The Most Appropriate Forum: Assessing the Applicable Law

Another issue in the recent Supreme Court of Canada decision in *Haaretz.com v Goldhar* (available here) involves the applicable law as a factor in the *forum non conveniens* analysis. It is clear that one of the factors in determining the most appropriate forum is the applicable law. This is because it is quite easy for the forum to apply its own law and rather more difficult for it to apply the law of another jurisdiction.

So if the defendant can show that the forum would apply not its own law but rather the law of another jurisdiction, that points to a stay of proceedings in favour of that other jurisdiction. In contrast, if the plaintiff can show that the forum would apply its own law, that points against a stay of proceedings. In *Haaretz.com* the plaintiff was able to show that the Ontario court would apply Ontario law, not Israeli law. So the applicable law factor favoured Ontario.

Not so, argued the defendant, because an Israeli court would apply Israeli law (see para 88). So as between the two jurisdictions neither was any more convenient than the other!

In the Supreme Court of Canada, four of the judges rejected the defendant's rejoinder. The dissenting judges held that "[i]t is entirely appropriate, in our view, for courts to only look at the chosen forum in determining the applicable law. Requiring courts to assess the choice of law rules of a foreign jurisdiction may require extensive evidence, needlessly complicating the pre-trial motion stage of the proceedings" (para 207). In separate concurring reasons, Justice Karakatsanis agreed with the dissent on this point (para 100). So because Ontario would apply Ontario law, this factor favours proceedings in Ontario rather than proceedings in Israel.

In contrast, Justice Cote, with whom Justices Brown and Rowe agreed, stated that "I am concerned that disregarding the applicable law in the alternative forum is inconsistent with the comparative nature of the *forum non conveniens* analysis" (para 89). She cited in support an article by Brandon Kain, Elder C. Marques and Byron Shaw (2012). The other two judges did not comment on this issue, so the

court split 4-3 against looking at the applicable law in the alternative forum.

There is force to the practical concern raised by the dissent, and even with the assistance of the parties in many cases the court will be unable to form a sufficiently strong view as to what law the foreign forum would apply. But conceptually it does seem that if it is established that the foreign forum will apply its own law, that should go to negate the benefits of the plaintiff's chosen forum applying its own law. Neither is any more convenient where compared against the other.

Perhaps because of the novelty of the approach, Justice Cote's application of it may have missed the mark. She held that "[a]s each forum would apply its own law, the applicable law factor cannot aid Haaretz in showing that it would be fairer and more efficient to proceed in the alternative forum" (para 88). But the true point flowing from establishing that Israel would apply Israeli law, it would seem, should be that the applicable law factor cannot aid Goldhar (the plaintiff) in showing that it would be fairer and more efficient to proceed in Ontario. If it cannot aid Haaretz.com that Israel would apply its own law, then how is the factor relevant and why is the court indicating a willingness to consider it? It surely could not aid Haaretz.com that Israel would apply some other law.

On a motion for a stay, if the court did know what law would be applied in both the chosen forum and the alternative forum, we would have four possible situations. On Justice Cote's approach, if both forums would apply their own law, this is a neutral factor. Similarly, if both forums would apply law other than forum law, this is also a neutral factor. In the other two situations, the applicable law factor favours the forum that would be applying its own law. With the court splitting 4-3 against looking at the applicable law in the alternative forum, this is not the approach – but should it be?

The Role of Foreign Enforcement

Proceedings in Forum Non Conveniens

The doctrine of *forum non conveniens*, in looking to identify the most appropriate forum for the litigation, considers many factors. Two of these are (i) a desire to avoid, if possible, a multiplicity of proceedings and (ii) any potential difficulties in enforcing the decision that results from the litigation. However, it is important to keep these factors analytically separate.

In the Supreme Court of Canada's recent decision in *Haaretz.com v Goldhar* (available here) Justice Abella noted that "enforcement concerns would favour a trial in Israel, in large part because Haaretz's lack of assets in Ontario would mean that any order made against it would have to be enforced by Israeli courts, thereby raising concerns about a multiplicity of proceedings" (para 142). Similarly, Justice Cote concluded (paras 82-83) that the fact that an Ontario order would have to be enforced in Israel was a factor that "slightly" favoured trial in Israel.

