Changzhou Sinotype Technology Co., Ltd, Hague Service Convention and Judgment Enforcement in China

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Changzhou Sinotype Technology Co, Ltd. v. Rockefeller Technology Investments (Asia) VII is a recent case decided by the Supreme Court of California on April 2, 2020. The *certiorari* to the Supreme Court of the US was denied on 5 October 2020. It is a controversial case concerning the interpretation of the Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters of November 15, 1965 (the "Hague Service Convention") for service of process in China.

1. **Facts:**

Changzhou SinoType Technology Co. (SinoType) is based in China. Rockefeller Technology Investments (Asia) VII (Rockefeller) is an American investment firm. In February 2008, they signed a memorandum of understanding (MOU) which provided that:

> *"6. The parties shall provide notice in the English language to each other at the addresses set forth in the Agreement via Federal Express or similar courier, with copies via facsimile or email, and shall be deemed received 3 business days after deposit with the courier.*
>
> *7. The Parties hereby submit to the jurisdiction of the Federal and State courts in California and consent to service of process in accord with the notice provisions above.*
>
> *8. In the event of any disputes arising between the Parties to this Agreement, either Party may submit the dispute to the Judicial Arbitration & Mediation Service in Los Angeles for exclusive and final resolution pursuant to according*

> *to [sic] its streamlined procedures before a single arbitrator who shall have ten years judicial service at the appellate level, pursuant to California law, and who shall issue a written, reasoned award. The Parties shall share equally the cost of the arbitration. Disputes shall include failure of the Parties to come to Agreement as required by this Agreement in a timely fashion."*

Due to disputes between the parties, in February 2012, Rockefeller brought an arbitration against SinoType. SinoType was defaulted in the arbitration proceeding. According to the arbitrator, SinoType was served by email and Federal Express to the Chinese address listed for it in the MOU. In November 2013, the arbitrator found favorably for Rockefeller.

Instead of enforcing the award in China according to the New York Convention,[1] Rockefeller petitioned to confirm the award in State courts in California. Cal. Civ. Proc. Code § 1290.4(a) provides that a petition to confirm an arbitral award "shall be served in the manner provided in the arbitration agreement for the service of such petition and notice." Therefore, Rockefeller transmitted the summons and its petition to SinoType again through FedEx and email according to paragraph 7 of the MOU. SinoType did not appear and the award was confirmed in October 2014. SinoType then appeared specially and applied to set aside the judgment. It argued that the service of the Californian court proceeding did not comply with the Hague Service Convention; therefore, it had not been duly served and the judgment was void.

2. **Decision**

The California Supreme Court rejected SinoType's argument.

The Court discerned three principles for the application of the Hague Service Convention. First, the Convention applies only to "service of process in the technical sense" involving "a formal delivery of documents". The Court distinguished "service" and "notice" by referring to the Practical Handbook on the Operation of the Service Convention, published by the Permanent Bureau of the Hague Conference on Private International Law ('Handbook'). The Court cited that

> *"the Convention cannot—and does not—determine which documents need to be served. It is a matter for the lex fori to decide if a document needs to be served*

> *and which document needs to be served. Thus, if the law of the forum states that a notice is to be somehow directed to one or several addressee(s), without requiring service, the Convention does not have to be applied."[2]*

Second, the law of the sending forum (i.e. the law of California) should be applied to determine whether "there is occasion to transmit a judicial or extrajudicial document for service abroad."

Third, if formal service of process is required under the law of the sending forum, the Hague Convention must be complied for international transmission of service documents.

The court held that the parties have waived the formal service of process, so the Hague Service Convention was not applicable in this case.[3]

3. **Comments**

The *Changzhou Sinotype Technology Co, Ltd* has a number of interesting aspects and has been commented such as here, here and here.

First, the Hague Service Convention is widely considered as 'non-mandatory' but 'exclusive'.[4] Addressing the non-mandatory nature of the Convention, the Handbook states that "the Convention can not—and does not—determine which documents need to be served. It is a matter for the lex fori to decide if a document needs to be served and which document needs to be served."[5] However, this statement does not necessarily mean, *when judicial documents are indeed transmitted from a member state to another to charge a defendant with notice of a pending lawsuit*, a member state can opt out of the Convention by unilaterally excluding the transmission from the concept of service. *Volkswagen Aktiengesellschaft v Schlunk* decided by the Supreme Court of the US and *Segers and Rufa BV v. Mabanaft GmbH* decided by the Supreme Court of the Netherlands (Hoge Raad) are the two most important cases on the non-mandatory nature of the Convention. Both cases concentrate on which law should be applied to whether a document needed to be transmitted abroad for service.[6] However, *Rockefeller* is different because it is about which law should be applied to determine the concept of service when the transmission of judicial documents takes place in the soil of another member state. The Handbook provides that the basic criterion for the Convention to apply is "transmission abroad" and "place of

service is determining factor".[7] When judicial documents are physically transmitted in the soil of a member state, allowing another member state to unilaterally determine the concept of service in order to exclude the application of the Convention will inappropriately expand the non-mandatory character of the Convention. This will inevitably narrow the scope of the application of the Convention and damage the principle of reciprocity as the foundation of the Convention. The Hague Convention should be applied to *Rockefeller* because the summons and petitions were transmitted across border for service in China.

Second, as part of its accession to the Hague Convention, China expressly stated that it does not agree to service by mail. Indeed, the official PRC declarations and reservations to the Hague Convention make it clear that, with the limited exception of voluntary service on a foreign national living in China by his country's own embassy or consulate, the ***only*** acceptable method of service on China is through the Chinese Central Authority. Therefore, although China has recognized monetary judgments issued in the US according to the principle of reciprocity, the judgment of *Changzhou Sinotype Technology Co, Ltd* probably cannot be recognized and enforced in China.

The California Supreme Court decision has important implications. For Chinese parties who have assets outside of China, they should be more careful in drafting their contracts because *Changzhou Sinotype Technology Co, Ltd* shows that a US court may consider their agreement on service by post is a waiver of China's reservation under the Hague Service Convention. For US parties, if Chinese defendants only have assets in China for enforcement, *Changzhou Sinotype Technology Co, Ltd* is not a good case to follow because the judgment probably cannot be enforced in China.

[1] China is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 ("New York Convention").

[2] Practical Handbook on the Operation of the Service Convention (4th ed. 2016) par. 54, p. 23, fn. Omitted.

[3] The Court emphasized that their conclusions should be limited to Section 1290.4, subdivision (a): “Our conclusions as to California law are narrow. When parties agree to California arbitration, they consent to submit to the personal jurisdiction of California courts to enforce the agreement and any judgment under section 1293. When the agreement also specifies the manner in which the parties “shall be served,” consistent with section 1290.4, subdivision (a), that agreement supplants statutory service requirements and constitutes a waiver of formal service in favor of the agreed-upon method of notification. If an arbitration agreement fails to specify a method of service, the statutory service requirements of section 1290.4, subdivisions (b) or (c) would apply, and those statutory requirements *would* constitute formal service of process. We express no view with respect to service of process in other contexts.”

[4] Martin Davies et al., Nygh’s Conflict of Laws in Australia 36 (10th ed. 2020).

[5] Paragraph 54 of the Handbook.

[6] Ibid., paragraphs 31-45, and 47.

[7] Ibid., paragraph 16.

Chris Thomale on the EP Draft Report on Corporate Due Diligence

Professor Chris Thomale, University of Vienna and Roma Tre University, has kindly provided us with his thoughts on the recent EP Draft Report on corporate due diligence and corporate accountability.

In recent years, debate on Corporate Social Responsibility (CSR) has picked up speed, finally reaching the EU. The Draft Report first and foremost contains a

draft Directive on corporate due diligence and corporate accountability, which seems a logical step ahead from the status quo developed since 2014, which so far only consists of reporting obligations (see the Non-Financial Reporting Directive) and sector specific due diligence (see the Regulations on Timber and Conflict Minerals). The date itself speaks volumes: Precisely, to the very day (!), 8 years after the devastating fire in the factory of Ali Enterprises in Pakistan, which attracted much international attention through its follow-up litigation against the KiK company in Germany, the EU is taking the initiative to coordinate Member State national action plans as required under the Ruggie Principles. Much could be said about this new Directive in terms of company law and business law: The balancing exercise of on the one hand, assuring effective transparency of due diligence strategies and, on the other hand, avoiding overregulation in particular with regard to SMEs still appears somewhat rough and ready and hence should see some refinement in due course. The same applies to the private enforcement of those due diligence duties: By leaving the availability and degree of private enforcement entirely to the Member States (Art. 20), the Directive seems to gloss over one of the most pressing topics of comparative legal debate. The question of availability, conditions and extent of private liability imposed on parent companies for human rights violations committed in their value chains abroad, must be addressed by the EU eventually.

To this forum, however, the private international implications of the Draft Report would appear even more important:

As regards the conflicts of laws solution, the proposed Art. 6a Rome II Regulation seeks to make available, at the claimant's choice, several substantive laws as conveniently summarized by Geert van Calster in the terms of lex loci damni, lex loci delicti commissi, lex loci incorporationis and lex loci activitatis. Despite my continuous call for a choice between the first two de regulatione lata, to be reached by applying a purposive reading of Art. 4 para 1 and 3 Rome II (see JZ 2017 and ZGR 2017), the latter two, lex loci incorporationis and lex loci activitatis, seem very odd to me. *First*, they are supported, to my humble knowledge, by no existing Private International Law Code or judicial practice. *Second*, the lex loci incorporationis has no convincing rationale, why it should in any way be connected with the legal *relationship* as created by the corporate perpetrator's tort. Lex loci activitatis is excessively vague and will create threshold questions as well as legal uncertainty. *Third*, I would most emphatically

concur with Jan von Hein's opinion of a quadrupled choice being excessive and impractical in and of itself.

The solution proposed in terms of international jurisdiction, I will readily admit, looks puzzling to me. I fail to see, which cases the proposed Art. 8 para 5 Brussels Ibis Regulation is supposed to cover: As far as international jurisdiction is awarded to the courts of the "Member State where it has its domicile", this adds nothing to Art. 4, 63 Brussels Ibis Regulation. In fact, it will create unnecessary confusion as to whether this venue of general jurisdiction is good even when there is no "damage caused in a third country [which] can be imputed to a subsidiary or another undertaking with which the parent company has a business relationship." Thus, we are left with the courts of "a Member State […] in which [the undertaking] operates." As already pointed out, this term itself will trigger a lot of controversy regarding certain threshold issues. But there is more: Oftentimes this locus activitatis will coincide with the locus delicti commissi, e.g., when claimants want to rely on an omission of oversight by the European parent company. In that case, Art. 7 No. 2 Brussels Ibis Regulation offers a venue at the very place, i.e. both in terms of international and local jurisdiction, where that omission was committed. How does the new rule relate to the old one? And, again, which cases exactly are supposed to be captured by this provision? In my view, this is a phantom paragraph that, if anything, can only do harm to the fragile semantic and systematic architecture built up by the Brussels Ibis Regulation and CJEU case law.

