Private International Law in Africa: Comparative Lessons

Written by Chukwuma Okoli, TMC Asser Institute, The Hague

About a decade ago, Oppong lamented a "stagnation" in the development of private international law in Africa. That position is no longer as true as it was then – there is progress. Though the African private international law community is small, the scholarship can no longer be described as minimal (see the bibliograhy at the end of this post). There is a growing interest in the study of private international law in Africa. Why is recent interest on the study of private international law [in Africa] important to Africa? What lessons can be learn't from other non-African jurisdictions on the study of private international law?

With increased international business transactions and trade with Africa, private international law is a subject that deserves a special place in the continent. Where disputes arise between international business persons connected with Africa, issues such as what court should have jurisdiction, what law should apply, and whether a foreign judgment can be recognized and enforced are keys aspects of private international law. Thus, private international law is indispensable in regulating international commercial transactions.

Currently, there is no such thing as an "African private international law" or "African Union private international law" that is akin to, for example, "EU private international law". It could, however, be argued that there is such a thing as "private international law in Africa". The current private international law in Africa is complicated as a consequence of a history of foreign rule, and the fact that Africa has diverse legal traditions (common law, Roman-Dutch law, civil law, customary law and religious law). Many countries in Africa still hang on to what they inherited during the period of colonialism. As colonialism breeds dependence, there has not been sufficient conscious intellectual effort to generate a private international law system that responds to the socio-economic, cultural, and political interests of countries in Africa.

Drawing from comparative experiences, it is opined that a systematic academic study of private international law might create the required strong political will

and institutional support (which is absent at the moment) that is necessary to give private international law its true place in Africa.

There has always been private international law in Africa from time immemorial. Africans, like any other persons, migrated from one territory to another (especially within Africa), where the clash of socio-cultural, political, and economic interests among persons in Africa gave rise to private international law problems as we know them today. Some of these disputes between private parties of different nation states may have likely been resolved through war or diplomacy.

The systematic study of private international law as we know it today has largely been academically developed by the Member States of the European Union (EU) and the United States of America ("USA"). The period of industrialization in the 19th century, and the rise of capitalism gave birth to a variety of solutions that could respond to globalization. Indeed, the firm entrenchment of the principle of party autonomy in international dispute settlement in the 20th century was a way of securing the interest of the international merchant who does their business in many jurisdictions. The *privatization* of international law dispute settlement is what gave birth to the name *private* international law.

In the international scene, the study of private international law is currently dominated by two major powers: the EU and the US, but the EU wields more influence internationally. The EU operates an integrated private international law system with its judicial capital in Luxembourg. The EU can be described as a super-power of private international law in the world, with The Hague as its intellectual capital. Many of the ideas in the Hague instruments (a very important international instrument on private international law) were originally inspired by the thinking of European continental scholars. As a result of colonization, many countries around the world currently apply the private international law methodology of some Member States of the EU. The common law methodology is applied by many Commonwealth countries that were formerly colonized by the United Kingdom; the civil law methodology is applied by many countries (especially in French-speaking parts of Africa) that were formerly colonized by France and Belgium; and the Roman-Dutch law methodology is applied by many countries that were formerly colonized by Netherlands.

Asia appears to have learnt from the EU and USA experience. Since 2015 till date, private international academics from Asia and other regions around the world

have held many conferences and meetings with the purpose of drawing up the principles of private international law on civil and commercial matters, known as "Asian Principles of Private International Law"). The purpose of the principles is to serve as a non-binding model that legislators and judges (or decision makers) in the Asian region can use in supplementing or reforming their private international law rules.

It is important to stress that it is the systematic study of private international law by scholars over the years in the US and Member States in the EU and Asia that created the required political will and institutional support to give private international law it's proper place in these countries. In Africa, such systematic study becomes especially important in an environment of growing international transactions both personal and commercial. This is what propels the study of private international. It is seldom an abstract academic endeavor given the nature and objectives of the subject

Professor Oppong – a leading authority on the subject of private international law in Africa – has rightly submitted in some of his works that private international law can play a significant role in Africa in addressing issues such as: "regional economic integration, the promotion of international trade and investment, immigration, globalization and legal pluralism." A systematic study of private international law in Africa will address these some of these challenges that are significant to Africa. Indeed, a solid private international law system in African States can create competition among countries on how to attract litigation and arbitration. This in turn can lead to economic development and the strengthening of the legal systems of such African countries

What should private international law in Africa look like in the future? Is it possible to have a future "African Union private international law" comparable to that of the European Union? Should it operate in an intra-African way to the exclusion of international goals such as conflicts between non-African countries, and the joint membership or ratification of international instruments such as The Hague Conventions? Should it take into account internal conflicts in individual African states, where different applicable customary or religious laws may clash with an enabling statute or the constitution, or different applicable religious or customary laws may clash in cross-border transactions? In the alternative, should it focus primarily on diverse solutions among countries in Africa, and promote international commercial goals, with less attention placed on African integration?