Justice Abella has arguably conflated the two factors rather than keeping them separate. The concerns raised by a multiplicity of proceedings tend to focus on substantive proceedings rather than on subsequent procedural steps to enforce a judgment. Courts rightly try to avoid substantive proceedings in more than one jurisdiction that arise from the same factual matrix, with one of the core concerns being the potential for inconsistent findings of fact. Of course, enforcement proceedings do involve an additional step that is avoided if the judgment can simply be enforced locally. But that, in itself, should not be grouped with the kinds of concerns raised by multiple substantive proceedings. It will be unfortunate if subsequent courts routinely consider contemplated foreign enforcement proceedings as raising a multiplicity of proceedings concern.

Justice Cote (with whom Justices Brown and Rowe agreed) did not conflate enforcement proceedings and the concern about multiplicity. However, it should be noted that *Club Resorts*, which she referenced on this point, stated (para 110 that "problems related to the recognition and enforcement of judgments" is a relevant factor for *forum non conveniens*. The stress there should be on "problems". If it can be anticipated that there may be problems enforcing the

judgment where the assets are, that is an important consideration. But if no such problems are anticipated, the mere fact that enforcement elsewhere is contemplated should not point even "slightly" against the forum as the place for the litigation. In *Haaretz.com* the judges who consider the enforcement factor did not identify any reason to believe that enforcement proceedings in Israel would be other than routine.

The dissenting judges (Chief Justice McLachlin and Justices Moldaver and Gascon) properly separated these two factors in their analysis (paras 234-237). They did not treat enforcement proceedings as part of the analysis of a multiplicity of proceedings. On enforcement, their view was that in defamation proceedings it is often sufficient just to obtain the judgment, in vindication of the plaintiff's reputation, and that enforcement can thus be unnecessary or "irrelevant" (para 236). Justice Cote strongly disagreed (para 83). Leaving that dispute to one side, the dissent could have also made the point that this was not a case where any "problems" had been raised about enforcement in Israel.

Staying Proceedings, Undertakings and "Buying" a Forum

One of the points of interest in the Supreme Court of Canada's recent decision in *Haaretz.com v Goldhar* (available here) concerns the appropriateness of the plaintiff's undertaking to pay the travel and accommodation costs of the defendant's witnesses, located in Israel, to come to the trial in Ontario. The defendant had raised the issue of the residence of its witnesses as a factor pointing to Israel being the more appropriate forum. The plaintiff, one presumes, made a strategic decision to counter this factor by giving the undertaking.

The motions judge and the Court of Appeal for Ontario both considered the undertaking as effective in reducing the difficulties for the defendant in having

the litigation in Ontario. However, the undertaking was viewed quite differently by at least some of the judges of the Supreme Court of Canada. Justice Cote, joined by Justices Brown and Rowe, stated that "consideration of such an undertaking would allow a wealthy plaintiff to sway the *forum non conveniens* analysis, which would be inimical to the foundational principles of fairness and efficiency underlying this doctrine" (para 66). Justice Abella, in separate reasons, stated "I think it would be tantamount to permitting parties with greater resources to tip the scales in their favour by 'buying' a forum. … it is their actual circumstances, and not artificially created ones, that should be weighed" (para 140). The other five judges (two concurring in the result reached by these four; three dissenting) did not comment on the undertaking.

Undertakings by one party in response to concerns raised by the other party on motions to stay are reasonably common. Many of these do involve some financial commitment. For example, in response to the concern that various documents will have to be translated into the language of the court, a party could undertake to cover the translation costs. Similarly, a party might undertake to cover the costs of the other party flowing from more extensive pre-trial discovery procedures in the forum. Travel and accommodation expenses are perhaps the most common subject for a financial undertaking. Is the Supreme Court of Canada now holding that these sorts of undertakings are improper?

The more general statement from Justice Abella rejecting artificially created circumstances could have an even broader scope, addressing more than just financial issues. Is it a criticism of even non-financial undertakings, such as an undertaking by the defendant not to raise a limitation period – otherwise available as a defence – in the foreign forum if the stay is granted? Is that an artificially-created circumstance?

Vaughan Black has written the leading analysis of conditional stays of proceedings in Canadian law: "Conditional *Forum Non Conveniens* in Canadian Courts" (2013) 39 Queen's Law Journal 41. Undertakings are closely related to conditions. The latter are imposed by the court as a condition of its order, while the former are offered in order to influence the decision on the motion. But both deal with very similar content, and undertakings are sometimes incorporated into the order as conditions. Black observes that in some cases courts have imposed financial conditions such as paying transportation costs and even living costs during litigation (pages 69-70). Are these conditions now inappropriate, if

undertakings about those expenses are? Or it is different if imposed by the court?

