# Jurisdiction in relation to hostile trust litigation

In *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] SGCA 62, the Singapore Court of Appeal considered a number of issues: (1) whether a plaintiff could amend its Statement of Claim at the appellate stage to tilt the balance of connecting factors towards Singapore; (2) whether a clause in the trust deed identifying Singapore as the "forum of administration" of the trust was a jurisdiction clause, and if so; (3) whether the clause covered hostile litigation in relation to the trust; and depending on the answers to the previous questions, (4) whether the Singapore proceedings ought to be stayed.

The case concerned Mr Ivanishvili, the former Georgian prime minister, who was a French and Georgian dual national. Mr Ivanishvili had set up the Mandalay Trust which was domiciled in Singapore. The trustee of the Mandalay Trust was Credit Suisse Trust Ltd, a Singapore trust company ("the Trustee"). The trustee's asset management powers were delegated to the Geneva branch of Credit Suisse AG ("the Bank"). The Mandalay Trust suffered losses purportedly due to the actions of one the Bank's employees (Mr Lescaudron) who was the portfolio manager of the Mandalay Trust. Mr Lescaudron was convicted in Swiss criminal proceedings for various forms of misconduct in relation to the Mandalay Trust. At first instance, Mr Ivanishvili and his wife and children, who were the beneficiaries of the Mandalay Trust, sued both the Trustee and the Bank alleging, *inter alia*, breaches of duties of care and skill and misrepresentation. A stay was granted by the court below on the grounds that Switzerland was a more appropriate forum for the action. At the Court of Appeal, Mr Ivanishvili *et al* strategically chose to discontinue proceedings against the Bank to strengthen their argument that Singapore was the appropriate forum for trial of the action and sought to amend their Statement of Claim to this effect. This also entailed reformulating some of the claims against the Trustee to remove references to the Bank. This was allowed by the Court of Appeal on the basis that absent bad faith, the appellants had the freedom of choice to choose its cause of action and to sue the party it wishes to sue.

On the second issue, the relevant clause provided that:

"2. (a) This Declaration is established under the laws of the Republic of Singapore and subject to any change in the Proper Law duly made according to the powers and provisions hereinafter declared the Proper Law shall be the law of the said Republic of Singapore and the Courts of the Republic of Singapore shall be the forum for the administration hereof."

Clause 2(b) granted the Trustee the power to change the proper law and provided that if so, the courts of the jurisdiction of the new proper law would become the "forum for the administration" of the trust. Contrasting clause 2 with the equivalent clause in *Crociani v Crociani* (17 ITELR 624) where the relevant clauses referred to a *country* being the "forum for the administration", the Court of Appeal noted that the references to "forum for the administration" in clause 2 was tied up with a reference to the *courts*. It therefore held that clause 2(a) was a jurisdiction clause. As a point of interest, it should be noted that, generally speaking, it is immaterial whether a jurisdiction clause naming Singapore as a forum is exclusive or non-exclusive in nature after the Court of Appeal's decision in *Shanghai Turbo v Liu Ming* [2019] 1 SLR 779 (previously noted here); as Singapore is a named forum, the "strong cause" test would apply to cases falling within the scope of the jurisdiction clause.

The question which had to be considered next was whether clause 2(a) covered hostile litigation concerning breach of trust issues (such as in the present case) or was confined to litigation over administrative matters. On this, the Court engaged in an extensive review of case law in other off-shore trust jurisdictions. While tentatively observing that "there is no legal rule limiting the meaning of the phrase 'forum for [the] administration' to an administration action in the traditional sense"(at [75]), the Court ultimately followed the reasoning of the Privy Council in *Crociani* and other cases in its wake and held that that the phrase "is intended to refer to the court or jurisdiction which would settle questions arising in the day to day administration of the trust, and to denote the supervisory and authorising court for actions the trustee might need to take which were not specifically by the trust deed or where its terms were ambiguous"(at [76]). Such clauses did not cover hostile litigation between trustees and beneficiaries. The Court observed that: "The trust deed is not a contract between two parties with obligations on both sides – rather, it is a unilateral undertaking by the trustee, and in our view this difference must play a part when we consider whether the intention of the drafters was to impose a mandatory jurisdiction clause for the

resolution of contentious disputes regarding allegations of breach of trust"(at [78]). This suggests that the "strong cause" test, which has as its starting point the upholding of the parties' contractual bargain, is not appropriate in hostile litigation involving beneficiaries to a trust.

In any event, the Court's conclusion on the scope of clause 2(a) meant that whether a stay ought to be granted was to be determined under the *Spiliada* test on *forum non conveniens* rather than the "strong cause" test. On this point, the Court split. A majority of the Court (Menon CJ and Prakash JA), held that the balance of connecting factors pointed towards Singapore and allowed the appeal against the stay. The appellants argued that with the amended claim, the focus was on the Trustee's breaches of trust, all of which occurred in Singapore. The Court was unconvinced of the respondents' argument that most of the relevant witnesses, such as Mr Lescaudron, were located in Switzerland and not compellable to appear before the Singapore court. The location of witnesses was but a weak factor pointing in favour of Switzerland being *forum conveniens* relative to Singapore. The respondents had also argued that Swiss banking secrecy laws meant that disclosure of certain documents could only be ordered by the Swiss court but the Court gave little weight to this, holding that it was not clear that the Trustee could not obtain the requisite documents from the Bank itself. In contrast, the shape of litigation post the re-framing of the actions by the appellants meant that the trust relationship, rather than the banking relationship, was at the forefront of the claims. This pointed towards Singapore being the centre of gravity of the action. Further, Singapore law was the governing law of the Mandalay Trust and the rights of all parties under the Trust Deed: "There is no doubt that the Singapore courts are the most well-placed to decide issues of Singapore trust law, and the Swiss courts, operating in a civil law jurisdiction with no substantive doctrine of trusts, would be far less familiar with these issues"(at [110]). This comment may be to understate the competence of the Swiss courts in this regard, as internal Swiss trusts which are governed by a foreign law are not an uncommon wealth management tool in Switzerland. The Court was also not persuaded by the Trustee's argument that there was a risk of conflicting findings of fact due to related proceedings elsewhere, holding that this was not a "sufficiently real possibility" (at [114]). Thus, a majority of the Court held that, on an overall assessment of the connecting factors, Singapore would be the more appropriate forum vis-à-vis Switzerland.

There was a strong dissent by Chao SJ on the application of the *Spiliada* test. His Honour was of the view that whether the Trustee would be prejudiced by having to defend itself in Singapore formed the crux of the stay issue. In relation to this, His Honour observed that Mr Ivanishvili was a hands-on investor who corresponded directly with the Bank officers. The Trustee was not always copied into Mr Ivanishvili's instructions to the Bank. The alleged losses occurred in Switzerland and the acts and omissions of the Bank and its officers and the role of Mr Ivanishvili himself remained relevant in determining the Trustee's liability. In contrast, the Trustee played a passive role and the operative events in Singapore were merely secondary in nature (at [153]). This belied the appellants' insistence that the Bank's alleged wrongdoing was no longer relevant in the Singapore proceedings given the amended claim. His Honour was concerned about the respondents' ability to defend itself properly in Singapore given that the evidence and witnesses central to defending the claims were mainly located in Switzerland. Chao SJ was therefore of the view that the action had a greater connection with Switzerland than with Singapore "by a significant margin" (at [154]). His Honour went on to say that if he was wrong on stage one of the *Spiliada* test, stage two would also point towards Switzerland. On stage two, Chao SJ agreed with the High Court that the ends of justice would best be met by the Swiss court applying Singapore trust law. This is as the trustee's conduct may only be properly understood against the backdrop of Mr Ivanishvili's relationship with the Bank and the Bank's conduct in relation to its asset management duties (at [154]).

A pdf of the judgment can be downloaded here.

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# Lord Jonathan Mance on the future relationship between the United Kingdom and Europe after

# Brexit

*Nicole Grohmann, a doctoral candidate at the Institute for Comparative and Private International Law, Dept. III, at the University of Freiburg, has kindly provided us with the following report on a recent speech by Lord Jonathan Mance.*

On Wednesday, 15 July 2020, the former Deputy President of the Supreme Court of the United Kingdom (UKSC), Lord Jonathan Mance, presented his views on the future relationship between the United Kingdom and Europe after Brexit in an online event hosted by the *Juristische Studiengesellschaft Karlsruhe*. This venerable legal society was founded in 1951; its members are drawn from Germany's Federal Constitutional Court, the Federal Supreme Court, the office of the German Federal Prosecutor, from lawyers admitted to the Federal Supreme Court as well as judges of the Court of Appeals in Karlsruhe and the Administrative Court of Appeals in Mannheim. In addition, the law faculties of the state of Baden-Württemberg (Heidelberg, Freiburg, Tübingen, Mannheim, Konstanz) are corporate members. Due to Corona-induced restrictions, the event took place in the form of a videoconference attended by more than eighty participants.

After a warm welcome by the President of the *Juristische Studiengesellschaft*, Dr. Bettina Brückner (Federal Supreme Court), Lord Mance shared his assessment of Brexit, drawing on his experience as a highly renowned British and internationally active judge and arbitrator. In the virtual presence of judges from the highest German courts as well as numerous German law professors and scholars, Lord Mance elaborated – in impeccable German – on the past and continuing difficulties of English courts dealing with judgments of the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) and the future legal struggles caused by the end of the transition period on the withdrawal of the United Kingdom from the European Union on 31 December 2020. Lord Mance's speech was followed by an open discussion regarding the most uncertain political and legal aspects of Brexit.

In his speech, Lord Mance highlighted the legal difficulties involved in the withdrawal of his country from the European Union. Since Lord Mance himself tends to picture the British as being traditional and generally pragmatic, he named Brexit as a rare example of a rather unpragmatic choice. Especially with

regard to the role of the United Kingdom as a global and former naval power, Lord Mance considered Brexit a step backwards. Besides the strong English individualism, which has evolved over the past centuries, the United Kingdom did not only act as an essential balancing factor between the global players in the world, but also within the European Union. Insofar, the upcoming Brexit is a resignation of the United Kingdom from the latter position.

Subsequently, Lord Mance focussed on the role of the European courts, the European Court of Justice and the European Court of Human Rights and their judgments in the discussions leading to Brexit. Both European courts gained strong importance and influence in the UK within the first fifteen years of the 21st century. Especially, the ECtHR is of particular importance for the British legal system since the Human Rights Act 1998 incorporated the European Convention on Human Rights into British law. Lord Mance described the Human Rights Act 1998 as a novelty to the British legal system, which lacks a formal constitution and a designated constitutional court. Apart from the Magna Charta of 1215 and the Bill of Rights of 1689, the British constitutional law is mainly shaped by informal constitutional conventions instead of a written constitution such as the German Basic Law. Following the Human Rights Act 1998 and its fixed catalogue of human rights, the British courts suddenly exercised a stricter control over the British executive, which initially gave rise to criticism. Even though the British courts are not bound by the decisions of the ECtHR following the Human Rights Act 1998, the British participation in the Council of Europe soon started a dialogue between the British courts and the ECtHR on matters of subsidiary and the ECtHR's margin of appreciation. The UK did not regard the growing caseload of the ECtHR favourably. Simultaneously, the amount of law created by the institutions of the European Union increased. Lord Mance stressed the fact that in 1973, when the United Kingdom joined the European Economic Community, the impact of the ECJ's decision of 5 February 1963 in *Van Gend & Loos*, C-26/62, was not taken into account. Only in the 1990s, British lawyers discovered the full extent and the ramifications of the direct application of European Union law. The binding nature of the ECJ's decisions substantiating said EU law made critics shift their attention from Strasbourg to Luxembourg.

In line with this development, Lord Mance assessed the lack of a constitutional court and a written constitution as the main factor for the British hesitance to accept the activist judicial approach of the ECJ, while pointing out that Brexit

would not have been necessary in order to solve these contradictions. The EU's alleged extensive competences, the ECJ's legal activism and the inconsistency of the judgments soon became the primary legal arguments of the Brexiteers for the withdrawal from the EU. Especially the ECJ's teleological approach of reasoning and the political impact of the judgments were mentioned as conflicting with the British cornerstone principles of parliamentary sovereignty and due process. Lord Mance stressed that the so-called *Miller* decisions of the Supreme Court in *R (Miller) v Secretary of State* [2017] UKSC 5 and *R (Miller) v The Prime Minister, Cherry v Advocate General for Scotland* (Miller II) [2019] UKSC 41, dealing with the parliamentary procedure of the withdrawal from the EU, are extraordinary regarding the degree of judicial activism from a British point of view. In general, Lord Mance views British courts to be much more reluctant compared to the German Federal Constitutional Court in making a controversial decision and challenging the competences of the European Union. As a rare exception, Lord Mance named the decision in *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, in which the UKSC defended the British constitutional instruments from being abrogated by European law. Indeed, Lord Mance also expressed scepticism towards the jurisprudential approach of the ECJ, because inconsistences and the need of political compromise could endanger the foreseeability and practicability of its decisions. Especially with regard to the recent decision of the German Constitutional Court of 5 May 2020 on the European Central Bank and the Court's approach to *ultra vires*, Lord Mance would have welcomed developing a closer cooperation between the national courts and the ECJ regarding a stricter control of the European institutions. Yet this important decision came too late to change Brexiteers' minds and to have a practical impact on the UK.

Finally, Lord Mance turned to the legal challenges resulting from the upcoming end of the transition period regarding Brexit. The European Union (Withdrawal) Acts 2018 and 2020 lay down the most important rules regarding the application of EU instruments after the exit day on 31 December 2020. In general, most instruments, such as the Rome Regulations, will be transposed into English domestic law. Yet, Lord Mance detected several discrepancies and uncertainties regarding the scope of application of the interim rules, which he described as excellent bait for lawyers. Especially two aspects mentioned by Lord Mance will be of great importance, even for the remaining Member States: Firstly, the British courts will have the competence to interpret European law, which continues to

exist as English domestic law, without the obligation to ask the ECJ for a preliminary ruling according to Art. 267 TFEU. In this regard, Lord Mance pointed out the prospective opportunity to compare the parallel development and interpretation of EU law by the ECJ and the UKSC. Secondly, Lord Mance named the loss of reciprocity guaranteed between the Member States as a significant obstacle to overcome. Today, the United Kingdom has to face the allegation of 'cherry picking' when it comes to the implementation of existing EU instruments and the ratification of new instruments in order to replace EU law, which will no longer be applied due to Brexit. Especially with regard to the judicial cooperation in civil and commercial matters and the recast of the Brussels I Regulation, the United Kingdom is at the verge of forfeiting the benefit of the harmonized recognition and enforcement of the decisions by its courts in other Member States. In this regard, Lord Mance pointed out the drawbacks of the current suggestion for the United Kingdom to join the Lugano Convention, mainly because it offers no protection against so-called torpedo claims, which had been effectively disarmed by the recast of the Brussels I Regulation – a benefit particularly cherished by the UK. Instead, Lord Mance highlighted the option to sign the Hague Convention of 30 June 2005 on Choice of Court Agreements which would allow the simplified enforcement of British decisions in the European Union in the case of a choice of court agreement. Alternatively, Lord Mance proposed the ratification of the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments. So far, only Uruguay and Ukraine have signed this new convention. Nevertheless, Lord Mance considers it as a valuable option for the United Kingdom as well, not only due to the alphabetical proximity to the other signatories.