The same seems true of the proposed Art. 26a Brussels Ibis: *First*, there is no evident need for such a *forum necessitatis*, rendering Member State courts competent to hear foreign-cubed cases with no connection to the EU whatsoever. To the contrary, recent development of the US Alien Torts Statute point in the opposite direction. *Second*, the EU might be overreaching its legislative jurisdiction: Brussels Ibis Regulation is based on the EU's competence to legislate on judicial cooperation in civil matters (Art. 81 para 2 TFEU). Such a global long-arm statute may not be covered by that competence, if it is legal at all under the public international confines incumbent upon civil jurisdiction (for details, see here). *Third*, it will be virtually anybody's guess what a court seized with a politicised and likely emotional case like the ones we are talking about will deem a "reasonable" Third State venue. In fact, this would be a forum non conveniens test with inverted colours, i.e. the very test the CJEU, in 2005, deemed

irreconcilable with the exigencies of foreseeability and legal certainty within the Brussels Ibis Regulation.

A step in the right direction, but nothing more – A critical note on the Draft Directive on mandatory Human Rights Due Diligence

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In April of 2020, EU Commissioner Didier Reynders announced plans for a legislative initiative that would introduce EU-wide mandatory human rights due diligence requirements for businesses. Only recently, Reynders reiterated his intentions during a conference regarding "Human Rights and Decent Work in Global Supply Chains" which was hosted by the German Federal Ministry of Labour and Social Affairs on the 6. October, and asseverated the launch of public consultations within the next few weeks. A draft report, which was prepared by MEP Lara Wolters (S&D) for the European Parliament Committee on Legal Affairs, illustrates what the prospective EU legal framework for corporate due diligence could potentially look like. The draft aims to facilitate access to legal remedies in cases of corporate human rights abuses by amending the Brussels *Ibis* Regulation as well as the Rome II Regulation. However, as these amendments have already inspired a comments by Geert van Calster, Giesela Rühl, and Jan von Hein, I won't delve into them once more. Instead, I will focus on the centre piece of the draft report – a proposal for a Directive that would establish mandatory

human rights due diligence obligations for businesses. If adopted, the Directive would embody a milestone for the international protection of human rights. As is, the timing could simply not be better, since the UN Guiding Principles (UNGPs) celebrate their 10th anniversary in 2021. The EU should take this opportunity to present John Ruggie, the author of the UNGPs, with a special legislative gift. However, I'm not entirely sure if Ruggie would actually enjoy this particular present, as the Directive has obvious flaws. The following passages aim to accentuate possible improvements, that would lead to the release of an appropriate legal framework next year. I will not address every detail but will rather focus on the issues I consider the most controversial – namely the scope of application and the question of effective enforcement.

General Comments

To begin with a disclaimer, I believe the task of drafting a legal document on the issue of business and human rights to be a huge challenge. Not only does one have to reconcile the many conflicting interests of business, politics, and civil society, moreover, it is an impossible task to find the correct degree of regulation for every company and situation. If the regulation is too weak, it does not help protect human rights, but only generates higher costs. If it is too strict, it runs the risk of companies withdrawing from developing and emerging markets, and – because free trade and investment ensure worldwide freedom, growth, and prosperity – of possibly inducing an even worse human rights situation. This being said, the current regulatory approach should first and foremost be recognised as a first step in the right direction.

I would also like to praise the idea of including environmental and governance risks in the due diligence standard (see Article 4(1)) because these issues are closely related to each other. Practically speaking, the conduct of companies is not only judged based on their human rights performance but rather holistically using ESG or PPP criteria. All the same, I am not sure whether or not this holistic approach will be accepted in the regulatory process: Putting human rights due diligence requirements into law is difficult enough, so maybe it would just be

easier to limit the proposal to human rights. Nonetheless, it is certainly worth a try.

Moving on to my criticism.

Firstly, the draft is supposed to be a Directive, not a Regulation. As such, it cannot impose any direct obligations on companies but must first be transposed into national law. However, the proposal contains a colourful mix of provisions, some of which are addressed to the Member States, while others impose direct obligations on companies. For example, Article 4(1) calls upon Member States to introduce due diligence obligations, whereas all other provisions of the same article directly address companies. In my eyes, this is inconsistent.

Secondly, the Directive uses definitions that diverge from those of the UNGPs. For example, the UNGPs define "due diligence" as a process whereby companies "identify, prevent, mitigate and account for" adverse human rights impacts. This seems very comprehensive, doesn't it? Due diligence, as stipulated in the Directive, goes beyond that by asking companies to identify, cease, prevent, mitigate, monitor, disclose, account for, address, and remediate human rights risks. Of course, one could argue that the UNGP is incomplete and the Directive fills its gaps, but I believe some of these "tasks" simply redundant. Of course, this is not a big deal by itself. But in my opinion, one should try to align the prospective mechanism with the UNGPs as much as possible, since the latter are the recognised international standard and its due diligence concept has already been adopted in various frameworks, such as the UN Global Compact, the OECD Guidelines for Multinational Enterprises, and the ISO 26000. An alignment with the UNGP, therefore, allows and promotes coherence within international policies.

Before turning to more specific issues, I would like to make one last general remark that goes in the same direction as the previous one. While the UNGP ask

companies to respect “at minimum” the “international recognized human rights”, meaning the international bill of rights (UDHR, ICCPR, ICESCR) and the ILO Core Labour Standards, the Directive requires companies to respect literally every human rights catalogue in existence. These include not only international human rights documents of the UN and the ILO, but also instruments that are not applicable in the EU, such as the African Charter of Human and People’s Rights, the American Convention of Human Rights, and (all?) “national constitutions and laws recognising or implementing human rights”. This benchmark neither guides companies nor can it be monitored effectively by the authorities. It is just too ill-defined to serve as a proper basis for civil liability claims or criminal sanctions and it will probably lower the political acceptance of the proposal.

Scope of Application

The scope of application is delineated in Article 2 of the Directive. It states that the Directive shall apply to all undertakings governed by the law of a Member State or established in the territory of the EU. It shall also apply to limited liability undertakings governed by the law of a non-Member State and not established within EU-territory if they operate in the internal market by selling goods or providing services. As one can see, the scope is conceivably broad, which gives rise to a number of questions.

First off, the Directive does not define the term “undertaking”. Given the factual connection, we could understand it in the same way as the Non-Financial Reporting Directive (2014/95/EU) does. However, an “undertaking” within the scope of the Non-Financial Reporting Directive refers to the provisions of the Accounting Directive (2013/34/EU), which has another purpose, i.e. investor and creditor protection, and is, therefore, restricted to certain types of limited liability companies. Such a narrow understanding would run counter to the purpose of the proposed Directive because it excludes partnerships and foreign companies. On the other hand, “undertaking” probably does mean something different than in EU competition law. There, the concept covers “any entity engaged in an economic activity, regardless of its legal status” and must be understood as

"designating an economic unit even if in law that economic unit consists of several persons, natural or legal" (see e.g. CJEU, Akzo Nobel, C-97/08 P, para 54 ff.). Under EU competition law, the concept is, therefore, not limited to legal entities, but also encompasses groups of companies (as "single economic units"). This concept of "undertaking", if applied to the Directive, would correspond with the term "business enterprises" as used in the UNGP (see the Interpretive Guide, Q. 17). However, it would ignore the fact that the parent company and its subsidiaries are distinct legal entities, and that the parent company's legal power to influence the activities of its subsidiaries may be limited under the applicable corporate law. It would also lead to follow-up questions regarding the precise legal requirements under which a corporate group would have to be included. Finally, non-economic activities and, hence, non-profit organisations would be excluded from the scope, which possibly leads to significant protection gaps (just think about FIFA, Oxfam, or WWF). In order to not jeopardise the objective – ensuring "harmonization, legal certainty and the securing of a level playing field" (see Recital 9 of the Directive) – the Directive should not leave the term "undertaking" open to interpretation by the Member States. A clear and comprehensive definition should definitely be included in the Directive, clarifying that "undertaking" refers to any legal entity (natural or legal person), that provide goods or services on the market, including non-profit services.

Secondly, the scope of application is not coherent for several reasons. One being that the chosen form of the proposal is a Directive, rather than a Regulation, thus providing for minimum harmonisation only. It is left to the Member States to lay down the specific rules that ensure companies carrying out proper human rights due diligence (Article 4(1)). This approach can lead to slightly diverging due diligence requirements within the EU. Hence, the question of which requirements a company must comply with arises. From a regulatory law's perspective alone, this question is not satisfactorily answered. According to Article 2(1), "the Directive" (i.e. the respective Member States' implementation acts) applies to any company which has its registered office in a Member State or is established in the EU. However, the two different connecting factors of Article 2(1) have no hierarchy, so a company must probably comply with the due diligence requirements of any Member State where it has an establishment (agency, branch, or office). Making matters worse (at least from the company's

perspective), in the event of a human rights lawsuit, due diligence would have to be characterised as a matter relating to non-contractual obligations and thus fall within the scope of the new Art. 6a Rome II. The provisions of this Article potentially require a company to comply with the due diligence obligations of three additional jurisdictions, namely lex loci damni, lex loci delicti commissi, and either the law of the country in which the parent company has its domicile (in this regard, I agree with Jan von Hein who proposes the use not of the company's domicile but its habitual residence as a connecting factor according to Article 23 Rome II) or, where it does not have a domicile (or habitual residence) in a Member State, the law of the country where it operates.

That leads us to the next set of questions: When does a company "operate" in a country? According to Article 2(2), the Directive applies to non-EU companies which are not established in the EU if they "operate" in the internal market by selling goods or providing services. But does that mean, for example, that a Chinese company selling goods to European customers over Amazon must comply fully with European due diligence requirements? And is Amazon, therefore, obliged to conduct a comprehensive human rights impact assessment for every retailer on its marketplace? Finally, are states obliged to impose fines and criminal sanctions (see Article 19) on Amazon or the Chinese seller if they do not meet the due diligence requirements, and if so, how? I believe that all this could potentially strain international trade relations and result in serious foreign policy conflicts.