My view is that the four judges who made these comments in *Haaretz.com* have put the point too strongly. *Forum non conveniens* is about balancing the interests of the parties. If one party points to a particular financial hardship imposed by proceeding in a forum, it should be generally open for the other party to ameliorate this hardship by means of a financial undertaking. Only in the most extreme cases should a court consider the undertaking inappropriate. And perhaps, though the judges do not say so expressly, *Haaretz.com* is such a case, in that there were potentially 22 witness who would need to travel from Israel to Ontario for a trial.

Supreme Court of Canada: Israel, not Ontario, is Forum Conveniens for Libel Proceedings

The decision to stay proceedings under the doctrine of *forum non conveniens* is discretionary, which in part means that appeal courts should be reluctant to reverse the decisions of motions judges on the issue. It comes as some surprise, therefore, that the Supreme Court of Canada has disagreed with not only the motions judge but also the Court of Appeal for Ontario and overturned two earlier decisions denying a stay. In *Haaretz.com v Goldhar* (available here) the court held (in a 6-3 decision) that the plaintiff's libel proceedings in Ontario should be stayed because Israel is the clearly more appropriate forum.

The decision is complex, in part because the appeal also considered the issue of jurisdiction and in part because the nine judges ended up writing five sets of reasons, four concurring in the result and a fifth in dissent. That is very unusual for Canada's highest court.

The case concerned defamation over the internet. The plaintiff, a resident of Ontario, alleged that an Israeli newspaper defamed him. Most readers of the story were in Israel but there were over 200 readers in Ontario.

On assumed jurisdiction, the court was asked by the defendant to reconsider its approach as set out in *Club Resorts* (available here), at least as concerned cases of internet defamation. Eight of the nine judges refused to do so. They confirmed that a tort committed in Ontario was a presumptive connecting factor to Ontario, such that it had jurisdiction unless that presumption was rebutted (and they held it was not). They also confirmed the orthodoxy that the tort of defamation is committed where the statement is read by a third party, and that in internet cases this is the place where the third party downloads and reads the statement (paras 36-38 and 166-167). Only one judge, Justice Abella, mused that the test for jurisdiction should not focus on that place but instead on "where the plaintiff suffered the most substantial harm to his or her reputation" (para 129). This borrows heavily (see para 120) from an approach to choice of law (rather than jurisdiction) that uses not the place of the tort (*lex loci delicti*) but rather the place of most substantial harm to reputation to identify the applicable law.

On the stay of proceedings, six judges concluded that Israel was the most appropriate forum. Justice Cote wrote reasons with which Justices Brown and Rowe concurred. Justice Karakatsanis disagreed with two key points made by Justice Cote but agreed with the result. Justices Abella and Wagner also agreed with the result but, unlike the other seven judges (see paras 91 and 198), they adopted a new choice of law rule for internet defamation. This was a live issue on the stay motion because the applicable law is a relevant factor in determining the most appropriate forum. They rejected the *lex loci delicti* rule from *Tolofson* (available here) and instead used as the connecting factor the place of the most substantial harm to reputation (paras 109 and 144). Justice Wagner wrote separately because he rejected (paras 147-148) Justice Abella's further suggestion (explained above) that the law of jurisdiction should also be changed along similar lines.

The core disagreement between Justice Cote (for the majority) and the dissent (written jointly by Chief Justice McLachlin and Justices Moldaver and Gascon) was that Justice Cote concluded that the motions judge made six errors of law (para 50) in applying the test for *forum non conveniens*, so that no deference was required and the court could substitute its own view. In contrast, the dissent held

that four of these errors were "merely points where our colleague would have weighed the evidence differently had she been the motions judge" (para 179) which is inappropriate for an appellate court and that the other two errors were quite minor and had no impact on the overall result (para 178). The dissent held strongly to the orthodox idea that decisions on motions to stay are entitled to "considerable deference" (para 177) lest preliminary motions and appeals over where litigation should occur undermine stability and increase costs (para 180).