Following his speech, the event concluded with a lively discussion about the problematic legal areas and consequences of Brexit, which shall be summarised briefly. Firstly, the President of the German Supreme Court Bettina Limperg joined Lord Mance in his assessment regarding the problem of jurisprudential inconsistency of the ECJ's decisions. However, like Lord Mance she concluded that the Brexit could not be justified with this argument. Lord Mance pointed out that in his view the ECJ was used as a pawn in the discussions surrounding the referendum, since the Brexiteers were unable to find any real proof of an overarching competence of the European Union. Secondly, elaborating on the issue of enforceability, Lord Mance added that he considers the need for an alternative to the recast of the Brussels I Regulation for an internationally

prominent British court, such as the London Commercial Court, not utterly urgent. From his practical experience, London is chosen as a forum mainly for its legal expertise, as in most cases enforceable assets are either located in London directly or in a third state not governed by EU law. Hence, Brexit does not affect the issue of enforceability either way. Finally, questions from a constitutional perspective were raised regarding the future role of the UKSC and its approach concerning cases touching on former EU law. Lord Mance was certain that the UKSC's role would stay the same regarding its own methodological approach of legal reasoning. Due to the long-standing legal relationship, Lord Mance anticipated that the legal exchange between the European courts, UK courts and other national courts would still be essential and take place in the future.

In sum, the event showed that even though Brexit will legally separate the United Kingdom from the European Union, both will still be closely linked for economic and historical reasons. As Lord Mance emphasized, the UK will continue to work with the remaining EU countries in the Council of Europe, the Hague Conference on PIL and other institutions. Further, the discrepancies in the Withdrawal Acts will occupy lawyers, judges and scholars from all European countries, irrespective of their membership in the European Union. Lastly, the event proved what Lord Mance was hoping to expect: The long-lasting cooperation and friendship between practitioners and academics in the UK and in other Member States, such as Germany, is strong and will not cease after Brexit.

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# The Artist, the Actor and the EEO Regulation; or, how the English Courts and the Spanish Constitutional Court prevented a

# cross-border injustice threatened via the EEO Regulation in the litigation concerning Gerardo Moreno de la Hija and Christopher Frank Carandini Lee

*Written by Jonathan Fitchen, University of Aberdeen*

**Introduction**

The EEO Regulation (805/2004) was mooted in the mid-1990's to combat perceived failings of the Brussels Convention that were feared to obstruct or prevent 'good' judgment creditors from enforcing 'uncontested' (i.e. undisputable) debts as cross-border debt judgments within what is now the EU. The characterisations 'good' and 'bad' are not employed facetiously; the unreasonable obstruction of a creditor who was assumed to pursue a meritorious debt claim was and remains a central plank of the EEO project: hence the Regulation offers an alternative *exequatur* and public policy free procedure for the cross-border enforcement of such uncontested monetary civil and commercial claims that, until 2002, fell under the quite different enforcement procedures of the Brussels Convention. The 2004 EEO Regulation covers money enforcement titles (judgments, settlements and authentic instruments) that are already enforceable in the Member State of origin and hence are offered an alternative route to cross-border enforcement in the Member State addressed via the successors to the Brussels Convention, first the Brussels I Regulation and now the Brussels Ia Regulation, on an expedited basis due to omitting both an *exequatur* stage and the ability of the Member State addressed to refuse enforcement because of public policy infringements.

As the EEO Regulation was introduced some years *after* the cross-border enforcement provisions of the Brussels Convention had been replaced by those of the Brussels I Regulation, many of the EEO's 'innovations' to remedy 'unnecessary' or abusive delays, caused by either a 'bad' debtor or by an overly

cautious enforcement venue, had already been mitigated three years before it came into force in 2005. This fact and other issues (e.g. a preference among lawyers for the familiar and now streamlined Brussels I Regulation enforcement procedure, the issue of ignorance of the EEO procedures, and a greater than expected willingness for creditors to litigate debt claims directly in foreign venues) contributed to a lower than expected take up of the EEO Regulation in the context of contentious legal proceedings.

Anecdotal evidence of low use of the EEO in contentious matters has led to a view that the EEO Regulation is somewhat redundant. The coming into force of the *exequatur*-free Brussels Ia Regulation and the surveys connected with the IC²BE project  have re-enforced this view of its redundancy. An expected recasting for the 2004 Regulation did not however occur in 2012 as the Commission withdrew it. The same year the Commission had received a less than complimentary report from RAND Europe concerning the Regulation (with which it disagreed and continues to disagree). It may be speculated that having lost the argument on restricting or deleting public policy in the course of the re-casting of the Brussels I Regulation, the Commission may have feared that the re-casting of the EEO might tend towards its *de facto*deletion if the Member States were permitted to consider its reliance on control in the Member State of origin and the lack of a public policy exception given examples of national case law that were already suggestive of structural difficulties with the Regulation and its underlying drafting assumptions (e.g. see G Cuniberti's comment on French Cour de cassation chambre civile 2, 6 janvier 2012 N° de pourvoi: 10-23518).

As matters stand, the EEO Regulation continues to apply and continues to cause particular difficulties for debtors (and also creditors, enforcement authorities and the CJEU), whether in the Member State of origin or in the Member State addressed. This assertion is supported by two litigation notes, of which this is the first (and most extraordinary): indeed, it is suggested that the difficulties that arose in the litigation discussed below are at least as significant for European private international law as the infamous case C-7/98 *Krombach v Bamberski*; *Krombach* and *Lee* each indicate the need for the inclusion of an overt public policy exception for those cases in which domestic civil procedure and the norms of European and international civil procedure have malfunctioned to such an extent that EU PIL is in danger of being 'understood' to force the Member State of enforcement to grant cross-border legal effect to a judgment granted

improperly in flagrant breach of European and domestic human rights standards.

**Facts**

In January 2014 the civil judgment enforcement officials of the English High Court received a European Enforcement Order (EEO) application from a Spanish gentleman's lawyers requesting the actual enforcement of the Spanish judgment and costs recorded by the EEO certificate for €923,000. The enforcement target – who had been contacted officially by a letter from the applicant's lawyers *for the first time in the proceedings* shortly before this application and given 14 days to pay – was the well-known actor Christopher Lee, who was domiciled in the UK and resident in London where he had lived for many years.

Thus began the enforcement stage of a cross-border saga in which the judgment creditor and judgment debtor sought respectively to enforce or resist the enforcement of an EEO certificate that was incomplete (hence defective on its face) and unquestionably should never have been granted because it related to a Spanish judgment that should never have been delivered (or declared enforceable) concerning a debt, that had not been properly established according to Spanish procedural law, and relating to an at best contestable (and at worst fanciful) legal liability alleged to somehow fall upon an actor in a film concerning a subsequent unauthorised use by the DVD distributor of that film of the claimant artist's copyrighted artwork from that film in connection with the European DVD release of that film. The claim under Spanish copyright law was based on proceedings dating from June 2007 commenced before the Burgos Commercial court that unquestionably were never at any time (whether as a process, a summons or a judgment) in the following seven years served properly on the famous and foreign-domiciled defendant in accordance with the service provisions of the EU Service Regulation.

The original claim named three parties: 1) a production company (The Quaid Project Ltd); 2) Mr. Juan Aneiros (who was alleged to have signed a contract pertaining to the artwork for the film with the claimant artist in 2004 and who was the son-in-law of Christopher Lee and who seemingly ran Mr Lee's website) and 3) Christopher Lee himself. The proceedings attempted in Spain however encountered an initial problem of how to serve these 'persons' in or from Spain. The solution selected as far as Lee was concerned did not use the Service Regulation nor did it anticipate the later reasoning of the CJEU in *Case C 292/10*

*G v de Visser ECLI:EU:C:2012:142*. After not finding Lee resident in Spain, the hopeless fiction of service by pinning the originating process to the noticeboard of the Burgos Commercial Court for a period of time was employed: it was then claimed that this properly effected service in circumstances where it was claimed to be impossible to find or serve a world renowned and famous English actor (or the actor's agent) in Spain (where he did not live).

Such modes of service where the defendant is likely to be domiciled in another state have been condemned as insufficient by the ECJ in cases such as: *Case 166/80 Peter Klomps v Karl Michel [1981] ECR 1593; Case C-300/14 Imtech Marine Belgium NV v Radio Hellenic SA ECLI:EU:C:2015:825; Case C-289/17 Collect Inkasso OU v Aint 2018 EU:C:2018*. These defects in serving Lee as intended defendant, and then as an enforcement target, proved fatal in February 2020 when, after roughly six years of challenges by Lee (and from mid 2015 by his Widow), the Spanish Constitutional Court decided that the consequences flowing from the service violations were sufficiently serious to remit the Spanish proceedings back to square one for noncompliance with Article 24 of the Spanish Constitution by the Spanish civil courts.

Significant aspects of the claim are unclear, in particular, why Lee was regarded as potentially liable for the claim. The various law reports make clear that the claim concerned compensation sought under Spanish copyright law by an artist whose contracted artwork for a film called 'Jinnah' (in which Christopher Lee had starred) had later been used without his permission for the subsequent European DVD release of that film. Though Spanish law permits such a contractual claim by the artist against the relevant party who uses his artwork, it is unclear from the various English and Spanish law reports how, in connection with the DVD release, this party was Christopher Lee. It is stated at para 11 of [2017] EWHC 634 (Ch) that Lee's lawyers told the English court that their client (who was not a producer or seemingly a funder of the original film) did not sign *any* contract with the claimant. It is hence not clear that Lee made (or could make) any decisions concerning the artwork for the film and still less concerning its later use for the European DVD release to breach the claimant's copyright. Such decisions appear to have been made by other natural and legal persons, without any link to Lee capable of making him liable for the compensation claimed.

Though it is doubtful that the issue will ever be resolved, a few statements in the Spanish press (*El Pais,* 22 March 2010) suggest both that the claimant regarded

Lee as having been amongst those who had 'authorised' his original appointment to the film as its artist/illustrator but also, and confusingly, that the artist had not been able to speak to Lee about the issue and did not, subject to what the court might hold, consider him responsible for the misuse. Though it is speculation, it may be that a connection was supposed by the claimant (or his lawyers) analogous to a form of partnership liability between Lee and some of the other defendants who might have been presumed to have been involved in the original decision to employ the artist at the time of the film and hence might possibly have later been involved in the decision to re-use the same artwork (this time without the artist's consent) for the European DVD release. Neither the matter nor the nature of Lee's potential liability is though clear.

Further uncertainty arises from the issue of quantum. Spanish law allows an aggrieved artist to bring a claim for contractual compensation to seek sums representing those revenues that would have accrued to him had there been a reasonable contractual agreement to use his artwork in this manner. One function of the Spanish court in such a claim is to determine the correct quantum of this sum by considering representations from *each* party to the claim: this process could not occur properly in the present case as the service defects meant that only the views of the claimant were ever presented. Why was €710,000 the correct sum? Why not €720,000, €700,000 or €10,000? Trusting the artist's own estimation seems optimistic given that the sum claimed was large and the matter concerned the European DVD release of a film that was many orders of magnitude less well-budgeted or commercially successful than other films in which Christopher Lee had starred (e.g. Star Wars and the Lord of the Rings). Equally, did the artist really have all the data in his possession to allow him to demonstrate unilaterally the proper quantum in a forensic manner?

Despite these uncertainties the suggested liability and quantum were asserted for the purposes of formulating the Spanish claim that led to the *in absentia* judgment granted in March 2009 which, by May 2009, (in default of any appeal by the officially uncontacted Lee) was declared final. In October 2009 the judgment was declared enforceable by yet another notice from the same Burgos court that was again pointlessly fixed to the notice board of the court in default of employing any effective mode of service that should have been used in this context.

The matter was reported (inaccurately) in the UK press and media in 2010, possibly based on not quite understood Spanish newspaper reports, without

however securing any comment from Lee. It is unclear if Lee ever did know unofficially of the Spanish proceedings, but it seems likely that he did as his son-in-law was involved in these. Such unofficial knowledge does not, of course, excuse successive service failures. One point that the UK media did record accurately in 2010 was that no defendant had appeared in the earlier Spanish proceedings.

In 2011, at the request of the claimant, the Burgos court issued him with an EEO certificate. It was seriously incomplete, omitting ticks for the boxes found at: 11.1 (that service had been as per the Service Regulation); 12.1 (ditto the summons); 13.1 (that service of the judgment had been as per the Regulation); 13.3 (that the defendant had a chance to challenge the judgment); and, 13.4 (that the defendant had not so challenged). The judgment on which the EEO certificate was based was claimed in the certificate to be one dated 26 April 2010 (seemingly never produced in the later London enforcement proceedings) while the certificate wrongly gave as Lee's London address as the address of his son-in-law and misspelled Lee's middle name.

In October 2013 the claimant applied to the Spanish courts for the rectification of the 2011 EEO certificate: such rectification was however confined only to correct the misspelled name and to add over €200,000 to the original 'debt' as costs due in part, it may be supposed from the comments of the Constitutional Court, to unsuccessful attempts to pursue the Spanish property of Lee's Spanish son-in-law. Seemingly no rectification was sought for the other serious omissions. The October 2013 EEO certificate was presented in January 2014 in London to Lee and to the English court. Lee's correct address had now been ascertained by the claimant's lawyers instructed to seek the cross-border enforcement of the EEO certificate concerning the 'uncontested' sums apparently due in Spain via its expedited and public policy free procedures.

On finally learning officially of the existence of the earlier Spanish *in absentia* proceedings when met with a lawyer's letter to his address demanding payment of the entire alleged debt within 14 days, Lee instructed his English lawyers and appointed Spanish lawyers to commence challenges to the earlier Spanish proceedings and to secure stays of enforcement in Spain and in the UK (the latter being via Art 23(c) EEO). By reason of a good-faith error, Lee's English lawyers 'jumped-the-gun' and represented to the English court that the Spanish challenge proceedings had already commenced – in fact at that point the Spanish lawyers

had only been *instructed* to bring a challenge – and secured the English Art.23(c) stay some 17 days ahead of the actual commencement of the Spanish challenge proceedings. The creditor, via his lawyers, objected (correctly) to the premature grant and also to the continuation of the stay under Art.23(c) which first required the commencement of the Spanish challenges: this objection led to a Pyric victory when the English court dispensed with the erroneous stay but replaced it, seamlessly, with another stay granted as part of its inherent jurisdiction (rather than via any provision of the EEO Regulation) which it justified as appropriate given the presentation of a manifestly defective and incomplete EEO certificate. The stay was to endure for the duration of the Spanish appeals and all Spanish challenges to enforcement. Lee's death in mid 2015 saw the stay endure for the benefit of his widow.

