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)*.)

A few takeaways of the Conclusions & Decisions of the HCCH governing body (CGAP): gender issues, Jurisdiction Project and future meetings

On 5 March 2021, the Conclusions & Decisions of the HCCH governing body, the Council on General Affairs and Policy (CGAP), were released. Click here for the English version and here for the French version.

Although there is a wide range of topics discussed, I would like to focus on three

aspects: gender issues, the Jurisdiction Project and future meetings.

1) Today is International Women's Day and there are important conclusions on gender issues. The Conclusions & Decisions No 52-54 read as follows:

> *"G. Geographic Representation*
>
> *"52. Reaffirming the principles of universality and inclusiveness, CGAP reiterated its commitment to ensuring appropriate geographic representation at the HCCH. Recognising the importance of this issue, CGAP agreed to maintain this item on the agenda for its 2022 meeting. CGAP invited the PB to facilitate, within existing resources, informal consultations ahead of the 2022 meeting of CGAP, through in-person meetings, while ensuring the opportunity for any HCCH Member to participate.*
>
> *53. In the context of this discussion, CGAP also recalled the importance of ensuring appropriate* ***gender representation****.*
>
> *54. CGAP requested the PB to provide a* ***historical overview of geographic and gender representation*** *in the key bodies and groups of the Organisation ahead of the 2022 meeting of CGAP." (our emphasis)*

Awareness of gender representation is always a victory for everyone!

2) As you may know, a spin-off from the Judgments Project was the establishment of the **Experts' Group on the Jurisdiction Project**. The purpose of this Group was to continue its discussions on "matters relating to direct jurisdiction (including exorbitant grounds and lis pendens / declining jurisdiction)", "with a view to preparing an additional instrument". It met 5 times.

A report of the Experts' Group was presented to the CGAP. It includes an aide-mémoire of the Chair (Annex I) and a Summary of the Responses to the Questionnaire on Parallel Proceedings and Related Actions in Court-to-Court Cases (Annex II). See here the Report on the Jurisdiction Project.

Interestingly, three options on the possible types of future instrument(s) were discussed by the Experts' Group but views were divided: [**Option A**] Binding instrument on direct jurisdiction, including on parallel proceedings; [**Option B**] Binding instrument on parallel proceedings, and a binding additional protocol on

direct jurisdiction; [**Option C**] Binding instrument on parallel proceedings, and a non-binding instrument (e.g., model law, guiding principles, etc.) on direct jurisdiction (see page 5).

A clear and strong preference was expressed for Options A and C (experts were divided).

In my personal opinion Option C seems to be the more sensible option. As expressed by the experts favoring this option: "[…] with a common consideration being that diverse legal backgrounds and jurisdictional rules from around the world would make a binding instrument on direct jurisdiction difficult to conclude and to implement. These experts also noted that Option A may not be feasible due to existing differences in opinion of experts and considering past similar attempts. In this context, they considered it more useful to develop a soft law instrument on direct jurisdiction and were open to considering the viability of different types of soft law instruments such as a model law, principles, or guidelines. Given the need to deal with parallel proceedings in practice, they expressed a preference for developing a binding instrument on parallel proceedings."

Following the conclusion of the work of the Experts' Group on the Jurisdiction Project, a new **Working Group on matters related to jurisdiction in transnational civil or commercial litigation** was established, and Professor Keisuke Takeshita (Japan) was invited to chair the Working Group.

The Conclusion & Decision No 9 of the CGAP reads:

> *"9. In continuation of the mandate on the basis of which the Experts' Group had worked, CGAP mandated:*
>
> *a. The Working Group to **develop draft provisions on matters related to jurisdiction in civil or commercial matters, including rules for concurrent proceedings**, to further inform policy considerations and decisions in relation to the scope and type of any new instrument.*
>
> *b. The Working Group to proceed in an inclusive and holistic manner, with an initial focus on **developing binding rules for concurrent proceedings (parallel proceedings and related actions or claims)**, and acknowledging the primary role of both jurisdictional rules and the*

doctrine of forum non conveniens, notwithstanding other possible factors, in developing such rules.

c. The Working Group to explore how flexible mechanisms for judicial coordination and cooperation can support the operation of any future instrument on concurrent proceedings and jurisdiction in transnational civil or commercial litigation.

d. The PB to make arrangements for two Working Group meetings before the 2022 meeting of CGAP, with intersessional work, so as to maintain momentum. If possible, one meeting will be held after the northern hemisphere summer of 2021, and another in early 2022, with a preference, where possible, for hosting in-person meetings" (our emphasis).

3) With regard to future meetings, there are a few meetings in the pipeline, among them:

Special Commission meetings (SC – basically, a global meeting of experts)

- Special Commission on the practical operation of the 2007 Child Support Convention and its Protocol – postponed to March-June 2022
- Special Commission on the Apostille Convention + 12th e-APP Forum – to be held online in October 2021
- Special Commission on the practical operation of the 1993 Adoption Convention – postponed to July 2022

Edition 2021 of HCCH a|Bridged will focus on the 2005 Choice of Court Convention (incl. and "subject to available resources, the circulation of a brief questionnaire to elicit reasons as to why more States have not become party to the Convention").

Recommendation in The Netherlands to suspend intercountry adoptions

The *Committee Investigating Intercountry Adoption*, has recommended that The Netherlands suspend intercountry adoptions. The interdisciplinary committee considered the history and legal evolution, and did an in-depth investigation into adoptions from five selected countries (Bangladesh, Brazil, Colombia, Indonesia and Sri Lanka). It looked into the consequences for the people involved (adoptees, birth families and adoptive families), the perception in society, the best interests of the child and the right to know one's origins and identity. It came to the conclusion that there have been too many abuses and that the current system is still open to fraud and abuses. It further stated that the lessons learned should be applied to new methods of family formation such as surrogacy.

For those who do not read Dutch, the Commission issued a press release in English and published an English summary of the report.

The Committee, established by the Minister for Legal Protection, Mr. Sander Dekker, was chaired by Mr. Tjibbe Joustra and further composed of Prof. Dr. Beatrice de Graaf and Mr. Bert-Jan Houtzagers.

Mareva injunctions, submission and forum non conveniens

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

The law in Singapore on Mareva injunctions supporting foreign proceedings is on the move again. The High Court's recent decision in *Allenger v Pelletier* [2020]

SGHC 279, issued barely a year after the Court of Appeal's decision in *Bi Xiaoqiong v China Medical Technologies* [2019] 2 SLR 595; [2019] SGCA 50 (see previous post here) qualifies the latter, confounding Singapore's position on this complex issue even further.

Pelletier sold shares to buyers in Florida while allegedly misrepresenting the company's value. The buyers obtained arbitral awards against him, then obtained a bankruptcy order against him in the Cayman Islands. By this time, however, Pelletier had initiated several transfers, allegedly to dissipate his assets to Singapore among other jurisdictions. The buyers then initiated proceedings to clawback the transfers in the Cayman courts, and obtained a worldwide Mareva injunction there with permission to enforce overseas. Subsequently, the buyers instituted proceedings in Singapore against Pelletier in Singapore based on two causes of action – s 107(1) of the Cayman Bankruptcy Law (the "Cayman law claim"), and s 73B of Singapore's Conveyancing and Law of Property Act (the "CLPA claim") – and applied for a Mareva injunction to freeze his Singapore assets.