Another fundamental disagreement between Justice Cote and the dissent was their respective view of the scope of the plaintiff's claim. During the motion and appeals, the plaintiff made it clear that he was only seeking a remedy in respect of damage to his reputation in Ontario (as opposed to anywhere else) and that he was not going to sue elsewhere. The dissent accepted that this undertaking to the court limited the scope of the claim (paras 162-163) and ultimately it pointed to Ontario as the most appropriate forum. In contrast, Justice Cote held that the plaintiff's undertaking "should not be allowed to narrow the scope of his pleadings" (para 23). It is very hard to accept that this is correct, and indeed on this point Justice Karakatsanis broke with Justice Cote (para 101) and agreed with the dissent. Why should the court not accept such an undertaking as akin to an amendment of the pleadings? Justice Cote claimed that "[n]either Goldhar nor my colleagues … may now redefine Goldhar's action so that it better responds to Haaretz's motion to stay" (para 24). But why should the plaintiff not be able to alter the scope of his claim in the face of objections to that scope from the defendant?

There are many other points of clash in the reasons, too many to engage with fully here. How important, at a preliminary stage, is examination of what particular witnesses who have to travel might say? What role does the applicable law play in the weighing of the more appropriate forum when it appears that each forum might apply its own law? Does a subsequent proceeding to enforce a foreign judgment count toward a multiplicity of proceedings (which is to be avoided) or do only substantive proceedings (on the merits) count? Is it acceptable for a court to rely on an undertaking from the plaintiff to pay the travel and accommodation costs for the defendant's witnesses or is this allowing a plaintiff to "buy" a forum?

It might be tempting to treat the decision as very much a product of its specific facts, so that it does not offer much for future cases. There could, however, be

cause for concern. As a theme, the majority lauded "a robust and careful" assessment of *forum non conveniens* motions (para 3). If this robust and careful assessment is to be performed by appellate courts, is this consistent with deference to motions judges in their discretionary, fact-specific analysis? The dissent did not think so (para 177).

Case C-191/18 and Us

Open your eyes, we may be next. Or maybe we are already there? Case C- 191/18, *KN v Minister for Justice and Equality*, is not about PIL. The questions referred to the CJ on March 16, actually relate to the European Arrest warrant (and Brexit). However, PIL decisions are mirroring the same concerns.

It has been reported, for instance, that a Polish district court has refused a Hague child return to England on the basis (*inter alia*) that Brexit makes the mother`s position too uncertain. A recent case before the Court of Appeal of England and Wales shows that English judges are also struggling with this (see "Brexit and Family Law", published on October 2017 by Resolution, the Family Law Bar Association and the International Academy of Family Lawyers, supplemented by mainland IAFL Fellows, Feb 2018).

And even if it was not the case: can we really afford to stay on the sidelines?

Needless to say, Brexit is just one of the ingredients in the current European Union melting pot. Last Friday's presentation at the Comité Français de Droit International Privé, entitled « Le Droit international privé en temps de crise », by Prof. B. Hess, provided a good assessment of the main economic, political and human factors explaining European contemporary mess – by the way, the parliamentary elections in Slovenia on Sunday did nothing but confirm his views. One may not share all that is said on the paper; it's is legitimate not to agree with its conclusions as to the direction PIL should follow in the near future to meet the ongoing challenges; the author's global approach, which comes as a follow up to his 2017 Hague Lecture, is nevertheless the right one. Less now than ever before can European PIL be regarded as a "watertight compartment", an isolated self-

contained field of law. Cooperation in criminal and civil matters in the AFSJ follow different patterns and maybe this is how it should be (I am eagerly waiting to read Dr. Agnieszka Frackowiak-Adamska's opinion on the topic, which seem to disagree with the ones I expressed in Rotterdam in 2015, and published later). The fact remains that systemic deficiencies of the judiciary in a given Member State can hardly be kept restricted to the criminal domain and leave untouched the civil one; doubts hanging over one prong necessarily expand to the other. The *Celmer* case, C-216/18 PPU, *Minister for Justice and Equality v LM*, heard last Friday (a commented report of the hearing will soon be released in Verfassungsblog, to the best of my knowledge), with all its political charge, cannot be deemed to be of no interest to us; precisely because a legal system forms a consistent whole mutual trust cannot be easily, if at all, compartmentalized.

The Paris presentation was of course broader and it is not my intention to address it in all its richness, in the same way that I cannot recall the debate which followed, which will be reproduced in due time at the *Travaux*. Still, I would like to mention the discussion on asylum and PIL, if only to refer to what Prof. S. Courneloup very correctly pointed out to: asylum matters cannot be left to be dealt with by administrative law alone; on the contrary, PIL has a big say and we – private international lawyers- a wide legal scenario to be alert to (for the record, albeit I played to some extent the dissenting opinion on Friday, my actual stance on the need to pair up public and private law for asylum matters is clear in *CDT*, 2017). Last year the JURI Committee of the European Parliament commissioned two studies (here and here; they were also reported in CoL) on the relationship between asylum and PIL, thus suggesting some legislative initiative might be taken. But nothing has happened since.