While the stay proceedings were ongoing in England, the attempts by Lee's lawyers to challenge the earlier Spanish proceedings before the Spanish civil courts and appeal courts went from bad to worse. The said courts all took the astonishing view (summarised in paras 23 – 30 of [2017] EWHC 634 (Ch) (03 April 2017)) that there had been sufficient service and that Lee was now out-of-time to raise objections by civil appeal. All Spanish stay applications were rejected; even the Constitutional Court rejected such a stay application (on an earlier appeal prior to the 2020 case), finding the earlier conclusions of the civil courts that there was no demonstrable irreparable harm for Lee without the stay to be in accordance with the Constitution. Appeal attempts before the civil courts to object to the frankly ridiculous triple failure of service of process, summons and judgment, or to the existence of a viable claim, or to the lack of the quantification stage required by Spanish procedural law, all fell on deaf ears in these courts.

In this sense, because the Spanish civil courts all demonstrated their unwillingness to remedy the successive misapplication of EU laws, the private international law and procedural law of the EU all failed in this case in the Member State of origin. That this failure did not result in immediate actual enforcement against Lee's estate in the Member State addressed was due only to the extemporisation by an English court of an inherent jurisdiction stay in response to an incomplete certificate supporting the application. Without this extemporised stay the enforcement would have proceeded in the UK without any possibility of Lee requesting corrective intervention by English authorities to invoke a missing public policy exception. The English court was clear that had the

empty boxes been ticked, there would have been no basis for the stay and enforcement would have been compelled. So much for the Recital 11 assurances of the EEO Regulation:

“This Regulation seeks to promote the fundamental rights and takes into account the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure full respect for the right to a fair trial as recognised in Article 47 of the Charter.”

These events left Lee’s lawyers with only one remaining challenge possibility in Spain, viz. arguing that the Spanish civil courts had violated the Spanish Constitution. These challenges were brought to the Spanish Constitutional Court by lawyers acting first for Lee and then, after his death, acting for his widow. The decision of the Constitutional Court was delivered on 20 February 2020 (see comment by M Requejo Isidro) and found that there had indeed been a significant domestic breach of the Spanish Constitution, specifically, Section 24 para 1 which (in English) reads

“All persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defense.”

The Constitutional Court – which necessarily is restricted to a consideration of the matters that go directly to the operation of the Spanish Constitution and hence has no further general appellate competence over the actions of the civil courts – concluded that the initial failure to serve a non-domiciled person, whose address was claimed to be unknown, but would have been very simple to discover, in accordance with the provisions of the relevant EU Service Regulation meant that Christopher Lee, and later his widow, were not adequately protected by the Spanish courts as required by Section 24 of the Spanish Constitution and hence had been deprived impermissibly of the defence that had to be provided. The order of the Constitutional Court annulled the earlier Spanish proceedings and sent the contingency-fee-funded claimant back to square one to recommence any subsequent proceedings properly and with due service concerning his alleged claim against whatever parts of the estate of the late Christopher Lee might now still be located within the UK or the EU.

## **Reflections on some of the wider issues**

Though this litigation was compared above with the cause-celebre that was *Krombach*, it can be argued to represent a greater Member State of origin catastrophe than the earlier case: at least Herr Krombach was officially notified, served, summoned to the proceedings and then notified of the judgment. *Krombach* and *Lee* do both however illustrate why a public policy exception in the Member State addressed is essential. Unfortunately, in *Lee* this illustration is set against the absence of that exception. Thus, *Lee* demonstrates the grim prospects facing the 'debtor of an uncontested sum' (who only has this status due to blatant and successive breaches of service and private international law procedures) in cross-border enforcement procedures if the 'emergency brake' of public policy has been removed by drafters keen to prevent its unnecessary application to facilitate faster 'forward-travel' in circumstances in which the application of the said brake would not be necessary.

Had not the presented EEO certificate been so deficient, the English courts would not have been willing to extemporise a stay and the whole sum would have been enforced against Lee in London long before the civil and constitutional proceedings – all of which *Lee* also had to fund – concluded in Spain. Few ordinary people could have effectively defended the enforcement across two venues for six years when facing a claimant pursuing a speculative claim via a conditional fee arrangement (with its clear significance for the likely recovery of defence costs and a resulting impact upon the need to fund your own lawyers in each jurisdiction). It must be presumed that, despite manifest breaches of EU law and human rights standards, most ordinary persons would simply have had to pay-up. Whether this has already occurred, or occurs regularly, are each difficult to ascertain; what can though be said is that the design and rationale of the EEO Regulation facilitate each possibility.

Lee was fortunate indeed to face an incomplete EEO certificate and to find English judges who, successively, were favourably disposed towards his applications despite a Regulation drafted to dismiss them. Though some may be disposed to regard the judiciary of *that* ex-Member State as 'constitutionally' predisposed to effect such interpretative developments, this would be a mistake, particularly in the present context of applications to the Masters in question (members of the judiciary who deal with incoming foreign enforcement applications). In any case, judicial willingness to extemporise a solution when faced with a defective EEO certificate to avert an immediate cross-border

injustice seems a slender thread indeed from which to hang the conformity of the operation of the EEO Regulation with the basic human rights that should have been, but were not, associated with the treatment of Lee throughout these proceedings.

It is suggested that the circumstances of *Lee* demonstrate the failure of both the EEO Regulation, and of EU PIL in general, to protect the rights of an unserved and officially unnotified defendant to object to a cross-border enforcement despite the grossest of failings in the Member State of origin that, given the existence of Article 24 of the Spanish Constitution, proved astonishingly unsusceptible to Spanish appeal procedures. Had the judgment creditor been compelled to proceed to enforcement under the Brussels I Regulation (or later under the Recast of that Regulation) the service defects would probably have been more evident whether in the assumption of jurisdiction and / or at the point of enforcement outside Spain: the judgment debtor would also have had the option to raise the public policy exception to defend the enforcement proceedings plus better stay options in the enforcement venue.

Further it is suggested that *Lee* indicates that the EEO Regulation is no longer fit for purpose and should be recast or repealed. *Lee,* like *Krombach*, illustrates the danger of relying on the Member State of origin when drafting cross-border procedures of a non-neutral nature, i.e. reflecting assumptions that certified claims sent abroad by the 'creditor' will be 'good'. It is not always correct that all will remain 'fixable' in the Member State of origin such that objections to enforcement in the Member State addressed and a public policy exception are unnecessary. *Krombach* and *Lee* may be exceptional cases, but it is for such cases that we require the equally exceptional use of a public policy exception in the enforcement venue.

# The Data Protection Conflict: The EU General Data Protection Regulation 2016 and India's Personal Data Protection Bill 2019

***By*** *Anubhav Das (National University of Advanced Legal Studies, Kochi) and Aditi Jaiswal (Ram Manohar Lohia National Law University, Lucknow)*

The internet brought significant changes in society, leading to a massive collection of data which necessitated legislation to regulate such data collection. The European Union enacted the General Data Protection Regulation, 2016(Hereafter GDPR), replacing the Data Protection Directive, 1995. Meanwhile, India, which currently lacks a separate data protection legislation, is in the process of enacting the Personal Data Protection Bill, 2019 (Hereafter PDP). The PDP has been introduced in the Indian parliament and is currently under the scrutiny of a parliamentary committee. The primary purpose of these legislations is the protection of informational privacy.

Even though GDPR and PDP follow the same set of data protection principles, but, there exists an inevitable conflict between the two. This conflict determines the applicability of the legislation on the data subject. The territorial scope of GDPR and the PDP makes it clear that both overlap each other and this overlap can be used by companies involved in data processing or collection, to circumvent the civil liability arising under the laws. This post analyses the conflict between both the laws and in conclusion, it will suggest a way to overcome such an issue.

**Territorial Scope: GDPR and PDP**

Article 3 of the GDPR provides for the territorial applicability of the law. The Regulation applies to the processing of personal data by a controller or a processer. According to Article 3(1), any controller or processer that is established in the member state (European Union) shall fall under the scope of the GDPR. In other words, any company which has an office in the European Union shall come within the purview of the GDPR. Article 3(2) states that even if any processer or controller is not established in the European Union, but if they

are offering goods or services irrespective of payment or monitoring behaviour in the European Union, then they will also fall under the scope of GDPR.

On the other hand, the PDP provides for the territorial applicability under Section 2. It applies to the processing of personal data by data fiduciary (similar to the controller under GDPR) and data processer (similar to processer under GDPR). Section 2(A) (a) states that if personal data is collected, disclosed, shared or otherwise processed within the territory of India, then it shall fall under the PDP. Section 2(A) (b), makes it applicable to the State, any Indian company, any citizen of India or any person or body of persons incorporated or created under Indian law. Section 2 (A) (c) makes it applicable to data fiduciary or data processor which are not in India but are processing in connection with any business carried on in India, or any systematic activity of offering goods or services to data principals within the territory of India or any activity concerning the profiling of data principle.

**The Overlap of Jurisdiction**

The internet has provided a way for companies to operate anywhere without the existence of an entity in a particular country. This also includes those companies which deal with data. In the context of Europe and India, a company doesn't need to have an entity in Europe or India to operate and do business. Thus, an Indian company can easily do business related to data in Europe without any real existence in Europe and vice versa. Consequently, the problem that arises concerning data protection laws is complicated. An Indian company will fall under the purview of the PDP as per Section 2(A) (b) but at the same time if this Indian company also deals with '*personal data for offering goods or services*' in the European Union, then it will also be regulated by the provisions of the GDPR.

Similarly, a European company '*collecting data in India*' will fall under the scope of both PDP and GDPR. It is a matter of fact that judicial courts do not have jurisdiction over foreign land. Hence, no monetary damages can be imposed on companies which operate from Europe by using PDP or companies operating from India by using GDPR.

A European company or an Indian company can also claim that there is proper compliance with GDPR or PDP, respectively. In the context of Europe and India, a company only needs to follow the data protection law of the land from where it

operates even though such an act violates data protection law of the other jurisdiction. This is possible as GDPR and PDP differ from each other on every key and essential aspect such as the very meaning of personal data.

**The Difference and its Implications**

The primary purpose of GDPR and PDP is the protection of personal data. But, the definition of personal data differs when GDPR is compared with PDP. The reason why such a description is essential is that a substantial part of both laws is based on the processing of personal data. This includes fair consent, purpose limitation, storage limitation, rights of data principle etc. Such aspects, when read with the territorial scope of both the laws, outlines the applicability of its provisions. The table below shows the difference in the definition of personal data.

| GDPR | PDP |
|---|---|
| **Personal data** means any information relating to an identified or identifiable natural person ('data subject'). An identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person; | **Personal data** is data about or relating to a natural person who is directly or indirectly identifiable, having regard to any characteristic, trait, attribute or any other feature of the identity of such natural person, whether online or offline, or any combination of such features with any additional information, and shall include any inference drawn from such data for profiling. |

Note – Underlined are the parts which show that it is not present in the other law.

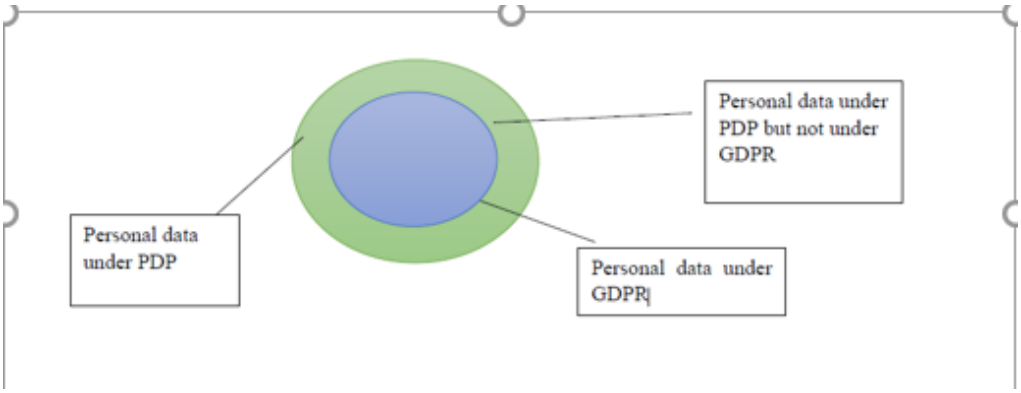
Both GDPR and PDP refer to personal data as information/data relating to

identified/identifiable natural person. At the same time, the nuances of what constitutes an identifiable natural person differ significantly as both use different terminology which creates a diversion in the meaning of the personal data.

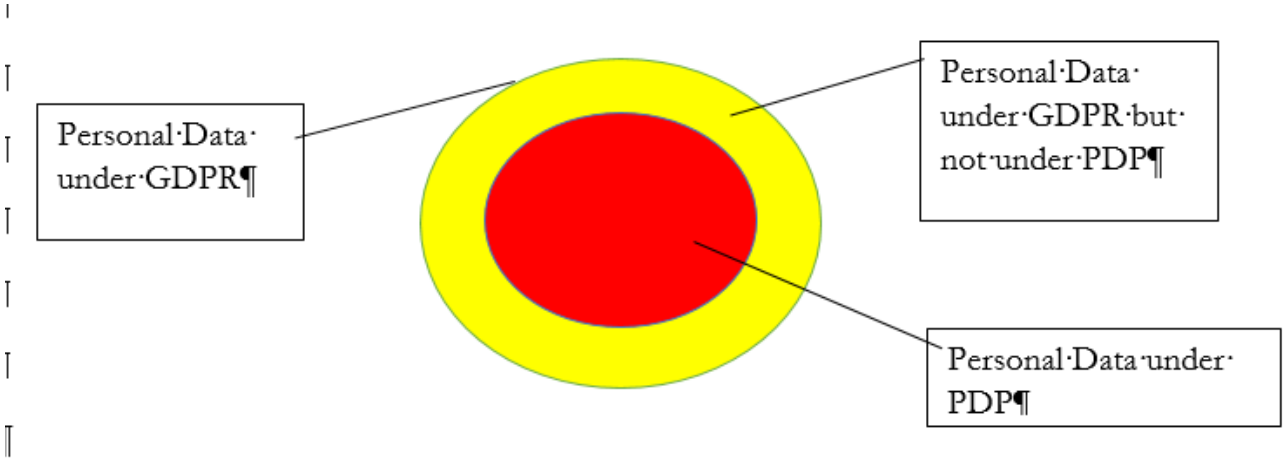
**Deviation 1** – PDP provides for words such as '*any other feature of identity, a combination of such feature with other information, any inference drawn for profiling*', in the meaning of an identifiable natural person. These terms can be interpreted more liberally and will probably be explained by courts in India and shall have an evolving meaning. GDPR, on the other hand, provides for specific terms like '*physical, physiological, genetic, mental, economic, cultural, social identity*'. Hence, European Courts will have to interpret personal data by mandatorily considering such terms, making it's scope narrower when compared to PDP in this context.

**Deviation 2 –** Terms such as '*identification number*' and '*location data*' is mentioned explicitly in GDPR and not in PDP, making PDP narrower in scope here.

This above discussion can be easily understood with the help of the following figure –




Deviation 1 – The green circle represents inference in PDP. The blue circle represents inference in GDPR. The green stripe represents personal data which is covered in PDP and not covered in GDPR.