Finally, and perhaps most controversially in regard to the scope, the requirements shall apply to all companies regardless of their size. While Article 2(3) allows the exemption of micro-enterprises, small companies with at least ten employees and a net turnover of EUR 700,000 or a balance sheet total of EUR 350,000 would have to comply fully with the new requirements. In contrast, the French duty of vigilance only applies to large stock corporations which, including their French subsidiaries and sub-subsidiaries, employ at least 5,000 employees, or including their worldwide subsidiaries and sub-subsidiaries, employ at least 10,000 employees. The Non-Financial Reporting Directive only applies to companies with at least 500 employees. And the due diligence law currently being discussed in

Germany, will with utmost certainty exempt companies with fewer than 500 employees from its scope and could perhaps even align itself with the French law's scope. Therefore, I doubt that the Member States will accept any direct legal obligations for their SMEs. Nonetheless, because the Directive requires companies to conduct value chain due diligence, SMEs will still be indirectly affected by the law.

Value Chain Due Diligence

Value chain due diligence, another controversial issue, is considered to be anything but an easy task by the Directive. To illustrate the dimensions: BMW has more than 12,000 suppliers, BASF even 70,000. And these are all just Tier 1 suppliers. Many, if not all, multinational companies probably do not even know how long and broad their value chain actually is. The Directive targets this problem by requiring companies to "make all reasonable efforts to identify subcontractors and suppliers in their entire value chain" (Article 4(5)). This task cannot be completed overnight but should not be impossible either. For example, VF Corporation, a multinational apparel and footwear company, with brands such as Eastpack, Napapijri, or The North Face in its portfolio, has already disclosed the (sub?)suppliers for some of its products and has announced their attempt to map the complete supply chain of its 140 products by 2021. BASF and BMW will probably need more time, but that shouldn't deter them from trying in the first place.

Mapping the complete supply chain is one thing; conducting extensive human rights impact assessments is another. Even if a company knows its chain, this does not yet mean that it comprehends every potential human rights risk linked to its remote business operations. And even if a potential human rights risk comes to its attention, the tasks of "ceasing, preventing, mitigating, monitoring, disclosing, accounting for, addressing, and remediating" (see Article 3) it is not yet fulfilled. These difficulties call up to consider limiting the obligation to conduct supply chain due diligence to Tier 1 suppliers. However, this would not only be a divergence from the UNGP (see Principle 13) but would also run counter to the

Directive's objective. In fact, limiting due diligence to Tier 1 suppliers makes it ridiculously easy to circumvent the requirements of the Directive by simply outsourcing procurement to a third party. Hence, the Directive takes a different approach by including the entire supply chain in the due diligence obligations while adjusting the required due diligence processes to the circumstances of the individual case. Accordingly, Article 2(8) states that "[u]ndertakings shall carry out value chain due diligence which is proportionate and commensurate to their specific circumstances, particularly their sector of activity, the size and length of their supply chain, the size of the undertaking, its capacity, resources and leverage". I consider this an adequate provision because it balances the interests of both companies and human rights subjects. However, as soon as it comes to enforcing it, it burdens the judge with a lot of responsibility.

Enforcement

The question of enforcement is of paramount importance. Without effective enforcement mechanisms, the law will be nothing more than a bureaucratic and toothless monster. We should, therefore, expect the Directive – being a political appeal to the EU Commission after all – to contain ambitious proposals for the effective implementation of human rights due diligence. Unfortunately, we were disappointed.

The Directive provides for three different ways to enforce its due diligence obligations. Firstly, the Directive requires companies to establish grievance mechanisms as low-threshold access to remedy (Articles 9 and 10). Secondly, the Directive introduces transparency and disclosure requirements. For example, companies should publish a due diligence strategy (Article 6(1)) which, inter alia, specifies identified human rights risks and indicates the policies and measures that the company intends to adopt in order to cease, prevent, or mitigate those risks (see Article 4(4)). Companies shall also publish concerns raised through their grievance mechanisms as well as remediation efforts, and regularly report on progress made in those instances (Article 9(4)). With these disclosure requirements, the Directive aims to enable the civil society (customers, investors

and activist shareholders, NGOs etc.) to enforce it. Thirdly, the Directive postulates public enforcement mechanisms. Each Member State shall designate one or more competent national authorities that will be responsible for the supervision of the application of the Directive (Article 14). The competent authorities shall have the power to investigate any concerns, making sure that companies comply with the due diligence obligations (Article 15). If the authority identifies shortcomings, it shall set the respective company a time limit to take remedial action. It may then, in case the company does not fulfil the respective order, impose penalties (especially penalty payments and fines, but also criminal sanctions, see Article 19). Where immediate action is necessary to prevent the occurrence of irreparable harm, the competent authorities may also order the adoption of interim measures, including the temporary suspension of business activities.

At first glance, public enforcement through inspections, interim measures, and penalties appear as quite convincing. However, the effectiveness of these mechanisms may be questioned, as demonstrated by the Wirecard scandal in Germany. Wirecard was Germany's largest payment service provider and part of the DAX stock market index from September 2018 to August 2020. In June of 2020, Wirecard filed for insolvency after it was revealed that the company had cooked its books and that EUR 1.9 billion were "missing". In 2015 and 2019, the Financial Times already reported on irregularities in the company's accounting practices. Until February 2019, the competent supervisory authority BaFin did not intervene, but only commissioned the FREP to review the falsified balance sheet, assigning only a single employee to do so. This took more than 16 months and did not yield any results before the insolvency application. While it is true that the Wirecard scandal is unique, it showcased that investigating malpractices of large multinational companies through a single employee is a crappy idea. Public enforcement mechanisms only work if the competent authority has sufficient financial and human resources to monitor all the enterprises covered by the Directive. So how much manpower does it need? Even if the Directive were to apply to companies with more than 500 employees, in Germany alone one would have to monitor more than 7.000 entities and their respective value chains. We would, therefore, need a whole division of public inspectors in a gigantic public agency. In my opinion, that sounds daunting. That does not mean that public

enforcement mechanisms are completely dispensable. As Ruggie used to say, there is no single silver bullet solution to business and human rights challenges. But it is also important to consider decentralised enforcement mechanisms such as civil liability. In contrast to public enforcement mechanisms, civil liability offers victims of human rights violations "access to effective remedy", which, according to Principle 25, is one of the main concerns of the UNGP.

So, what does the Directive say about civil liability? Just about nothing. Article 20 only states that "[t]he fact that an undertaking has carried out due diligence in compliance with the requirements set out in this Directive shall not absolve the undertaking of any civil liability which it may incur pursuant to national law." Alright, so there shouldn't be a safe harbour for companies. But that does not yet mean that companies are liable for human rights violations at all. And even if it were so, the conditions for asserting a civil claim can differ considerably between the jurisdictions of the Member States. The Directive fails to achieve EU-wide harmonisation on the issue of liability. That's not a level playing field. This problem could be avoided by passing an inclusive Regulation containing both rules concerning human rights due diligence and a uniform liability regime in case of violations of said rules. However, such an attempt would probably encounter political resistance from the Member States and result in an undesirable delay of the legislative process. A possible solution could be to only lay down minimum requirements for civil liability but to leave the ultimate drafting and implementation of liability rules to the Member States. Alternatively, the Directive could stipulate that the obligations set out in Articles 4 to 12 are intended to determine the due care without regard to the law applicable to non-contractual obligations. At least, both options would ensure that companies are liable for any violation of their human rights due diligence obligations. Is that too much to ask?

Forward to the Past: A Critical Note on the European Parliament's Approach to Artificial Intelligence in Private International Law

On 20 October 2020, the European Parliament adopted – with a large margin – a resolution with recommendations to the Commission on a civil liability regime for artificial intelligence (AI). The text of this resolution is available here; on other issues of AI that are part of a larger regulatory package, see the Parliament's press release here. The draft regulation (DR) proposed in the resolution is noteworthy from a choice-of-law perspective because it introduces new, specific conflicts rules for artificial intelligence (AI) (on the general issues of AI and PIL, see the conference report by Stefan Arnold here). With regard to substantive law, the draft regulation distinguishes between legally defined high-risk AI systems (Art. 4 DR) and other AI systems involving a lower risk (Art. 8 DR). For high-risk AI systems, the draft regulation would introduce an independent set of substantive rules providing for strict liability of the system's operator (Art. 4 DR). Further provisions deal with the amount of compensation (Art. 5 DR), the extent of compensation (Art. 6 DR) and the limitation period (Art. 7 DR). The spatial scope of those autonomous rules on strict liability for high-risk AI systems is determined by Article 2 DR, which reads as follows:

"1. This Regulation applies on the territory of the Union where a physical or virtual activity, device or process driven by an AI-system has caused harm or damage to the life, health, physical integrity of a natural person, to the property of a natural or legal person or has caused significant immaterial harm resulting in a verifiable economic loss.

2. Any agreement between an operator of an AI-system and a natural or legal person who suffers harm or damage because of the AI-system, which circumvents or limits the rights and obligations set out in this Regulation, concluded before or after the harm or damage occurred, shall be deemed

null and void as regards the rights and obligations laid down in this Regulation.

3. This Regulation is without prejudice to any additional liability claims resulting from contractual relationships, as well as from regulations on product liability, consumer protection, anti-discrimination, labour and environmental protection between the operator and the natural or legal person who suffered harm or damage because of the AI-system and that may be brought against the operator under Union or national law."

The unilateral conflicts rule found in Art. 2(1) DR would prevail over the Rome II Regulation on the law applicable to non-contractual relations pursuant to Art. 27 Rome II, which states that the Rome II Regulation shall not prejudice the application of provisions of EU law which, in relation to particular matters, lay down conflict-of-law rules relating to non-contractual obligations. Insofar, it must be noted that Art. 2(1) DR deviates considerably from the choice-of-law framework of Rome II. While Art. 2(1) DR reflects the lex loci damni approach enshrined as the general conflicts rule in the Rome II Regulation (Art. 4 Rome II), one must not overlook the fact that product liability is subject to a special conflicts rule, i.e. Art. 5 Rome II, which is considerably friendlier to the victim of a tort than the general conflicts rule. Recital 20 Rome II states that "[t]he conflict-of-law rule in matters of product liability should meet the objectives of fairly spreading the risks inherent in a modern high-technology society, protecting consumers' health, stimulating innovation, securing undistorted competition and facilitating trade". In order to achieve these purposes, the Rome II Regulation opts for a cascade of connections, starting with the law of the country in which the person sustaining the damage has his or her habitual residence when the damage occurred, provided that the product was marketed in that country (Art. 5(1)(a) Rome II). If that connection fails because the product was not marketed there, the law of the country in which the product was acquired governs, again provided that the product was marketed in this state (Art. 5(1)(b) Rome II). Finally, if that fails as well, the Regulation returns to the lex loci damni under Art. 5(1)(c) Rome II, if the product was marketed there. This cascade of connections is evidently influenced by the desire to protect the mobile consumer from being confronted with a law that may be purely accidental from his point of view because it has neither a relationship with the legal environment that he is accustomed to (his habitual residence) nor to the place where he decided to expose himself to the danger possibly emanating from the product (place of

acquisition). The rule reflects the presumption that most consumers will be affected by a defective product in the country where they are habitually resident. Insofar, Art. 2(1) DR is, in comparison with the Rome II Regulation, friendlier to the *operator* of a high-risk AI system than to the *consumer*.