Doors open for First Hearing of

International Chamber at Paris Court of Appeal

Written by Duncan Fairgrieve (BIICL;Université de Paris Dauphine) and Solenn Le Tutour (avocat, Barreau de Paris)

When the French Government announced in February this year plans to launch an "English" Commercial court in Paris, eyebrows were raised and, it is fair to say, an element of skepticism expressed in the common law world as to whether such a development would really prove to be a serious competitor to the Commercial Courts on Fetter Lane in London. In what some might say was an uncharacteristically pragmatic fashion, collective judicial sleeves in Paris were pulled up however and the project taken forward with some alacrity. With broad support from the legal and political class given what is seen as re-shuffling of cards post-Brexit, the project was accelerated to such an extent that the first hearing of the new Chamber took place yesterday afternoon. The Court, which is an International Chamber of the Paris Court of Appeal, will hear appeals from the international chamber of the first instance Commercial court in Paris which has been in operation – albeit rather discretely – for almost a decade.

Setting aside the PR and legal spin, the procedural innovations of the new International Chamber are in fact quite radical. The headline-grabbing change is of course the use of English. Proceedings can take place in languages other than French, including English, and indeed it has recently been confirmed by the Court that non-French lawyers will also be granted rights of audience to appear before the International Chamber, as long as accompanied by a lawyer called to the Paris Bar. This is of course a major change in a normally very traditional French institution, though it is interesting to note that written submissions and pleadings as well as the resultant judgments will be in French (and officially translated into English).

Case management is to be stream-lined as well. Gone will be the rather languorous meandering French appellate procedure and in will be ushered a new highly case-managed equivalent with the parties and judge settling a timetable at the outset with fixed dates for filing written submissions, as well as – strikingly – the actual date of the ultimate judgment being set in stone, usually within 6

months of the first case-management hearing.

A minor revolution has also occurred in terms of the hearing. The approach will mean that the hearings will be more detailed, with the Court placing an emphasis on oral submissions, over and above the traditionally document-based approach where the judicial dossier takes precedence. There is even provision for the cross-examination of witnesses and experts during the hearing, something that rarely occurs in France outside the criminal arena.

Indications are also that there might even be a more fundamental change in the style of judicial judgments handed down by the International Chamber. At a recent seminar at the Paris Bar, the first judge assigned to the Chamber noted that there would be a deliberate attempt to ensure the judgments set out in more detail the reasoning of the Court, and a greater attention to legal certainty in terms of following previous case law – itself a very interesting potential shift in a legal system which has not traditionally adhered to any form of judicial precedent.

Some have also talked of allowing a more expansive approach to the judicially-sanctioned disclosure of documents – a simplified form of discovery where litigating parties are forced to communicate inconvenient files to the other side – which is all the more surprising as often lampooned by French commentators as one of the misdeeds of "American" style litigation.

Whilst this might not all add up to a complete judicial revolution, the changes in France are significant, and along with similar announcements in Amsterdam, Frankfurt, and Brussels, it is clear that there is an attempt across Europe – albeit only an attempt at this stage – to challenge the hegemony of English courts in international commercial litigation.

The Belgian Government unveils

its plan for the Brussels International Business Court (BIBC)

Written by Guillaume Croisant, Université Libre de Bruxelles

In October 2017, as already reported in a previous post, the Belgian Government announced its intention to set up a specialised English-speaking court with jurisdiction over international commercial disputes, the Brussels International Business Court ("BIBC"). An update version of the text has finally been submitted to Parliament on 15 May 2018, after the Government's initial draft faced criticisms from the High Council of Justice (relating to the BIBC's independence and impartiality, its source of funding and its impact on the ordinary courts) and was subject to the review of the Conseil d'Etat.

In the wake of Brexit, the Belgian Government aims at establishing a specialised business court able to position Brussels as a new hub for international commercial disputes, in line with its international status as *de facto*capital of the EU and seat of many international institutions and companies. Similar projects are ongoing in several jurisdictions throughout the EU, including France, the Netherlands and Germany (see previous post).

