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

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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.

Unwired Planet v Huawei [2020] UKSC 37: The UK Supreme Court Declared Competence to Determine Global FRAND

Licensing Rate

1. Background

The UK Supreme Court delivered the landmark judgment on Unwired Planet v Huawei and Conversant v Huawei and ZTE, [2020] UKSC 37 on 26 Aug 2020. In 2014, the US company Unwired Planet sued Huawei and other smartphone manufacturers for infringing its UK patents obtained from Ericsson. Some of these patents are essential to the 2G, 3G and 4G wireless telecommunication standards set by the European Telecommunications Standards Institute (ETSI), an international standards setting organization (SSO). Since Ericsson and Nokia are subject to various ETSI policies including patent policies, these policies continue to apply after they are acquired by Unwired Planet. The ETSI patent policy requires that holder of patents that are indispensable for the implementation of ETSI standards, referred to as standard essential patents (SEP) , must grant licence to implementers (such as the smartphone manufacturers) on "fair, reasonable and non-discriminatory " (FRABD) terms. In 2017, Canadian company Conversant filed similar lawsuits against Huawei and ZTE.

Unwired Planet and Conversant proposed to grant the worldwide licence, but Huawei proposed a UK only licence. Huawei believes that the UK litigation only concerns the UK licence and the licence fees paid to resolve disputes under the UK procedure should cover only British patents and not global patents. The UK Supreme Court upheld the High Court and Court of Appeal judgments, ruling that the FRAND licence will need to be global between large multinational companies. If Huawei refuses to pay the FRAND global licence rate determined by the court, the court will issue an injunction restraining Huawei's sale of infringing products in the UK.

2. Legal Issues

The Supreme Court answers five legal questions: 1. Does the English court have the power or jurisdiction without the parties' agreement to require the parties to enter into a global licence under a multinational patent portfolio? 2. Is England the proper forum for such a claim? 3. What is the meaning and effect of the non-discrimination component of the FRAND undertaking? 4. Does the CJEU's

decision in Huawei v ZTE mean that a SEP owner is entitled to seek an injunction restraining infringement of those SEPs in circumstances such as those of the Unwired case? 5. Should Court grant damages in lieu of an injunction?

Given our focus on private international law, this note only focuses on the private international law related issue, namely the English court's "long arm" jurisdiction to grant a global licence for dispute concerning the infringement of the UK patent and to issue an injunction if the global licence rate is not complied.

3. Territoriality of Patents and Globalisation of Telecommunication

Telecommunication industry faces the conflict between territoriality of patents and globalisation of telecom products and equipment. Products made in different countries should be able to communicate and inter-operate and keep operational in different jurisdictions. It would be unrealistic to require patent holders to defend their patent country by country. It is also harmful to the industry if SEP holders demand unreasonable licence fees and prohibit the use of its invention within a national jurisdiction. It is unreasonable for consumers if they cannot use their mobiles smartphones or other telecom devices when travel abroad. To reconcile the conflict, the ETSI policy requires the SEP holders to irrevocably license their SEP portfolios on fair, reasonable and non-discriminatory ("FRAND") terms. The policy reconciles conflict of interest between SEP holders and SEP implementers but does not, at least directly, resolve the conflict between territoriality and globalisation. In terms of the later, the industry practice shows that multinational SEP holders and implementers usually negotiate worldwide licences, bearing in mind that the SEP holders and implementers cannot test validity of each patent of the portfolio in each country. The licence rate is thus based on the understanding that some patents may be invalid in some countries.

The Supreme Court confirmed the territoriality principle. English court only has jurisdiction to determine validity and infringement of the UK patent. But the English court, based on the jurisdiction on the UK patent, has the competence to grant a global licence rate.

This judgment includes a few private international law matters. Firstly, the granting of global licence rate is a matter in relation to applicable law instead of jurisdiction from the private international law perspective. The case concerns the

infringement and validity of the UK patents and the English court has no problem to take jurisdiction. After ruling the defendant indeed infringed the valid UK patents the English court moved to remedy. The remedy to the infringement of SEPs is the grant of FRAND rate pursuant to the ETSI policy and industry practice. This, however, does not mean the English court directly treats business custom or ETSI policy as the governing law, which, standing alone, may not be able to acquire the status as other non-state norms under the current legal framework. (Rome I Regulation) They are applied pursuant to the contract principle. The judgment heavily relies on the ETSI policy, including its language and purpose. The court concludes that the ETSI policy creates a contractual arrangement between SEP holders and implementers and it is the intention of the policy to grant global licences for SEP portfolios taking into account of industry practices and the purpose. English courts' power to determine a global FRAND licence rate is inherently consistent with the ETSI policy, given there is no alternative international forum available. There is no much consideration of any choice of law rules, except the clarification that the ETSI policy was governed by French law. The court nevertheless does not consider the French law principle in interpreting contracts. Instead, the court naturally applies these non-state norms as part of the contract between the parties. Relying on contract to seise the power to determine the global rate helps the court to avoid the necessity to determine the validity of foreign patents of the same patent family.

The Supreme Court also considered the forum non conveniens in Conversant case (forum non conveniens was not plead in Unwired Planet). The court refused to accept that China would be the more appropriate alternative forum. Although 64% of Huawei's sales occur in China and only 1% in the UK and 60% of the ZTE's operating revenue in the first six months of 2017 was from China and only 0.07% from the UK, the Supreme court held that Chinese courts might not assume jurisdiction to determine the global FRAND term. It seems possible that if China, or any other country, which maybe the most important global market for the disputed patents, follows the UK approach to grant global licence for SEP portfolios, the English court may apply *forum non conveniens* to decline jurisdiction. In fact, Chinese law does not prevent a Chinese court from issuing licence with broader territorial coverage, though there is not yet any case on this matter. The "Working Guidance for Trial of SEP disputes by the Guangdong Province Higher People's Court (for Trial Implementation)" of 2018 provides in Art 16 that if the SEP holder or implementer unilaterally applies for the licence

covering areas exceeding the court's territory, and the other party does not expressly oppose or the opposition is unreasonable, the court could determine the applied licence rate with broader geographic coverage.

