here, resident-plaintiffs allege that they suffered in-state injury because of defective products that Ford extensively promoted, sold, and serviced in Montana and Minnesota. For all the reasons we have given, the connection between the plaintiffs' claims and Ford's activities in those States— or otherwise said, the "relationship among the defendant, the forum[s], and the litigation"—is close enough to support specific jurisdiction. Walden, 571 U. S., at 284 (internal quotation marks omitted). The judgments of the Montana and Minnesota Supreme Courts are therefore affirmed."*

In sum, in this David and Goliath scenario, the US Supreme Court sided with the consumers and promoted access to justice.

The Nigerian Court of Appeal declines to enforce a Commonwealth of Virginia (in USA) Choice of Court Agreement

I am coordinating together with other African private international law experts (Richard Frimpong Oppong, Anthony Kennedy, and Pontian Okoli) an extended and in-depth version of this blog post and more topics, titled "Investing in English-speaking Africa: A private international law toolkit", which will be the topic of an online Master Class at TMC Asser Institute on June 24-25, 2021.

Introduction

In the year 2020, the Nigerian Court of Appeal delivered at least three decisions on foreign choice of court agreements.[1] I discussed two of those cases in this blog here and here. In the first two decisions delivered in the year 2020, the Nigerian Court of Appeal gave full contractual effect to the parties' foreign choice of court agreement.[2] In other words, the Nigerian Court of Appeal interpreted the parties' foreign choice of court agreement strictly according to is terms as it would do to a contractual document between commercial parties.

In November 30 2020, the Nigerian Court of Appeal delivered a third decision where it declined to enforce a Commonwealth of Virginia (in USA) Choice of Court Agreement.[3] In this connection, the author is of the view that the Court of Appeal's decision was delivered *per incuriam*. This is the focus of this comment.

Facts

In this case, the claimant/respondent commenced action at the Kaduna High Court with a writ of summons and statement of claim dated the 18th December, 2018 wherein it claimed against the defendant/appellant, the sum of $18,103.00 (USD) being due and unpaid software licensing fee owed by them by virtue of the agreement between the parties dated 12th day of June, 2013.

The defendant/appellant filed a conditional appearance along with a Statement of defence and counter affidavit. Its argument, *inter alia*, was that by virtue of Article 12 and 13 of their agreement, the Nigerian court had no jurisdiction in this case. The relevant portion of their agreement reads as follows:

"ARTICLE 12
GOVERNING LAW: The Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia, USA without regard to the principle of conflicts of any jurisdiction."
"ARTICLE 13
With the exception of an action or suit for the Licensee's failure to make any payment required hereunder when there was no suit or action arising under this Agreement may be brought more than one (1) year following the occurrence giving rise thereto. All suits and actions arising under this Agreement shall be brought in the Commonwealth of Virginia, USA and License hereby submits to the jurisdiction of the Courts of the Commonwealth of Virginia and the United States District Courts Sitting in Virginia."

By a ruling delivered on the 11th December, 2019, the trial High Court entered judgment in favour of the claimant/respondent. The defendant/appellant appealed to the Nigerian Court of Appeal.

Decision

Though the Court of Appeal (Hussaini JCA) was of the view that the choice of court agreement in favour of the Commonwealth of Virginia (in USA) was clear and unambiguous and did not have any vitiating circumstances surrounding it (such as fraud), it unanimously held that it would not apply the principle of *pacta sunt servanda* (agreements between parties should be respected) in this case. It followed the obiter dictum of Oputa JSC which reads as follows:

"[Nigerian] Courts should not be too eager to divest themselves of jurisdiction conferred on them by the Constitution and by other laws simply because parties in their private contracts chose a foreign forum … Courts guard rather jealously their jurisdiction and even where there is an ouster clause of that jurisdiction by Statute it should be by clear and unequivocal words. If that is so, as is indeed it is, how much less can parties by their private acts remove the jurisdiction properly and legally vested in our Courts ? Our courts should be in charge of their own proceedings. When it is said that parties make their own contracts and that the courts will only give effect to their intention as expressed in and by the contract, that should generally be understood to mean and imply a contract which does not rob the Court of its jurisdiction in favour of another foreign forum."[4]