The BIBC will have jurisdiction over disputes:

- which are international in nature, i.e. where (i) the parties have their establishment in different jurisdictions, (ii) a substantial part of the commercial relationship must be performed in a third country, or (iii) the applicable law to the dispute is a foreign law. In addition, another language than French, Dutch or German (Belgium's official languages, which are already used before ordinary courts) must have been used frequently by the parties during their commercial relationship;
- among "enterprises" (i.e. every entity pursuing an economic purpose, including public enterprises which provide goods and services on a market basis); and
- provided that the parties have agreed to the BIBC's jurisdiction before or after the crystallisation of their dispute.

Subject to potential amendments in Parliament, the main procedural hallmarks of the BIBC can be summarised as follows:

- the procedure will be conducted in English (notices and submissions, evidence, hearings, judgments, etc.);
- while the BIBC remains a State court, the procedure will be based on the UNCITRAL Model Law on international arbitration, which means that the parties will be offered greater flexibility and room to organise the conduct of the proceedings;
- the cases will be heard by *ad hoc* chambers of three judges, one professional and two lay judges (appointed by the president of the BIBC on the basis of a panel of Belgian and international experts in international business law), with the assistance of the Registrar of the Brussels Court of Appeal;
- the BIBC will be granted the power to issue provisional and protective measures (including upon request *ex parte* measures);
- no appeal will be open against the BIBC's decision (with the exception of an *opposition*/*tierce opposition* before the BIBC for absent parties/interested third parties, and a *pourvoi en cassation* on points of law before the Supreme Court);
- the BIBC should be self-financing and the court fees are therefore going to be significantly increased (to around € 20,000/case).

The Belgian Government aims to have the BIBC up and running by 1 January 2020.

Proving Chinese Law: Deference to the Submissions from Chinese

Government?

Written by Dr. Jie (Jeanne) Huang, Senior Lecturer, University of New South Wales Faculty of Law

The recent U.S. Supreme Court case, Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd, concerns what weight should be given to the Chinese government's submission of Chinese law. On Page 58 of the trial transcript, Justices Kagan and Ginsburg asked how about other countries dealing with formal submissions from the Chinese government. There are two examples.

One is Hong Kong. In TNB Fuel Services SDN BHD v China National Coal Group Corporation ([2017] HKCFI 1016), the issue is whether the defendant, a state-owned enterprise, is protected by Chinese absolute sovereignty immunity under Chinese law. The court deferred to an official letter provided by the Hong Kong and Macao Affairs Office of the State Department in Mainland China. The Office answers no absolute sovereignty immunity to Chinese state-owned enterprises carrying out commercial activities. The Court adopted this opinion without second inquiry (para 14 of the judgment). After considering a bunch of other factors, the court ruled against the defendant.

The other is Singapore. In Sanum v. Laos ([2016] SGCA 57), the issue is whether the China-Laos Bilateral Investment Treaty (BIT) shall be applied to Macao Special Administrative Region. Chinese embassy in Laos and China Ministry of Foreign Affairs provided diplomatic announcements indicating that the BIT shall not be applied to Macao. However, the Court of Appeal of Singapore held that China's announcements were inadmissible and, even if admitted, they did not change the applicability of the BIT to Macau. This is partly because, before the dispute with Sanum crystalized, no evidence showed that China and Laos had agreed that the BIT should not be applied to Macau. Therefore, the China's diplomatic announcements should not be retroactively applied to a previous dispute. For a more detailed discussion, please see pages 16-20 of my article.

TNB Fuel Services and Sanum share important similarities with Animal Science Products, because the key issues are all about the proving of Chinese law. In the three cases, Chinese government all provided formal submissions to explain the meaning and the applicability of Chinese law. However, TNB Fuel Services and

Sanum can also be distinguished from Animal Science Products, because comity plays no role in the former two cases. TNB Fuel Services concerns sovereign immunity, which is an issue that Hong Kong courts must follow China's practices. This is established by Democratic Republic of the Congo v. FG Hemisphere Associates (FACV Nos. 5, 6 & 7 of 2010). Sanum is a case to set aside an investment arbitration award, so the Court of Appeal of Singapore need not consider comity between Singapore and China. In contrast, in Animal Science Products, the U.S. Court of Appeals for the Second Circuit elaborated the importance of comity between the U.S. and China. Therefore, Animal Science Products should not be considered as a technical case of proving foreign laws. The U.S. Supreme Court may consider deferring to the submissions of Chinese government to a certain extent but allows judges to decide whether the Chinese government's submission is temporally consistent with its position on the relevant issue of Chinese law.