Even if one limits the comparison between Art. 2(1) DR and the Rome II Regulation to the latter's general rule (Art. 4 Rome II), it is striking that the DR does not adopt familiar approaches that allow for deviating from a strict adherence to lex loci damni. Contrary to Art. 4(2) Rome II, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, Art. 2 DR does not allow to apply the law of that country. Moreover, an escape clause such as Art. 4(3) or Art. 5(2) Rome II is missing in Art. 2 DR. Finally yet importantly, Art. 2(2) DR bars any party autonomy with regard to strict liability for a high-risk AI system, which deviates strongly from the liberal approach found in Art. 14 Rome II.

Apart from the operator's strict liability for high-risk AI systems, the draft regulation would introduce a fault-based liability rule for other AI systems (Art. 8 DR). In principle, the spatial scope of the latter liability rule would also be determined by Art. 2 DR as already described. However, unlike the comprehensive set of rules on strict liability for high-risk systems, the draft regulation's model of fault-based liability is not completely autonomous. Rather, the latter type of liability contains important carve-outs regarding the amounts and the extent of compensation as well as the statute of limitations. Pursuant to Art. 9 DR, those issues are left to the domestic laws of the Member States. More precisely, Art. 9 DR provides that

"Civil liability claims brought in accordance with Article 8(1) shall be subject, in relation to limitation periods as well as the amounts and the extent of compensation, to the laws of the Member State in which the harm or damage occurred."

Thus, we find a lex loci damni approach with regard to fault-based liability as well. Again, all the modern approaches codified in the Rome II Regulation – the cascade of connecting factors for product liability claims, the common habitual residence rule, the escape clause, and party autonomy – are strikingly absent from the draft regulation.

Moreover, the draft regulation, in principle, limits its personal scope to the liability of the operator alone (as legally defined in Art. 3(d)–(f) DR). Recital 9 of the resolution explains that the European Parliament "[c]onsiders that the existing fault-based tort law of the Member States offers in most cases a sufficient level of protection for persons that suffer harm caused by an interfering third party like a hacker or for persons whose property is damaged by such a third party, as the interference regularly constitutes a fault-based action; notes that only for specific cases, including those where the third party is untraceable or impecunious, does the addition of liability rules to complement existing national tort law seem necessary". Thus, for third parties, the conflicts rules of Rome II would continue to apply.

At first impression, it seems rather strange that a regulation on a very modern technology – artificial intelligence – should deploy a conflicts approach that seems to have more in common with Joseph Beale's First Restatement of the 1930's than with the modern and differentiated set of conflicts rules codified by the EU itself at the beginning of the 21st century, i.e. the Rome II Regulation. While the European Parliament's resolution, in its usual introductory part, diligently enumerates all EU regulations and directives dealing with substantive issues of liability, the Rome II Regulation is not mentioned *once* in the Recitals. One wonders whether the members of Parliament were aware of the European Union's acquis in the field of private international law all. In sum, compared with Rome II, the conflicts approach of the draft regulation would be a regrettable step backwards. It remains to be seen how the relationship between the draft regulation and Rome II will be designed and fine-tuned in the further course of legislation.

Back to the Future – (Re-)Introducing the Principle of

Ubiquity for Business-related Human Rights Claims

On 11 September 2020, the European Parliament's Committee on Legal Affairs presented a draft report with recommendations to the Commission on corporate due diligence and corporate accountability. This report has already triggered first online comments by Geert van Calster and Giesela Rühl; the present contribution aims both at joining and at broadening this debate. The draft report consists of three proposals: first, a directive containing substantive rules on corporate due diligence and corporate accountability; secondly, amendments to the Brussels I*bis* Regulation that are designed to grant claimants from third states access to justice in the EU Member States; and thirdly, an amendment to the Rome II Regulation on the law applicable to non-contractual obligations. The latter measure would introduce a new Art. 6a Rome II, which codifies the so-called principle of ubiquity for business-related human rights claims, i.e. that plaintiffs are given the right to choose between various laws in force at places with which the tort in question is closely connected. While the basic conflicts rule remains the place of damage (*lex loci damni*) under Art. 4(1) Rome II, Art. 6a of the Rome II-draft will allow plaintiffs to opt for the law of the country in which the event giving rise to the damage occurred (the place of action or *lex loci delicti commissi* in the narrow sense), the law of the country in which the parent company has its domicile, or, where it does not have a domicile in a Member State, the law of the country where it operates.

The need for having a conflicts rule on the law applicable to business-related human rights claims derives from the fact that the draft report proposes a directive which only lays down minimum requirements for corporate due diligence concerning human rights, but which does not contain an independent set of rules on civil liability triggered by a violation of such standards. Thus, domestic corporate and tort laws will continue to play an important role in complementing the rules of the directive once they have been transposed into domestic law. In theory, this problem might be avoided by trying to pass a wholesale EU Regulation containing both rules on corporate due diligence as well as on related issues of civil liability. The EU has already passed the Regulations on Timber and Conflict Minerals, which deal with fairly specific issues and which

are limited in their scope. Taking into account, however, that both domestic corporate law and tort law are very intricate bodies of law, the EU legislature so far has, in the overwhelming number of cases, opted for the less intrusive and more flexible instrument of a directive (see, e.g., the Directive [EU] 2017/1132 relating to certain aspects of company law or the Product Liability Directive). The regulatory choice made in the draft report is thus fully consistent with established modes of EU legislation and the principle of subsidiarity.

The fundamental conflicts problem arising in cross-border human-rights litigation is well-known: Art 4(1) Rome II leads to the application of the law in force at the place of damage, which is frequently located in a third world country having a "weak legal system and enforcement (cf. Recital 2 of the draft directive). Starting a suit in such a forum frequently results not in a "home-court advantage" for plaintiffs, but rather diminishes their prospects of success. Insofar, suing a multinational corporation in the EU becomes attractive. While the hurdle of international jurisdiction can be surmounted rather easily in most cases, e.g. by suing the defendant at its general jurisdiction (Art. 4(1) Brussels I*bis*), a Member State court will nevertheless, under Art. 4(1) Rome II, apply a third state law. In the discussion about domestic due diligence laws, the widely preferred, if not the only viable solution so far has consisted in characterising such laws as being of an overriding mandatory nature within the meaning of Art. 16 Rome II, thus ensuring their application in spite of the otherwise applicable tort law. Seen from the national perspective, this is of course a sound approach because a Member State legislature simply has no mandate to tinker with the Rome II Regulation itself. Once the question of corporate due diligence and liability is answered at the EU level itself, however, there is no practical need for limiting the doctrinal discussion to a unilateral approach within the narrow framework of Art. 16 Rome II. In light of this fact, it is not surprising that the draft report explores another conflicts tool that has been developed in order to strengthen the protection of weaker parties or general interests, i.e. the principle of applying the law more favourable to a party in a given case. This approach, which nowadays mostly consists in letting the plaintiffs choose which law they consider more favourable to them, is well-known, for example, in the domestic PIL codes of Italy and Germany. In those countries, it even is the general rule in international tort law – a hardly convincing solution, because the victim is not the weaker party in every case (for an in-depth treatment of this issue, see here). Therefore, the more modern Rome II Regulation opted for a more differentiating approach: *lex loci*

damni is the general rule (Art. 4(1) Rome II), whereas the principle of ubiquity – i.e. that a tort may be located in more than one place – is only codified in groups of cases where a specific interest legitimises deviating from this rule: first, environmental damage (Art. 7 Rome II), and secondly, multi-state cases involving cartel damages (Art. 6(3) Rome II). Moreover, while Rome II is not applicable to violations of personality rights, the CJEU's case law on Art. 7(2) Brussels I*bis* has frequently been emulated in domestic conflicts law as well. In sum, the principle of ubiquity has always remained a part of the doctrinal toolbox of EU choice of law.

Insofar, the question must be answered as to whether the ubiquity approach has major advantages compared with the mandatory rule approach. The first factor in favour of applying the principle of ubiquity to business-related human rights claims as well is that it considerably reduces the need for the frequently difficult delineation between human rights violations (Art. 6a Rome II draft) and environmental damages (Art. 7 Rome II). Thus, intricate problems of characterisation and, if necessary, adaptation, are avoided at the outset. In addition, tortious human rights claims may also be rooted in a violation of ILO labour standards (see the definition of "human rights risk" in Art. 3 of the proposed directive). In light of the fact that Art. 8(1) Rome I favours the employee as well by providing for an alternative connection of contractual claims, having a *favor laboratoris* for labour-related human-rights claims fits into the normative framework of EU law, too.

A second advantage is that the ubiquity approach respects party autonomy (Art. 14 Rome II), whereas the parties could not derogate from a truly mandatory rule (Art. 16 Rome II). Thus, the ubiquity approach facilitates settlements, particularly in human rights cases that involve a large number of claimants.

Thirdly, claimants from the Global South are frequently compelled by the "weak legal systems and enforcement" of their home country to seek their fortune abroad rather than by weaknesses of their own substantive laws. In many former colonies, the Common Law or the French Code Napoléon are still in force (with modifications) and would in principle allow a successful suit based on a tortious claim. In this regard, giving claimants the option to sue a company in a Member State, while at the same time applying their own law if they so wish, avoids a paternalistic, neo-colonialist stance that rests on the implicit assumption that our Western laws are inherently better than those of developing countries.