In applying this *obiter dictum* to the facts of the case, Hussaini JCA held as follows:

"By reason of Section 6(1)(2)(6)(b) of the Constitution of FRN, 1999 (as amended) the judicial powers vested in the Courts "extend to all matters between persons or between Government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person". Consequently, no person or group of persons by their own private treaty or arrangements can agree to oust the jurisdiction and provisions vested in the Courts by the Constitution. Even where such clauses are put in place in or as a contract with international flavour to rob the Courts of the land of jurisdiction in favour of another foreign forum, the Courts of the land are obliged to apply the blue pencil rule to severe those clauses from the contract or ignore same by virtue of the Constitutional provision which confer on the Court, the jurisdiction and power to entertain those cases.
Talking about the jurisdiction of the Courts, the Court below, by virtue of Section 272 of the Constitution of Federal Republic of Nigeria, 1999 (as amended) has jurisdiction to entertain cases such as recovery of debts, as in the instant case on appeal. It is for this reason that clauses in the likes of Articles 12 and 13 in the Article of the Agreement should be ignored when determining the rights and liabilities between the parties herein in matters such as this and the trial Court took the right approach when it discountenanced same to reach the conclusion that it did.
In any case, is it for the recovery of the sum of $18,103, (USD) only claimed by the Respondents, that parties herein are required, by that contract or agreement

to submit themselves to a foreign forum in Virginia, USA for adjudication of their case, without consideration of the concomitant procedural difficulties attendant thereto, as for instance, of having to return the case to Nigeria, the place where the contract was concluded initially, to register the judgment obtained at that foreign forum, in Virginia, USA, to be enforced in Nigeria? I think the Courts in Nigeria, fully seized of the case, will in the exercise of its discretion refuse the request to refer the case to a foreign forum for adjudication. It is for all the reasons already expressed in this discourse that I hold the firm view that the trial Court was competent or is competent when it entertained and adjudicated over the recovery suit or action filed by the Respondent against the Appellant."[5]

Comments

There are five comments that could be made about the Court of Appeal's decision (Hussaini JCA) in *A.B.U. v VTLS*.[6] First, the Court of Appeal (Hussaini JCA) in *A.B.U. v VTLS*[7] followed Oputa JSC's obiter dictum in *Sonnar (Nig) Ltd v Partenreedri MS Norwind*.[8] It should be stressed that Oputa JSC's obiter dictum is not binding on lower courts according to the Nigerian common law doctrine of *stare decisis*. In addition, Oputa JSC's obiter dictum was a concurring judgment. Indeed, the Supreme Court in *Sonnar* (*supra*) had unanimously given preference to the enforcement of a foreign jurisdiction clause except where strong cause is advanced to the contrary.[9] The majority of the Supreme Court did not treat it as an ouster clause. It is incongruous to hold, on the one hand, that the Nigerian court would hold parties to their bargain in enforcing a foreign jurisdiction clause except where strong cause is shown to the contrary, and on the other hand, treat a foreign jurisdiction clause as if it were an ouster clause. In *Sonnar*, the choice of court agreement was not enforced because strong cause was shown to the contrary – the proceedings would be time-barred in a foreign forum, and the claimant would not have access to justice.