Who Owns France.com?

France is a state. France.com, by contrast, is a domain name, and it was, until recently, owned not by the French state but instead by a Californian company, France.com, Inc. That conflict is now being litigated in a fascinating dispute reminiscent of the early days of the internet.

In those early days, in 1994 to be precise, a French-born individual living in the United States, Jean-Noël Frydman, registered the domain name France.com. The domain name is now held by a Californian company, France.com Inc, which Frydman set up. The website, at first dedicated to general information for Francophiles around the world, was later expanded to operate as a travel site. But France.com, Inc, did not, it appears, own trademarks in Europe. This enabled a Dutch company, Traveland Resorts, to register French and European word and graphic marks for France.com in 2010. In 2014, France.com, Inc brought suit in France against Traveland for fraudulent filings of trademarks and achieved a

settlement under which Traveland transferred the trademarks.

But that was a Pyrrhic victory. The French state and its own travel development agency, Atout, intervened in the litigation, claiming the trademarks for itself instead. Atout had been running, since 2010, its own information site, france.fr. French state and Atout were successful, first before the Tribunal de Grande Instance, Paris , and then, partly, on appeal before the Cour' d'appel de Paris (English translation, note by Alison Bouakel) As a consequence, web.com transferred the domain in 2018. Now, France.com immediately directs to France.fr.

So far, the conflict is mostly a French affair. But Frydman is taking the litigation to the United States. France.com, Inc has brought suit in Federal Court in Virginia against the French State, Atout, and against Verisign, the authoritative domain registry of all .com addresses. The suit alleges cybersquatting, reverse domain hijacking, expropriating, trademark infringement, and federal unfair competition. US courts and WIPO panels have so far not looked favorably at foreign government's claims for their own .com domain name; examples include PuertoRico.com, NewZealand.com, and Barcelona.com. Will the French State be more successful, given the French judgment in its favor?

Although neither the French courts nor the complaint in the United States address conflict of laws issues, the case is, of course, full of those. Are the French state and its travel agency protected by sovereign immunity? The Foreign Sovereign Immunities Act contains an exception for commercial activities and is limited to sovereign acts: Does ownership of a domain name constitute commercial activity? Surely, many of the activities of Atout do. Or is it linked to sovereignty? After all, France is the name of the country (though not, ironically, the official name.) The U.S. Court of Appeal for the Second Circuit left the question open in 2002 (Virtual Countries, Inc. v. South Africa, 300 F.3d 230).

Must the federal court recognize the French judgment? That question is reminiscent of the Yahoo litigation. Then, a French court ordered that Yahoo.com could not offer Nazi paraphernalia on its auction website. Yahoo brought a declaratory action in federal court against recognizability of the judgment in the United States. The affair created a lively debate on the limits of territorial reach in internet-related litigation, a debate that is still not fully resolved.

Relatedly, did the French state engage in illegal expropriation without compensation? Such acts of expropriation are in principle limited to the territory of the acting state, which could mean that the French state's actions, if so qualified, would be without legal effect in the United States.

To what extent is US law applicable to a French trademark? By contrast, to what extent can the French trademark determine ownership of the domain? Trademarks are a perennially difficult topic in private international law, given their territorial limitations; they conflict in particular with the ubiquity of the internet.

Is the top level domain name – .com, as opposed to .fr – a relevant connecting factor in any of these matters? That was once considered a promising tool. But even if .fr could in some way link to France as owner, it is not clear that .com links to the United States, given that it has long been, effectively, a global top level domain. On the other hand, most governments do not own their own .com domain. And US courts have, in other cases (most famously concerning barcelona.com) not doubted applicability of US law.

A timeline with links to documents can be found at Frydman's blog site.

The Supreme Court deals the death blow to US Human Rights Litigation

Written by Bastian Brunk, research assistant and doctoral student at the Institute for Comparative and Private International Law at the University of Freiburg (Germany)

On April 24, the Supreme Court of the United States released its decision in *Jesner v Arab Bank* (available here; see also the pre-decision analysis by *Hannah Dittmers* linked here and first thoughts after the decision of *Amy Howe* here) and, in a 5:4 majority vote, shut the door that it had left ajar in its *Kiobel* decision. Both cases are concerned with the question whether private corporations may be sued under the Alien Tort Statute (ATS).