A fourth factor arguing for giving plaintiffs the right to choose the applicable law is that the mandatory rule approach will frequently not sufficiently cover the risks inherent in cross-border litigation. In the German *Rana Plaza* case, the claims of the plaintiffs failed because, under the law of Pakistan, they were barred by the statute of limitations, which was extremely short (just one year) compared with German standards, particularly for a cross-border case (see OLG Hamm NJW 2019, 3527). In light of the CJEU case law on Art. 16 Rome II, however, German limitation periods could hardly be characterised as being of an overriding mandatory nature (ECLI:EU:C:2019:84). Under Art. 6a Rome II-draft, the claimants could simply have chosen German law to govern their case.

On the other hand, the ubiquity approach has been criticised as leading to an impairment of foreseeability because the question of the applicable law remains unanswered until the plaintiffs have made their choice. However, under the mandatory rule approach as well, foreseeability of the applicable law is not necessarily guaranteed. Only a Member State court would apply the due diligence standard as a part of its own *lex fori* (Art. 16 Rome II), but a company would always face the risk of being sued in a third state where it would not be ensured that a local court would take a foreign mandatory rule into account. Even among the Member States, such a courtoisie could not be taken for granted because, unlike Art. 9(3) Rome I, the Rome II Regulation contains no rule on the applicability of *foreign* overriding mandatory rules. One might argue that this concern is purely academic because the proposed directive would harmonise the standards of corporate due diligence in the EU anyway. Yet this would be a serious error because the proposal (Art. 1(1) subpara. 2) only establishes *minimum* requirements.

Thus, the advantages inherent in the ubiquity approach clearly outweigh those of the mandatory rule approach. Nevertheless, it is certainly true that there can be too much of a good thing. Allowing the plaintiffs to choose between *four* different laws is hardly practical and sets up a very dangerous liability trap for lawyers who would have to perform extremely difficult studies in comparative law before advising their clients on where to sue a defendant. Thus, the number of options should simply be reduced to two: either the place of damage or the habitual residence of the defendant.

The latter option should refer to the habitual residence of a corporation because this is the connecting factor commonly used in the Rome II Regulation (Art. 23

Rome II). There is no practical need to replace it with “domicile” which is a concept deployed in European civil *procedure* (Art. 63 Brussels I*bis*), but not in EU choice-of-law Regulations.

In sum, Article 6a Rome II-draft certainly leaves room for further refinement, but its basic approach rests on a sound doctrinal rationale and has major practical advantages compared with the mandatory rule model so far favoured in domestic due diligence laws. Thus, the EP draft deserves an appropriate and thorough consideration rather than a hasty judgment.

Chinese Court Holds Arbitral Award by Foreign Arbitration Institutions in China Enforceable

(This is another version of views for the recent Chinese case on international commercial arbitration provided by Chen Zhi, a PhD candidate in the University of Macau, Macau, PRC)

On 6 August 2020, Guangzhou People’s Intermediate Court (“Guangzhou court”) handed down a ruling on a rare case concerning the enforcement of an award rendered by International Commercial Court of Arbitration (“ICC”) in China,[1] which have given rise to heated debate by the legal community in China. This case was thought to be of great significance by many commentators because it could open the door for enforcement of arbitral awards issued by foreign institution with seat of proceeding in China, and demonstrates the opening-up trend for foreign legal service.
[1]Brentwood Industries Inc. v. Guangdong Faanlong Co, Ltd and Others 2015 Sui Zhong Min Si Fa Chu No.62?

Backgrounds of the facts
The plaintiff, Brentwood Industries, Inc. a USA based company, entered into a Sale and Purchase Agreement (“SPA”) along with a Supplementary Agreement

with three Chinese companies (collectively, “Respondents”) in April 2010. Article 16 of Sale and Purchase Agreement provided as follow:
Any dispute arising out of or in connection with this contract shall be settled by amicable negotiation between the parties. If such negotiations fail to resolve the dispute, the matter shall be referred to the Arbitration Commission?sic?of International Chamber of Commerce for arbitration at the project site in accordance with international practice. The award thereof shall be final and binding on the Parties. The costs of the arbitration shall be borne by the losing party, unless the Arbitration Commission?sic?decides otherwise. The language of the arbitration shall be bilingual, English and Chinese.

According to Article 3 of Supplementary Agreement, the project site was in Guangzhou.
On 29 May 2011, Brentwood submitted an application to Guangzhou Court, seeking for nullification of the arbitration clause in SPA. The Guangzhou Court handed down a judgement in early 2012 rejecting Brentwood’s application and confirming the validity of the arbitration clause.
Because the ICC does not have an office in Guangzhou, Brentwood subsequently commenced an arbitration proceeding before Arbitration Court of International Chamber of Commerce Hong Kong Office on 31 August of 2012. In the course of proceeding, all three respondents participate in the arbitration presenting their written defenses, and among them, one respondent also raised objection of jurisdiction of the ICC Court to handle the case. The ICC Court decided that the jurisdiction issue shall be addressed by a sole arbitrator after giving all parties equal opportunities to present their arguments. Hence, with the consensus of all parties, the ICC Court appointed a sole arbitrator on 10 January of 2013.

On 3rd April 2013, the case management conference was held in Guangzhou and each party appeared and agreed upon the Term of Reference. After exchange of written submissions and hearing (all attended by all parties), the arbitrator rendered Final Award with the reference No. 18929/CYK (the Final Award) on 17 March 2014.

Enforcement proceeding and judgment
Brentwood sought to enforce the Final Award before the Guangzhou Court, mainly on the basis of non-domestic award as prescribed in Article 1(1) of the “New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, which China is a signatory party (“New York Convention”). To

increase its options in obtaining enforcement, Brentwood also invoked the Arrangement on Reciprocal Enforcement of Arbitral Awards Between SPC and Hong Kong Special Administrative Region Government, in the event the court regards the award as Hong Kong award because conducted by the ICC Hong Kong Office.

The Respondents raised their own objections respectively, which can be summarized to four main points:

(1) non-domestic award under New York Convention was not applicable to the PRC because it had declared reservation on this matter;

(2) the arbitration clause was invalid because the ICC Court was not an arbitration institutions formed in accordance with Article 10 of the PRC Arbitration Law (revised in 2017);

(3) there are substantive errors in the Final Award;

(4) the arbitrator exceeded its power in the Final Award.

The Guangzhou Court ruled that the arbitration clause was valid and its validity had been confirmed in previous case by the same court. As for the nationality and enforceability of the Final Award, the court opined that it shall be regarded as a domestic award which can be enforced in accordance to Article 273 of Civil Procedural Law (revised in 2012), and stipulated that the awards by foreign-related arbitration institutions in China were enforceable before competent intermediated courts. Based on the above reasoning, the court stated that Brentwood had invoked the wrong legal basis, and it refused to amend its claim after the court asked clarification multiple times. Hence, the court concluded that the case shall be closed without enforcing the Final Award, while Brentwood had the right to file a new enforcement proceeding with correct legal basis.

China's Stance to domestic award by foreign institutions

There is no law directly applicable to awards issued by foreign institution with seat in China. The current legislation divided awards into three categories:

(1) domestic award rendered by Chinese arbitration institutions, which is governed by the Arbitration Law and Civil Procedure Law.

(2) foreign-related award made by Chinese institutions, which is enforceable under Article 273 of Civil Procedure Law.

(3) awards made offshore, which are governed by international conventions (i.e. New York Convention), judicial arrangements and Supreme People Court's judicial interpretation depending on the place of arbitration.

The problem arises mainly because of the conflict between Chinese law and international conventions. Unlike the common practice in international arbitration across the world, which decides the nationality of award and competent court for remedies thereof based on the seat of arbitration proceeding, Chinese law traditionally relied upon the nationality of arbitration institutions instead. The term “arbitration seat” was not embedded in the legislation framework until the SPC’s Interpretation on Application of Arbitration Law in 2006, and Supreme People’s Court only begins to decide the nationality of award based on the seat since 2009.[2]

Due to the lacuna in law, there is no remedy for such China seated foreign award, and therefore parties may face enormous legal risks: on one hand, such award cannot be enforced by any Chinese court if the losing party refuse to perform it voluntarily, on the other hand, the party who is dissatisfactory with the award or arbitration proceeding has no way to seek for annulment of the award.

In 2008, Ningbo Intermediate Court ruled on a controversial case concerning the enforcement of an ICC award rendered in Beijing,[3] granting enforcement by regarding the disputed award as “non-domestic” award as prescribed in the last sentence of the Article 1(1) of New York Convention, under which the member states may extend the effect of Convention to certain type of award which is made inside its territory while is not considered as domestic for various reasons. It shall be noted that the method used by Ningbo Court is problematic and have given rise to heavy criticisms,[4] because China had filed the reservation set out in Article 1(3) of New York Convection confirming that it will apply the Convention to the “recognition and enforcement of awards made only in the territory of another Contracting State”. In other words, said non-domestic award approach shouldn’t be use by Chinese courts.

With this respect, the approach employed in Brentwood seems less controversial because it does not concern a vague and debatable concept not included in current law. Moreover, by deciding the nationality of award based on the seat of arbitration instead of the base of institution, the Guangzhou Court is actually promoting the reconciliation of Chinese law with New York Convention.

[2]See Article 16 of SPC’s Interpretation on Several Questions in Application of Arbitration Law Fa Shi 2006 No.7, see also SPC’s Notice on Matters of Enforcing Hong Kong Award in Continental China Fa 2009 No. 415. As cited in Gao Xiaoli, The Courts Should Decide the Nationality of Arbitral Award by Seat Instead of Location of Arbitration Institution, People’s Judicature (Volume of Cases),

Vol.2017 No. 20, p. 71.
[3] Duferco S.A. v. Ningbo Art & Craft Import & Export Corp. 2008 Yong Zhong Jian No.8.
[4] Author Dong et al, Does Supreme People's Court's Decision Open the Door for Foreign Arbitration Institutions to Explore the Chinese Market?, available at http://arbitrationblog.kluwerarbitration.com/2014/07/15/does-supreme-peoples-courts-decision-open-the-door-for-foreign-arbitration-institutions-to-explore-the-chinese-market/

Comments

Brentwood decision does not appear out of thin air, but contrarily, it is in line with the opening-up trend in the judicial practice of commercial arbitration in China started in 2013. At that time, the Supreme People's Court ruled on the landmark Longlide case by confirming the validity of arbitration agreement which require arbitration proceeding conducted by foreign arbitration in China.[5]This stance has been followed and further developed by the First Intermediate Court of Shanghai in the recent Daesung Industrial Gases case,[6]. In this case, a clause providing "arbitration in Shanghai by Singapore International Arbitration Center" was under dispute by two respondents who alleged that foreign based institutions were prohibited from managing arbitration proceeding in China. However the court viewed this assertion as lacking of legal basis in Chinese law, and was contradictory to the developing trend of international commercial arbitration in the PRC.