Senior Judge Andrew Ang acknowledged that "the Mareva injunction remains, at its very core, ancillary to a main substantive cause of action." (*Allenger*, [125]). In doing so, he remained in step with *Bi Xiaoqiong*. Ang SJ eventually held that Mareva could be sustained based on the CLPA claim. However, he reasoned that the Cayman law claim could not; it is this latter point that is of relevance to us.

Ang SJ first held that the court had subject-matter jurisdiction over the Cayman law claim, because Singapore's courts have unlimited subject-matter jurisdiction over any claim based on statute or common law, whether local or foreign. The statute that defined the court's civil jurisdiction – Section 16(1) of the Supreme Court of Judicature Act ("SCJA") – implicitly retained the position at common law, that the court possessed a generally "unlimited subject-matter jurisdiction", while expressly defining only the court's *in personam* jurisdiction over defendants ([45], [51]-[52]). The only limits on the court's subject-matter jurisdiction, then, were those well-established in the common law, such as the Mozambique rule and the rule against the justiciability of foreign penal, revenue and public law claims ([54]). This was a conception of international jurisdiction organised primarily around control and consent rather than sufficient connections between causes of action and the forum, although Ang SJ's recognition of the abovementioned common law exceptions suggests that a connection-based notion of jurisdiction

may have a secondary role to play.

However, Ang SJ then held that the court could not issue a Mareva injunction against Pelletier, because, as all parties had accepted, Singapore was *forum non conveniens*. This is where the difficulty began, because the court's reasoning here was anything but clear. At times, Ang SJ suggested that Singapore being *forum non conveniens* precluded the *existence* of the court's jurisdiction over Pelletier; for instance, he dismissed the buyer's arguments for a Mareva injunction based on the Cayman law claim on grounds that "Singapore court would first have to have *in personam* jurisdiction over a defendant before it could even grant a Mareva injunction" ([145]). At other times, however, Ang SJ suggested that Singapore being *forum non conveniens* only prevented the court from "*exercising* its jurisdiction" over Pelletier ([123], emphasis added). The former suggestion, however, would have been misplaced: as Ang SJ himself noted ([114]), Pelletier had voluntarily submitted to proceedings, which gave the court *in personam* jurisdiction over him. That Ang SJ would otherwise have refused the buyers leave to serve Pelletier should also have been irrelevant: Section 16(1) of the SCJA, mirroring the position at common law, gives Singapore's courts "jurisdiction to hear and try any action in personam where (a) the defendant is served with a writ of summons or any other originating process … *or* (b) the defendant submits to the jurisdiction of the [court]" (emphasis added).

Ang SJ's objection, then, must have been the latter: if a court will not to exercise its jurisdiction over a defendant, it should not issue a Mareva injunction against him. This conclusion, however, is surprising. Ang SJ considered himself bound to reach that conclusion because of the Court of Appeal's holding in *Bi Xiaoqiong* that "the Singapore court cannot exercise any power to issue an injunction unless it has jurisdiction over a defendant" (*Bi Xiaoqiong*, [119]). Yet, this hardly supports Ang SJ's reasoning, because *Bi Xiaoqiong* evidently concerned the *existence* of jurisdiction, not its exercise. There, the Court of Appeal simply adopted the majority's position in *Mercedes Benz v Leiduck* [1996] 1 AC 284 that a court need only possess *in personam* jurisdiction over a defendant to issue Mareva injunctions against him. It was irrelevant that the court would not exercise that jurisdiction thereafter; even if the court stayed proceedings, it retained a "residual jurisdiction" over them, which sufficed to support a Mareva injunction against the defendant (*Bi Xiaoqiong*, [108]). Indeed, in *Bi Xiaoqiong* itself the court did not exercise its jurisdiction: jurisdiction existed by virtue of the

defendant's mere presence in Singapore, and the plaintiff itself applied to stay proceedings thereafter on grounds that Singapore was *forum non conveniens* (*Bi Xiaoqiong*, [16], [18])

Ang SJ's decision in *Allenger* thus rests on a novel proposition: that while a defendant's presence in Singapore can support a Mareva against him even when Singapore is *forum non conveniens*, his submission to proceedings in Singapore cannot unless Singapore is *forum conveniens*, though in both situations the court has *in personam* jurisdiction over him. Moreover, while Ang SJ's decision may potentially have been justified on grounds that the second requirement for the issuance of Mareva injunctions in *Bi Xiaoqiong* – of a reasonable accrued cause of action in Singapore – was not met, his reasoning in *Allenger*, in particular the distinction he drew between presence and submission cases, was directed solely at the first requirement of *in personam* jurisdiction. On principle, however, that distinction is hard to defend: in both scenarios, the court's jurisdiction over the defendant derives from some idea of consent or control, and not from some connection between the substantive cause of action and the forum. If like is to be treated alike, future courts may have to relook Ang SJ's reasoning on this point.

What was most surprising about *Allenger*, however, was the fact that Ang SJ himself seemed displeased at the conclusion he believed himself bound to reach. In *obiter*, he criticised *Bi Xiaoqiong* as allowing the "'exploitation' of the principle of territoriality by perpetrators of international frauds" (*Allenger*, [151]), and suggested that *Bi Xiaoqiong* should be overturned either by Parliament or the Court of Appeal ([154]). In the process, he cited Lord Nicholls' famous dissent in *Leiduck*, that Mareva injunctions should be conceptualised as supportive of the enforcement of judgments rather than ancillary to causes of action (*Leiduck*, 305). The tenor of Ang SJ's statements thus suggests a preference that courts be allowed to issue free-standing Mareva injunctions against any defendant with "substantial assets in Singapore which the orders of the foreign court … cannot or will not reach" (*Allenger*, [151]). Whether the Court of Appeal will take up this suggestion, or even rectify the law after *Allenger*, is anyone's guess at this point. What seems clear, at least, is that Singapore's law on Mareva injunctions supporting foreign proceedings is far from settled.

RCD Holdings Ltd v LT Game International (Australia) Ltd: Foreign jurisdiction clauses and COVID-19

By Jie (Jeanne) Huang, Associate Professor, University of Sydney Law School Australia

In 2013, the plaintiffs, ePayment Solutions Pty Ltd (EPS) and RCD Holdings Ltd (RCD) concluded a written contract with the defendant, LT Game International (Australia) Ltd (LT) about the development and installation of a computer betting game. LT is a company incorporated in the Virgin Islands and registered in Australia as a foreign company. The contract was signed in Australia. Its Clause 10 provides.

"**10. Governing Law**

Any dispute or issue arising hereunder, including any alleged breach by any party, shall be heard, determined and resolved by an action commenced in Macau. The English language will be used in all documents."

When a dispute arose, the plaintiffs commenced the proceedings at the Supreme Court of Queensland in Australia ([2020] QSC 318). The defendant entered a conditional appearance and applied to strike out the claim, or alternatively, to have it stayed as being commenced in this court contrary to the contract. This case shed useful light on how an Australian court may address the impacts of COVID-19 on foreign jurisdiction clauses.

The parties did not dispute that Clause 10 was an exclusive jurisdiction clause choosing courts in Macau China. However, an exclusive foreign jurisdiction clause does not exclude Australian courts' jurisdiction. The plaintiffs alleged that the

Supreme Court of Queensland should not enforce the exclusive jurisdiction clause due to the COVID?19 pandemic for two reasons.