Furthermore, the Nigerian Supreme Court in another case held that where a plaintiff sues in Nigeria in breach of a foreign jurisdiction clause, Nigerian law "requires such discretion to be exercised by granting a stay unless strong cause for not doing so is shown. The burden of showing such strong cause for not granting the application lies on the doorsteps of…the plaintiff."[10] The Supreme Court in this case enforced the choice of court agreement and stayed the

proceedings in Nigeria because the plaintiff did not file a counter affidavit to demonstrate strong reasons why the proceedings should not be heard in a foreign forum chosen by the parties.[11]

If the *ratio decidendi* in the Supreme Court cases in *Sonar* and *Nika* are applied to the recent Court of Appeal's decision in *A.B.U. v VTLS* (*supra*), it is clear that the Court of Appeal (Hussaini JCA) reached its decision *per incuriam*. There was nothing in the judgment to demonstrate that the plaintiff provided strong reasons (such as time bar in a foreign forum) why the choice of court agreement in favour of the Commonwealth of Virginia (in USA) should not be enforced. The argument that the choice of court agreement is an ouster clause without more is not a strong reason not to enforce the choice of court agreement.

Second, a foreign choice of court agreement does not mean the Nigerian court's jurisdiction no longer exists (without jurisdiction) under the Nigerian Constitution, as the Court of Appeal (Hussaini JCA) held in this case. Such jurisdiction exists, but it is up to the Nigerian court in *exercise* of its jurisdiction to decide whether or not to *stay* proceedings. This view is consistent with the Nigerian Supreme Court's decisions in *Sonar* and *Nika.* The fact that such proceedings are *stayed* and *not dismissed* means that a Nigerian court's jurisdiction is not ousted.

Third, some Nigerian judges confuse choice of court with choice of law. The Court of Appeal (Hussaini JCA) also fell into this error. The choice of the law of the Commonwealth of Virginia is not the same thing as choosing the courts of the Commonwealth of Virginia. For example, the Nigerian courts *could* assume jurisdiction and apply the law of the Commonwealth of Virginia.

Fourth, looking at the bigger picture, I generally acknowledge that the principle of *pacta sunt servanda* in enforcing choice of court agreements are aimed at enhancing the efficacy of business transactions and, legal certainty and predictability in international commercial litigation. However, I must point out that despite the Nigerian Supreme Court decisions on the point that hold that choice of court agreements should be enforced except there are strong reasons to the contrary, I am generally not in favour of Nigerian courts declining jurisdiction in international commercial litigation. It ultimate hurts the Nigerian economy (e.g. less job for Nigerian lawyers), hampers access to Nigerian justice, and does not help Nigerian judges in strengthening our legal system. What is the solution?

I suggest that in the future the Nigerian Supreme Court should apply the test of "interest of justice" in determining whether or not it will enforce a choice of court agreement. The burden of proof should rest on the claimant to manifestly demonstrate that taking into account all the relevant circumstances of the case, the interest of justice will not be served if the foreign choice of court agreement is enforced. I also suggest that in such cases where a foreign choice of court agreement is enforced in Nigeria, a stay should be granted. In addition, if it is sufficiently demonstrated that the chosen foreign forum later becomes inaccessible or impracticable for the claimant to sue, the Nigerian court in the interest of justice should retain jurisdiction to handle such claims.

Fifth, Nigeria should consider ratifying the Hague Choice of Court Convention, 2005. This Convention will work better in Nigerian courts if litigation is made attractive for international commercial actors, so they can designate Nigerian courts as the chosen forum. Speed, efficiency, legal aid for poor and weaker parties, and integrity of the Nigeria's system are some of the issues that can be taken into account in enhancing Nigeria's status as an attractive forum for international commercial litigation.

Conclusion

The Nigerian Court of Appeal has delivered three reported decisions on choice of court agreements in the year 2020. The recent Court of Appeal's decision in *A.B.U. v VTLS* (*supra*) was reached *per incuriam* because it is inconsistent with Nigerian Supreme Court decisions that hold that a choice of court agreement should be enforced except there are strong reasons to the contrary.

The Nigerian Supreme Court in the future should rise to the occasion to create new tests for determining if a choice of court agreement should be enforced in Nigeria. These tests should reconcile the needs of access to Nigerian justice on the one hand, and respecting the contractual agreements of parties to designate a foreign forum.