A more controversial point of the judgment is that the Supreme Court concludes that the ESTI policy would allow the court to issue injunction if the implementer refuses to pay the global licence rate. It is important to know that the ESTI policy does not expressly state such an effect. The UK court believes that an injunction would serve as a strong incentive for the patentee to accept a global licence. Damages, on the other hand, may encourage implementers to infringe patents until damages are applied and received in each jurisdiction. This conclusion is rather surprising as the injunction of SEPs in one jurisdiction may have the potential to disturb the whole telecommunication market for the given manufacturer. There is even argument that the purpose of ESTI is to prohibit injunction for SEPs (here; and here) The use of injunction may not "balance" the conflicting interests, but significantly favours the SEP holders to the disadvantage of the implementers

4. Forum Shopping and Conflict of Jurisdiction

It is important to note that regardless of the current geopolitical tension between the US and China, the UK Supreme Court's judgment should not be interpreted as one that has taken the political stance against China's High-Tech companies. (here) It upholds the judgments of the lower courts dated back to 2017. It is also consistent with the principle of judicial efficiency, protection of innovation and business efficacy. Although the final result protects the patent holders more than the implementers, it is hard to argue anything wrong in terms of policy. Furthermore, since Huawei and Unwired Planet had already settled and the rate set by the court had been paid, this judgment will not result in additional payment obligations or an injunction. (here) Finally, although Huawei lost this case as the implementer, Huawei is also the biggest 5G SEP holder. Pursuant to this judgment, although Huawei has been banned from the UK's 5G network, it can still require other 5G implementers for a global FRAND licence rate and apply for injunction upon a refusal.

If there is any political drive, it may be the intention to become an international litigation centre for patent disputes after Brexit. This judgment allows the English court jurisdiction to determine a global licence rate simply based on the

infringement of a UK patent, no matter how small the UK market is. The one-stop solution available in the English court would be particularly welcome by patent holders, especially SEP holders, who would no longer need to prove validity in each jurisdiction. This judgment also enhances the negotiation power of the SEP holders versus implementers. It is likely that more FRAND litigation would be brought to the UK.

On the other hand, some implementers may decide to give up the UK market, especially those with small market share in the UK. Some companies may decide to accept the injunction instead of paying high global licence rate. This may also suggest that the UK consumers may find it slower and more expensive to access to some high-tech products.

Furthermore, the Supreme Court's judgment does not depend on any unique domestic legislation but the ETSI contractual arrangement which applies to its members and the industry practice and custom. There is no barrier for other countries, including China, to follow the same reasoning. It is possible many other countries may, fully or partly, follow this judgment. If the courts of multiple countries can set the global FRAND rate and they apply different standards to set this rate, forum shopping and conflict of jurisdictions may be inevitable. Anti-suit injunction and anti-enforcement injunction may be more frequently applied and issued. The China Supreme Court IP Tribunal recently restrained the Conversant from applying the German court to enforce the German judgment in a related case, which awards Conversant the FRAND rate 18.3 times of the rate awarded by the Chinese courts on the infringement of the Chinese patents of the same family. This is called act preservation in China with the similar function as the anti-enforcement injunction. ((2019) Supreme Court IP Tribunal Final One of No 732, 733 and 734) This case suggests Chinese courts would be ready to issue the similar act preservation order or injunction to prevent the other party from enforcing a global FRAND rate set by the foreign court against the Chinese implementers, whether or not Chinese court could issue the global FRAND licence. The long term impact of the Unwired Planet v Huawei may be the severer competition in jurisdiction between different courts which may require reconciliation either through judicial cooperation arrangement or through the establishment of a global tribunal by the relevant standard setting organisation.

Ruth Bader Ginsburg and the Conflict of Laws

by Tobias Lutzi, University of Cologne

Since the sad news of her passing, lawyers all around the world have mourned the loss of one of the most iconic and influential members of the legal profession and a true champion of gender equality. Through her work as a scholar and a justice, just as much as through her personal struggles and achievements, Ruth Bader Ginsburg has inspired generations of lawyers.



On top of being a global icon of women's rights and a highly influential voice on a wide range of issues, Ginsburg has also expressed her views on questions relating to the interaction between different legal systems, both within the US and internationally, on several occasions. In fact, two of her early law-review articles focus entirely on two perennial problems of private international law.

Accordingly, readers of this blog may enjoy to go through some of her writings in this area, both judicial and extra-judicial, in an attempt to pay tribute to her work.

Jurisdiction

In one of Ginsburg's earliest publications, *The Competent Court in Private International Law: Some Observations on Current Views in the United States* (20 (1965) Rutgers Law Review 89), she retraces the approach to the adjudication of persons outside the forum state in US law by reference to both the common law and continental European approaches. She argues that

> *[t]he law in the United States has […] moved closer to the continental approach to the extent that a relationship between the defendant or the particular litigation and the forum, rather than personal service, may function as the basis of the court's adjudicatory authority.*

Ginsburg points out, though, that each approach includes 'exorbitant' bases of judicial competence, which 'provide for adjudication resulting in a personal judgment in cases in which there may be no connection of substance between the litigation and the forum state.'

> *Bases of judicial competence found in the internal laws of certain continental states, but generally considered undesirable in the international sphere, include competence founded exclusively on the nationality of the plaintiff – for example, Article 14 of the French Civil Code – and competence (to render a personal judgment) based on the mere presence of an asset of the defendant when the claim has no connection with that asset-a basis found in the procedural codes of Germany, Austria, and the Scandinavian countries. Equally undesirable in the view of continental jurists is the traditional Anglo-American rule that personal service within the territory of the forum confers adjudicatory authority upon a court even in the case of a defendant having no contact with the forum other than transience*

The 'most promising currently feasible remedy' for improper use of these 'internationally undesirable' bases of jurisdiction, she argues, is the doctrine of *forum non conveniens*.

> *At the least, a plaintiff who chooses such a forum should be required to show some reasonable justification for his institution of the action in the forum state rather than in a state with which the defendant or the res, act or event in suit is*

more significantly connected.