First, the pandemic currently prevents the plaintiffs from commencing proceedings in Macau. The court rejected this argument because no evidence suggested that representatives of the plaintiffs had to be present in Macau for lawyers retained by them to commence proceedings.

Second, plaintiffs also alleged that their witnesses could not travel from Australia to Macau because of the pandemic. The court also rejected this argument because of insufficient evidence. According to the court, the plaintiffs did not provide any evidence of the impact of COVID?19 in Macau, for example, what restrictions were being experienced now, what restrictions were likely to be experienced in the future and how long those restrictions may persist. There was also no evidence showing when a trial of proceedings commenced now in Macau might be heard. Although Australian witnesses might be called in the Macau proceedings, the plaintiffs did not identify any specific persons who would be called were residents in Australia. It was also unclear whether overseas witnesses might be called if the proceedings were conducted in Australia as Australia also imposed strict travel restrictions.

Finally, the court ruled for the defendant and dismissed the plaintiffs' claim. Nevertheless, the court indicated that the plaintiffs could recommence the proceedings in Queensland if the circumstances of the COVID-19 pandemic changed materially in Macao in the future.

Comments:

It is well established that an exclusive foreign jurisdiction clause does not operate to exclude Australian courts' jurisdiction; however, the courts will hold the parties to their bargain and grant a stay of proceedings, unless the party who seeks that the proceedings be heard in Australia can show that there are strong reasons against litigating in the foreign jurisdiction.[1] In exercising its discretion, the court should take into account all the circumstances of the particular case. However, doubts have been cast as to whether courts should consider financial or forensic inconvenience attaching to the nominated foreign jurisdiction, at least when these factors should have been known to the parties at the time the exclusive jurisdiction clause was agreed by them.[2]

In *RCD*, the court correctly held that Clause 10 should be interpreted as manifesting an intention that disputes would be determined in Macau by applying the law of Macau. Although the application of Macau law might bring financial benefits to the defendant because it is more difficult to prove liability for damages under the Macau law than the law in Australia. However, this is insufficient to convince the court to exercise jurisdiction because the potential financial benefits for the defendant are what the parties have bargained for.

Regarding the location of witnesses, the court is also correct that parties should expect that breaches may occur in Australia as the contract would be partially performed there, and consequently, witnesses in Australia may need to be called for proceedings in Macao. Therefore, the location and travel of witnesses are not a strong reason for Australian courts to exercise jurisdiction.

The outbreak of the COVID-19 pandemic is a factor that parties could not reasonably expect when they concluded their foreign jurisdiction clause. If a plaintiff wants to convince an Australian court to exercise jurisdiction in spite of an exclusive foreign jurisdiction clause, this plaintiff must provide solid evidence of the impacts of the COVID-19 pandemic on foreign proceedings. If the plaintiff can show that the pandemic developed so as to effectively prevent, or unduly frustrate the plaintiff in litigating in the foreign jurisdiction, then that might be a discretionary consideration, with any other relevant considerations, in favor of allowing the plaintiffs to litigate in Australia.

[1] High Court of Australia decisions such as *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 at 445, *Oceanic Sunline Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 259, *Huddart Parker Ltd v The Ship Mill Hill* (1950) 81 CLR 502 at 508-509.

Decisions of intermediate courts of appeal such as *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq) & Ors* (2010) 79 ACSR 383 at 402-403, [88]-[89], *Australian Health & Nutrition Association Ltd & Anor v Hive Marketing Group Pty Ltd & Anor* (2019) 99 NSWLR 419 at 438, [78], *Venter v Ilona MY Ltd* [2012] NSWSC 1029.

[2] *Incitec Ltd v Alkimos Shipping Corp* (2004) 138 FCR 496 at 506 and *Australian Health & Nutrition Association Ltd & Anor v Hive Marketing Group Pty*

Ltd & Anor (2019) 99 NSWLR 419.

UK Supreme Court in Okpabi v Royal Dutch Shell (2021 UKSC 3): Jurisdiction, duty of care, and the new German "Lieferkettengesetz"

by Professor Dr Eva-Maria Kieninger, Chair for German and European Private Law and Private International Law, University of Würzburg, Germany

The Supreme Court's decision in Okpabi v Royal Dutch Shell (2021 UKSC 3) concerns the preliminary question whether English courts have jurisdiction over a joint claim brought by two Nigerian communities against Royal Dutch Shell (RSD), a UK parent company, as anchor defendant, and a Nigerian oil company (SPDC) in which RSD held 30 % of the shares. The jurisdictional decision depended (among other issues that still need to be resolved) on a question of substantive law: Was it "reasonably arguable" that RSD owed a common law duty of care to the Nigerian inhabitants whose health and property was damaged by the operations of the subsidiary in Nigeria?

In the lower instance, the Court of Appeal had not clearly differentiated between jurisdiction over the parent company and the Nigerian sub and had treated the "arguable case"-requirement as a prerequisite both for jurisdiction over the Nigerian sub (under English autonomous law) and for jurisdiction over RSD, although clearly, under Art. 4 (1) Brussels Ia Reg., there can be no such additional requirement pursuant to the CJEU's jurisprudence in *Owusu*. In *Vedanta*, a case with large similarities to the present one, *Lord Briggs*, handing down the judgment for the Supreme Court, had unhesitatingly acknowledged the unlimited jurisdiction of the courts at the domicile of the defendant company under the Brussels Regulation. In *Okpabi, Lord Hamblen*, with whom the other Justices

concurred, did not come back to this issue. However, given that from a UK point of view, the Brussels model will soon become practically obsolete (unless the UK will still be able to join the Lugano Convention), this may be a pardonable omission. It is to be expected that the English courts will return to the traditional common law restrictions on jurisdiction such as the "arguable case"-criterion and "forum non conveniens".

Although the Supreme Court's decision relates to jurisdiction, its importance lies in the potential consequences for a parent company's liability on the level of substantive law: The Supreme Court affirms its previous considerations in *Vedanta* (2019) and rejects the majority opinion of the CoA which in 2018 still flatly ruled out the possibility of RDS owing a duty of care towards the Nigerian inhabitants. Following the appellants' submissions, *Lord Hamblen* minutely sets out where the approach of the CoA deviated from *Vedanta* and therefore "erred in law". The majority in the CoA started from the assumption that a duty of care can only arise where the parent company effectively "controls" the material operations of the sub, and furthermore, that the issuance of group wide policies or standards could never in itself give rise to a duty of care. These propositions have now been clearly rejected by the Supreme Court as not being a reliable limiting principle (para 145). In the present judgment, the SC affirms its view that "control" is not in itself a meaningful test, since in practice, it can take many different forms: *Lord Hamblen* cites with approval *Lord Briggs's* statement in *Vedanta*, that "there is no limit to the models of management and control which may be put in place within a multinational group of companies" (para 150). He equally approves of *Lord Briggs*'s considerations according to which "the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if in fact it does not do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken" (para 148).

Whether or not the English courts will ultimately find a duty of care to have existed in either or both of the *Vedanta* and *Okpabi* sets of facts remains to be seen when the law suits have been moved to the trial of the substantive issues. Much will depend on the degree of influence that was either really exercised on the sub or publicly pretended to be exercised.