In addition, local administrative authorities have shown firm stance and laudable attempt to promote the opening-up policy by attracting foreign institutions to carry out business in China. In late 2019, the justice department of Shanghai adopted new policies permitting foreign arbitration bodies to setup branch and carry out business in Lingang Free Trade Pilot Zone, and to set up detailed rules for registration and supervision in this regard.[7] On 28 August of 2020, the State Council agreed to a new proposal jointly by the Beijing government and the Ministry of Commerce on further opening up service industry, allowing world-renowned offshore arbitration institutions to run business in certain area of Beijing after registration at the Beijing justice department and the PRC Justice Ministry. This goes even further than Shanghai's policy by stipulating that competent authorities shall support preservations for arbitration proceeding, increasing the reach of foreign institution on local justice system.[8]

Nevertheless, there are still lots of works to be done for the landing of foreign

institutions:

First, as the lacuna in the law still exists, the judicial policy will continue to be "uncertain, fraught with difficulty and rapidly evolving" in this regard, as described by the High Court of Singapore. [9] Because Article 273 of Civil Procedural Law does not contain award by foreign institution stricto senso, and Guangzhou Court applied it only on analogous basis, this approach is more likely to be an expedient measure by taking into account surrounding circumstances (i.e. the validity of arbitration clause in dispute had been confirmed by the court itself, and all respondents had actively participated in the arbitration proceeding), instead of corollary of legal terms. Further, albeit the decision in Brentwood case is consistent with SPC's opening-up and arbitration friendly policy, no evidence shows its legal validity was endorsed by SPC like that in Longlide case. Therefore, it is doubtful whether this approach will be employed by other courts in future.

Second, even though the validity and enforceability issues have been settled, the loophole in law concerning auxiliary measures (i.e. interim relief, decision of jurisdiction, etc.) and annulment proceeding remains unsolved, which will probably be another obstruction for foreign institution to proceed with arbitration proceeding in Continental China. The above mentioned proposal by Beijing government provides a good example in this respect, while this problem can only be fully settled through revision of law.

Third, the strict limitations on the content of arbitration agreement remain unchanged. Arbitration agreements providing ad hoc proceeding is still invalid by virtue of the law. Moreover referring dispute without foreign-related factor to foreign institutions is also unacceptable under current judicial policy, even for exclusively foreign-owned enterprises. These limitations have been heavily criticized by legal practitioners and researchers over the years, however whilst the above issues have been formally lifted, the arbitration agreement shall be well drafted in terms of both arbitration institution and the seat of arbitration.

[5] Longlide Packaging Co. Ltd. v. BP Agnati S.R.L. (SPC Docket Number: 2013-MinTa Zi No.13).

[6] Daesung Industrial Gases Co., Ltd.&Another v. Praxair (China) Investment Co., Ltd 2020 Hu 01 Min Te No.83.

[7] See: Measures for the Establishment of Business Bodies by Offshore Arbitration Institutions in the New Lingang Area of the Pilot Free Trade Zone of China (Shanghai) available at

http://sfj.sh.gov.cn/xxgk_gfxwj/20191020/3fbcd61ef43147379c5841e28bdf6007.html
[8] See Article 8 of State Council's Instruction on the Work Plan for the Construction of a National Demonstration Zone for Expanding and Opening Up Beijing's Services Industry in a New Round of Comprehensive Pilot Project?available at http://www.gov.cn/zhengce/content/2020-09/07/content_5541291.htm?trs=1
[9] BNA v BNB [2019] SGHC 142 para.116.

Human rights in global supply chains: Do we need to amend the Rome II-Regulation?

Written by Giesela Rühl, Humboldt-University of Berlin

The protection of human rights in global supply chains has been high on the agenda of national legislatures for a number of years. Most recently, also the European Union has joined the bandwagon. After Commissioner for Justice Didier Reynders announced plans to prepare a European human rights to due diligence instrument in April 2020, the JURI Committee of the European Parliament has now published a Draft Report on corporate due diligence and corporate accountability. The Report contains a motion for a European Parliament Resolution and a Proposal for a Directive which will, if adopted, require European companies – and companies operating in Europe – to undertake broad mandatory human rights due diligence along the entire supply chain. Violations will result, among others, in a right of victims to claim damages.

The proposed Directive is remarkable because it amounts to the first attempt of the European legislature to establish cross-sectoral mandatory human rights due diligence obligations coupled with a mandatory civil liability regime. However,

from a private international law perspective the Draft Report attracts attention because it also contains proposals to change the Brussels Ia Regulation and the Rome II Regulation. In this post I will briefly discuss – and criticize – the proposed changes to the Rome II Regulation. For a discussion of the changes to the Brussels Ia Regulation I refer to *Geert Van Calster's* thoughts on GAVC.

Victims' unilateral right to choose the applicable law

The proposed change to the Rome II Regulation envisions the introduction of a new Article 6a entitled "Business-related human rights claims". Clearly modelled on Article 7 Rome II Regulation relating to environmental damage the proposal allows victims of human rights violations to choose the applicable law. However, unlike Article 7 Rome II Regulation, which limits the choice to the law of the place of injury and the law of the place of action, the proposed Article 6a allows victims of human rights violations to choose between potentially four different laws, namely

1) the law of the country in which the damage occurred, i.e. the law of the place of injury,

2) the law of the country in which the event giving rise to damage occurred, i.e. the law of the place of action,

3) the law of the country in which the parent company has its domicile or, where the parent company does not have a domicile in a Member State,

4) the law of the country where the parent company operates.

The rationale behind the proposed Article 6a Rome II Regulation is clear: The JURI Committee tries to make sure that the substantive provisions of the proposed Directive will actually apply – and not fall prey to Article 4(1) Rome II Regulation which, in typical supply chain cases, leads to application of the law of the host state in the Global South and, hence, non-EU law. By allowing victims to choose the applicable law, notably the law of the (European) parent company, the JURI Committee takes up recommendations that have been made in the literature over the past years.

However, a right to choose the applicable law *ex post* – while certainly good for victims – is conceptually ill-conceived because it results in legal uncertainty for all

companies that try to find out *ex ante* what their obligations are. Provisions like the proposed Article 6a Rome II Regulation, therefore, fundamentally impair the deterrence function of tort law and increase compliance costs for companies because they have to adjust their behaviour to four – potentially – different laws to avoid liability. It is for this reason that choice of law rules that allow one party to unilaterally choose the applicable law *ex post* have largely (even though not completely) fallen out of favour.

Alternative roads to European law

The proposed Article 6a Rome II Regulation, however, does not only fail to convince conceptually. It also fails to convince as regards to the purpose that it seeks to achieve. In fact, there are much better ways to ensure that European standards apply in supply chain cases. The most obvious way is to simply adopt the envisioned European instrument in the form of a Regulation. Its provisions would then have to be applied as international uniform law by all Member State courts – irrespective of the provisions of the Rome II Regulation. However, even if the European legislature prefers to adopt a European instrument in the form of a Directive – for political or competence reasons –, no change of the Rome II Regulation is necessary to ensure that it is applied throughout Europe. In fact, its provisions can simply be classified as overriding mandatory provisions in the meaning of Article 16 Rome II Regulation. The national provisions implementing the Directive will then apply irrespective of the otherwise applicable law.

In the light of the above, application of European human rights due diligence standards can be ensured without amending the Rome II Regulation. It is, therefore, recommended that the JURI Committee rethinks – and then abandons – the proposed Article 6a Rome II Regulation.

Note: This post is also available via the blog of the European Association of Private International Law.

Fraud and Foreign Judgments under Singapore law

A foreign judgment is generally not to be reviewed on the merits at the recognition and enforcement stage. Yet, an exception has always been carved out for fraud under the common law rules on the basis that 'fraud unravels everything' (*Lazarus Estates Ltd v Beasley* [1956] 1 QB 702, 712 *per* Lord Denning). Thus, English courts allow a judgment debtor to raise fraud at the recognition and enforcement stage even if no new evidence is adduced and fraud had been considered and dismissed by the court of origin (*Abouloff v Oppenheimer & Co* (1882) 10 QBD 295). This seeming anomaly with the prohibition against a review of the merits of a foreign judgment has been justified on the basis that where fraud is concerned, the court of origin is misled, not mistaken (*Abouloff*). The *Abouloff* rule has been much criticized, but successive courts have refused to depart from it (see also *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804, [116] (Privy Council)). Further, in *Takhar v Gracefield Developments Ltd* ([2019] UKSC 13, [2020] AC 450) which is a case on fraud and domestic judgments, the Supreme Court held that, generally, no requirement that the fraud could not have been uncovered with reasonable diligence in advance of obtaining the judgment would be imposed on the party seeking to set aside the judgment on the basis of fraud. As one of the oft-cited criticisms for the *Abouloff* rule is that it is out of step with how English courts deal with domestic judgments, *Takhar* may have the effect of further embedding the *Abouloff* rule.

In *Hong Pian Tee v Les Placements Germain Gauthier* ([2002] SGCA 17, [2002] 1 SLR(R) 515), the Singapore Court of Appeal criticized the *Abouloff* rule on the basis that it would encourage 'endless litigation' and 'judicial chauvinism' (at [27]-[28]). Drawing on Canadian and Australian authorities on fraud and foreign judgments, the Court held that insofar as intrinsic fraud (ie, fraud which goes to the merits of the case) is concerned, the foreign judgment may only be impeached where 'fresh evidence has come to light which reasonable diligence on the part of the defendant would not have uncovered and the fresh evidence would have been likely to make a difference in the eventual result of the case' (at [30]).

The current position on fraud and domestic judgments under Singapore law is

that the fresh evidence rule applies, albeit flexibly (see, eg, *Su Sh-Hsyu v Wee Yue Chew* [2007] SGCA 31, [2007] 3 SLR(R) 673). However, the Court of Appeal recently considered *Takhar* in a decision concerning a domestic adjudication determination (AD). Adjudication is available under the Building and Construction Industry Security of Payment Act (Cap 30B, Rev Ed 2006) and is a quick and inexpensive process to resolve payment disputes arising from building and construction contracts. In *Facade Solution Pte Ltd v Mero Asia Pacific Pte Ltd* ([2020] SGCA 88), the Court of Appeal held that an AD could be set aside on the ground of fraud. The party raising fraud would have to establish that the facts which were relied on by the adjudicator were false; that the other party either knew or ought reasonably to have known them to be false; and that the innocent party did not in fact, subjectively know or have actual knowledge of the true position throughout the adjudication proceedings (at [30]). The Court emphasised that 'there is no requirement on the innocent party to show that the evidence of fraud could not have been obtained or discovered with reasonable diligence during the adjudication proceeding' (at [31]). It cited *Takhar* and the High Court of Australia decision of *Clone Pty Ltd v Players Pty Ltd (in Liquidation)* [2018] HCA 12 with approval, the High Court of Australia having also rejected the reasonable diligence requirement in the context of a fraudulently obtained domestic judgment in the latter case.