Deviation 2 – The yellow circle represents personal data in GDPR. The red circle represents personal data in PDP. The yellow stripe represents personal data which is covered in GDPR and not covered in PDP.

In the figure above, in **Deviation 1**, the green strip represents that personal data, which when processed by a company shall not fall under the scope of GDPR even though it shall be under the scope of the PDP. Such a difference implies that companies falling under the territorial ambit of both the laws, can follow one and circumvent the other.

A European company can process personal data represented in the green strip from India, and for that, it doesn't need to comply with GDPR as that data is not personal data under GDPR. Now even though, there is a violation of the provisions under PDP the company can escape liability as Indian courts do not have jurisdiction in Europe, and European Courts cannot adjudge the matter as it falls outside the material scope of GDPR. The vice versa will happen if the case of **deviation two** is considered.

The consequence of such inconsistencies will be faced by data subjects who won't be able to claim damages provided under their respective data protection law. One of the ways to ensure that damages can be claimed is by harmonising the data protection laws which can only be done by international cooperation.

**The Need For International Cooperation in Data Protection**

The existence of such issues in the framework of GDPR and PDP is not because of the extraterritorial application. Advocating against the extraterritorial application to resolve the problem of overlap in the jurisdiction of data protection laws would only give rise to more infringement of informational privacy of data subjects by

foreign companies. This, in turn, will be detrimental for the very purpose for which data protection legislation is enacted.

The requirement at present is to harmonise the key definitions such as personal data in the data protection legislation. This will ensure that a right of action lies in both GDPR and PDP. Even if a foreign company cannot be dragged to the national court, harmonisation will at least ensure that a data subject has a right to seek damages in the international court.

The aspect discussed in this article is regarding two jurisdictions. However, consider, for instance,  the complications that could arise when more than two jurisdictions are involved. To illustrate, an Indian Company having an office in Canada and that office is doing business in data from the European Union. In such cases, the best way to ensure data protection rights is by harmonisation, and this can only be achieved with the help of international cooperation. Thus, data protection in the age of internet needs multilateral international agreements.

**Conclusion**

The international regime of data protection is complicated in today's world. There is no proper international agreement which governs the data protection legislation across the globe, which resulted in a difference in the critical terms of data protection when GDPR and PDP are compared. This, in – turn can be used by corporates to get away with liability. So, the aim must be not to let anyone violate the data protection principles by using this inconsistency and get away with it. To deal with this and safeguard the privacy of data subject, international cooperation in data protection is essential.

# A Dangerous Chimera: Anti-Suit Injunctions Based on a "Right to be Sued" at the Place of Domicile under the Brussels Ia Regulation?

This post introduces my case note titled 'A Dangerous Chimera: Anti-Suit Injunctions Based on a "Right to be Sued" at the Place of Domicile under the Brussels Ia Regulation?' which appeared in the July 2020 issue of the *Law Quarterly Review* at page 379. An open access version of the case note is available here.

In *Gray v Hurley* [2019] EWCA Civ 2222, the Court of Appeal (Patten LJ, Hickinbottom LJ and Peter Jackson LJ), handed down the judgment on the claimant's appeal in *Gray v Hurley* [2019] EWHC 1972 (QB). The appellant appealed against the refusal of an anti-suit injunction.

The appellant (Ms Gray) and respondent (Mr Hurley) had been in a relationship. They acquired property in various jurisdictions using the appellant's money, but held it in either the respondent's name or in corporate names. The relationship ended and a dispute commenced over ownership of some of the assets and properties. The appellant was domiciled in England; the respondent lived in New Zealand after the relationship ended and was no longer domiciled in England. He initiated proceedings there for a division of the property acquired by the couple during the relationship. The appellant issued proceedings in England seeking a declaration that she was entitled absolutely to the assets. She also applied for an anti-suit injunction to restrain the defendant from continuing with proceedings in the courts of New Zealand. Lavender J held that England was the appropriate forum for the trial of the appellant's claims but that the respondent's New Zealand claim could not be determined in England. He rejected her argument that Article 4(1) of the Brussels Ia Regulation obliged him to grant an anti-suit injunction to prevent the respondent from litigating against her in a non-EU state.

The appellant argued that *Samengo-Turner v J&H Marsh & McLennan (Services) Ltd* [2007] EWCA Civ 723, [2007] 2 All E.R. (Comm) 813 and *Petter v EMC Europe Ltd* [2015] EWCA Civ 828, [2015] C.P. Rep. 47 were binding authority that

Article 4(1) provided her with a right not to be sued outside England, where she was domiciled, obliging the court to give effect to that right by granting an anti-suit injunction.

The Court of Appeal considered that the issue was not *acte claire* and sent a preliminary reference to the CJEU (pursuant to Article 267 TFEU) asking whether Article 4(1) of the Brussels Ia Regulation provided someone domiciled in England with a right not to be sued outside England so as to oblige the courts to give effect to that right by granting an anti-suit injunction.

The case note examines the Court of Appeal's decision in *Gray v Hurley* [2019] EWCA Civ 2222. It offers a pervasive critique of the argument that the general rule of jurisdiction under the Brussels Ia Regulation gives rise to a substantive right to be sued only in England and that this right is capable of enforcement by an anti-suit injunction. It is argued that the previous decisions of the Court of Appeal in *Samengo-Turner v J&H Marsh & McLennan (Services) Ltd* [2007] EWCA Civ 723 and *Petter v EMC Europe Ltd* [2015] EWCA Civ 828 were themselves wrongly decided. In light of this, it will be even more difficult to justify the broader application of a similar result in the present case.

Indeed, the law would take a wrong turn if the present case is allowed to build on the aberrational foundations of the developing law on anti-suit injunctions based on rights derived from the Brussels Ia Regulation. Essentially, a chimerical remedy based on a fictitious right would not only infringe comity but would also deny the respondent access to justice in the only available forum. The note also anticipates the CJEU's potential findings in this case.

An open access version of the case note is available here.

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# Uber Arbitration Clause

# Unconscionable

In 2017 drivers working under contract for Uber in Ontario launched a class action. They alleged that under Ontario law they were employees entitled to various benefits Uber was not providing. In response, Uber sought to stay the proceedings on the basis of an arbitration clause in the standard-form contract with each driver. Under its terms a driver is required to resolve any dispute with Uber through mediation and arbitration in the Netherlands. The mediation and arbitration process requires up-front administrative and filing fees of US$14,500. In response, the drivers argued that the arbitration clause was unenforceable.

The Supreme Court of Canada has held in *Uber Technologies Inc. v. Heller*, 2020 SCC 16 that the arbitration clause is unenforceable, paving the way for the class action to proceed in Ontario. A majority of seven judges held the clause was unconscionable. One judge held that unconscionability was not the proper framework for analysis but that the clause was contrary to public policy. One judge, in dissent, upheld the clause.

A threshold dispute was whether the motion to stay the proceedings was under the *Arbitration Act, 1991*, S.O. 1991, c. 17 or the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sch. 5. Eight judges held that as the dispute was fundamentally about labour and employment, the ICAA did not apply and the AA was the relevant statute (see paras. 18-28, 104). While s. 7(1) of the AA directs the court to stay proceedings in the face of an agreement to arbitration, s. 7(2) is an exception that applies, *inter alia*, if the arbitration agreement is "invalid". That was accordingly the framework for the analysis. In dissent Justice Cote held that the ICAA was the applicable statute as the relationship was international and commercial in nature (paras. 210-18).

The majority (a decision written by Abella and Rowe JJ) offered two reasons for not leaving the issue of the validity of the clause to the arbitrator. First, although the issue involved a mixed question of law and fact, the question could be resolved by the court on only a "superficial review" of the record (para. 37). Second, the court was required to consider "whether there is a real prospect, in the circumstances, that the arbitrator may never decide the merits of the jurisdictional challenge" (para. 45). If so, the court is to decide the issue. This is rooted in concerns about access to justice (para. 38). In the majority's view, the

high fees required to commence the arbitration are a "brick wall" on any pathway to resolution of the drivers' claims.

The majority then engaged in a detailed discussion of the doctrine of unconscionability. It requires both "an inequality of bargaining power and a resulting improvident bargain" (para. 65). On the former, the majority noted the standard form, take-it-or-leave-it nature of the contract and the "significant gulf in sophistication" between the parties (para. 93). On the latter, the majority stressed the high up-front costs and apparent necessity to travel to the Netherlands to raise any dispute (para. 94). In its view, "No reasonable person who had understood and appreciated the implications of the arbitration clause would have agreed to it" (para. 95). As a result, the clause is unconscionable and thus invalid.

Justice Brown instead relied on the public policy of favouring access to justice and precluding an ouster of the jurisdiction of the court. An arbitration clause that has the practical effect of precluding arbitration cannot be accepted (para. 119). Contractual stipulations that prohibit the resolution of disputes according to law, whether by express prohibition or simply by effect, are unenforceable as a matter of public policy (para. 121).

Justice Brown also set out at length his concerns about the majority's reliance on unconscionability: "the doctrine of unconscionability is ill-suited here. Further, their approach is likely to introduce added uncertainty in the enforcement of contracts, where predictability is paramount" (para. 147). Indeed, he criticized the majority for significantly lowering the hurdle for unconscionability, suggesting that every standard-form contract would, on the majority's view, meet the first element of an inequality of bargaining power and therefore open up an inquiry into the sufficiency of the bargain (paras. 162-63). Justice Brown concluded that "my colleagues' approach drastically expands the scope of unconscionability, provides very little guidance for the doctrine's application, and does all of this in the context of an appeal whose just disposition requires no such change" (para. 174).

In dissent, Justice Cote was critical of the other judges' willingness, in the circumstances, to resolve the issue rather than refer it to the arbitrator for decision: "In my view, my colleagues' efforts to avoid the operation of the rule of systematic referral to arbitration reflects the same historical hostility to

arbitration which the legislature and this Court have sought to dispel. The simple fact is that the parties in this case have agreed to settle any disputes through arbitration; this Court should not hesitate to give effect to that arrangement. The ease with which my colleagues dispense with the Arbitration Clause on the basis of the thinnest of factual records causes me to fear that the doctrines of unconscionability and public policy are being converted into a form of ad hoc judicial moralism or "palm tree justice" that will sow uncertainty and invite endless litigation over the enforceability of arbitration agreements" (para. 237). Justice Cote also shared many of Justice Brown's concerns about the majority's use of unconscionability: "I am concerned that their threshold for a finding of inequality of bargaining power has been set so low as to be practically meaningless in the case of standard form contracts" (para. 257).

The decision is lengthy and several additional issues are canvassed, especially in the reasons of Justice Cote and Justice Brown. The ultimate result, with the drivers not being bound by the arbitration clause, is not that surprising. Perhaps the most significant questions moving forward will be the effect these reasons have on the doctrine of unconscionability more generally.

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# The end of fostering outdated injustice to children born outside marriage through reparation of Nazi-expatriation acts: Ruling of the German Constitutional Court of 20 May 2020 (2 BvR 2628/18)

*Marie-Luisa Loheide is a doctoral candidate at the University of Freiburg who writes her dissertation about the relationship between the status of natural*

*persons in public and private international law. She has kindly provided us with her thoughts on a recent ruling by the German Constitutional Court.*

According to Article 116 para. 2 of the German Basic Law *(Grundgesetz – GG)*, every descendant of former German citizens of Jewish faith who have been forcibly displaced and expatriated in a discriminatory manner by the Nazi-regime is entitled to attain German citizenship upon request. This rule has been incorporated in the Basic Law since 1949 as part of its confrontation with the systematic violations of human rights by the Nazi-regime and is therefore meant to provide reparation by restoring the *status quo ante*.

Descendants *("Abkömmlinge")* as referred to in Article 116 para. 2 are children, grandchildren and all future generations without any temporal constraint. Regardless of their parents' choice of citizenship, they have a personal right to naturalisation which is exercised upon request by reactivation of the acquisition of citizenship *iure sanguinis*. This very wide scope is legitimated by the striking injustice done by the Nazi-regime. Yet, according to the settled case law of the Federal Administrative Court, it had been limited by a strict "but-for" test: in order to solely encompass those people affected by this specific injustice. This meant that the descendant must hypothetically have possessed German citizenship according to the applicable citizenship law at the time of its acquisition which is usually the person's birth. To put it more clearly, one had to ask the following hypothetical question: Would the descendant be a German citizen if his or her ancestor had not been expatriated by the Nazis?

Exactly this limiting prerequisite was the crucial point of the matter decided upon by the German Constitutional Court on 20 May 2020. In the underlying case, the hypothetical question described above would have had to be answered in the negative: Until its revocation in 1993, German citizenship law stated that children of an unmarried German father and a mother of other citizenship did not acquire the German citizenship of their father but only that of their mother, contrary to today's principle of *ius sanguinis*-acquisition. As *in casu* the daughter of a forcibly displaced and expatriated former German emigrant of Jewish faith and a US-American mother was born outside marriage in 1967, she was denied the acquisition of the German citizenship. Whereas this was not criticised by the administrative courts seised, the German Constitutional Court in its ruling classified the denial as an obvious violation of the principle of equal treatment of children born within and outside marriage underlying Article 6 para. 5 GG as well

as the principle of equal treatment of women and men according to Article 3 para. 2 GG, as alleged by the plaintiff. In its reasoning, the Court emphasised that an exception from the principle of equal treatment of children born outside marriage could only be made if absolutely necessary. This corresponds to the case-law of the European Court of Human Rights on Article 14 of the ECHR that a difference in treatment requires “very weighty reasons”. The former non-recognition of the family relationship between an unmarried father and his child, however, did obviously contradict the stated constitutional notion without being justified by opposing constitutional law. Out of two possible interpretations of “descendant” as referred to in Article 116 para. 2 GG the court must have chosen the one that consorts best with the constitution. According to the Constitutional Court, the more generous interpretation of descendant also prevents a perpetuation of the outdated notion of inferiority of children born outside marriage through Article 116 para 2 GG and corresponds to its purpose of reparation.

As the notion of inferiority of children born outside marriage has fortunately vanished, a clarifying judgment was highly overdue and is therefore most welcome. It is not acceptable that outdated notions are carried to the present through a provision of the Basic Law that is meant to provide reparation of Nazi crimes. Especially in post-Brexit times, the question dealt with has become more and more urgent with respect to people reclaiming their German citizenship in order to maintain their Union citizenship and the rights pertaining to it (see here).

In regard to conflicts law, this clarification of a key question of citizenship law is relevant to the determination as a preliminary issue (incidental question or *Vorfrage)* when nationality is used as a connecting factor. The judgment is likely to lead to more cases of dual citizenship that are subject to the ambiguous conflicts rule of Art. 5 para. 1 sentence 2 EGBGB.

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# Justice Andrew Bell opines on

# arbitration and choice of court agreements

**By Michael Douglas and Mhairi Stewart**

Andrew Bell is a leader of private international law in Australia. His scholarly work includes *Forum Shopping and Venue in Transnational Litigation* (Oxford Private International Law Series, 2003) and several editions of *Nygh's Conflict of Laws in Australia* (see LexisNexis, 10th ed, 2019). As a leading silk, he was counsel on many of Australia's leading private international law cases. In February 2019, his Honour was appointed President of the New South Wales Court of Appeal.