On the same day on which the SC's judgment was given (12 February 2021), the

German Federal Government publicly announced the key features of a future piece of legislation on corporate social resonsibility in supply chains (*Sorgfaltspflichtengesetz*) that is soon to be enacted. The government wants to pass legislation before the summer break and the general elections in September 2021, not the least because three years ago, it promised binding legislation if voluntary self-regulation according to the National Action Plan should fail. Yet, contrary to claims from civil society (see foremost the German "*Initiative Lieferkettengesetz*") the government no longer plans to sanction infringements by tortious liability towards victims. Given the applicability of the law at the place where the damage occurred under Art. 4 (1) Rome II Regulation, and the fact that the UK Supreme Court in *Vedanta* and *Okpabi* held the law of Sambia and Nigeria to be identical with that of England, this could have the surprising effect that the German act, which the government proudly announced as being the strictest and most far-reaching supply chain legislation in Europe and the world (!!), would risk to fall behind the law in anglophone Africa or on the Indian sub-continent. This example demonstrates that an addition to the Rome II Regulation, as proposed by the European Parliament, which would give victims of human rights' violations a choice between the law at the place of injury and that at the place of action, is in fact badly needed.

Webb v Webb (PC) – the role of a foreign tax debt in the allocation of matrimonial property

By Maria Hook (University of Otago, New Zealand) and Jack Wass (Stout Street Chambers, New Zealand)

When a couple divorce or separate, and the court is tasked with identifying what property is to be allocated between the parties, calculation of the net pool of assets usually takes into account certain debts. This includes matrimonial debts that that are in the sole name of one spouse, and even certain personal debts,

ensuring that the debtor spouse receives credit for that liability in the division of matrimonial property. However, where a spouse owes a liability that may not, in practice, be repaid, deduction of the debt from the pool of the couple's property may result in the other spouse receiving a lower share of the property than would be fair in the circumstances. For example, a spouse owes a debt to the Inland Revenue that is, in principle, deductible from the value of that spouse's assets to be allocated between the parties. But the debtor spouse has no intention of repaying the debt and has rendered themselves judgment-proof. In such a case, deduction of the debt from the debtor spouse's matrimonial property would leave the other spouse sharing the burden of a debt that will not be repaid.

This result is patently unfair, and courts have found a way to avoid it by concluding that, in order to be deductible, the debt must be one that is likely to be paid or recovered (see, eg, *Livingstone v Livingstone* (1980) 4 MPC 129 (NZHC)). This enquiry can give rise to conflict of laws issues: for example, there may be questions about the enforceability of a foreign judgment debt or the actionability of a foreign claim. Ultimately, the focus of the inquiry should be on the creditor's practical chances of recovery.

In the relatively recent Cook Islands case of *Webb v Webb*, the Privy Council ([2020] UKPC 22) considered the relevance of a New Zealand tax debt to matrimonial property proceedings in the Cook Islands. The Board adopted a surprisingly narrow approach to this task. It concluded that the term "debts" only included debts that were enforceable *against matrimonial property* (which in this case was located in the Cook Islands), and that the debts in question were not so enforceable because they would be barred by the "foreign tax principle". Lord Wilson dissented on both points.

Background

The parties – Mr and Mrs Webb – lived in the Cook Islands when they separated. Upon separation, Mr Webb returned to New Zealand. Mrs Webb commenced proceedings against Mr Webb in the Cook Islands under the Matrimonial Property Act 1976 (a New Zealand statute incorporated into Cook Islands law), claiming her share of the couple's matrimonial property that was located in the Cook Islands.

Mr Webb, however, owed a judgment debt of NZ$ 26m to the New Zealand Inland

Revenue. He argued that, under s 20(5) of the Act, this debt had to be deducted from any matrimonial property owned by him. Under s 20(5)(b), (unsecured) personal debts had to be deducted from "the value of the matrimonial property owned by" the debtor spouse to the extent that they "exceed the value of any separate property of that spouse". Given the size of Mr Webb's debt, the effect of s 20(5)(b) would have been to leave Mrs Webb with nothing. She argued that the debt fell outside of s 20(5)(b) because it was not enforceable in the Cook Islands and Mr Webb was unlikely to pay it voluntarily.

Whether the debt had to be enforceable against the matrimonial property in the Cook Islands

Lord Kitchin, with whom the majority agreed, concluded that s 20(5)(b) only applied to debts that were either enforceable against the matrimonial assets or likely to be paid out of those assets. Debts that were not so enforceable were not to be taken into account when dividing the matrimonial assets (unless the debtor spouse intended to pay them by using those assets in his name). A different interpretation would lead to "manifest injustice", because if the Inland Revenue "cannot enforce its judgment against those assets, Mr Webb can keep them all for himself" (at [41]). If the Inland Revenue could not execute its judgment against the assets, and Mr Webb did not pay the debt, the reason for applying s 20(5)(b) – which was to protect a debtor spouse's unsecured creditors – disappeared.

Lord Kitchin considered that this conclusion found support in *Government of India v Taylor*, where Viscount Simonds (at 508) had explained that the meaning of "liabilities" in s 302 of the Companies Act 1948 excluded obligations that were not enforceable in the English courts. The result in that case was that a foreign government could not prove in the liquidation of an English company in respect of tax owed by that company (at [42]).

In *Webb*, the judgment debt in question was a personal debt incurred by Mr Webb. However, Lord Kitchin seemed to suggest that the outcome would have been no different if the debt had been a debt incurred in the course of the relationship under s 20(5)(a) (at [46]). The word "debts" had the same meaning in s 20(5)(a) and (b), as referring to debts which are enforceable against the matrimonial property or which the debtor spouse intends to pay.

Lord Wilson did not agree with the Board's interpretation. He considered that it

put a gloss on the word "debts" (at [118]), and that it had "the curious and inconvenient consequence of requiring a court … to determine … whether the debt is enforceable against specified assets" (at [120]). Rather, a debt was a liability that was "likely to be satisfied by the debtor-spouse" or that was "actionable with a real prospect of recovery on the part of the creditor" (citing *Fisher on Matrimonial Property* (2nd ed, 1984) at para 15.6) – regardless of whether recovery would be against matrimonial or other assets (at [123]).

Applying this interpretation to the tax liability in question, Lord Wilson concluded that the liability was clearly actionable (because it had already been the subject of proceedings) and that the Inland Revenue did have a real prospect of recovery in New Zealand (at [126]-[127]). Mr Webb was living in New Zealand and was presumably generating income there, and the Commissioner had applied for the appointment of receivers of his property. This was sufficient to conclude that the debt was enforceable in New Zealand, "including on a practical level" (at [131]). The facts were different from the case of *Livingstone v Livingstone* (1980) 4 MPC 129, where the New Zealand Court had concluded that a Canadian tax debt could "for practical purposes" be disregarded because the debtor had already left the country at the time the demand was issued, he had no intention of returning and he had removed his assets from the jurisdiction. In such a case, if the debtor spouse were permitted to deduct the foreign tax debt without ever actually repaying it, they could take the benefit of the entire pool of matrimonial assets and thus undermine the policy and operation of the whole regime.