The Court held (at [33]; emphasis added):

'Where it is established that an AD is infected by fraud, it is neither material nor relevant to inquire as to whether the innocent party could have discovered the truth by the exercise of reasonable diligence. A fraudulent party cannot be allowed to claim that he could have been caught had reasonable diligence been exercised, but because he was not caught, he should be allowed to get away with it. Such a view would bring the administration of justice into disrepute and it would be unprincipled to hold in effect that there is no sanction on the fraudulent party because he could have been found out earlier. Parties dealing with the *court*, and in the same vein, with the adjudicator in the adjudication of their disputes under the Act are expected to act with utmost probity.'

This passage suggests that the position on fraud and domestic judgments would change in the near future. It also raises the question whether the requirement of reasonable diligence in respect of intrinsic fraud and foreign judgments would survive for long. On the one hand, the Court in *Hong Pian Tee* had said that:

'There is no logical reason why a different rule should apply in relation to a foreign judgment' (at [27]) (ie, vis-à-vis a domestic judgment). The requirement of reasonable diligence has also been criticized on the basis that the court would be 'taking the side of the fraudster against his negligent opponent' (Briggs, 'Crossing the River by Feeling the Stones; Rethinking the Law on Foreign Judgments' (2005) 8 *SYBIL* 1, 21). On the other hand, there was a heavy emphasis on judicial comity in *Hong Pian Tee*. The Court observed that: 'It is … vitally important that no court of one jurisdiction should pass judgment on an issue already decided upon by a competent court of another jurisdiction …. It must be borne in mind that the enforcement forum is not an appellate tribunal vis-à-vis the foreign judgment' (at [28]).

It remains to be seen whether the Singapore Court of Appeal would in future resile from *Hong Pian Tee.* At least, the recent developments in the domestic context intimate that the point is arguable.

Brentwood Industries v. Guangdong Fa Anlong Machinery Equipment Co., Ltd. –A third way to enforce China-seated arbitral awards made by foreign arbitration institution

Brentwood Industries v. Guangdong Fa Anlong Machinery Equipment Co., Ltd.–A third way to enforce China-seated arbitral awards made by foreign arbitration institution

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Background

Nationality of an arbitral award marks the source of the legal validity of the award. Most countries generally divide the awards into domestic awards and foreign awards, and provide different requirements for their recognition and enforcement. It is a common practice to determine the nationality of the arbitral award by the seat of arbitration, which is the so-called "territorial theory". However, Chinese law adopts the "institutional theory", which raises controversy concerning the nationality of the arbitral award made by foreign arbitration institutions located in mainland. After long-term debate in practice, the *Brentwood* Case[1] finally confirmed that China-seated arbitral awards made by a foreign arbitration institution shall be regarded as Chinese foreign-related awards.

Fact and decision

Guangzhou Intermediate People's Court (hereinafter, "the court") delivered the judgment on *Brentwood Industries v. Guangdong Fa Anlong Machinery Equipment Co., Ltd.* on 6 Aug 2020[2]. After *DUFERCOS* Case[3], it is another landmark case that granted the enforcement of arbitral award made by a foreign arbitration institution in mainland China.

Brentwood Industries (hereinafter, "plaintiff") concluded a sales contract with three Chinese companies (hereinafter, "defendants") and agreed that "any dispute arising out of or in relation to the agreement shall be settled by amiable negotiation. If no agreement can be reached, each party shall refer their dispute to the International Commercial Chamber (hereinafter, "ICC") for arbitration at the site of the project in accordance with international practice." Due to the defendants' delay in payment, theplaintiff submitted their disputes to the ICC for arbitration. Since the "project" mentioned in the arbitration clause was the "Guangzhou Liede Sewage Treatment Plant Phase IV Project" listed in Article 3 of the "Supplementary Agreement", located in Guangzhou, China, the seat of arbitration shall be Guangzhou, China. After defendants refused to perform the award, which was in favor of plaintiff, plaintiff resorted to the court for recognition and enforcement.

Under current Chinese law, there are two possible ways to enforce the arbitral award made by a foreign arbitration institution in mainland China: (1) Classify such an award as a foreign award by the location of the arbitration institution under Art. 283 Civil Procedure Law of the People's Republic of China (hereinafter, "Civil Procedure Law"), which provides that an award made by a foreign arbitration institution must be recognised and enforced by a people's court pursuant to international treaties or the principle of reciprocity. (2) Classify such award as non-domestic award provided by the last sentence of Art. 1(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter, "New York Convention"), which provides that the convention shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

Besides the aforementioned choices, the court provided a third way. It ruled that the arbitral award made by a foreign arbitration institution in mainland China shall be regarded as Chinese foreign-related arbitral award. If a party fails to perform the arbitral award, the other party may refer to Art. 273 of the Civil Procedure Law for recognition and enforcement. Under Art. 273 of the Civil Procedure Law, after an award has been made by an arbitration institution of the People's Republic of China for foreign-related disputes, no party may file a lawsuit in a people's court. If a party fails to perform the arbitral award, the other party may apply for enforcement to the intermediate people's court of the place where the domicile of the person against whom an application is made is located or where the property is located.

Comment

Since *Long Lide* Case[4], Chinese court had affirmed the validity of arbitration agreements providing arbitration proceedings conducted by a foreign arbitration institution in mainland China. But in practice, arbitral awards based on these agreements still face the dilemma in recognition and enforcement. Because in China, different from international practice, the nationality of an arbitral award is determined by the location of the arbitration institution instead of the seat of arbitration, which is referred to as the "institutional theory". Under Art. 283 Civil Procedure Law, to recognise and enforce an award made by a foreign arbitration institution by a people's court, the people's court shall handle the matter

pursuant to international treaties concluded or acceded to by the People's Republic of China or in accordance with the principle of reciprocity. It impliedly refers to the New York Convention. However, concerning the determination of the nationality of the arbitral award, the New York Convention adopts the "territorial theory", which provides: "this Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought". The "territorial theory" adopted by the New York Convention collides with the provision of the Civil Procedure Law. The confusion on application of law has not yet been dispelled.

In response to the conflict between domestic legislation and international convention, judicial practice has shown inclination to convert towards the "territorial theory". For example, in *DMT* case[5], the nationality of an arbitral award made by ICC in Singapore was deemed Singapore rather than France. But in line with the "territorial theory", arbitral awards made in mainland China shall therefore be deemed as Chinese awards. Under the "reciprocity reservation" filed by China, the New York convention shall only be applied to the recognition and enforcement of awards made in the territory of another contracting state. Hence, the New York Convention shall not be applied to China-seated arbitral awards.

As early as *DUFERCOS* Case, the court defined the arbitral award made by the ICC in Beijing as non-domestic and therefore enforced it under the New York Convention. However, it failed to clarify what exactly constitutes a non-domestic award and how to interpret the reciprocity reservation. Originally, both non-domestic awards and reciprocity reservation were methods to encourage the acceptance and enlarge the application of the New York Convention. Conversely, their coexistence has impaired the effect of the New York Convention.

From this perspective, the Guangzhou Intermediate Court did find another way out by completely avoiding such conflict. The current Chinese law divides arbitral awards into: (1)domestic awards; (2)Chinese foreign-related awards; (3)foreign awards. Compared with domestic awards, Chinese foreign-related awards take into account the particularity of foreign-related factors, and the review standards for recognition and enforcement are less strict, subject to procedural review only. Compared with foreign awards, Chinese foreign-related awards can be set aside by Chinese court, which makes them under more restrictive supervision. That is reason why some argued that China-seated arbitral awards will be subject to

stricter supervision by Chinese court because there are more diversified judicial review channels.[6] Indeed, arbitral awards made by Chinese foreign-related arbitration institution are under triple supervision carried out by the seat of arbitration, the place of recognition and enforcement, and China. But it should be noted that when it comes to China-seated arbitral awards made by foreign arbitration institution, China, as the seat of arbitration, has the inherent power to review the arbitral award and set it aside. Moreover, according to Art. 70 and Art. 71 of the Chinese Arbitration Law, reasons for setting Chinese foreign-related arbitral awards aside do not exceed the scope of reasons for refusing recognition and enforcement of these awards. Therefore, they are not imposed with any additional burden by being regarded as Chinese foreign-related arbitral awards. Concerning the recognition and enforcement of Chinese foreign-related award, Art. 274 of the Civil Procedure Law provided a more tolerant standard than the New York Convention. Compared with Art. 5 of the New York Convention, the legal capacity of the parties to the agreement and the final effect of the award are no longer obstacles to recognition and enforcement. Since arbitral awards made by foreign arbitration institutions are regarded as Chinese foreign-related award, they are treated more favorably than foreign awards concerning recognition and enforcement. Left the legal problems behind, it showed China's effort to support the arbitration within the current legislative framework.

However, Chinese foreign-related arbitral award itself is a distorting product of the conflicts between "institutional theory" and "territorial theory". Application of Art. 273 of the Civil Procedure Law can only temporarily ease the tension. "Institutional theory" stipulated by Chinese law is an issue left over from history. "Foreign-related arbitration institutions" historically referred to the China International Economic and Trade Arbitration Commission (hereinafter referred to as CIETAC) and China Maritime Arbitration Commission (hereinafter referred to as CMAC). They were established respectively in 1954[7] and 1958[8]. At that time, only CIETAC and CMAC can accept foreign-related arbitration cases, while domestic arbitration institutions can only accept domestic arbitration cases. Accordingly, arbitral awards made by different arbitration institutions were divided into Chinese foreign-related arbitral awards and domestic arbitral awards. However, nowadays, such restrictions are extinct in practice. In 1996, the State Council of People's Republic of China issued a document stating that: "The main responsibility of the newly established arbitration institution is to accept domestic arbitration cases; if the parties to a foreign-related arbitration case voluntarily

choose the newly established arbitration institution for arbitration, the newly established arbitration commission can accept the case."[9] In fact, there is no longer division of foreign-related arbitration institution and domestic arbitration institution. Hence, the "institutional theory" can no longer meet the needs of practice. Under the "territorial theory", the arbitral awards are divided into domestic awards, non-domestic awards and foreign awards. We may wonder whether China would revoke the reciprocity reservation, the obstacle in recognition and enforcement of non-domestic arbitral awards, in the future. Would China-seated arbitral awards made by foreign arbitration institution be defined as non-domestic awards by then? To get out of the dilemma once for all, the responsibility remains on the shoulder of legislative body.