Recently, in *Inghams Enterprises Pty Ltd v Hannigan* [2020] NSWCA 82, his Honour provided a helpful exposition of the principles applicable to dispute resolution agreements, including arbitration and choice of court agreements. His Honour dissented from the majority of Justices of Appeal Meagher and Gleeson.

## Background

Inghams Enterprises, the Australian poultry supplier, entered a contract with Gregory Hannigan by which Hannigan would raise and feed chickens provided by Inghams.

The contract was to continue until 2021 but in 2017 Inghams purported to terminate the contract for alleged breaches by Hannigan. Hannigan successfully sought a declaration that the contract had been wrongfully terminated; see *Francis Gregory Hannigan v Inghams Enterprises Pty Limited* [2019] NSWSC 321.

In May 2019 Hannigan issued a notice of dispute to Inghams seeking unliquidated damages for losses he incurred between 8 August 2017 and 17 June 2019 while the contract was wrongfully terminated. Following an unsuccessful mediation in August 2019, Hannigan considered that clause 23.6 of the contract—extracted below—entitled him to refer the dispute to arbitration.

Hannigan's referral to arbitration was premised by a complex and tiered dispute

resolution clause: clause 23. Compliance with clause 23 was a precondition to commencing court proceedings. The clause also contained a requirement to provide notice of a dispute; to use 'best efforts' to resolve the dispute in an initial period; and to then go to mediation. If mediation were unsuccessful, then the clause provided that certain disputes must be referred to arbitration. Relevantly, clause 23 included the following:

*'23.1 A party must not commence court proceedings in respect of a* ***dispute arising out of this agreement*** *("Dispute"), including without limitation a dispute regarding any breach or purported breach of this agreement, interpretation of any of its provisions, any matters concerning of parties' performance or observance of its obligations* ***under this agreement****, or the termination or the right of a party to terminate this agreement) until it has complied with this clause 23.'*

*'23.6 If:*

*23.6.1 the dispute concerns* ***any monetary amount payable and/or owed by*** *either party to the other under this agreement, including without limitation, matters relating to determination, adjustment or renegotiation of the Fee under Annexure 1 under clauses 9.4, 10, 11, 12, 13 and 15.3.3 …*

*23.6.2 the parties fail to resolve the dispute in accordance with clause 23.4 within twenty eight (28) days of the appointment of the mediator*

*then the parties must (unless otherwise agreed) submit the dispute to arbitration using an external arbitrator (who must not be the same person as the mediator) agreed by the parties or, in the absence of agreement, appointed by the Institute Chairman.'* (Emphasis added.)

Inghams sought to restrain the referral to arbitration and failed at first instance; see *Inghams Enterprises Pty Ltd v Hannigan* [2019] NSWSC 1186.

Inghams sought leave to appeal. In hearing the question of leave together with the appeal, then granting leave, the two key issues for determination by the Court of Appeal were:

- Whether a claim for unliquidated damages could fall within the scope of the arbitration clause which required claims to be concerning monetary

amounts '*under this agreement*' (the construction issue); and
- Whether Hannigan had waived his entitlement to arbitrate by bringing the proceedings in 2017 (the waiver issue).

# The construction issue

Meagher JA, with whom Gleeson JA agreed, determined Hannigan's claim for unliquidated damages for breach of contract was not a claim 'under' the contract and therefore did not fall within the terms of the arbitration clause in clause 23.

The phrase 'monetary amount payable and/or owed' referred to a payment obligation by one party to another. Read with the phrase 'under this agreement', the clauses required that the contract must be the source of the payment obligation to invoke the requirement to arbitrate. A claim for unliquidated damages was beyond the scope of the clause.

The majority and Bell P thus disagreed on whether an assessment for unliquidated damages for breach of contract is 'governed or controlled' by a contract because the common law quantum of damages considers the benefits which would have been received under the contract. The majority found that liquidated damages are a right of recovery created by the contract itself and occur as a result of a breach; unliquidated damages for a breach are compensation determined by the Court.

Bell P included provided a detailed discussion of the interpretation of dispute resolution clauses and considered the orthodox process of construction is to be applied to the construction of dispute resolution clauses. That discussion is extracted below. Bell P's liberal approach was not followed by the majority.

# The waiver issue

The Court found that Hannigan did not unequivocally abandon his right to utilise the arbitration clause by initiating the breach of contract proceedings against Inghams for the following reasons:

1. Hannigan did not abandon his right to arbitration by failing to bring a damages claim in the 2017 proceedings.
2. In 2017 Hannigan enforced his rights under clause 23.11 by seeking

declaratory relief.
3. The contract explicitly required that waiver of rights be waived by written notice.
4. The bringing of proceedings did not constitute a written agreement not to bring a damages claim to arbitration.

It was noted that if Hannigan had sought damages in 2017 then Ingham's waiver argument may have had some force.

# President Bell's dicta on dispute resolution clauses

In his dissenting reasons, Bell P provided the following gift to private international law teachers and anyone trying to understand dispute resolution clauses:

*Dispute resolution clauses may be crafted and drafted in an almost infinite variety of ways and styles. The range and diversity of such clauses may be seen in the non-exhaustive digest of dispute resolution clauses considered by Australian courts over the last thirty years, which is appended to these reasons. [The Appendix, below, sets out a table of example clauses drawn from leading cases.]*

*Dispute resolution clauses may be short form or far more elaborate, as illustrated by the cases referred to in the Appendix. They may be expressed as service of suit clauses… They may provide for arbitration… They may be standard form… They may be bespoke… They may be asymmetric… They may and often will be coupled with choice of law clauses… They may be multi-tiered, providing first for a process of mediation, whether informal or formal, or informal and then formal, before providing for arbitral or judicial dispute resolution…*

*Dispute resolution clauses are just as capable of generating litigation as any other contractual clause, and the law reports are replete with cases concerned with the construction of such clauses. The cases referred to in the Appendix supply a sample.*

*Such clauses have also spawned specialist texts and monographs…*

*The question raised by this appeal is purely one of construction. It is accordingly*

*desirable to begin by identifying the principles applicable to the construction of a dispute resolution clause. …*

*It has been rightly observed that "the starting point is that the clause should be construed, just as any other contract term should be construed, to seek to discover what the parties actually wanted and intended to agree to"…*

*In short, the orthodox process of construction is to be followed…*

*In the context of dispute resolution clauses, whether they be arbitration or exclusive jurisdiction clauses, much authority can be found in support of affording such clauses a broad and liberal construction…*

*In Australia, unlike other jurisdictions, the process of contractual construction of dispute resolution clauses has not been overlaid by presumptions cf [some other jurisdictions]. Thus, in [Rinehart v Welker (2012) 95 NSWLR 221] at [122], Bathurst CJ, although not eschewing the liberal approach that had been adumbrated in both Francis Travel and Comandate to the construction of arbitration clauses, rejected the adoption of a presumption … the presumption was that the court should, in the construction of arbitration clauses, "start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal", and that the clause should be construed in accordance with that presumption, "unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction…*

*In [Rinehart v Hancock Prospecting Pty Ltd (2019) 93 ALJR 582], the plurality indicated that the appeals could be resolved with the application of orthodox principles of construction, which required consideration of the context and purpose of the Deeds there under consideration… In his separate judgment, Edelman J described as a "usual consideration of context" the fact that "reasonable persons in the position of the parties would wish to minimise the fragmentation across different tribunals of their future disputes by establishing 'one-stop adjudication' as far as possible"… This may have been to treat the considerations underpinning [leading] cases… as stating a commercially commonsensical assumption…*

*The proper contemporary approach was eloquently articulated in the following*

*passage in [Hancock Prospecting Pty Ltd v Rinehart (2017) 257 FCR 442] (at [167]) which I would endorse:*

*"The existence of a 'correct general approach to problems of this kind' does not imply some legal rule outside the orthodox process of construction; nor does it deny the necessity to construe the words of any particular agreement. But part of the assumed legal context is this correct general approach which is to give expression to the rational assumption of reasonable people by giving liberal width and flexibility where possible to elastic and general words of the contractual submission to arbitration, unless the words in their context should be read more narrowly. One aspect of this is not to approach relational prepositions with fine shades of difference in the legal character of issues, or by ingenuity in legal argument… another is not to choose or be constrained by narrow metaphor when giving meaning to words of relationship, such as 'under' or 'arising out of' or 'arising from'. None of that, however, is to say that the process is rule-based rather than concerned with the construction of the words in question. Further, there is no particular reason to limit such a sensible assumption to international commerce. There is no reason why parties in domestic arrangements (subject to contextual circumstances) would not be taken to make the very same common-sense assumption. Thus, where one has relational phrases capable of liberal width, it is a mistake to ascribe to such words a narrow meaning, unless some aspect of the constructional process, such as context, requires it."* (Citations omitted.)

# Bell P's appendix

| **Schedule of Jurisdiction and Arbitration Clauses** | | |
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| **Case Name** | **Citation** | **Clause** |
| *Tanning Research Laboratories Inc v O'Brien* | (1990) 169 CLR 332; [1990] HCA 8 | "10. Arbitration. Any controversy or claim arising out of, or relating to, this Agreement or the breach thereof, shall be settled by arbitration, in accordance with the rules, then obtaining, of the American Arbitration Association, and judgment upon the award rendered may be entered in any court having jurisdiction thereof." |
| *IBM Australia Ltd v National Distribution Services Ltd* | (1991) 22 NSWLR 466; (1991) 100 ALR 361 | "9. Governing Law and Arbitration This Agreement will be construed in accordance with and governed by the laws of New South Wales. Any controversy or claim arising out of or related to this Agreement or the breach thereof will be settled by arbitration. The arbitration will be held in Sydney, New South Wales and will be conducted in accordance with the provisions of the *Commercial Arbitration Act*, 1984 (as amended). The decision of the arbitrator(s) will be final and binding." |
| *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* | (1996) 39 NSWLR 160; (1996) 131 FLR 422 | "ARTICLE 19<br>*Arbitration*<br>Any dispute or difference arising out of this Agreement shall be referred to the arbitration in London of a single Arbitrator to be agreed upon by the parties hereto or in default of such agreement appointed by the President for the time being of the Royal Aeronautical Society. The and the provisions of the Arbitration Act 1950 and any statutory modifications or re-enactments therefore for the time being in force shall apply. (sic)<br>ARTICLE 20<br>*Applicable Law*<br>This Agreement shall in all respects be interpreted in accordance with the Laws of England." |
| *Akai Pty Ltd v People's Insurance Co Ltd* | (1996) 188 CLR 418; [1996] HCA 39 | "Governing Law<br>This policy shall be governed by the laws of England. Any dispute arising from this policy shall be referred to the Courts of England." |

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| *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection & Indemnity Association* | (1997) 41 NSWLR 117 | "This Reinsurance is subject to English jurisdiction", with a manuscript addition: "Choice of Law: English" |
| *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers (No 5)* | (1998) 90 FCR 1; (1998) 159 ALR 142 | "Any dispute arising from this charter or any Bill of Lading issued hereunder shall be settled in accordance with the provisions of the *Arbitration Act* 1950 and any subsequent Acts, in London, each party appointing an Arbitrator, and the two Arbitrators in the event of disagreement appointing an Umpire whose decision shall be final and binding upon both parties hereto.<br>This Charter Party shall be governed by and construed in accordance with English Law.<br>The Arbitrators and Umpire shall be commercial men normally engaged in the Shipping Industry.<br>Any claim must be in writing and claimant's Arbitrator appointed within six months of the Vessel's arrival at final port of discharge, otherwise all claims shall be deemed to be waived." |
| *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* | (2000) 100 FCR 420; [2000] FCA 547 | "*Applicable Law, Pricing and Terms of Sale*: Any contract between Buyer and Hettinga shall be governed, construed and interpreted under the law of the State of Iowa, and shall be subject to the terms and conditions listed below. Any Purchase Order issued by Buyer as a result of this quotation shall be deemed to incorporate the terms and conditions of this quotation. If there is any conflict between these conditions of sale and those of the buyer, these conditions shall control …<br>…<br>*Arbitration*: All disputes hereunder, including the validity of this agreement, shall be submitted to arbitration by an arbitrator in Des Moines, Iowa USA under the Rules of the American Arbitration Association, and the decision rendered thereunder shall conclusively bind the parties. Judgment upon the award may be entered in any court having jurisdiction." |
| *HIH Casualty & General Insurance Ltd (in liq) v RJ Wallace* | (2006) 68 NSWLR 603; [2006] NSWSC 1150 | "ARTICLE XVIII<br>SERVICE OF SUIT<br>The Reinsurer hereon agrees that:<br>i. In the event of a dispute arising under this Agreement, the Reinsurers at the request of the Company will submit to the jurisdiction of any competent Court in the Commonwealth of Australia. Such dispute shall be determined in accordance with the law and practice applicable in such Court.<br>ii. Any summons notices or process to be served upon the Reinsurer may be served upon MESSRS. FREEHILL, HOLLINGDALE & PAGE M.L.C. CENTRE, MARTIN PLACE, SYDNEY, N.S.W. 2000 AUSTRALIA who has authority to accept service and to enter an appearance on the Reinsurer's behalf, and who is directed, at the request of the Company to give a written undertaking to the Company that he will enter an appearance on the Reinsurer's behalf.<br>iii. If a suit is instituted against any one of the Reinsurers all Reinsurers hereon will abide by the final decision of such Court or any competent Appellate Court.<br>ARTICLE XIX<br>ARBITRATION:<br>Disputes arising out of this Agreement or concerning its validity shall be submitted to the decision of a Court of Arbitration, consisting of three members, which shall meet in Australia.<br>The members of the Court of Arbitration shall be active or retired executives of Insurance or Reinsurance Companies.<br>Each party shall nominate one arbitrator. In the event of one party failing to appoint its arbitrator within four weeks after having been required by the other party to do so, the second arbitrator shall be appointed by the President of the Chamber of Commerce in Australia. Before entering upon the reference, the arbitrators shall nominate an umpire. If the arbitrators fail to agree upon an umpire within four weeks of their own appointment, the umpire shall be nominated by the President of the Chamber of Commerce in Australia.<br>The Arbitrators shall reach their decision primarily in accordance with the usages and customs of Reinsurance practice and shall be relieved of all legal formalities. They shall reach their decision within four months of the appointment of the umpire.<br>The decision of the Court of Arbitration shall not be subject to appeal.<br>The costs of Arbitration shall be paid as the Court of Arbitration directs.<br>Actions for the payment of confirmed balances shall come under the jurisdiction of the ordinary Courts." |
| *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd* | (2006) 157 FCR 45; [2006] FCAFC 192 | "(b) London<br>All disputes arising out of this contract shall be arbitrated at London and, unless the parties agree forthwith on a single Arbitrator, be referred to the final arbitrament of two Arbitrators carrying on business in London who shall be members of the Baltic Mercantile & Shipping Exchange and engaged in Shipping one to be appointed by each of the parties, with the power to such Arbitrators to appoint an Umpire. No award shall be questioned or invalidated on the ground that any of the Arbitrators is not qualified as above, unless objection to his action be taken before the award is made. Any dispute arising hereunder shall be governed by English Law.<br>…" |
| *Armacel Pty Ltd v Smurfit Stone Container Corporation* | (2008) 248 ALR 573; [2008] FCA 592 | "21.3.1 This Agreement must be read and construed according to the laws of the state of New South Wales, Australia and the parties submit to the jurisdiction of that State. If any dispute arises between the Licensor and the Licensee in connection with this Agreement or the Technology, the parties will attempt to mediate the dispute in Sydney, Australia.<br>21.3.2 In the event that there is a conflict between the laws of the State of New South Wales, Australia and the jurisdiction in which the Equipment is located, then the parties agree that the laws of the State of New South Wales shall prevail.<br>21.3.3 If the licensee is in breach of this Agreement, the Licensee must pay to the Licensor on demand the amount of any legal costs and expenses incurred by the Licensor for the enforcement of its rights under this Agreement and this provision shall prevail despite any order for costs made by any Court." |
| *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd* | (2008) 168 FCR 169; [2008] FCA 551 | "(b) Any dispute arising out of this Charter Party or any Bill of Lading issued hereunder shall be referred to arbitration in accordance with the Arbitration Acts 1996 and any statutory modification or re-enactment in force. English law shall apply<br>…<br>(c) The arbitrators, umpire and mediator shall be commercial persons engaged in the shipping industry. Any claim must be made in writing and the claimant's arbitrator nominated within 12 months of the final discharge of the cargo under this Charter Party, failing which any such claim shall be deemed to be waived and absolutely barred." |