In our view, Lord Wilson's interpretation is to be preferred. The relevant question should be whether the debt is one that will be practically recoverable (whether in the forum or overseas). A debt may still be practically recoverable even if it is not enforceable against the matrimonial assets and is unlikely to be paid out of those assets. It is true that, in many cases under s 25(1)(b), the chances of recovery would be slim if the matrimonial assets are out of reach and the debtor spouse has no intention of paying the debt voluntarily (which seemed to be the case for Mr Webb: at [62]). By definition, personal debts are only relevant "to the extent that they exceed the value of any separate property of that spouse", so in practice their recoverability would depend on future or matrimonial assets. Lord Wilson's assessment of the evidence – as allowing a finding that there was a real likelihood that Mr Webb would have to repay the debt in New Zealand – is open to question on that basis. But that doesn't mean that the debts *must* be enforceable against

the matrimonial assets. While this interpretation would lead to fairer outcomes under s 25(1)(b) – because it avoids the situation of the debtor spouse not having to share their matrimonial assets even though the debt is recoverable elsewhere – it could lead to strange results under s 25(1)(a), which provides for the deduction of matrimonial debts that are owed by a spouse individually. It would be unfair, under s 25(1)(a), if such debts were not deductible from the value of matrimonial property owned by the spouse by virtue of being unenforceable against that property, in circumstances where the debts are enforceable against the spouse's personal property.

The Board's reliance on *Government of India v Taylor* [1955] AC 491 (HL) in this context is unhelpful. The question before the House of Lords was whether a creditor could claim in a liquidation for a debt that would not be enforceable in the English courts (regardless of whether the debt would be enforceable over certain – or any – assets). Under the Matrimonial Property Act, on the other hand, the court is not directly engaged in satisfying the claims of creditors, so the debt need not be an obligation enforceable in the forum court. Neither need it be an obligation enforceable against matrimonial property, wherever located. It simply needs to be practically recoverable.

Whether the debt was enforceable against the matrimonial property in the Cook Islands

As we have noted, Lord Wilson argued that there was a real prospect of the debt being paid – the implication being that this was not a case about a foreign tax debt at all. Mr and Mrs Webb were New Zealanders, and Mr Webb had relocated to New Zealand before the proceedings were commenced in 2016 and had stayed there. The practical reality was that unless he found a way to meet his revenue obligations he would be bankrupted again. Lord Kitchin noted Mr Webb's apparent determination to avoid satisfying his liabilities to the IRD. Nevertheless, there was no suggestion that Mr Webb would leave New Zealand permanently to live in the Cook Islands and there enjoy the benefits of the matrimonial property.

Nevertheless, the majority's analytical framework required it to consider whether the tax debt was enforceable against the matrimonial property in the Cook Islands. The majority found that for the purpose of the foreign tax principle, the Cook Islands should be treated relative to New Zealand as a foreign sovereign state, despite their close historical and constitutional ties (and found that the

statutory mechanism for the enforcement of judgments by lodging a memorial, cognate to the historical mechanism for the enforcement of Commonwealth judgments, did not exclude the foreign tax principle).

It was obvious that bankruptcy was a serious prospect, the IRD having appointed a receiver over Mr Webb's assets shortly before the hearing before the Board. That begged the question whether the IRD could have recourse to the Cook Islands assets, but on this point the case proceeded in a peculiar way. The Board observed that it had been given no details of the steps that a receiver or the Official Assignee might be able to take to collect Cook Islands assets, going so far as to doubt whether the Official Assignee would even be recognized in the Cook Islands "for the Board was informed that there was no personal bankruptcy in the Cook Islands and the position of Official Assignee does not exist in that jurisdiction." Section 655(1) of the Cook Islands Act 1915 states that "Bankruptcy in New Zealand shall have the same effect in respect to property situated in the Cook Islands as if that property was situated in New Zealand", but the Board was not prepared to take any account of it, the provision having been introduced for the first time at the final appeal and there being some doubt about whether it was even in force.

The unfortunate consequence was that the Board gave no detailed consideration to the question of how the foreign tax principle operates in the context of cross-border insolvency, a point of considerable interest and practical significance.

The common law courts have been prepared to recognise (and in appropriate cases, defer to) foreign insolvency procedures for over 250 years, since at least the time of *Solomons v Ross* (1764) 1 H Bl 131, 126 ER 79 where the Court of Chancery allowed funds to be paid over to the curators of a debtor who had been adjudicated bankrupt in the Netherlands. But the relationship between this principle and the foreign tax principle has never been clear.

The UNCITRAL Model Law on Cross-Border Insolvency 1997 preserves states' ability to exclude foreign tax claims from an insolvency proceeding. As to the common law, the New Zealand Law Commission (expressing what may be the best guide to the content of Cook Islands law) observed in 1999 that the policy justification for refusing enforcement of foreign tax judgments may not apply in the same way in the context of cross-border insolvency where the collective interests of debtors are concerned. It noted that a number of countries (including

Australia, the Isle of Man and South Africa) had moved past an absolute forbidding of foreign tax claims where such claims form part of the debts of an insolvent debtor subject to an insolvency regime. It thus concluded that "foreign taxation claims may sometimes be admitted to proof in a New Zealand bankruptcy or liquidation." While the Privy Council had a number of difficult issues to confront, it is perhaps unfortunate that they did not take the opportunity to bring clarity to this important issue.

Territorial Jurisdiction relating to Succession and Administration of Estates under Nigerian Private International Law

Issues relating to succession and administration of estate of a deceased person raise significant issues in Nigerian private international law (or conflict of laws), whether a person dies testate or intestate. In the very recent case of *Sarki v Sarki & Ors,*[1] the Nigerian Court of Appeal considered the issue of what court had territorial jurisdiction in a matter of succession and administration of estate of a deceased person's property under Nigerian conflict of laws dealing with inter-state matters. While this comment agrees with the conclusion reached by the Court of Appeal, it submits that the rationale for the Court's decision on the issue of territorial jurisdiction for succession and administration of estates under Nigerian private international law in inter-state matters is open to question.

In *Sarki*, the claimants/respondents were the parents of the deceased person, while the defendant/appellant was the wife of the deceased person. The defendant/appellant and her late husband were resident in Kano State till the time of his death. The deceased was intestate, childless, and left *inter alia* immovable properties in some States within Nigeria – Bauchi State, Gombe State, Plateau State, Kano State, Jigawa State and the Federal Capital Territory, Abuja. The deceased's family purported to distribute his property in accordance with Awak custom (the deceased's personal law) with an appreciable proportion to the defendant/appellant. The defendant/appellant was apparently not pleased with the distribution and did not cooperate with the deceased's family, who tried to gain access to the deceased's properties. The claimants/respondents brought an action against the defendant/appellant before the Gombe State High Court. The claimants/respondents claimed *inter alia* that under Awak custom, which was the personal law of the deceased person, they are legitimate heirs of his property, who died childless and intestate; a declaration that the distribution made on 22 August 2015 by the deceased's family in accordance with Awak custom, giving an appreciable sum of the property to the defendant/appellant is fair and just; an order compelling the defendant/appellant to produce and hand over all the original title documents of the landed properties and boxer bus distributed by the deceased family on 22 August 2015; and cost of the action. In response, the defendant/appellant made a statement of defense and counter-claim to the effect that she and the deceased are joint owners of all assets and properties acquired during their marriage; a declaration that the estate of the deceased is subject to rules of inheritance as envisaged by marriage under the Marriage Act[2] and not native law and custom; a declaration that as court appointed Administratrix, she is entitled to administer the estate of the deceased person; an order of injunction restraining the claimants/respondents to any or all of the assets forming part of the estate of the deceased person based on custom and tradition; and costs of the action.