Applicable Law

As a Supreme Court justice, Ginsburg also had numerous opportunities to rule on conflicts between federal and state law.

In *Honda Motor Co v Oberg* (512 U.S. 415 (1994)), for instance, Ginsburg dissented from the Court's decision that an amendment to the Oregon Constitution that prevented review of a punitive-damage award violated the Due Process Clause of the federal Constitution, referring to other protections against excessive punitive-damage awards in Oregon law. In *BMW of North America, Inc v Gore* (517 US 559 (1996)), she dissented from another decision reviewing an allegedly excessive punitive-damages award and argued that the Court should 'resist unnecessary intrusion into an area dominantly of state concern.'

According to Paul Schiff Berman (who provided a much more complete account of Ginsburg's relevant writings than this post can offer in *Ruth Bader Ginsburg and the Interaction of Legal Systems* (in Dodson (ed), *The Legacy of Ruth Bader Ginsburg* (CUP 2015) 151)), her 'willingness to defer to state prerogatives in interpreting state law [...] may surprise those who focus on Justice Ginsburg's Fourteenth Amendment jurisprudence in gender-related cases.'

The same deference can also be found in some of her writings on the interplay between US law and other legal systems, though. In a speech to the International Academy of Comparative Law, she argued in favour of taking foreign and international experiences into account when interpreting US law and concluded:

> *Recognizing that forecasts are risky, I nonetheless believe the US Supreme Court will continue to accord "a decent Respect to the Opinions of [Human]kind" as a matter of comity and in a spirit of humility. Comity, because projects vital to our well being [...] require trust and cooperation of nations the world over. And humility because, in Justice O'Connor's words: "Other legal systems continue to innovate, to experiment, and to find . . . solutions to the new legal problems that arise each day, [solutions] from which we can learn and benefit."*

Recognition of Judgments

Going back to another one of Ginsburg's early publications, in *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments* (82 (1969) Harvard Law Review 798), Ginsburg discussed the problem of the hierarchy between conflicting judgments from different states and made a case for 'the unifying function of the full faith and credit clause'. As to whether anti-suit injunctions should also the clause, she expressed a more nuanced view, though, explaining that

> *[t]he current state of the law, permitting the injunction to issue but not compelling any deference outside the rendering state, may be the most reasonable compromise […].*
>
> *The thesis of this article, that the national full faith and credit policy should override the local interest of the enjoining state, would leave to the injunction a limited office. It would operate simply to notify the state in which litigation has been instituted of the enjoining state's appraisal of forum conveniens. That appraisal, if sound, might induce respect for the injunction as a matter of comity.*

Ginsburg had an opportunity to revisit a similar question about thirty years later, when delivering the opinion of the Court in *Baker v General Motor Corp* (522 US 222 (1998)). Although the Full Faith and Credit Clause was not subject to a public-policy exception (as held by the District Court), an injunction stipulated in settlement of a case in front of a Michigan court could not prevent a Missouri court from hearing a witness in completely unrelated proceedings:

> *Michigan lacks authority to control courts elsewhere by precluding them, in actions brought by strangers to the Michigan litigation, from determining for themselves what witnesses are competent to testify and what evidence is relevant and admissible in their search for the truth.*
>
> *This conclusion creates no general exception to the full faith and credit command, and surely does not permit a State to refuse to honor a sister state judgment based on the forum's choice of law or policy preferences. Rather, we simply recognize that, just as the mechanisms for enforcing a judgment do not travel with the judgment itself for purposes of Full Faith and Credit […] and just as one State's judgment cannot automatically transfer title to land in another State […] similarly the Michigan decree cannot determine evidentiary issues in*

> *a lawsuit brought by parties who were not subject to the jurisdiction of the Michigan court.*

According to Berman, this line of reasoning is testimony to Ginsburg's judicial vision of 'a system in which courts respect each other's authority and judgments.'

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The above selection has been created rather spontaneously and is evidently far from complete; please feel free to use the comment section to highlight other *interesting* parts of Justice Ginsburg's work.

The Bee That's Buzzing in Our Bonnets. Some Thoughts about Characterisation after the Advocate General's Wikingerhof Opinion

Last week, AG Saugmandsgaard Øe rendered his Opinion on Case C-59/19 Wikingerhof, which we first reported in this post by Krzysztof Pacula. The following post has been written by Michiel Poesen, PhD Candidate at KU Leuven, who has been so kind as to share with us some further thoughts on the underlying problem of characterisation.

Characterisation is not just a bee that has been buzzing in conflicts scholars' bonnets, as Forsyth observed in his 1998 LQR article. Given its central role in how we have been thinking about conflicts for over a century, it has pride of place in jurisprudence and literature. The *Wikingerhof v Booking.com* case (C-59/19) is

the latest addition to a long string of European cases concerning the characterisation of actions as 'matters relating to a contract' under Article 7(1) of the Brussels Ia Regulation n° 1215/2012.

Earlier this week, Krzysztof Pacula surveyed Advocate General Saugmandsgaard Øe's opinion in the *Wikingerhof* case on this blog (Geert Van Calster also wrote about the opinion on his blog). Readers can rely on their excellent analyses of the facts and the AG's legal analysis. This post has a different focus, though. The *Wikingerhof* case is indicative of a broader struggle with characterising claims that are in the grey area surrounding a contract. In this post, I would like to map briefly the meandering approaches to characterisation under the contract jurisdiction. Then I would like to sketch a conceptual framework that captures the key elements of characterisation.

1. Not All 'Matters Relating to a Contract' Are Created Equal

There are around 30 CJEU decisions concerning the phrase 'matters relating to a contract'. Three tests for characterisation are discernible in those decisions. In the first approach, characterisation depends on the nature of the legal basis relied on by the claimant. If a claim is based on an obligation freely assumed, then the claim is a matter relating to a contract to which the contract jurisdiction applies. Statutory, fiduciary, or tortious obligations arising due to the conclusion of a contract are also contractual obligations for private international law purposes. I will call this approach the 'cause of action test', because it centres on the nature of the cause of action pleaded by the claimant. In recent decisions, for example, the cause of action test has been used to characterise claims between third parties as contractual matters (C-337/17 *Feniks*, blogged here; C-772/17 *Reitbauer*, blogged here; joined cases C-274/16, C-447/16 and C-448/16 *flightright*).