[1] https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=bded4e3c31b94ae8b42fac2500a68cc4

[2] https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=bded4e3c31b94ae8b42fac2500a68cc4

[3] https://www.pkulaw.com/specialtopic/61ffaac8076694efc8cef2ae6914b056bdfb.html

[4] https://www.pkulaw.com/chl/233828.html

[5] http://www.pkulaw.cn/fulltext_form.aspx/pay/fulltext_form.aspx?Db=chl&Gid=bd44ff4e02d033d0bdfb

[6]Good News or Bad News? Arbitral Awards Rendered in China by Foreign Arbitral Institutions Being Regarded as Chinese Awards available at: https://www.chinajusticeobserver.com/a/good-news-or-bad-news-arbitral-awards-rendered-in-china-by-foreign-arbitral-institutions-being-regarded-as-chinese-awards?from=timeline

[7] http://www.cietac.org/index.php?m=Page&a=index&id=2

[8]
http://www.cmac.org.cn/%E6%B5%B7%E4%BB%B2%E7%AE%80%E4%BB%8B

[9] http://cicc.court.gov.cn/html/1/218/62/83/440.html

Anti-Suit Injunction Issued in China: Comity, Pragmatism and Rule of Law

1 Anti-suit Injunctions issued in *Huawei v Conversant* and *Xiaomi v Intel Digital*

Chinese courts have issued two anti-suit injunctions recently in cross-border patent cases. The first is the Supreme Court's ruling in *Huawei v Conversant,* (2019) Zui Gao Fa Zhi Min Zhong 732, 733 and 734 No 1. (here) Huawei, a Chinese telecom giant brought an action on 25 Jan 2018 in Jiangsu Nanjing Intermediate Court requiring determination of FRAND royalty for all Chinese patents held by Conversant that is essential to 2G, 3G and 4G standard (standard essential patent or 'SEP'). Conversant brought another action in Düsseldorf, Germany on 20 April 2018 claiming Huawei infringed its German patents of the same patent family. On 16 Sept 2019, the Chinese court ordered a relatively low rate pursuant to Chinese standard and Conversant appealed to the Supreme Court on 18 Nov 2019. On 27 Aug 2020, the German Court held Huawei liable and approved the FRAND fee proposed by Conversant, which is 18.3 times of the rate determined by the Chinese court. Pursuant to Huawei's application, the Chinese Supreme Court restrained Conversant from applying the German court to

enforce the German judgment. The reasons include: the enforcement of the Düsseldorf judgment would have a negative impact on the case pending in Chinese court; an injunction is necessary to prevent irreparable harm to Huawei; the damage to Conversant by granting the injunction is significantly smaller than the damage to Huawei if not granting injunction; injunction will not harm public interest or international comity.

On 9 June 2020, Chinese company Xiaomi brought the proceedings in the Wuhan Intermediate Court requesting the determination of the global FRAND rate for SEPs held by the US company, Inter Digital. On 29 July, Intel Digital sued Xiaomi in Delhi High Court in India for infringement of Indian patents of the same patent family and asking for injunction. The Wuhan Intermediate Court ordered Inter Digital to stop the injunction application in India and prohibited Intel Digital from applying injunctions, applying for the determination of FRAND rate or enforcing junctions already received in any countries. (Xiaomi v Intel Digital (2020) E 01 Zhi Min Chu 169 No 1) The court provides reasons as follows: Inter Digital intentionally brought a conflicting action in India to hamper the Chinese proceedings; the Indian proceedings may lead to judgments irreconcilable to the Chinese one; an anti-suit injunction is necessary to prevent irreparable harm to Xiaomi's interests; an anti-suit injunction will not harm Intel Digital's legitimate interests or public interests.

2 Innovative Judicial 'Law Making' to Transplant Foreign Law

These two cases are interesting in that they open the door for the courts to 'make law' by providing Chinese legislation innovative interpretation. Chinese law does not explicitly permit the courts to issue anti-suit or anti-arbitration injunctions. Article 100 of the Civil Procedure Law of China permits Chinese courts to order or prohibit the respondent to do, or from doing, certain actions, if the respondent's behaviour may lead to the difficulty to enforce the judgment or cause other damages to the other party. But this act preservation provision was generally used only in the preservation of property, injunction of infringing actions, or other circumstances where the respondent's action may directly cause substantive harm to the applicant's personal or proprietary rights. It was never applied as the equivalent to anti-suit injunctions. The 'Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in Cases Involving the Review of Act Preservation in Intellectual Property Disputes' (No. 21 [2018] of the Supreme People's Court) enforced from 1 Jan 2019 did not mention the court's

competence to issue anti-suit injunction. These two judgments provide innovative interpretation to Art 100 by extending act preservation measures to cover anti-suit injunction.

It is important to note that anti-suit injunction is a controversial instrument used to combat the conflict of jurisdiction and forum shopping. It is not issued frequently or lightly. Instead, there is a high threshold to cross. In England, for example, an anti-suit injunction can be ordered only if the foreign proceedings are vexatious or oppressive and England is the natural forum, (*Airbus Industrie GIE v Patel* [1999] AC 119) or the foreign proceedings would breach a valid exclusive jurisdiction or arbitration clause between the parties. (*The "Angelic Grace"*, [1995] 1 Lloyd's Rep. 87) In both cases, neither courts justify China is a natural forum. Such justification may be more difficult in disputes concerning foreign patent due to the territoriality of patent. Furthermore, foreign proceedings are not oppressive just because they award higher rate to the parent holder, which is not properly handled either by the Chinese judgments. In the US, anti-suit injunction requires the parties and issues in foreign proceedings are 'the same' as the local ones. (*E. & J. Gallo Winery v. Andina Licores SA*, 446 F. 3d 984 (Court of Appeals, 9th Circuit 2006)) This barrier is difficult to lift in disputes concerning infringement of national patents in the same family. In FRAND cases, the court usually relies on the 'contractual umbrella over the patent' to avoid the difficulty brought by the territoriality of patent. (*Huawei v Samsung*, Case No. 3:16-cv-02787-WHO) Even if a contractual approach is adopted, the court still needs to ascertain the foreign litigation may frustrate a local policy, would be vexatious or oppressive, would threaten the U.S. court's in rem jurisdiction, or would prejudice other equitable considerations. (*Zapata Off-Shore Company v. Unterweser Reederei GMBH*, 428 F.2d 888 (United States Court of Appeals, Fifth Circuit, 1970))

The Chinese judgments show clear sign of borrowing the common law tests. In particular, the *Huawei v Conversant* judgment has high similarity with *Huawei v Samsung* judgment rendered by the California Northern District Court. The problem is the enjoined Düsseldorf judgment awarded FRAND rate instead of an unconditional injunction like the Shenzhen judgment. While enforcing a permanent injunction in the biggest market of Samsung may lead to a forced settlement which would make the US proceedings unnecessary or redundant, enforcing the court determined FRAND rate covering only one state may not have

the same effect on the Chinese proceedings. In particular, due to different standards to calculate the FRAND rate, a higher rate covering the German market is not oppressive and would not result in a forced settlement for Chinese FRAND rate. The Wuhan judgment focuses on the vexatious foreign proceedings brought in bad faith and abuse of process. The Wuhan court considers the Indian proceedings was brought to frustrate the pending proceedings before the Wuhan court. The judgment seems to follow the English trait. However, the court did not fully explain how an action purely covering Indian patents and concerning Indian market would affect the Chinese proceedings based on contract. It is also unclear whether Chinese court could award a global FRAND rate as the English court will do. Although in contrast to many other judgments, these two judgments show reasonable quality and laudable efforts of reasoning, reading in details may suggest the courts have learnt more in form instead of substance. The judicial transplant of very unfamiliar common law instruments into Chinese practice seems a little awkward and immature.

3 Comity, Pragmatism and Rule of Law

Anti-suit injunction is a controversial instrument in that it may infringe foreign judicial sovereignty and comity. Even if it is technically directed to the respondent not a foreign court, it makes judgment on the appropriateness of foreign proceedings, which, in normal circumstances, should be judged by the foreign court. No matter how indirect the interference is, an interference is there. Such an approach is fundamentally incompatible with Chinese jurisprudence and diplomatic policy, which emphasise on the principle of sovereign equality and non-interference. China usually considers parallel proceedings tolerable which concern the judicial sovereignty of two countries and each could continue jurisdiction pursuant to their domestic law. (Art 533 of Civil Procedural Law Judicial Interpretation by SPC) Adopting anti-suit injunction to tackle foreign parallel proceedings or related proceedings directly contradicts this provision.

Since Chinese courts would not deviate from the central government’s policy, the two judgments may be a sign to show China is gradually adjusting its international policy from self-restraint to zealous competition, at least in the high-tech area. This is consistent with China’s strategic plan to develop its high-tech industry and a series of reform is adopted to improve IP adjudication. It may imply consideration of diffused reciprocity, i.e. since some foreign courts may issue anti-suit injunction to obstruct Chinese proceedings, Chinese courts should

have the same power. It may also reflects China's increased confidence on its institutions led by its economic power. The transplant of anti-suit injunction cannot be deemed as admiring foreign law, but a pragmatic approach to use any tools available to achieve their aims. Since anti-suit injunctions may interfere a state's sovereignty, a foreign state may issue 'anti-anti-suit injunction' to block it. While injunction wars occur in high-tech cases, the final trump card should be a country's economic power. Since China is the biggest market for many telecom products, it would be the last market that most companies would give up, which would provide Chinese courts a privilege.

Finally, since anti-suit injunction is not included explicitly in Chinese law, there is no consistent test applying to it. The two judgments have applied different tests following the practice from different common law countries. It is also noted that the lack of relevant training in exercise discretion in issuing anti-suit injunctions or applying precedents leads to uncertainty and some discrepancy. Issuing anti-suit injunction is serious in that it may affect comity and international relation. It thus cannot be adopted randomly or flexibly by mirroring one or two foreign judgments. If China indeed wants to adopt anti-suit injunction, a test guidance should be provided. Anti-suit injunction needs to be issued under the rule of law.