The Gombe State High Court held that the Marriage Act was applicable in distributing the estate of the deceased person and not native law and custom. However, the Court distributed the property evenly between the claimants/respondents and defendant/appellants on the basis that it will be unfair for the claimants/respondents as parents of the deceased not to have access to the deceased's property. The defendant/appellant successfully appealed this ruling and won on the substantive aspect of the case. The private international

law issue was whether the Gombe State High Court had territorial jurisdiction in this case, rather than the Kano State High Court where the defendant/appellant alleged the cause of action arose? The defendant/appellant argued that the cause of action arose exclusively in Kano State because that is where the deceased lived and died, and the defendant/appellant had obtained letters of administration issued by the Kano State High Court. The defendant/appellant lost on this private international law issue.

The Court of Appeal began on the premise that the issue of whether Gombe State or Kano State had jurisdiction was a matter of private international law, and not an issue of that was governed by a States' civil procedures rules that governs dispute within a judicial division.[3] It also held that it is the plaintiff's statement of claim that determines jurisdiction.[4] The Court of Appeal then approved its previous decisions that in inter-state matters of a private international law matter, a State High Court is confined to the location of the cause of action.[5] In this connection, the Court of Appeal rejected the argument of counsel for the defendant/appellant and held that the cause of action arose both in Kano and Gombe State – the latter State being the place where the dispute arose with the deceased's family on the distribution of the deceased's estate. Thus, both the Kano State High Court and Gombe State High Court could assume jurisdiction over the matter.[6] The Court of Appeal further held that other States such as Kano, Bauchi and Plateau could also assume jurisdiction because letters of administration were granted by the State High Courts of these jurisdictions.[7] In the final analysis, the Court of Appeal held that the claimants/respondents could either institute its action in either Gombe, Kano, Bauchi and Plateau – being the place where the cause of action arose, but procedural economy (which leads to convenience, saving time, saving costs, and obviates the risk of conflicting orders) encouraged the claimants/respondents to concentrate its proceedings in one of these courts – Gombe State High Court in this case.[8] Accordingly, this private international law issue was resolved in favour of the claimants/respondents.

There are three comments that could be made about the Court of Appeal's judgments. First, it appears the issue of territorial jurisdiction was raised for the first time on appeal. It does not appear that this issue was raised at the lower court. If this is the case, it is submitted that the defendant/appellant should have been deemed to have waived its procedural right on jurisdiction on the basis that it submitted to the jurisdiction of the Gombe State High Court. Matters of

procedural jurisdiction can be waived by the parties but not substantive jurisdiction such as jurisdiction mandatorily prescribed by the constitution or enabling statutes in Nigeria.[9] The issue of territorial jurisdiction among various State High Courts was a procedural matter and should have been raised promptly by the defendant/appellant or it would be deemed to have waived its right to do so by submitting to the jurisdiction of the Gombe State High Court.

Second, the Court of Appeal appeared to miss the point that there are Nigerian Supreme Court authorities that addressed the issue before it. According to the Supreme Court of Nigeria, in matters of succession and administration of states, the *lex situs* is given a predominant role for matters of jurisdiction purposes so that a Nigerian court would ordinarily not assume jurisdiction over foreign property, whether in an international or inter-state matter. Nigerian courts, as an exception, apply the rule to the effect that, where the Court has jurisdiction to administer an estate or trust, and the property includes movables or immovables situated in Nigeria and immovables situated abroad, the court has jurisdiction to determine questions of title to the foreign immovables for the purpose of administration. Again Nigerian courts apply this rule both in inter-State and international matters.[10] This rule established by the Nigerian Supreme Court in accordance with the English common law doctrine should have guided the Court of Appeal to hold that since it had jurisdiction over the deceased immovable properties in Gombe State, it also had jurisdiction over other immovable properties constituting the deceased's estate in other States in Nigeria. The issue of where the cause of action arose was clearly irrelevant.

This brings me to the third and final comment – where the cause of action arose – the issue of territorial jurisdiction. The Nigerian Supreme Court has held in some decided cases that in inter-state matters, a State High Court cannot assume jurisdiction over a matter where the cause of action is exclusively located in another State, irrespective of whether the defendant is resident and willing to submit to the court's jurisdiction.[11] This current approach by the Supreme Court may have influenced the Court of Appeal to be fixated on the issue of territorial jurisdiction and confining itself to where the cause of action arose. Looking at the bigger picture, the current approach of the Nigerian Supreme Court in relation to matters of action *in personam* demonstrates a clear misunderstanding of applying common law private international law matters of jurisdiction in inter-state matters.[12] If a defendant is resident in a State and/or

willing to submit, it shouldn't matter where the cause of action arose in inter-state and international matters. Indeed, there is no provision of the Nigerian 1999 Constitution or enabling statute that prohibits a State High Court from establishing extra-territorial jurisdiction in inter-state or international matters, provided the defendant is resident and/or wiling to submit to the Court's jurisdiction. The current approach of the Nigerian Supreme Court unduly circumscribes the jurisdiction of the State High Courts in inter-state matters, and also risks making Nigerian courts inaccessible in matters of international commercial litigation in matters that occur exclusively outside Nigeria, thereby making the Nigerian court commercially unattractive for litigation, and resulting in injustice.[13] Therefore it is time for the Supreme Court to overrule itself and revert to its earlier approach that held that in inter-state or international matters a Nigerian court can establish jurisdiction, irrespective of where the cause of action arose, provided the defendant is resident and/or submits to the jurisdiction of the Nigerian court.[14]

In my final analysis, I would state that the Court of Appeal in *Sarki* reached the right conclusion on the issue of private international law, but the rationale for its decision is open to question. Moreover, though this private international law issue was resolved against the defendant/appellant, it substantially won on the substantive issues in the case. If this case goes on appeal to the Supreme Court, it should be an opportunity for the Supreme Court to set the law right again on the concept of jurisdiction in matters of succession and administration and estates, and overrule itself where it held that in inter-state matters, a State High Court is restricted to the place where the cause of action arose, irrespective of whether the defendant is resident and/or willing to submit to its jurisdiction.

[1] (2021) LPELR – 52659 (CA).

[2] Cap 218 LFN 1990.

[3]*Sarki* (n 1) 13-14.

[4] *Ibid* 14.

[5] *Ibid* 14-18, approving *Lemit Engineering Ltd v RCC Ltd* (2007) LPELR-42550 (CA).

[6] *Sarki* (n 1) 21.

[7]*Ibid* 21-3.

[8] *Ibid* 23-5, approving *Onyiaorah v Onyiaorah* (2019) LPELR-47092 (CA).

[9] See generally *Odua Investment Co Ltd v Talabi* (1997) 10 NWLR (Pt. 523) 1 ; *Jikantoro v Alhaji Dantoro* (2004) 5 SC (Pt. II) 1, 21 . This is a point that has been stressed by Abiru JCA in recent cases such as *Khalid v Ismail (* 2013) LPELR-22325 (CA); *Alhaji Hassan Khalid v Al-Nasim Travels & Tours Ltd* (2014) LPELR-22331 (CA) 23 – 25 ; *Nigerian National Petroleum Corporation v Zaria* (2014) LPELR-22362 (CA) 58 – 60; *Obasanjo Farms (Nig) Ltd v Muhammad* (2016) LPELR-40199 (CA). See also *The Vessel MT. Sea Tiger & Anor v Accord Ship Management (HK) Ltd* (2020) 14 NWLR (Pt. 1745) 418.