The second approach to characterisation is to focus on the relationship between the litigants. From this standpoint, only claims between litigants who are bound by a contract can be characterised as 'matters relating to a contract'. This approach has for example been used in the *Handte* and *Réunion européenne* decisions. We will call it the 'privity test'. Sometimes scholars relied on this test to argue that all claims between contracting parties are to be characterised as matters relating to a contract.

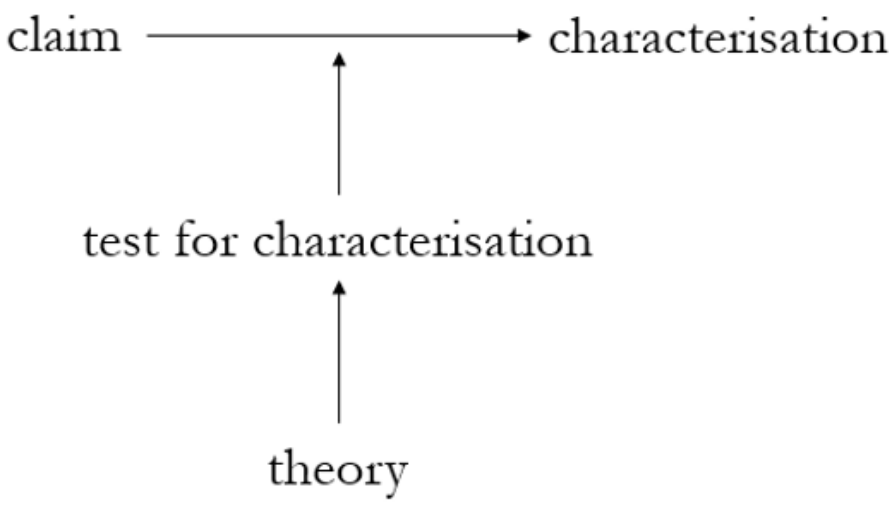
The third and final approach emphasises the nature of the facts underlying the claim brought by the claimant. This approach was first developed in the *Brogsitter* decision (C-548/12). However, it is predated by AG Jacob's opinions in the *Kalfelis* (C-189/87) and *Shearson Lehmann Hutton* (C-89/91) cases (which since have been eagerly picked up by the *Bundesgerichtshof* of Germany). The *Brogsitter* decision provided that a claim is a contractual matter if the defendant's allegedly wrongful behaviour can reasonably be regarded to be a breach of contract, which will be the case if the interpretation of the contract is indispensable to judge. I will dub this approach the 'factual breach test', since it directs attention to factual elements such as the defendant's behaviour and the indispensability to interpret the contract. It is plain to see that this is by far the most complicated of the three approaches to characterisation we discussed here (among other things because of the unclear relation between the different layers of which the test is composed, an issue that AG Saugmandsgaard Øe entertained in *Wikingerhof*, [69]–[70], and C-603/17 *Bosworth v Arcadia*).

The use in practice and literature of the three approaches laid out above demonstrates a tale of casuistry. Similar claims have been subjected to different approaches, and approaches developed in a specific setting have been applied to entirely different contexts. For example, a few CJEU decisions characterised claims between litigants who are not privy to consensual obligations as non-contractual in nature under the privity test. Other decisions characterised such claims as contractual in nature, applying the cause of action test. A similar dichotomy underlies the characterisation of claims between contracting parties. Initially, the CJEU jurisprudence applied the cause of action test, focussing on the nature of the legal basis relied on (see C-9/87 *Arcado v Haviland*). Later, the *Brogsitter* decision adopted the factual breach test, which shifted the focus to the nature of the facts underlying the claim.

It is difficult to understand why these divergences have occurred. How can they be explained?

2. The Theories Underlying Characterisation

A good way to start is to conceptualise characterisation further along the lines of this scheme:



Seen from the perspective of this scheme, the previous section described three 'tests for characterisation'. A 'test for characterisation' refers to the interpretational exercise that lays down the conditions under which a claim can be characterised as a matter relating to a contract. Each test elevates different elements of a 'claim' as relevant for the purpose of characterisation and disregards others. Those elements are the identity of the litigants, the claim's legal basis, or the dispute underlying the claim. As such, it concretises an idea about the broader purpose the contract jurisdiction should serve, which is called a 'theory'. The divergences among the tests for characterisation outlined above is explained by the reliance on different theories.

The AG's considerations about *Brogsitter* in the *Wikingerhof* opinion illustrate the scheme. The AG observed that the factual breach test is informed by what I will dub the 'natural forum theory'. According to that theory, the contract jurisdiction offers the most appropriate and hence natural forum for all claims that are remotely linked to a contract (for the sake of proximity and avoiding multiple jurisdictional openings over claims relating to the same contract). This theory explains why the factual breach test provides such a broad, hypothetical test for characterisation that captures all claims that could have been pleaded as a breach of contract. Opining against the use of the factual breach test and underlying natural forum theory, the AG suggested that the cause of action test be applied. He then integrated the indispensability to interpret the contract (originally a part of the factual breach test) into the cause of action test as a tool for determining whether a claim is based on contract ([90] et seq). Essentially, his approach was informed by what I will call the 'ring-fencing theory'. In contrast to the natural

forum theory, this theory presumes that the contract jurisdiction should be delineated strictly for two reasons. First, the contract jurisdiction is a special jurisdiction regime that cannot fulfil a broad role as a natural *forum contractus* ([84]–[85]). Second, a strict delineation promotes legal certainty and efficiency, since it does not require judges to engage in a broad, hypothetical analysis to determine whether a claim is contractual or not ([76]–[77]). The scheme was applied succinctly here, but the analysis could be fleshed out for example by integrating the role of the parallelism between the Brussels Ia and Rome I/II Regulations.