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| *Paharpur Cooling Towers Ltd v Paramount (WA) Ltd* | [2008] WASCA 110 | [Background: "Clause 22 of the contract provides that when any dispute arises between the parties any party may give to the other party a notice in writing that a dispute exists. Clause 22 then sets out a process by which the parties are to endeavour to resolve the dispute. If they are unable to do so, Paramount (as Principal) at its sole discretion:"]<br>"[S]hall determine whether the parties resolve the dispute by litigation within the jurisdiction of the courts of Western Australia or arbitration under the Commercial Arbitration Act. [Paramount] shall notify [Paharpur], by notice in writing, of its decision to refer the dispute to litigation or arbitration within 28 days of either [Paramount] or [Paharpur] electing that the dispute be determined by either litigation or arbitration."<br>"'Dispute' means a dispute or difference between the parties as to the construction of the Contract or as to any matter or thing of whatsoever nature arising, whether antecedent to the Contract and relating to its formation or arising under or in connection with the Contract, including any claim at common law, in tort, under statute or for restitution based on unjust enrichment or for rectification or frustration or a dispute concerning a direction given and/or acts or failing to act by the Engineer or the Engineer's Representative or interference by the Principal or the Principal's Representative." |
| *Electra Air Conditioning BV v Seeley International Pty Ltd ACN 054 687 035* | [2008] FCAFC 169 | "20. Dispute Resolution<br>20.1 If at any time there is a dispute, question or difference of opinion ("Dispute") between the parties concerning or arising out of this Agreement or its construction, meaning, operation or effect or concerning the rights, duties or liabilities of any party, one party may serve a written notice on the other party setting out details of the Dispute.<br>Thereafter:<br>(a) senior management of each party will try to resolve the Dispute through friendly discussions for a period of thirty (30) days after the date of receipt of the notice; and<br>(b) if senior management of each party are unable to resolve the Dispute under Section 20.1(a), it shall be referred to arbitration in accordance with the Rules for the Conduct of Commercial Arbitrations of the Institute of Arbitrators and Mediators Australia. The number of arbitrators shall be 1. The place of arbitration shall be Melbourne, Australia. The language of arbitration shall be English. The arbitral award shall be final and binding upon both parties.<br>20.2 Pending the resolution of the Dispute under Section 20.1, the parties shall continue to perform their obligations under this Agreement without prejudice to a final adjustment in accordance with any award.<br>20.3 Nothing in this Section 20 prevents a party seeking injunctive or declaratory relief in the case of a material breach or threatened breach of this Agreement."<br>"25. Governing law and Jurisdiction<br>This Agreement is governed by the laws of Victoria, Australia. Subject to Section 20, the parties irrevocably submit to the courts of Victoria, and any courts of appeal from such courts, in relation to the subject matter of this Agreement." |
| *Ace Insurance Ltd v Moose Enterprise Pty Ltd* | [2009] NSWSC 724 | <u>Policy</u><br>"Should any dispute arise concerning this policy, the dispute will be determined in accordance with the law of Australia and the States and Territories thereof. In relation to any such dispute the parties agree to submit to the jurisdiction of any competent court in a State or Territory of Australia."<br><u>Expona Endorsement</u><br>"Provided that all claims which fall under the terms of this endorsement, it is agreed:<br>(i) the limits of liability are inclusive of costs as provided under supplementary payment in this policy.<br>(ii) that should any dispute arise between the insured and ACE over the application of this policy, such dispute shall be determined in accordance with the law and practice of the Commonwealth of Australia." |
| *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)* | [2010] NSWCA 196; (2010) 79 ACSR 383 | <u>Limited Partnership Agreement</u><br>"This Agreement and the rights, obligations and relationships of the parties hereto under this Agreement and in respect of the Private Placement Memorandum shall be governed by and construed in accordance with the laws of England and all the parties irrevocably agree that the courts of England are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement or the Private Placement Memorandum or the acquisition of Commitments, whether or not governed by the laws of England, and that accordingly any suit, action or proceedings arising out of or in connection with this Agreement or Private Placement Memorandum or the acquisition of Commitments shall be brought in such courts. The parties hereby waive, to the extent not prohibited by applicable law, and agree not to assert by way of motion, as a defence or otherwise, in any such proceeding, any claim that it is not subject personally to the jurisdiction of such courts, that any such proceedings brought in such courts is improper or that this Agreement or the Private Placement Memorandum, or the subject matter hereof or thereof, may not be enforced in or by such court."<br><u>Deed of Adherence</u><br>"14. This Deed of Adherence and the rights, obligations and relationships of the parties under this Deed of Adherence and the Partnership Agreement and in respect of the Private Placement Memorandum shall be governed by and construed in accordance with the laws of England.<br>15. The Applicant irrevocably agrees that the courts of England are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Deed of Adherence, the Partnership Agreement, the Private Placement Memorandum, or the acquisition of Commitments whether or not governed by the laws of England, and that accordingly any suit, action or proceedings arising out of or in connection with this Deed of Adherence, the Partnership Agreement, the Private Placement Memorandum, or the acquisition of Commitments shall be brought in such courts. The Applicant hereby waives, to the extent not prohibited by applicable law, and agrees not to assert by way of motion, as a defence or otherwise, in any such proceeding, any claim that the Applicant is not subject personally to the jurisdiction of such courts, that any such proceeding brought in such courts is improper or that this Deed of Adherence, the Partnership Agreement or the Private Placement Memorandum, or the subject matter hereof or thereof, may not be enforced in or by such court. |
| *Faxtech Pty Ltd v ITL Optronics Ltd* | [2011] FCA 1320 | "the agreement shall be interpreted, construed and enforced in accordance with the laws of England, and the parties submit to the jurisdiction of the competent courts of England (London)." |

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| *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* | [2013] WASCA 66; (2013) 298 ALR 666 | Asset Sale Agreement<br>"16.2 Governing Law and Dispute Resolution<br>(a) This agreement is governed by the laws of Western Australia.<br>(b) Subject to clause 16.2(d), the procedures prescribed in this clause 16 must be strictly followed to settle a dispute arising under this agreement.<br>(c) If any dispute arises out of or in connection with this agreement, including any question regarding the existence, validity or termination of this agreement;<br>(1) within ten Business Days of the dispute arising senior representatives from each party must meet in good faith, act reasonably and use their best endeavours to resolve the dispute by joint discussions;<br>(2) failing settlement by negotiation, either party may, by notice to the other party, refer the dispute for resolution by mediation:<br>(A) at the Singapore Mediation Centre (SMC) in Singapore;<br>(B) under the SMC Mediation Procedures;<br>(C) with one mediator;<br>(D) with English as the language of the mediation; and<br>(E) with each party bearing its own costs of the mediation; and<br>(3) failing settlement by mediation, either party may, by notice to the other party, refer the dispute for final and binding resolution by arbitration:<br>(A) at the Singapore International Arbitration Centre (SIAC) in Singapore;<br>(B) under the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL) in force on the date of this agreement, which are deemed to be incorporated by reference into this clause;<br>(C) to the extent, if any, that the UNCITRAL do not deal with any procedural issues for the arbitration, the procedural rules in the SIAC Arbitration Rules in force on the date of this agreement will apply to the arbitration;<br>(D) with the substantive law of the arbitration being Western Australian law;<br>(E) with one Arbitrator;<br>(F) with English as the language of the arbitration; and<br>(G) with each party bearing its own costs of the arbitration.<br>(d) Nothing in this clause 16:<br>(1) prevents either party seeking urgent injunctive or declaratory relief from the Supreme Court of Western Australia in connection with the dispute without first having to attempt to negotiate and settle the dispute in accordance with this clause 16; or<br>(2) requires a party to do anything which may have an adverse effect on, or compromise that party's position under, any policy of insurance effected by that party."<br>Guarantee Agreement<br>"9.9. Governing law and jurisdiction<br>(a) This document is governed by the laws of Western Australia.<br>(b) Subject to clause 9.9(c)(iii)(G), the procedures prescribed in this clause 9.9 must be strictly followed to settle a dispute arising under this document.<br>(c) If any dispute arises out of or in connection with this document, including any question regarding the existence, validity or termination of this document:<br>(i) within 10 Business Days of the dispute arising senior representatives from each party must meet in good faith, act reasonably and use their best endeavours to resolve the dispute by joint discussions;<br>(ii) failing settlement by negotiation, any party may, by notice to the other parties, refer the dispute for resolution by mediation; and<br>(A) at the Singapore Mediation Centre (SMC) in Singapore;<br>(B) with one mediator;<br>(C) with English as the language of the Mediation; and<br>(D) with each party bearing its own costs of the mediation; and<br>(iii) failing settlement by mediation, any party may, by notice to the other parties, refer the dispute for final and binding resolution by arbitration:<br>(A) at the Singapore International Arbitration Centre (SIAC) in Singapore or in Hong Kong;<br>(B) under the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL) in force on the date of this agreement, which are deemed to be incorporated by reference into this clause;<br>(C) to the extent, if any, that UNCITRAL do not deal with any procedural issues for the arbitration, the procedural rules in the SIAC Arbitration Rules in force on the date of this agreement will apply to the arbitration;<br>(D) with the substantive law of the arbitration being Western Australian law;<br>(E) with one arbitrator;<br>(F) with English as the language of the arbitration; and<br>(G) with each party bearing its own costs of the arbitration.<br>(d) Nothing in this clause 9.9:<br>(i) prevents any party seeking urgent injunctive or declaratory relief from the Supreme Court of Western Australia in connection with the dispute without first having to attempt to negotiate and settle the dispute in accordance with this clause 9.9; or<br>(ii) requires a party to do anything which may have an adverse effect on, or compromise that party's position under, any policy of insurance effected by that party." |
| *AAP Industries Pty Limited v Rehaud Pte Limited* | [2015] NSWSC 468 | Supply Agreement<br>"The agreed place of jurisdiction, irrespective of the amount in dispute, is Singapore."<br>Conditions of Purchase<br>"This contract shall be construed in accordance with and governed in every respect by the laws of Singapore, and all disputes arising out of or in connection with this agreement shall be brought in the courts of Singapore." |

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| *Rinehart v Rinehart (No 3)* (and *Rinehart v Welker*, in relation to the Hope Downs Deed; and *Rinehart v Hancock Prospecting Pty Ltd*, in relation to the Hope Downs Deed and April 2005 Deed of Obligation and Release) | (2016) 257 FCR 310<br><br>(and (2012) 95 NSWLR 221;<br><br>and [2019] HCA 13; (2019) 366 ALR 635) | April 2005 Deed of Obligation and Release<br>"This Deed shall be governed by and shall be subject to and interpreted according to the laws of the State of Western Australia, and the parties hereby agree, subject to all disputes hereunder being resolved by confidential mediation and arbitration in Western Australia, to submit to the exclusive jurisdiction of the Courts of Western Australia for all purposes in respect of this Deed."<br>Hope Downs Deed<br>"20. CONFIDENTIAL MEDIATION/ARBITRATION<br>In the event that there is any dispute under this deed then any party to his [sic] deed who has a dispute with any other party to this deed shall forthwith notify the other party or parties with whom there is the dispute and all other parties to this deed ('Notification') and the parties to this deed shall attempt to resolve such difference in the following manner.<br>20.1 Confidential Mediation<br>(a) the disputing parties shall first attempt to resolve their dispute by confidential mediation subject to Western Australian law to be conducted by a mediator agreed to by each of the disputing parties and GHR (or after her death or non-capacity, HPPL);<br>(b) each of the disputing parties must attempt to agree upon a suitably qualified and independent person to undertake the mediation;<br>(c) the mediation will be conducted with a view to:<br>(i) identifying the dispute;<br>(ii) developing alternatives for resolving the dispute;<br>(iii) exploring these alternatives; and<br>(iv) seeking to find a solution that is acceptable to the disputing parties.<br>(d) any mediation will not impose an outcome on the disputing parties. Any outcome must be agreed to by the disputing parties;<br>(e) any mediation will be abandoned if:<br>(i) the disputing parties agree;<br>(ii) any of the disputing parties request the abandonment.<br>20.2 Confidential Arbitration<br>(a) Where the disputing parties are unable to agree to an appointment of a mediator for the purposes of this clause within fourteen (14) days of the date of the Notification or in the event any mediation is abandoned then the dispute shall on that date be automatically referred to<br>arbitration for resolution ('Referral Date') and the following provisions of this clause shall apply;<br>(i) in the event that no agreement on the arbitrator can be reached within three (3) weeks of the Referral Date, the arbitrator will be Mr Tony Fitzgerald QC (provided he is willing to perform this function and has not reached 74 years of age at that time), or in the event Mr Tony Fitzgerald QC is unwilling or unable to act, the Honourable Justice John Middleton (provided he is no longer a Judge of the Federal or other Australian Court and provided he<br>has not reached 74 years of age at that time), and irrespective of whether either of these persons have carried out the mediation referred to above, or in the event that neither is willing or able to act,<br>(ii) subject to paragraph (iv) below by confidential arbitration with one (1) party to the dispute nominating one (1) arbitrator, and the other party to the dispute nominating another arbitrator and the two (2) arbitrators selecting a third arbitrator within a further three (3) weeks, who shall together resolve the matter pursuant to the Commercial Arbitration Act of Western Australia and whose decision shall be final and binding on the parties;<br>(iii) if the arbitrators nominated pursuant to paragraph 2(a)(ii) are unable to agree in the selection of a third arbitrator within the time provided in paragraph 2(a)(iii), the third arbitrator will be designated by the President of the Law Society of Western Australia and shall be a legal practitioner qualified to practise in the State of Western Australia of not less than twenty (20) years standing.<br>(iv) in the event that a disputing party does not nominate an arbitrator pursuant to Clause 2(a)(ii) within twenty-one (21) days from being required to do so it will be deemed to have agreed to the appointment of the arbitrator appointed by the other disputing party.<br>(b) The dispute shall be resolved by confidential arbitration by the arbitrator agreed to by each of the disputing parties or appointed pursuant to paragraph 2(a)(i) above (or if more than one is appointed pursuant to paragraph 2(a)(ii) then as decided by not less than a majority of them) who shall resolve the matter pursuant to the Commercial Arbitration Act of Western Australia and whose decision shall be final and binding on the parties.<br>(c) The arbitration will take place at a location outside of a Court and chosen to endeavour to maintain confidentiality and mutually agreed to by the disputing parties and failing agreement in Western Australia and the single Arbitrator or the Chairman of the Arbitral Tribunal as the<br>case may be will fix the time and place outside of a Court for the purposes of the confidential hearing of such evidence and representations as any of the disputing parties may present. If any of the parties request wheelchair access, this will be taken into account in the selection of the premises and parking needs. Except as otherwise provided, the decision of the single arbitrator or, if three arbitrators, the decision of any two of them in writing will be binding on the disputing parties both in respect of procedure and the final determination of the issues.<br>(d) The arbitrators will not be obliged to have regard to any particular information or evidence in reaching his/their determination and in his/their discretion procure and consider such information and evidence and in such form as he/they sees fit;<br>(e) The award of the arbitrator(s) will be to the extent allowed by law non-appealable, conclusive and binding on the parties and will be specifically enforceable by any Court having jurisdiction. …<br>[21. the deed] shall be governed by and be subject to and interpreted according to the laws of the State of Western Australia"."<br>August 2009 Deed of Further Settlement<br>"16. The CS Deed and this Deed will be governed by the following dispute resolution clause:<br>(i) the parties shall first seek to resolve any dispute or claim arising out of, or in relation to this Deed or the CS Deed by discussions or negotiations in good faith;<br>(ii) Any dispute or claim arising out of or in relation to this Deed or the CS Deed which is not resolved within 90 days, will be submitted to confidential arbitration in accordance with the UNCITRAL Arbitration Rules then in force. There will be three arbitrators. JLH shall appoint one arbitrator, HPPL shall appoint the other arbitrator and both arbitrators will choose the third Arbitrator. The place of arbitration shall be in Australia and the exact location shall be chosen by HPPL. Each party will be bound by the Arbitrator's decision.<br>(iii) A party may not commence court proceedings in relation to any dispute arising out of or in relation to this Deed or the Original Deed or the CS Deed;<br>(iv) The costs of the arbitrators and the arbitration venue will be borne equally as to half by JLH and the other half by the non JLH party. Each party is responsible for its own costs in connection with the dispute resolution process; and<br>(v) Despite the existence of a Dispute, the parties must continue to perform their respective obligations under this Deed." |