The Nigerian government should create the necessary infrastructure and requirements that will enable Nigeria effectively ratify and implement the Hague Convention on Choice of Court agreements, 2005.

[1] *Kashamu v UBN Plc* (2020) 15 NWLR (Pt. 1746) 90; *Damac Star Properties LLC v Profitel Limited* (2020) LPELR-50699(CA); *A.B.U. v VTLS* (2020) LPELR-52142 (CA).

[2] *Kashamu v UBN Plc* (2020) 15 NWLR (Pt. 1746) 90; *Damac Star Properties LLC v Profitel Limited* (2020) LPELR-50699(CA).

[3] *A.B.U. v VTLS* (2020) LPELR-52142 (CA).

[4](1987) 4 NWLR 520, 544 – 45, approving Lord Denning's statement in *The Fehmarn* [1958] 1 All ER 333 , 335 . Cf. *Conoil Plc v Vitol SA* (2018) 9 NWLR 463, 489 (Nweze JSC) – "our courts will only interrogate contracts which are designed to rob Nigerian courts of their jurisdiction in favour of foreign fora or where, by their acts, they are minded to remove the jurisdiction, properly and legally, vested in Nigerian courts." See also LAC v AAN Ltd (2006) 2 NWLR 49, 81 (Ogunbiyi JCA as she then was).

[5]*A.B.U. v VTLS* (2020) LPELR-52142 (CA) 15 – 18.

[6] (2020) LPELR-52142 (CA),

[7] (2020) LPELR-52142 (CA),

[8](1987) 4 NWLR 520, 544 – 45

[9] Even Oputa JSC held thus: 'Where a domestic forum is asked to stay proceedings because parties in their contract chose a foreign Court … it should be very clearly understood by our courts that the power to stay proceedings on that score is not mandatory. Rather it is discretionary which in the ordinary way, and in the absence of strong reasons to the contrary will be exercised both judiciously and judicially bearing in mind each parties right to justice ' –*Sonnar* (*supra*) at 545 (emphasis added).

[10] *Nika Fishing Company Ltd v Lavina Corporation* (2008) 16 NWLR 509, 535 (Mohammed JSC, as he then was).

[11] *Conoil Plc v Vitol SA* (2018) 9 NWLR 463, 489 (Nweze JSC), 500-1 (Okoro JSC), 502 (Eko JSC).

Is Tessili still good law?

by Felix M. Wilke, University of Bayreuth, Germany

Most readers of this blog will be well aware that, according to the ECJ, the "place of performance" of a contractual obligation within the meaning of Article 7(1)(a) Brussels I*bis* is not a concept to be understood independently from national law. Rather, in order to determine this place, one must apply the substantive law designated by the forum's conflict-of-law rules. The ECJ has held so for decades, starting with *Tessili* (Case C-12/76, ECLI:EU:C:1976:133, at 13). Recent decisions by the ECJ have led me to doubt that *Tessili* still is *lex terrae Europaea*, at least as far as contracts with some relation to a right *in rem* in immovable property are concerned. (And I am not alone: Just today, Marion Ho-Dac analyses this issue as well over at the EAPIL Blog.)

The applicability of Article 7(1)(a) Brussels I*bis* in the context of co-ownership agreements

To begin with, it is necessary to establish what Article 7(1)(a) Brussels I*bis* has to do with co-ownership agreements. Article 24(1) Brussels I*bis* might appear to be the more natural jurisdictional rule in this context. But it does not suffice that a case has some connection to property law. Article 24(1) Brussels I*bis* only applies if the action is based on a right *in rem*. The Court has been characterising rights as rights *in rem* independently from national law (a point I would agree with). The main feature of a right *in rem* is its effect *erga omnes* (*Wirkung gegenüber jedermann; effet à l'egard de tous* – see Case C-292/93, ECLI:EU:C:1994:241– *Lieber*, at 14). Thus, Art. 24(1) Brussels I*bis* will not apply to a dispute concerning rights whose effect is limited to other co-owners and/or the association of co-owners. Rather, Article 7(1)(a) Brussels I*bis* comes into play. The Court considers the corresponding obligations as freely consented to, as they ultimately arise from the voluntary acquisition of property, regardless of the fact that the resulting membership in the association of co-owners is prescribed by law (Case C-25/18, ECLI:EU:C:2019:376 – *Kerr*, at 27). This applies, e.g., to a co-owner's payment obligation arising from a decision taken by the general meeting of co-owners.