The scheme can be used to understand and evaluate the CJEU's eventual judgment in *Wikingerhof*. I hope that the decision will be a treasure trove that furthers our understanding of the mechanics of characterisation in EU private international law.

Facebook's further attempts to resist the jurisdiction of the Federal Court of Australia futile

Earlier in the year, Associate Professor Jeanne Huang reported on the Australian Information Commission's action against Facebook Inc in the Federal Court of Australia. In particular, Huang covered *Australian Information Commission v Facebook Inc* [2020] FCA 531, which concerned an ex parte application for service outside of the jurisdiction and an application for substituted service.

In April, Thawley J granted the Commission leave to serve the first respondent (Facebook Inc) in the United States, and the second respondent (Facebook Ireland Ltd) in the Republic of Ireland. Through orders for substituted service, the Commission was also granted leave to serve the relevant documents by email (with respect to Facebook Inc) and by mail (with respect to Facebook Ireland Ltd).

Facebook Inc applied to set aside the orders for its service in the United States, among other things. Facebook Ireland appeared at the hearing of Facebook Inc's application seeking equivalent orders, although it did not make submissions.

On 14 September, Thawley J refused that application: *Australian Information Commissioner v Facebook Inc (No 2)* [2020] FCA 1307. The foreign manifestations of Facebook are subject to the Federal Court's long-arm jurisdiction.

The decision involves an orthodox application of Australian procedure and private international law. The policy represented by the decision is best understood by brief consideration of the context for this litigation.

Background

The Australian Information Commission is Australia's 'independent national regulator for privacy and freedom of information', which promotes and upholds Australians' rights to access government-held information and to have their personal information protected.

Those legal rights are not as extensive as equivalent rights enjoyed in other places, like the European Union. Australian law offers minimal constitutional or statutory human rights protection at a federal level. Unlike other common law jurisdictions, Australian courts have been reluctant to recognise a right to privacy. Australians' 'privacy rights', in a positivist sense, exist within a rough patchwork of various domestic sources of law.

One of the few clear protections is the *Privacy Act 1988* (Cth), (*'Privacy Act'*), which (among other things) requires large-ish companies to deal with personal information in certain careful ways, consistent with the 'Australian Privacy Principles'.

In recent years, attitudes towards privacy and data protection seem to have changed within Australian society. To oversimplify: in some quarters at least, sympathies are becoming less American (ie, less concerned with 'free speech' above all else), and more European (ie, more concerned about privacy et al). If that description has any merit, then it would be due to events like the notorious Cambridge Analytica scandal, which is the focus of this litigation.

Various manifestations of Australian governments have responded to changing societal attitudes by initiating law reform inquiries. Notably, in 2019, the Australian Competition and Consumer Commission ('ACCC') delivered its final report on its *Digital Platforms Inquiry*, recommending that Australian law be reformed to better address 'the implications and consequences of the business models of digital platforms for competition, consumers, and society'. The broad-ranging inquiry considered overlapping issues in data protection, competition and consumer protection—including reform of the *Privacy Act*. The Australian Government agreed with the ACCC that Australian privacy laws ought to be strengthened 'to ensure they are fit for purpose in the digital age'. A theme of this report is that the foreign companies behind platforms like Facebook should be better regulated to serve the interests of Australian society.

Another important part of the context for this Facebook case is Australia's media environment. Australia's 'traditional' media companies—those that produce newspapers and television—are having a hard time. Their business models have been undercut by 'digital platforms' like Facebook and Google. Many such traditional media companies are owned by News Corp, the conglomerate driven by sometime-Australian Rupert Murdoch (who is responsible for Fox News. On behalf of Australia: sorry everyone). These companies enjoy tremendous power in the Australian political system. They have successfully lobbied the Australian government to force the foreign companies behind digital platforms like Google to pay Australian companies for news.

All of this is to say: now more than ever, there is regulatory appetite and political will in Australia to hold Facebook et al accountable.

Procedural history

Against that backdrop, in March 2020, the Commission commenced proceedings against each of the respondents in the Federal Court, alleging 'that the personal information of Australian Facebook users was disclosed to the *This is Your Digital Life* app for a purpose other than the purpose for which the information was collected, in breach of the *Privacy Act*'.

The Commissioner alleges that:

1. Facebook disclosed the users' personal information for a purpose other

than that for which it was collected, in breach Australian Privacy Principle ('APP') 6;
2. Facebook failed to take reasonable steps to protect the users' personal information from unauthorised disclosure in breach of APP 11.1(b); and
3. these breaches amounted to serious and/or repeated interferences with the privacy of the users, in contravention of s 13G of the *Privacy Act*.

In April, the service orders reported by Huang were made. Facebook Inc and Facebook Ireland were then served outside of the jurisdiction.

Facebook's challenge to the orders for service outside of the jurisdiction: 'no prima facie case'

Facebook Inc contended that service should be set aside because the Court should not be satisfied that there was a prima facie case for the relief claimed by the Commissioner as required by r 10.43(4)(c) of the *Federal Court Rules 2011* (Cth).

The Court summarised the principles applicable to setting aside an order as to service as follows (at [23]):

- An application for an order discharging an earlier order granting leave to serve out of the jurisdiction, or for an order setting aside such service, is in the nature of a review by way of rehearing of the original decision to grant leave to serve out of the jurisdiction.
- It is open to the party who sought and obtained an order for service out of the jurisdiction to adduce additional evidence, and make additional submissions.
- The onus remains on the applicant in the proceedings to satisfy the Court in light of the material relied upon, including any additional material relied upon, that leave ought to have been granted.

Facebook Inc accepted that although demonstrating a prima facie case is 'not particularly onerous', the Commissioner had failed to establish an arguable case; she had merely posited 'inferences' which did not reasonably arise from the material tendered: [28]-[29].

As noted above, the underlying 'case' that was the subject of that argument is in relation to the Cambridge Analytica scandal and alleged breaches of the *Privacy Act*.