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| *Mobis Parts Australia Pty Ltd v XL Insurance Company SE* | [2016] NSWSC 1170 | "The place of jurisdiction for any dispute arising out of this Policy shall be Bratislava", with an anterior clause: "This Policy shall be governed exclusively by Slovakian law. This also applies to Insured Companies with a foreign domicile." |
| *Parnell Manufacturing Pty Ltd v Lonza Ltd* | [2017] NSWSC 562 | "16.5 Governing Law/Jurisdiction. This Agreement is governed in all respects by the laws of the State of Delaware, without regard to its conflicts of laws principles. The Parties agree to submit to the jurisdiction of the courts of Delaware." |
| *Royal Bank of Scotland plc v Babcock & Brown DIF III Global Co-Investment Fund LP* | [2017] VSCA 138 | "This Letter Agreement shall be governed by, and construed and interpreted in accordance with, the laws of the State of New York applicable to contracts executed in and to be performed in that State. Each of the parties hereto (a) consents to submit itself to the personal jurisdiction of the United States District Court for the Southern District of New York or any court of the State of New York located in such district in the event any dispute arises out of this Letter Agreement or any of the transactions contemplated by this Letter Agreement, (b) agrees that it will not attempt to deny or defeat such personal jurisdiction or venue by motion or other request for leave from any such court and (c) agrees that it will not bring any action relating to this Letter Agreement or any of the transactions contemplated by this Letter Agreement in any court other than such courts sitting in the State of New York. THE PARTIES HEREBY WAIVE TRIAL BY JURY IN ANY ACTION, SUIT, PROCEEDING OR COUNTERCLAIM BROUGHT BY EITHER OF THEM AGAINST THE OTHER IN ANY MATTERS ARISING OUT OF OR IN ANY WAY CONNECTED WITH THIS AGREEMENT." |
| *Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd* | (2019) 99 NSWLR 419; [2019] NSWCA 61 | Risk Transfer Agreement<br>"The parties shall strive to settle any dispute arising from the interpretation or performance of this Agreement through friendly consultation within 30 days after one party asks for consultation. In case no settlement can be reached through consultation, each party can submit such matter to the court. The English Courts shall have the exclusive jurisdiction for all disputes arising out of or in connection with this Agreement."<br>Promotion Agreement<br>"This Agreement is governed by the law in force in New South Wales. The parties submit to the non-exclusive jurisdiction of the courts having jurisdiction in New South Wales and any courts, which may hear appeals from those courts in respect of any proceedings in connection with this Agreement." |

# Conclusion

Respectfully, Bell P's dissenting reasons are to be preferred to those of Meagher JA, with whom Gleeson JA agreed. Bell P's reasons are more consistent the weight of authority on construction of arbitration and choice of court agreements in Australia and abroad. On the other hand, the majority approach shows that Australian courts often do not feel bound to follow the solutions offered by foreign courts to common private international law problems.

***Michael Douglas co-authored this post with Mhairi Stewart. This post is based on their short article first published by Bennett + Co.***

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# Private International Law and the outbreak of Covid-19: Some initial thoughts and lessons to face in

# daily life

*Written by Inez Lopes (Universidade de Brasília) and Fabrício Polido (Universidade Federal de Minas Gerais)*

Following the successful repercussion of the **Webinar PIL & Covid-19: Mobility of Persons, Commerce and Challenges in the Global Order,** which took place between 11 and 22nd May 2020, the Scientific Committee headed by Prof. Dr Inez Lopes (Universidade de Brasília), Prof. Dr Valesca R. Moschen (Universidade Federal do Espírito Santo), Prof. Dr Fabricio B. Pasquot Polido (Universidade Federal de Minas Gerais), Prof. Dr Thiago Paluma (Universidade Federal de Uberlandia) and Prof. Dr Renata Gaspar (Universidade Federal de Uberlandia) is pleased to announce that the Webinar´s videos are already available online (links below). The committee thanks all those professors, staff and students who enthusiastically joined the initiative. A special thank is also given to the University of Minas Gerais and the Brazilian Centre for Transnational and Comparative Studies for the online transmissions. The sessions were attainable to both participants and the audience.

On the occasion of the Webinar, scholars and specialists from Argentina, Brazil, Uruguay, Mexico, Portugal, Spain and the United Kingdom shared their preliminary views on Private International Law (PIL) related issues to the existing challenges posed by Covid-19 outbreak in Europe and the Americas. The main objective of the Webinar was to focus on the discussions on three main multidisciplinary clusters for PIL/Covid-19 research agenda: *(I) Private International Law, International Institutions and Global Governance in times of Covid-19*; (*II) Protection of persons in mobility and Covid-19: human rights, families, migrants, workers and consumers; (III) International Commerce and Covid-19: Global supply chains, investments, civil aviation, labour and new technologies*.

The initiative brought together the ongoing collaborative research partnerships among peers from the University of Brasília-UnB, Federal University of Minas Gerais-UFMG, Federal University of Uberlândia-UFU, Federal University of Espírito Santo-UFES, State University of Rio de Janeiro, Federal Rural University

of Rio de Janeiro, FGV Law/São Paulo, Federal University of Paraná, Federal University of Rio Grande do Sul, Universidad Nacional del Litoral/Argentina, Universidad de la República/Uruguay, CIDE/Mexico, University of Coimbra/Portugal, University of Minho/Portugal, Universidad de València/Spain, University of Edinburgh/UK, and besides to members of the American Association of Private International Law – ASADIP, the Latin American Society of International Law, the Latin American Research Network of International Civil Procedure Law and the Brazilian Association of International Law.

The proposal for e-gathering specialists was made in line with the intense academic engagement to explore potential critical views related to current and future avenues for Private International Law during a pandemic crisis. One could remark the strong narratives about "global" and "domestic" health crises and their interactions with the practical operation of PIL lawmaking and decision-making processes. More generally, participants raised several issues on how PIL framework, norm-setting and dispute resolution mechanisms would be intertwined with global health emergencies, national public health interests, social isolation and distancing, inequalities, poverty, the demise of social protection on global scale and restrictions on the mobility of families, groups, individuals, companies and organizations during a pandemic crisis.

The Webinar participants also talked about an expedite PIL agenda on core issues related to state and non-state actors' practices during Covid-19 health crisis, challenges to international commerce, investment, labour and technologies and enforcement of human rights in cross-border cases. In view of the three clusters and specific topics, the Webinar sessions went into the analysis of the actual and potential impacts of Covid-19 outbreak on PIL related areas, its methodologies and policy issues. Participants highlighted that the PIL sectors on applicable law, jurisdiction, international legal (administrative and judicial) cooperation and recognition of foreign judgments will remain attached to the objective of resolving urgent cases, such as in the field of family and migration law (e.g. cases of international abduction, family reunion vs. family dispersion), consumer law, labour law, international business law and overall in cross-border litigation (e.g. reported cases involving state immunity, bankruptcy, disruption of global supply chains).

Likewise, there was a converging view amongst participants that PIL and its overarching principles of cooperation, recognition and systemic coordination will

be of a genuine practical meaning for what is coming next in Covid-19 pandemic. Also, values on cosmopolitanism, tolerance and integration going back to the roots and veins of the Inter-American scholarship to PIL studies (since the end of 19th century!) may help to improve institutions dealing with local, regional and global. Likely those principles and values could provide PIL community with 'cautionary tales' in relation to existing trends of opportunistic nationalism, refusal of cooperation and threats with foreign law bans (for example, with regard to specific states, migrants and even businesses). As to policy level and to State practices (connected to international politics and public international law), participants have raised various concerns about the mobility of persons, sanitary barriers and national campaigns perniciously devoted to spreading xenophobia, marginalising groups, minorities and migrants. Some participants have also referred to the dangers of unilateral practices of those States advocating a sort of international isolation of countries and regions affected by Covid-19 without engaging in cooperation and dialogues. Even in those extreme cases, there will be harmful consequences to PIL development and its daily operation.

Inevitably, the tragedies and lost lives in times of Coronavirus have made participants reflect upon the transformative potentials for international scholarship and policy in a multidisciplinary fashion. For example, as remarked in some panels, in order to engage in a constructive and policy-oriented approach, PIL scholarship could refrain from any sort of 'black-letter' reading or absenteeism concerning Covid-19. At this stage, a sort of 'political awareness' should be encouraged for studies in public and private international law. Issues on economic reconstruction (rather than simply 'economic recovery'), access to public health, disruptive technologies, generational environmental concerns, labour markets, access to credit will be highlighted in global governance talks during Covid-19 pandemic and beyond. Some participants conceive the moment as "reality shock" rather than "mindset change" in facing good/bad sides of the pandemic.

As a preliminary matter of housekeeping method, participants shared some conceptual and normative questions in advance to the Webinar as a kick-off stage. A first teaser was initially to generate discussions about the interplay between state actors, international institutions, International Health Law and PIL. One of the departing points was the impact of the global sanitary emergency on individuals, families, organizations and companies and overlapping goals of state

powers, public ordering and transnational private regulation. In addition, participants raised further concerns on the current international institutional design and PIL roles. Covid-19 accelerated and openly exposed the weakness of international institutions in guiding States and recalling their obligations concerning the protection of citizens during national emergencies or providing aid to most states affected by the outbreak of a pandemic disease. That scenario reveals existing gaps and bottlenecks between international, regional and national coordination during health emergencies (for example, the World Health Organization, Organization of American States and the European Union in relation to Member States). Participants also proposed further questions whether a global health emergence would change current views on jurisdiction (prescriptive, adjudicatory and executive), particularly in cases where cooperation and jurisdictional dialogues are refused by states in times of constraints and ambivalent behaviours in global politics.

Interdisciplinary PIL approaches also allowed participants to draw preliminary lines on the intersectionality between global health, national policies and jurisdictional issues, particularly because of the distinct regulatory frameworks on health safety and their interplay with cross-border civil, commercial and labour matters. The Coronavirus outbreak across the globe paves the way to rethink roles and new opportunities for international organizations, such as the United Nations, WHO, WTO, the Hague Conference of Private International Law, European Union, ASEAN, Mercosur and Organization of American States. One of the proposals would be a proper articulation between governance and policy matters in those international institutions for a constructive and reactive approach to the existing and future hardship affecting individuals, families and companies in their international affairs during pandemics and global crises. Since Private International Law has been functionally (also in historical and socio-legal dimensions) related to “the international life” of individuals, families, companies, organizations, cross-border dealings, a more engaged policy-oriented approach would be desirable for the PIL/global health crisis interplay. To what extent would it be possible to seek convergence between PIL revised goals, health emergencies, new technologies, governance and “neo-federalism” of organizations for advanced roles, new approaches, new cultures?

Some panels have directly referred to the opportunities and challenges posed ahead to PIL research agenda as well as to international, transnational and

comparative studies. Both the Covid-19 outbreak and the global crisis require a study to continuously commit with inter- and multidisciplinary research and even strategically to recover some overarching values for a global order to be rebuilt. Reinforced and restorative cooperation, cosmopolitanism, ethics of care, solidarity and the entitlement of human rights (for instance, new proposed formulations for the right to development under the UN 2030 Agenda) are inevitably related to practical solutions for global health crises and emergencies. Humankind has been in a never-ending learning process no matter where in the globe we live. In a certain fashion, the despicable speech and behaviour of certain governments and global corporations' representatives during the fight against the coronavirus generated endurable feelings in scholarly circles worldwide. Besides, political agents' disdain regarding lost lives will never be forgotten.

How could PIL resist and respond to global challenges involving politics, international affairs and global health while at the same time it will be confronted with upcoming events and processes associated to extremist discourses and hatred, disinformation, historical revisionism, 'junk science' or everything else that disregards principles of global justice, international cooperation and protection of the rights of the person in mobility? Perhaps it is too early to reach consensus or a moral judgment on that. Nevertheless, the fight against Coronavirus/Covid-19 seems to extoll the powerful narratives of alterity, care, social protection, equalities, science, access to knowledge and education. Private International Law may play an important and critical role during forthcoming 'austerity projects' that may come during these dark sides and days of our History. As recalled by participants, the present requires our communities to engage in new proposals to support people, enterprises, consumers, workers and governments in their aspirations and endeavours for improving 'social contracts' or creating new ones. A pandemic crisis would not be the last stop or challenge.