In *Kiobel*, the Court rejected the application of the ATS to so-called *foreign-cubed* cases (cases in which a foreign plaintiff sues a foreign defendant for acts committed outside the territory of the US), but left the door open for cases that *touch and concern the territory of the US* (see also the early analysis of *Kiobel* by *Trey Childress* here). In *Jesner v. Arab Bank*, the majority now held that – in any case – "foreign corporations may not be defendants in suits brought under the ATS" (p. 27).

The respondent in the present case, Arab Bank, PLC, a Jordanian financial institution, was accused of facilitating acts of terrorism by maintaining bank accounts for jihadist groups in the Middle East and allowing the accounts to be used to compensate the families of suicide bombers. The petitioners further alleged that Arab Bank used its New York branch to clear its dollar-transactions via the so-called Clearing House Interbank Payment System (CHIPS) and that some of these transactions could have benefited terrorists. Finally, the petitioners accused Arab Bank of laundering money for a US-based charity foundation that is said to be affiliated with Hamas.

As in *Kiobel*, the facts of the case barely *touch and concern* the territory of the United States. The Court therefore held that "in this case, the activities of the defendant corporation and the alleged actions of its employees have insufficient connections to the United States to subject it to jurisdiction under the ATS" (p. 11). However, in order to overcome the divided opinions between the Courts of Appeals and to provide for legal certainty, the Supreme Court decided to answer the question of corporate liability under the ATS, but limited its answer to the applicability of the ATS to *foreign* corporations only. *Justice Kennedy*, who delivered the opinion of the majority vote, therefore based his reasoning on a cascade of three major arguments that rely on the precedents in *Sosa* and *Kiobel*.

First, the Court referred to the historic objective of the ATS, which was enacted "to avoid foreign entanglements by ensuring the availability of a federal forum

where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen" (p. 8 f.). Thus, the goal of the Statute's adoption was to avoid disturbances in foreign relations and not to create them by alienating other countries. This was the main concern with the present case "that already ha[d] caused significant diplomatic tensions with Jordan for more than a decade" (p. 11).

Second, the Court emphasized the "strictly jurisdictional" character of the ATS and asked for a proper cause of action to impose liability on corporations in accordance with the test established in the *Sosa*-decision. The *Sosa*-test allows for the recognition of a cause of action for claims based on international law (p. 10), but requires the international legal provision to be "specific, universal and obligatory" (p. 11 f.). The majority concluded that it could not recognize such a norm as almost every relevant international law statute (e.g. the Rome Statute and the statutes of the ICTY and the ICTR) excludes corporations from its jurisdictional reach and, accordingly, limits its scope of application to individuals.

Thirdly, even if there was a legal provision justifying corporate liability in international law, the Supreme Court found that US courts should refrain from applying it without any explicit authorization from Congress. In this way, the Supreme Court upheld the separation-of-powers doctrine stating that it is the task of the legislature, not the judiciary, to create new private rights of action, especially when these pose a threat to foreign relations. From this reasoning, courts are required to "exercise 'great caution' before recognizing new forms of liability under the ATS" (p. 19). In doing so, courts should not create causes of action out of thin air but by analogous application of existing (and therefore Congress-approved) laws. However, neither the Torture Victim Protection Act (TVPA) nor the Anti-Terrorism Act (as the most analogous statutes) are applicable because the former limits liability to individuals whereas the latter provides a cause of actions to US-citizens only (thus being irreconcilable with the ATS, which is available only for claims brought by "*an alien*"; see p. 20-22).

Justice Sotomayor, who wrote a 34-page dissent, criticized the majority for absolving "corporations from responsibility under the ATS for conscience-shocking behavior" and argues that "[t]he text, history, and purpose of the ATS, as well as the long and consistent history of corporate liability in tort, confirm that tort claims for law-of-nations violations may be brought against corporations under the ATS" (*Sotomayor*, p. 1). However, the dissenting opinion could not

prevail over the conservative majority.

Thus, for now, *Jesner v Arab Bank* has rendered human rights litigation against foreign corporations before US courts impossible. However, in contrast to this post's title, the decision is not necessarily the end of the *US human rights litigation*. The ATS is still applicable if the defending corporation has its seat in the territory of the US. Moreover, the Court emphatically calls upon Congress to provide for legislative guidance. "If Congress and the Executive were to determine that corporations should be liable for violations of international law, that decision would have special power and force because it would be made by the branches most immediately responsive to, and accountable to, the electorate" (p. 27 f.). It remains to be seen whether Congress answers this call.