The case thus turns on application of an Australian statute to seemingly cross-border circumstances. Rather than having regard to forum choice-of-law rules, the parties seemingly accepted that the case turns on statutory interpretation. The extra-territorial application of the *Privacy Act* depends on an organisation having an 'Australian Link'. Section 5B(3) relevantly provides:

> *(3) An organisation or small business operator also has an Australian link if all of the following apply: …*
>
> *(b) the organisation or operator carries on business in Australia or an external Territory;*
>
> *(c) the personal information was collected or held by the organisation or operator in Australia or an external Territory, either before or at the time of the act or practice.*

Facebook Inc argued that the Commissioner failed to establish a prima facie case that, at the relevant time, Facebook Inc:

- carried on business in Australia within the meaning of s 5B(3)(b) of the *Privacy Act*; or
- collected or held personal information in Australia within the meaning of s 5B(3)(c) of the *Privacy Act*.

Facebook Inc carries on business in Australia

In *Tiger Yacht Management Ltd v Morris* (2019) 268 FCR 548 (noted here), the Full Court of the Federal Court of Australia 'observed that the expression "carrying on business" may have a different meaning in different contexts and that, where used to ensure jurisdictional nexus, the meaning will be informed by the requirement for there to be sufficient connection with the country asserting jurisdiction': [40].

The Court considered the statutory context of the Commissioner's case, being the application of Australian privacy laws to foreign entities. The Court had regard to the objects of the *Privacy Act*, which include promotion of the protection of privacy of individuals and responsible and transparent handling of personal information by entities: *Privacy Act* s 2A(b), (d). Whether Facebook Inc 'carries on business in Australia' for the purposes of the *Privacy Act* is a factual inquiry that should be determined with reference to those broader statutory purposes.

The Commissioner advanced several arguments in support of the proposition that Facebook Inc carries on business in Australia.

One argument advanced by the Commissioner was that Facebook Inc had financial control of foreign subsidiaries carrying on business in Australia, suggesting that the parent company was carrying on business in Australia. (Cf *Tiger Yacht*, above.) That argument was rejected: [155].

Another argument turned on agency more explicitly. Essentially, the Commissioner sought to pierce the corporate veil by arguing Facebook is 'a single worldwide business operated by multiple entities': [75]. Those entities contract with one another so that different aspects of the worldwide business are attributed to different entities, but the court ought to pierce the jurisdictional veil. The Commissioner submitted that 'the performance pursuant to the contractual arrangements by Facebook Inc of functions necessary for Facebook Ireland to provide the Facebook service…, including in Australia, indicated that Facebook Ireland was a convenient entity through which Facebook Inc carried on business in Australia during the relevant period': [115].

Facebook Inc appealed to cases like *Adams v Cape Industries* [1990] 1 Ch 433, where the English Court of Appeal explained that, typically, a company would not be considered to be carrying on business within the forum unless: '(a) it has a fixed place of business of its own in this country from which it has carried on business through servants or agents, or (b) it has had a representative here who has had the power to bind it by contract and who has carried on business at or from a fixed place of business in this country' (at 529). (See also *Lucasfilm Ltd v Ainsworth* [2008] EWHC 1878 (Ch).)

Ultimately, the Court was not satisfied that Facebook Inc carried on business within Australia on the basis that Facebook Ireland conducted Facebook Inc's

business in Australia: [117]. More accurately, the Commissioner had not established a prima facie case to that effect.

But the Commissioner *had* established a prima facie case that Facebook Inc *directly* carried on business within Australia.

Facebook Inc is responsible for various 'processing operations' in relation to the Facebook platform, which includes responsibility for installing, operating and removing cookies on the devices of Australian users. Facebook Inc appealed to case authority to argue that this activity did not amount to carrying on business in Australia. The Court thus considered cases like *Dow Jones v Gutnick* (2002) 210 CLR 575 and *Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190, which each addressed the territorial aspects of businesses that depend on communication on the internet.

The Court rejected Facebook Inc's argument that 'installing' cookies is to be regarding as equivalent to uploading and downloading a document (cf *Gutnick*). At the interlocutory stage of the proceeding, there was not enough evidence to accept Facebook Inc's claim; but there was enough to draw the inference that the installation and operation of cookies within Australia involves activity in Australia.

The Court concluded: 'the Commissioner has discharged her onus of establishing that it is arguable, and the inference is open to be drawn, that some of the data processing activities carried on by Facebook Inc can be regarded as having occurred in Australia, notwithstanding that the evidence did not establish that any employee of Facebook Inc was physically located in Australia': [137]. It was thus concluded that the Commissioner had established a prima facie case that Facebook Inc carried on business within Australia: [156]. (Cf the reasoning of Canadian courts that led to *Google Inc v Equustek Solutions Inc* [2017] 1 SCR 824, noted here.)

Facebook Inc collected or held personal information in Australia

The Court was assisted by responses provided by Facebook Inc to questions of the Commissioner made pursuant to her statutory powers of investigation. One question concerned the location and ownership of servers used to provide the

Facebook service. Although Facebook Inc's answer was somewhat equivocal, it suggested that the platform depends on servers located in Australia (including network equipment and caching servers) to improve connection and delivery time. This was enough for the Court to make the relevant inference as to collection and holding of personal information within Australia: [170].

The Court had regard to the purposes manifested by the Explanatory Memorandum to the *Privacy Act* in concluding that 'the fact that the personal information is uploaded in Australia and stored on Australian users' devices and browser caches and on caching servers arguably owned or operated by Facebook Inc in Australia, it is arguable that Facebook Inc collected the personal information in Australia': [185].

Combined with the findings as to carrying on business, this was enough to establish a prima facie case that the extra-territorial application of the *Privacy Act* was engaged. The Court's orders as to service were not disturbed.

Concluding remarks

The interlocutory character of this decision should be emphasised. The Court's findings on the territorial aspects of 'carrying on business' and data collection were each subject to the 'prima facie case' qualification. These are issues of fact; the Court may find differently after a thorough ventilation of evidence yet to be adduced.