For the sake of a peaceful and safe global community, PIL has 'tools and minds' to raise awareness about a balanced, fairly and universally oriented compromise to keep global, regional and national legal regimes operating in favour of the mobility of persons, the recognition of foreign situations, enforcement of human rights, allocation of distributive international trade, as well as engaging in environmental and human development goals. For example, recent academic writings on hardship or 'force majeure' theories could indeed focus on technical solutions for international contracts and liability rules, which are suitable for

accommodating certain interests (the ‘zero-sum’ game?) among public and/or private parties during Covid-19 and after that. Yet those reflections could not isolate themselves from a broader discussion on major social and economic hurdles associated to business environments worldwide, such as unequal access to finance, trade imbalance, precarious work, digital dispossession by new technologies and multi-territorial and massive violation of human rights. From now on, global fairness and solidarity appear to be crucial for a common talk and shared feeling for countries during their socioeconomic reconstruction. Cooperation remains a cornerstone to pursue equilibrium strategies and surely PIL and its academic community will remain a great place for an authentic and constructive exchange between ideas beyond PIL itself. Stay with your beloved, stay safe!

***Inez Lopes*** *(Universidade de Brasília)*
***Fabrício Polido*** *(Universidade Federal de Minas Gerais)*

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### *International Law, International Relations and Institutions: narratives on Covid-19 & challenges for Private International Law*

05/11 – Monday – 10:30

Raphael Vasconcelos – State University of Rio de Janeiro; Fabrício B. Pasquot Polido – Federal University of Minas Gerais; Renata Gaspar – Federal University of Uberlândia

Video here

### *PIL, Global Governance, mobility of persons and Covid-19: enforcement of sanitary measures, international public policy and critical debates*

05/12 – Tuesday – 16:30

Paula All – National University of Litoral/ Argentina; Rosa Zaia – Federal University of Uberlândia; Renata Gaspar – Federal University of Uberlândia

Video here

### *PIL, state immunity, international organizations and cross-border civil/commercial litigation in Covid-19*

05/13 – Wednesday – 10:30

Valesca R. Borges Moschen – Federal University of Espírito Santo; Martha Olivar Jimenez – Federal University of Rio Grande do Sul; Fabrício B. Pasquot Polido – Federal University of Minas Gerais; Tatiana Cardoso Squeff – Federal University of Uberlândia

Video here

### *Emerging issues for international protection of consumer tourist and Covid-19*

05/14 – Thursday – 10:30

Guillermo Palao Moreno – University of València/Spain; Tatiana Cardoso Squeff – Federal University of Uberlândia; Valesca R. Borges Moschen – Federal University of Espírito Santo

Video here

### *Covid-19, persons in mobility, social and sexual rights at transnational level: violence, vulnerability, xenophobia and discrimination*

05/15 – Friday – 10:30

Tatyana Friedrich – Federal University of Paraná; Mariah Brochado – Federal University of Minas Gerais; Francisco Gomez – University of València / Spain; Raphael Vasconcelos – State University of Rio de Janeiro

Video here

### *Global digital economy, data protection, online misinformation and cybersecurity in times of Covid-19: jurisdictional and international legal cooperation*

05/18 – Monday – 10:30

Anabela Susana Gonçalves – University of Minho / Portugal; Alexandre Pacheco – Getúlio Vargas Foundation – FGV / Direito-SP; Fabrício B.P. Polido – Federal University of Minas Gerais; Inez Lopes – University of Brasília – UnB

Video here

### *Civil aviation and Covid-19: current landscape for transportation of passengers and international commercial transactions*

05/19 – Tuesday – 10:30

Inez Lopes – GDIP-Aéreo-Espacial / University of Brasília; Fabrício B. Pasquot Polido – Federal University of Minas Gerais; Marcelo Queiroz – GDIP-Aéreo-Espacial / UnB and GETRA / UnB; Fernando Feitosa – GDIP-Aero-Espacial / UnB and GETRA / UnB

Video here

### *Covid-19, foreign investments, integrated markets and PIL goals: regulatory choices, critical infrastructure and litigation*

05/20 – Wednesday – 10:30

Laura Capalbo – University of the Republic / Uruguay; Veronica Ruiz Abou-Nigm – University of Edinburgh / UK; Ely Caetano Xavier Junior- ICHS – Federal Rural University of Rio de Janeiro

Video here

***Covid-19 & future of work in the global order: aspects of DIP, employment contracts, outsourcing and worker protection***

05/21 – Thursday – 10:30

Marcia Leonora Orlandini – Federal University of Uberlândia; Marcel Zernikow – State University of Rio de Janeiro; Maurício Brito – GDIP-Transnational Justice / UnB

Full video here.

***Covid-19, International commerce, global supply chains, WTO and beyond***

05/22 – Friday – 16:30

María Mercedes Albornoz – CIDE / Mexico; Rui Dias – University of Coimbra / Portugal; Fabio Morosini – Federal University of Rio Grande do Sul; Renata Gaspar – Federal University of Uberlândia

Full video here

***Covid-19, PIL and new technologies: research opportunities for Ph.D Students*** 05/19 – Tuesday – 19:00

Cecília Lopes – Master's Student / UFMG; Fernanda Amaral – Master's Student / UFMG

Full video here

***Covid-19, PIL and protection of vulnerable communities: research opportunities for Ph.D Students***

05/22, Friday – 10:30 – Márcia Trivellato – Doctoral candidate/ UFMG; Thaísa Franco de Moura – Doctoral candidate/ UFMG; Diogo Álvares – Master

student/UFMG;

Full video here

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# A few thoughts on the Guide to Good Practice on the grave-risk exception (Art. 13(1)(b)) under the Child Abduction Convention, through the lens of human rights (Part I)

*Written by Mayela Celis – The comments below are based on the author's doctoral thesis entitled "The Child Abduction Convention – four decades of evolutive interpretation" at UNED*

As mentioned in a previous post, after many years in the making, the *Guide to Good Practice on the grave-risk exception (Article 13(1)(b)) under the Child Abduction Convention* (grave-risk exception Guide or Guide) has been published. Please refer to our previous posts here and here. This Guide to Good Practice deals with a very controversial topic indeed. The finalisation and approval of this Guide is without a doubt a milestone and thus, this Guide will be of great benefit to users.

For ease of reference, I include the relevant provision dealt with in the Guide. Article 13(1)(b) of the Child Abduction Convention sets out the following: "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that – […] b) there is a ***grave risk*** that his or her return would expose

the child to ***physical or psychological harm*** or otherwise place the child in an ***intolerable situation***. […]" (our emphasis).

The comments on the grave-risk exception Guide will be divided into two posts. In the present post, I will analyse the Guide exclusively through the lens of human rights. In the second post, I will comment on some specific legal issues of the Guide but will also touch upon on some aspects of human rights law. These posts reflect only my personal opinion. Given the controversial nature of this topic, there might be other different and valid opinions out there so please bear that in mind.

At the outset, it should be noted that this Guide is only advisory in nature and thus nothing in the Guide may be construed as binding upon Contracting Parties to the 1980 Convention (and any other HCCH Convention) and their courts (paras 7 and 8 of the Guide) Therefore, courts have enough leeway to supplement it and take on board what they see fit.

Human rights law is gaining importance every day, also in private international law cases. However, apart from some fleeting references to the United Nations Convention on the Rights of the Child (pp. 16 and 56), there are no references to human rights case law in the Guide. Indeed, the increasing number of judgments of the European Court of Human Rights (ECtHR) is not mentioned in the Guide, even though dozens of these judgments have dealt with the grave-risk exception (Art. 13(1)(b)) of the Child Abduction Convention); thus there appears to be an "elephant in the room". We will try to respond in this post to the following questions: what has been the contribution of the ECtHR on this topic and what are the possible consequences of the absence of references to human rights case law in the Guide.

In this regard, I refer readers to our previous post regarding the interaction of human rights and the Child Abduction Convention here and my article entitled: The controversial role of the ECtHR in the interpretation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, with special reference to *Neulinger and Shuruk v. Switzerland* and *X v. Latvia* (in Spanish only but with abstracts in English and Portuguese in the Anuario Colombiano de Derecho Internacional). To view it, click on "*Ver artículo – descargar artículo*", currently pre-print version, published online in March 2020.

Before going into the substance of this post, it is perhaps important to clarify why the case law of the ECtHR in child abduction matters is of such great importance in Europe and beyond, perhaps for the benefit of our non-European readers. First, in addition to being binding upon ***47 States*** party to the European Convention on Human Rights, *which represent about half of the total number of Contracting Parties to the Child Abduction Convention (45%)*, the case law of the *ECtHR not only applies to child abduction cases between European States*. It will also apply, for example, if the requested State in child abduction proceedings is a party to the European Convention on Human Rights and the requesting State is not. Indeed, the geographical location of the requesting State and whether it is a party to the European Convention on Human Rights are not relevant. See for example, *Neulinger and Shuruk v. Switzerland* (Application No. 41615/07), Grand Chamber, where the requesting State was Israel, and *X v. Latvia* (Application No. 27853/09), Grand Chamber, where the requesting State was Australia, both of which are not a party to the European Convention. Secondly, not only European citizens can launch proceedings before the ECtHR. All of this is nicely summarised in Article 1 of the European Convention on Human Rights, which sets out that "The High Contracting Parties shall secure to *everyone within their jurisdiction* the rights and freedoms defined in Section I of this Convention" (our emphasis).

In *X v. Latvia*, the Grand Chamber of the ECtHR has established a legal standard in the handling of child abduction cases where the 13(1)(b) exception has been raised (and indeed other exceptions of the Child Abduction Convention such as Articles 12, 13(1)(a), 13(2) and 20), which is the following:

"106. The Court [ECtHR] considers that a harmonious interpretation of the European Convention and the Hague Convention (see paragraph 94 above) can be achieved provided that the following two conditions are observed. Firstly, ***the factors*** capable of constituting an exception to the child's immediate return in application of ***Articles 12, 13 and 20 of the Hague Convention***, particularly where they are raised by one of the parties to the proceedings, ***must genuinely be taken into account by the requested court. That court must then make a decision that is sufficiently reasoned on this point***, in order to enable the Court to verify that those questions have been effectively examined. Secondly, ***these factors must be evaluated in the light of Article 8 of the Convention*** (see *Neulinger and Shuruk*, cited above, § 133)." (our empahsis)

[…]

“118. As to the need to comply with the short time-limits laid down by the Hague Convention and referred to by the Riga Regional Court in its reasoning (see paragraph 25 above), the Court reiterates that while Article 11 of the Hague Convention does indeed provide that the judicial authorities must act expeditiously, this does not exonerate them from the duty to undertake an ***effective examination*** of allegations made by a party on the basis of one of the exceptions expressly provided for, namely Article 13 (b) in this case.” (our emphasis)

In addition, the ECtHR indicates that domestic courts must conduct “meaningful checks” to determine whether a grave risk exists (paragraph 116 of *X v. Latvia*), and to do so a court may obtain evidence on its own motion if for example, this is allowed under its internal law.

Importantly, this case also underlines the need to secure “tangible” measures of protection for the return of the child (paragraph 108 of *X v. Latvia*).

Moreover, there are *at least two issues in the Guide* that could have benefited from a human rights analysis, namely the incarceration of (mainly) the abducting mother upon returning the child to the State of habitual residence and the separation of siblings.

With regard to the first issue, it should be noted that the fact that the mother will be ***incarcerated upon returning the child*** to the State of habitual residence could have serious consequences for the child. The Guide has correctly explained the different ways in which such an outcome could be avoided. However, the Guide concludes with the following: “*The fact that the charges or the warrant cannot be withdrawn is generally not sufficient to engage the grave risk exception*” (paragraph 67).

In my view, where *objective* reasons have been raised by the mother to refuse to return to the State of habitual residence, such as incarceration, there should be a human rights analysis in the light of Article 8 of the European Convention on Human Rights. While there might be some cases where incarceration may not be sufficient to refuse a return, there might be other cases where this would place the taking parent and the child in grave risk of harm or intolerable situation. By way of example, objective reasons for not returning could include a long

incarceration or a disproportionate sanction, the fact the other parent cannot take care of the child upon the incarceration of the other parent, the inability to contest custody while imprisoned, etc. According to the ECtHR, an analysis should be undertaken as to whether these actions are necessary in a "democratic society". Accordingly, the decision of the mother not to return based on a whim should not be considered seriously. See, for example, the ECtHR cases, *Neuliger and Shuruk v. Switzerland* (Application No. 41615/07), Grand Chamber (as clarified by X v. Latvia (Application No. 27853/09), Grand Chamber)), and *B. c. Belgique* (Requête No. 4320/11). Arresting and handcuffing the mother at the airport has undoubtedly a tremendous impact on children; so all efforts should be geared via judicial co-operation and direct judicial communications to make sure that charges are dropped as mentioned in the Guide (first part of paragraph 67 of the Guide).

As regards the second scenario, it is important to note that the ***separation of siblings when one of them has successfully objected to being return under Article 13(2) of the Child Abduction Convention*** may inflict harm on the children and may be difficult to enforce. The Guide noted that every child should be considered individually and concluded that "*Consequently, the separation of the siblings resulting from the non-return of one child (regardless of the legal basis for the non-return) does not usually result in a grave risk determination for the other child*" (paragraph 74).

According to article 12 of the UN Convention on the Rights of the Child, the views of the child should be given due weight in accordance with the age and maturity of the child. By ordering the return of usually the younger sibling(s) and forcing the mother to make a choice between returning with one child and staying with the child who objected, a judge could not be giving enough weight to the views of the child objecting to being returned. This is especially the case when we are dealing with full siblings and all are subject to return proceedings. In my view, and given that the reason for not returning are the views, in particular, of the older child, this should be factored in when the judge exercises his or her discretion.  See, for example, the ECtHR case, *M.K. c. Grèce* (Requête n° 51312/16). Obviously, if the separation of siblings is due to the action of the mother by not wanting to return, then a separation of the siblings would most likely not be a ground for refusing the return.

The underlying basis of the above is that the Child Abduction Convention is for

the protection of children and not to vindicate the position of adults who are immersed in a legal battle or to merely sanction the abductor.

The standard in *X v. Latvia* should be kept in mind when dealing with international child abduction cases. Given that the grave-risk exception Guide is silent on this, practitioners would need to ***supplement the Guide with relevant literature and case law on human rights*** if they are dealing with a case in Europe. Practitioners outside Europe having a child abduction case which is being resolved in Europe may need to do the same in order to know what their possibilities of success and options are.

In this day and age, and as mentioned by the honorable Eduardo Vio Grossi, judge of the Inter-American Court of Human Rights, in a recent virtual forum ("Challenges to Inter-American Law"), the focus should not only be on sanctioning States for violations of human rights but we should assist States in not getting sanctioned by providing the necessary guidance and if possible, paving the way.