[10] *Ogunro v Ogedengbe* (1960) 5 SC 137; *Salubi v Nwariaku* (2003) 7 NWLR 426.

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

[12]See generally Abiru JCA in *Muhammed v Ajingi* (2013) LPELR-20372 (CA) 23 – 25, 25 – 26; CSA Okoli and RF Oppong, *Private International Law in Nigeria* (1st edition, Hart, Oxford, 2020) 95-103; AO Yekini, "Comparative Choice of Jurisdiction Rules in Cases having a Foreign Element: are there any Lessons for Nigerian Courts?" (2013) 39 *Commonwealth Law Bulletin* 333; Bamodu O., "In Personam Jurisdiction: An Overlooked Concept in Recent Nigerian Jurisprudence" (2011) 7 *Journal of Private International Law* 273.

[13] See for example *First Bank of Nigeria Plc v Kayode Abraham* (2003) 2 NWLR 31 where the Court of Appeal held the lower court did not have jurisdiction because the cause of action arose exclusively outside Nigeria. This decision was however overturned by the Supreme Court in *First Bank of Nigeria Plc v Kayode Abraham* (2008) 18 NWLR (Pt 1118) 172 on other dubious grounds. For a critique, see CSA Okoli and RF Oppong, *Private International Law in Nigeria* (1st edition, Hart, Oxford, 2020) 90.

[14] See generally *Nigerian Ports Authority v Panalpina World Transport (Nig) Ltd* (1973) 1 ALR Comm 146, 172; *British Bata Shoe Co v Melikan* (1956) SCNLR 321. See also *Barzasi v Visinoni* (1973) NCLR 373., 381-2.

Global sales law in a global pandemic: The CISG as the applicable law to the EU-AstraZeneca Advance Purchase Agreement?

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Last week, following severe criticisms of its procurement strategy and a dispute with AstraZeneca over the delays in delivery of the vaccine, the EU Commission has published the Advance Purchase Agreement for the Production, Purchase and Supply of a Covid-19 Vaccine in the European Union (APA) it had concluded with AstraZeneca in August 2020. Although some important clauses were blackened at the request of AstraZeneca, the document gives interesting insights into the procurement practice of the EU and has incited a plethora of comments by the legal experts. Despite the broad coverage in legal and non-legal press, the issue of applicable law has received comparably little attention (but see Till Maier-Lohmann on the CISG's potential applicability). In its first part, this post will argue that, as far as one can tell by the published document, the CISG is likely to be the applicable law to the contract, before outlining some of the consequences of the CISG's potential application in the second part.

I. The CISG as the applicable law to the APA?

The issue of the applicable law would be considered by Belgian courts that are exclusively competent under the APA's forum selection clause (§ 18.5 (b) APA). Since Belgium is a Contracting State to the CISG, Belgian courts are bound to apply the CISG's provisions on its sphere of application that take precedence over the conflict rules in the Rome I-Regulation (Article 25 Rome I-Regulation).

Pursuant to Article 1 (1) (a) CISG, the Convention applies to contracts of sale of goods between parties that have their places of business in different Contracting States.

1. **Vaccine procurement as a (private) contract for the sale of goods?**

The CISG does not distinguish between private law and public law entities and is not limited to contracts between private parties.[1] It is therefore applicable to sales contracts concluded by public law entities such as States if these entities do not act in exercise of their sovereign powers but *iure gestionis* like a private person could act as well,[2] irrespective of whether a public law tender procedure has preceded the conclusion of the contract.[3] The tender process that precedes the conclusion of the contract also does not fall under the exclusion of sales by auction in Art. 2 (b) CISG.[4]

A more nuanced question is whether the APA is a contract for the sale of goods. The question may seem moot since the parties themselves have labelled the agreement Advance Purchase Agreement and the contract provides for the delivery of vaccines against payment. However, it also contains some other elements that may be relevant for the qualification as a sales contract under Articles 1, 3 CISG. The first question is whether the buyers' involvement in the manufacturing process is relevant. Pursuant to Article 3 (1) CISG, the Convention applies to the sale of goods to be manufactured unless the party ordering the goods undertakes to supply a substantial part of the materials. Indeed, the APA contains an obligation of the buyers to "use Best Reasonable Efforts to assist AstraZeneca in securing the supply" of drug substances and other materials (§ 6.1 APA) as well as an obligation to provide funding to AstraZeneca in order to enable it to procure the necessary materials (§ 7.1 APA). However, this assistance and funding does not seem to amount to an undertaking to supply a substantial part of the materials, particularly as the contract stipulates that "AstraZeneca shall secure the supply of all drug substances […] and drug product capacity […] as well as components critical to the development, manufacture and supply of the Initial Europe Doses" (§6.1). The second question is whether the obligation to deliver vaccines is "the preponderant part of the obligations" of the seller under Article 3 (2) CISG. Here, it seems clear that the core of the contract is the delivery of the vaccines, not the provision of a service of any kind. Other obligations, such as the reporting obligations (§§ 6.3, 10.2 APA), only seem to

serve a complementary purpose to ensure the successful delivery of effective vaccines.

Finally, the APA purports to be merely an advance agreement.[5] The decisive factor is, however, not the designation of the agreement but whether it already contains the essential features of a sales contract.[6] The APA contains obligations to produce and deliver the vaccine for AstraZeneca (using their 'best reasonable efforts' in the manufacturing) and obliges the Commission and the Participating Member States to acquire vaccines. The APA is thus a sales contract for the purposes of Article 1 (1) (a) CISG.[7]

2. Parties having their places of business in different Contracting States?

Pursuant to Article 1 (1) (a) CISG, the parties to the APA need to have places of business in different Contracting States. The first difficulty is thus to identify the parties to the APA.[8] According the APA, the parties are AstraZeneca AB and the European Commission "acting on behalf and in the name of the member states of the European Union". The APA goes on to state that "[t]he Commission, the Participating Member States and AstraZeneca may each be referred to herein individually as a **'Party'** and collectively as the **'Parties'**." Taken at face value, this would mean that, on the side of the buyers, both the European Commission and the Participating Member States are the parties to the contract in terms of Article 1 (1) (a) CISG. This understanding is in line with the APA's provisions that not only contain obligations of the Participating Member States but also of the Commission (see e.g. § 9.1 APA).

The parties to the APA need to have their respective places of business in different Contracting States, irrespective of where the goods are manufactured or whereto they are delivered.[9] As per the APA, AstraZeneca AB has its place of business in Sweden while the Commission has its place of business in Brussels. Both Belgium and Sweden are Contracting States. Questions arise only in relation to some of the 27 Participating Member States.[10] While most Participating Member States are Contracting States to the CISG, Ireland and Malta are not. Portugal recently acceded to the CISG but the Convention has not yet entered into force. Amongst the other Participating Member States, Sweden has its place of business in the same Contracting State as AstraZeneca, ie in Sweden,[11] and Finland and Denmark are Contracting States in general but have declared a

reservation under Article 94 CISG that exempts sales contracts between parties with their places of business in different Scandinavian States from the CISG's sphere of application.[12]According to the prevailing view, however, in cases of multiparty contracts, it is sufficient that one party on either side of the transaction have their respective places of business in different Contracting States for the whole contract to be governed by the CISG.[13] Given that the Commission and most of the Participating Member States have their respective places of business in Contracting States other than Sweden, Finland or Denmark, the CISG would be applicable. I have argued elsewhere that the prevailing view is too expansive and that, in cases of multiparty contracts, courts should apply Article 10 (a) CISG by analogy to the different parties (rather than merely to different places of business) on either side of the transaction.[14] Even if one were to follow this approach, the APA would arguably still fall within the sphere of application of the CISG, since the most closely connected place of business on the side of the buyers seems to be the place of business of the Commission that is acting on behalf and in the name of the Participating Member States. The Parties to the APA thus have their respective places of business in different Contracting States pursuant to Article 1 (1) (a) CISG.