This decision is not anomalous. The assertion of long-arm jurisdiction over Facebook Inc indicates Australian courts' increasing willingness to pierce the jurisdictional veil for pragmatic ends. In my experience, most Australian lawyers do not really care about the multilateralist ideals of many private international law enthusiasts. The text of the Australian statutes that engage the case before them is paramount. Lawyers are directed to consider the text of the statute in light of its context and purpose: *Australian Securities and Investments Commission v King* (2020) 94 ALJR 293, [23]; *Acts Interpretation Act 1901* (Cth) s 15AA. Essentially, in the case of a forum statute with putative extraterritorial operation, a form of interest analysis is mandated.

I am OK with this. If the policy of the *Privacy Act* is to have any chance of success, it depends on its application to internet intermediaries comprised of corporate

groups with operations outside of Australia. As an island continent in a technologically interconnected world, the policy of Australian substantive law will increasingly determine the policy of Australian private international law.

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US Federal Rules of Civil Procedure, the US Supreme Court and the Hague Service Convention: is reform necessary?

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The USA is a Contracting Party to the 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (the "Hague Service Convention", which it ratified in 1967. The Hague Service Convention is a multilateral treaty whose purpose is to simplify, standardize, and generally expedite the process of serving documents abroad, thus it plays a central role in international litigation. The Hague Service Convention specifies several allowed methods of service to provide due notice of a proceeding in one Contracting State to a party in another.
The primary method (and main alternative to service through diplomatic channels) — laid out in Articles 2 to 7 of the Convention — is via a designated Central Authority in each Contracting State. When a Central Authority receives a request for service, it must serve the documents or arrange for their service. This method is usually faster than service through diplomatic and consular agents (which remain available under Article 8 of the Convention), along with the possibility that two or more Contracting States may agree to permit channels of

transmission of judicial documents other than those provided for in the Convention.

Further, at Article 19 the Convention clarifies that it does not preempt any internal laws of its Contracting States that permit service from abroad via methods not otherwise allowed by the Convention. Thus, it could be argued that a sort of favor summonitio (borrowed by the principle of favor contractus) permeates the entire instrument, in that the Convention strikes a fair balance between the formal notice of a proceeding and the validity of an effective summon in favor of the latter, to allow for swift international litigations. Indeed, another fast method of service expressly approved by the Convention is through postal channels, unless the receiving State objects by making a reservation to Article 10(a) of the Convention. This is considered the majority view shared by multiple jurisdictions. However, in the United States different interpretations existed on this point, because Article 10(a) of the Convention does not expressly refer to "service" of judicial documents (it instead uses the term "send"). Consequently, it was an unsettled question whether Article 10(a) encompassed sending documents by postal channels abroad for the purpose of service, until the US Supreme Court has been called to interpret this instrument.

US Supreme Court's interpretation of Article 10(a) of the Hague Service Convention

The USA did not make any reservation objecting to service by mail under Article 10 of the Convention. In Water Splash, Inc. v. Menon, 581 U.S. ___ (2017), the US Supreme Court pronounced itself on Article 10(a) of the Hague Service Convention to resolve these conflicting views, according to some of which the Convention was to be read as prohibiting service by mail.

After a detailed contextual treaty interpretation and also a comparison of the text with the French version (equally authentic), the US Supreme Court found that that Article 10(a) unmistakably allows for service by mail. The Supreme Court further clarified that "this does not mean that the Convention affirmatively authorizes service by mail." It held that "in cases governed by the Hague Service Convention, service by mail is permissible if two conditions are met: first, the receiving state has not objected to service by mail; and second, service by mail is authorized under otherwise-applicable law." This means that it is not The Hague Service Convention to authorize service by mail, but it must be the lex fori to do so (the Convention simply permits service by mail). So, where the Convention applies, it is not enough to make sure that a summon effectuated abroad is valid under the Convention just because that foreign jurisdiction allows for service by

international registered mail. It further must be ascertained that the jurisdiction in which the case is pending authorizes service by mail requiring a signed receipt. However, by a simple reading of the US Federal Rules of Civil Procedure, it is possible to note how this set of rules misunderstood the scope of The Hague Service Convention.

The US Federal Rules of Civil Procedure and the Hague Service Convention

In cases pending before a US federal court where the Hague Convention applies and where the foreign jurisdiction (in which the defendant resides or is registered) allows for service by mail, the plaintiff – who serves the defendant abroad – should further wonder whether US Federal law authorizes serving the defendant in a foreign country by mail.

Rule 4 of the Federal Rules of Civil Procedure (FRCP), dealing with summons, answers this question. In particular, Rule 4(h)(2) FRCP deals with serving a corporation abroad by remanding to Rule 4(f) FRCP, which in turn deals with serving an individual. So, the same rule applies to serving either an individual or a corporation abroad. Rule 4(f)(1) FRCP makes express reference to the Hague Service Convention:

"(f) Serving an Individual in a Foreign Country. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served at a place not within any judicial district of the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;"

However, as stated by the US Supreme Court in Water Splash, Inc. v. Menon, the fact that Article 10(a) of the Hague Service Convention encompasses service by mail does not mean that it affirmatively authorizes such service. Rather, service by mail is permissible if the receiving State has not objected to service by mail and if such service is authorized under otherwise-applicable law.

Probably, the words "[…]as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;" in Rule 4(f)(1) FRCP should be more correctly rephrased with "[…]as those allowed by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;" in order to be in line with the jurisprudence of the US Supreme Court.

So, as Rule 4(f)(1) FRCP does not provide the final answer, the plaintiff needs to look at Rule 4(f)(2)(C)(ii) FRCP, which expressly authorizes the use of any form of

mail that requires a signed receipt.
Hence, in cases pending before a federal US court where the Hague Service Convention applies and the receiving states permits service by mail, a plaintiff may serve a company or an individual abroad by means of international registered mail by virtue of Rule 4(f)(2)(C)(ii) FRCP (rather than Rule 4(f)(1) FRCP remanding to The Hague Service Convention). Consequently, the FRCP should be amended to avoid further misunderstandings as to the scope of application of the Hague Service Convention by replacing the word authorized with the term allowed at Rule 4(f)(1).