From *Schmidt* to *Ellmes Property*

Kerr only concerned the question of whether Art. 7(1)(a) Brussels I*bis* applies to such disputes at all. The Court had reasoned (to my mind quite correctly) in *Schmidt* (Case C-417/15, ECLI:EU:C:2016:881, at 39) earlier that an action based on the alleged invalidity of a contractual obligation for the conveyance of the ownership of immovable property is no matter falling under Article 24(1) Brussels I*bis*. It then had gone beyond the question referred to it and stated that Article 7(1)(a) Brussels I*bis* applies, noting that this contractual obligation would have to be performed in Austria (being the location of the immovable property in question). *Ellmes Property* (Case C-433/19, ECLI:EU:C:2020:900, reported on this blog here and here) now combines the two strands from Kerr and Schmidt. This recent case again concerns a dispute in the context of a co-ownership agreement. One co-owner sued the other for an alleged contravention of the designated use of the respective apartment building (i.e., letting an apartment out to tourists). If this designated use does not have effect *erga omnes*, e.g. cannot be relied on against a tenant, the CJEU would apply Article 7(1)(a) Brussels I*bis*. But once again, the Court does not stop there. It goes on to assert that "[The obligation to adhere to the designated use] relates to the actual use of such property and must be performed in the place in which it is situated." (at 44).

A *Tessili*-shaped hole in the Court's reasoning

In other words, the Court seems at least twice to have determined the place of performance itself, without reference to the applicable law – even though there does not seem to be any pertinent rule of substantive law that the Court would have been competent to interpret. A reference to *Tessili* or any decision made in its wake is missing from both *Schmidt* and *Ellmes Property*. (In his Opinion on *Ellmes Property*, Advocate General Szpunar did not fail to mention *Tessili*, by the way.) And in *Ellmes Property*, the Court proceeds to argue that this very place of performance makes sense in light of the goals of Brussels I*bis* and its Article 7 in particular. The Court thus uses jurisdictional arguments for a question supposedly subject to considerations of substantive law.

"Here's your answer, but please make sure it is correct."

Admittedly, the statement in *Schmidt* was made *obiter*, and the Court locates the place of performance only "subject to verification by the referring court" in

Ellmes Property. The latter might be a veiled reference to *Tessili*. But why not make it explicit? Why not at least refer to the Advocate General's opinion (also) in this regard? And why the strange choice of the word "verification" for question of law? But the Court has not expressly overruled Tessili. Furthermore, I do not want to believe that it has simply overlooked such an important strand of its case-law presented to it on a silver platter by the Advocate-General, one arguably enshrined in the structure of Article 7(1) Brussels I*bis*, anyway. Hence, I (unlike Marion Ho-Dac, although I certainly agree with her as to the low quality of the judgment in *Ellmes Property*) still hesitate to conclude that *Tessili* must be disregarded from now on. This assumption, however, leads to one further odd result. While the referring court that had asked the ECJ for clarification of the place of performance does receive a concrete answer, it now has to check whether this answer is actually correct. Granted, it is not uncommon for the Court to assign certain homework to the referring court. Yet here, the former employed some new standard and tasked the latter to check whether the result holds up if one applies the old standard. I fail to see the point of this exchange between the national court and the Court of Justice.

(A full case note of mine (in German) on *Ellmes Property*, touching on this issue as well as others, is forthcoming in the *Zeitschrift für das Privatrecht der Europäischen Union (GPR)*.)