However, even if one of the parties were considered to have its place of business in a non-Contracting State,[15] the Convention would still apply by virtue of Article 1 (1) (b) CISG since the Belgian conflict of laws rules, most notably Article 3 (1) Rome I-Regulation, would point to the law of Belgium as a Contracting State to the CISG.

3. Exclusion of the CISG by the Parties in the APA?

The Parties are free to exclude the CISG pursuant to Article 6 CISG. In their choice of law clause, the Parties have chosen the "laws of Belgium" to govern the APA. Although the question of whether the parties wished to exclude the Convention is to be decided on a case-by-case basis, it seems firmly established that, as a general matter, the choice of the law of a Contracting State does not amount to an exclusion of the Convention as the CISG forms part of the Contracting State's law.[16] Importantly, Belgian courts have repeatedly held that the choice of Belgian law includes the Convention. The choice of law clause would thus in principle not impede the application of the Convention by Belgian courts.

An analysis of the publicly available documents seems to suggest that Belgian

courts would indeed apply the CISG to the APA if a claim was brought.[17]

II. Some of the consequences of the CISG's application

The question one might ask now is: does it matter at all whether the CISG is applicable? After all, there are a lot of detailed provisions in the contract, for instance on force majeure (§ 18.7 APA) and termination for cause (§ 12.3 APA), that take precedence over the default rules laid down in the Convention (Article 6 CISG). I will briefly outline two of the many consequences of the application of the CISG to the APA.

1. Interpretation of contract

Many of the issues that are currently debated with respect to the contract are ultimately issues of interpretation of contract. For instance, the questions of whether AstraZeneca is only obliged to deliver vaccines that are produced in the EU or of how to apply the notion of 'best reasonable efforts' will turn on how different sections of the APA are interpreted. The relevant CISG provision here is Article 8 CISG, although the Convention's rules on interpretation may, to a certain extent, be modified by the APA's provisions, most notably by the clause on interpretation of the agreement (§ 18.1 APA) and the Entire Agreement-Clause (§ 18.9 APA). Pursuant to Article 8 (1), (2) CISG, the interpretation of the contract is controlled by a common intention of the parties and, lacking such intention, by the understanding of a reasonable third party.

2. Allocation of vaccines amongst several buyers in cases of shortage of supply

It was reported that AstraZeneca limited its delivery to the EU while fulfilling its obligations towards other third-party buyers such as the United Kingdom. The allocation of scarce goods amongst competing buyers has been debated in CISG scholarship and the prevailing opinion seems to point to a pro rata delivery to the different buyers in proportion to their respective contractual entitlements.[18] Of course, this default position may need to be reconsidered in light of the provisions of the APA, eg the default allocation between Participating Member States on a pro rata basis reflecting the size of their respective populations (§ 8.3 (b)) or AstraZeneca's warranties (§ 13 APA).

III. Conclusion

The above analysis may be surprising: Why should a Convention that is unknown even to many lawyers govern the arguably most important procurement contracts in recent European history? Conversely, however, one might ask which legal instrument should be more appropriate to govern an international sales contract between 29 Parties from 27 different States? More than forty years after its adoption, the CISG may face its first test on global centre stage – it will be up to the test!

[1] Peter Mankowski in: Mankowski (ed.), *Commercial Law* (C.H. Beck Hart Nomos, 2019), CISG, Art. 1, para. 31; Ulrich G. Schroeter, „Grenzfragen des Anwendungsbereichs und international einheitliche Auslegung des UN-Kaufrechts (CISG)", IHR 2019, 133, 134.

[2] Mankowski (n 1) Art. 1, para. 31.

[3] Schroeter (n 1) 134.

[4] Ulrich Magnus in: *Staudinger-BGB, CISG*, [2018], Art.2, para. 34; Schroeter (n 1) 134; Frank Spohnheimer in: Kröll, Mistelis & Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (2nd edn, C.H. Beck Hart Nomos 2018), Art. 2, para. 30.

[5] Till Maier-Lohmann, "EU-AstraZeneca contract – applicability of the CISG?".

[6] See Magnus (n 4) Art. 1, para. 13; Ingeborg Schwenzer & Pascal Hachem in: Schwenzer (ed.), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, C.H. Beck Oxford University Press 2016) Art. 1, para. 8.

[7] Maier-Lohmann (n 5); see, on the application of the CISG to purchase options, Magnus (n 4) Art. 1, para. 41; Schwenzer & Hachem (n 6) Art. 1, para. 10.

[8] Maier-Lohmann (n 5).

[9] See Clayton P. Gillette & Stephen D. Walt, *The UN Convention on Contracts for the International Sale of Goods – Theory and Practice* (2nd edn, Cambridge University Press 2016) 27; Magnus (n 4) Art. 1, para. 11, with further references.

[10] See APA, Schedule B.

[11] Maier-Lohmann (n 5), with the question of how this may affect the CISG's applicability.

[12] According to the prevailing opinion, the reservation is also to be applied in other Contracting States such as Belgium, Johnny Herre in: Kröll et al. (n 4) Art. 94, para. 5; Schwenzer & Hachem (n 6) Art. 94, para. 7.

[13] Schweizerisches Bundesgericht, Entscheid vom 28.5.2019 – 4A_543/2018, CISG-online no. 4463, IHR 2019, 236; Ulrich G. Schroeter, „Irrtumsanfechtung nach nationalem Recht und Anforderungen an Ausschlussvereinbarungen bei Anwendbarkeit des UN-Kaufrechts (CISG)", IHR 2019, 231, 232.

[14] Claude Witz & Ben Köhler, "Panorama Droit uniforme de la vente internationale de marchandises", Recueil Dalloz 2020, 1074, 1077.

[15] See, the question of Maier-Lohmann (n 5), hinting at AstraZeneca's presence in the UK.

[16] Maier-Lohmann (n 5); see, with further references, CISG Advisory Council Opinion no. 16: "Exclusion of the CISG under Article 6, Rapporteur: Lisa Spagnolo, Comment 4 (b) (i); Mankowski (n 5) Art. 6, para. 8.

[17] See also Maier-Lohmann (n 5): „the Convention's applicability cannot be excluded from the outset".

[18] Christoph Brunner in: Brunner & Gottlieb (eds), *Commentary on the UN Sales Law (CISG)* (Kluwer 2019) Art. 79, para. 12; Schwenzer in: Schwenzer (ed.) (n 6) Art. 79, para. 28; Ben Köhler, *Die Vorteils- und Gewinnherausgabe im CISG* (MohrSiebeck, forthcoming 2021) 225.