Ethiopia's Ratification of Convention on the Recognition and Enforcement of Foreign Arbitral Awards: A reflection

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Ethiopia, located in east Africa, is the second most populous country in the continent. The Ethiopian parliament has recently ratified, through proclamation No 1184/2020[1], the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" which is commonly known as "New York Convention" (here after referred as "the Convention"). This short piece aims to reflect some points in reaction to this ratification proclamation, specifically changes that this will bring to the approach to arbitration in Ethiopia.

As stated in the Convention, state parties are obliged to recognize and give effect to arbitral agreements including an arbitral clause; and ordinary courts are precluded from exercising their jurisdiction on the merits of the case.[2] In addition, unless in exceptional circumstances recognized under the convention,

foreign arbitral awards shall be enforced just like domestic arbitral awards.[3]

By ratifying the Convention, Ethiopia undertakes to perform the above-mentioned and other obligations of the Convention. As a result, some of the hitherto debatable issues are addressed by the terms of the Convention. For instance, the Ethiopian Supreme Court cassation bench had previously passed a decision that rejects the parties' agreement that makes the outcome of the arbitration to be final.[4] In its decision, the cassation bench contends that its mandate given by the Ethiopian constitution as well as the "Federal Courts Proclamation re-amendment Proclamation No 454/1997" cannot be limited by an arbitration finality clause. But now, this power of cassation can be taken to have ceased at least in relation to cases falling under the scope of application of the Convention.

The declarations and reservation that Ethiopia has entered while ratifying the Convention should not be forgotten though. As such, Ethiopia will apply the Convention only in relation to arbitral awards made in the territory of another contracting state.[5] In the Civil Procedure Code of Ethiopia, Art 458 and Art 461(1) (a), the law that had been in force before the ratification of the Convention, reciprocity was one of the requirements that need to be fulfilled before recognizing and giving effect to the terms of foreign judgments as well as foreign arbitral awards.

Ethiopian courts require the existence of a reciprocity treaty signed between Ethiopia and the forum state whose judgment is sought to be recognized or enforced.[6] It is fair to assume that Ethiopian courts would have the same stand in relation to foreign arbitral awards. And Art 2(1) has fulfilled this requirement because the arbitral award has been given in the member state to the Convention by itself warrants the recognition and enforcement of the award in Ethiopia.

Moreover, Ethiopia also declares that "the convention will apply on differences arising out of legal relationships, whether contractual or not, which are considered commercial under the National Law of Ethiopia."[7] But here, a national law that provides a comprehensive list or definition of commercial activities hardly exists. As a result, while giving effect to the terms of the Convention, Ethiopian courts are expected to answer what sort of activities shall be deemed to be commercial activities according to Ethiopian law.

The definition contained under Art 2(6) of the "Trade Competition and Consumers

Protection Proclamation" will provide some help in identifying "commercial activities" in Ethiopia. Accordingly, "Commercial activities are activities performed by a business person as defined under sub-Art 5 of this article."[8] And Art 2(5) defines a business person as "any person who professionally and for gain carries on any of the activities specified under Art 5 of the Commercial Code, or who dispenses services or who carries those commercial activities designed as such by law". [9] Moreover, it is to be noted that the "Commercial Registration and Licensing Proclamation (Proclamation No. 980/2016)" also provides the same kind of definition for commercial activities.[10]

From the combined reading of the above provisions, commercial activities are those activities listed under Art 5 of the Commercial Code, when they are performed by a person professionally and for gain. However, this cannot be a comprehensive answer to the question, as there can be areas other than those listed under Art 5 of the Commercial Code that can be characterized as commercial activities. In addition, there are numerous service deliveries that can be considered as commercial activities. In such cases, Ethiopian courts will have to consult other domestic laws and decide whether the activity in question can be considered as commercial or not.

Last but not least, even if ratified treaties are declared to be an integral part of the law of Ethiopia[11], the domestic application of treaties whose contents have not been published in domestic law gazette has been a debatable issue for long. As there are points that are not incorporated under the ratification proclamation, the same problem may probably arise in relation to the New York Convention. To avoid this challenge, the Ethiopian parliament should have published the provisions of the Convention together with the ratification proclamation.[12] As per its responsibility under Art 5 of the ratification proclamation the Federal Attorney General, should at least have the Convention translated to Ethiopian working languages**.**

[1] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards Ratification Proclamation, Proclamation No 1184/2020, Federal *Negarit* Gazette, 26th year No 1, Addis Ababa, 13th March 2020.

[2] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), Art. II(1),(2),(3)

[3] *Id*.Art I and V

[4] National Mineral Corporation Plc. vs. Danni Drilling plc., Federal Supreme Court, cassation bench

[5] Ratification Proclamation, *supra* note 1, Art 2(1)

[6] See *paulos papassinus* case, Federal Supreme court File no 1769/88; *Yosera Abdulmuen* et al. vs. *Abdulkeni Abdulmuen*, Federal Supreme Court of Ethiopia, Cassation Bench , Fed Sup. Court File No 78206

[7] Ratification Proclamation, *supra* note 1, Art 2(2)

[8] Trade Competition and Consumers Protection Proclamation, Proclamation No 813/2013, Federal *Negarit* Gazette, 20th year No 28, Addis Ababa, 21st March 2013, Art 2(6)

[9] *Id*. Art. 2(5)

[10] The Commercial Registration and Licensing Proclamation, Proclamation No 980/2016, Federal *Negarit* Gazette, 22nd year No. 101, Addis Ababa, 5th August 2016, Art 2(2)&(3)

[11] Constitution of Federal Democratic Republic of Ethiopia, Proclamation No 1/1995, Federal *Negarit* Gazette, 1st year No.1 , Addis Ababa, 21st August 1995, Art 9(4)

[12] International Agreements Making and Ratification Procedure (Proclamation No 1024/2017) states that "The House of Peoples' Representatives may decide to publish the provisions of the international agreements with the ratification proclamation."(Art. 11)