These questions are not easy to answer. It is opined that private international law in Africa deserves to be systematically studied, and solutions advanced on how the current framework of private international law in Africa can be improved. If such study is devoted to this topic, the required political will and institutional support can be created to give [private international law] proper significance in Africa.

For recent monographs on the subject see generally
CSA Okoli and RF Oppong, *Private International Law in Nigeria* (Hart, 2020-forthcoming)

P Okoli, *Promoting Foreign Judgments; Lessons in Legal Convergence from South Africa and Nigeria* (Wolters Kluwer, Alphen aan den Rijn, 2019)

AJ Moran and AJ Kennedy, *Commercial Litigation in Anglophone Africa: The law relating to civil jurisdiction, enforcement of foreign judgments, and interim remedies* (Juta, Cape Town, 2018)

RF Oppong, *Private International Law in Ghana* (Wolters Kluwer Online, Alphen aan den Rijn, 2017)

M Rossouw, *The Harmonisation of Rules on the Recognition and Enforcment of Foreign Judgments in Southern African Customs Union* (Pretoria University Law Press, Pretoria, 2016)

E Schoeman *et. al.*, *Private International Law in South Africa* (Wolters Kluwer Online, Alphen aan den Rijn, 2014)

RF Oppong, *Private International Law in Commonwealth Africa* (Cambridge University Press, Cambridge, 2013)

C Forsyth, *Private International Law – the Modern Roman Dutch Law including the Jurisdiction of the High Courts* (5th edition, Juta, Landsowne, 2012).

Ssangyong Engineering & Construction Co. Ltd. *v.* National Highways Authority of India (NHAI) 2019 SCC OnLine SC 677

By Mohak Kapoor

The recent decision of the apex court of Ssangyong Engineering & Construction Co. Ltd. v. NHAI, has led to three notable developments: (1) it clarifies the scope of the "public policy" ground for setting aside an award as amended by the Arbitration and Conciliation (Amendment) Act 2015, (2) affirms the prospective applicability of the act and (3) adopts a peculiar approach towards recognition of minority decisions.

FACTS

The dispute arose out of a contract concerning the construction of a four-lane bypass on a National Highway in the State of Madhya Pradesh, that was entered into by the parties. Under the terms of the contract, the appellant, Ssangyong Engineering, was to be compensated for inflation in prices of the materials that were required for the project. The agreed method of compensation for inflated prices was the Wholesale Price Index ("WPI") following 1993 – 1994 as the base year. However, by way of a circular, the National Highways Authority of India ("NHAI") changed the WPI to follow 2004 – 2005 as the base year for calculating the inflated cost to the dismay of Ssangyong. Hence, leading to the said dispute. .

After the issue was not resolved, the dispute was referred to a three member arbitral tribunal. The majority award upheld the revision of WPI as being within the terms of the contract. The minority decision opined otherwise, and held that the revision was out of the scope the said contract. Due to this, Ssangyong challenged the award as being against public policy before Delhi High Court and upon the dismissal of the same, the matter was brought in front of the apex court by way of an appeal.

LEGAL FINDINGS

The Supreme Court ruled on various issues that were discussed during the proceedings of the matter. The Court held that an award would be against justice and morality when it shocks the conscience of the court. However, the same would be determined on a case to case basis.

The apex court interpreted and discussed the principles stipulated under the New York convention. Under Para 54 of the judgement, the apex court has discussed the necessity of providing the party with the appropriate opportunity to review the evidence against them and the material is taken behind the back of a party, such an instance would lead to arising of grounds under section 34(2)(a)(iii) of the Arbitration and Conciliation (Amendment) Act, 2015. In this case, the SC applied the principles under the New York convention of due process to set aside an award on grounds that one of the parties was not given proper chance of hearing. The court held that if the award suffers from patent illegality, such an award has to be set aside.

However, this ground may be invoked if (a) no reasons are given for an award, (b) the view taken by an arbitrator is an impossible view while construing a contract, (c) an arbitrator decides questions beyond a contract or his terms of reference, and (d) if a perverse finding is arrived at based on no evidence, or overlooking vital evidence, or based on documents taken as evidence without notice of the parties.

Out now: Yearbook of Private International Law, Vol. XX (2018/19)

The XXth volume of the Yearbook of Private International Law has just been published. Ilaria Pretelli, who has edited this volume together with Andrea Bonomi and Gian Paolo Romano, has been so kind as to provide not only the following teaser but also the Table of Contents and Foreword to *conflictoflaws.net*.

The new 20th volume (2018/2019) of the Yearbook of Private International Law contains over 30 articles on the most important aspects of private international

law by authors from all over the world. You will find inspiring articles on the law of non-recognised states, the American restatement on international arbitration, the recognition of so-called marriage for all in Europe and, highly topical, a contribution to the Hague Judgments Convention and the reform of the Brussels IIa Regulation.

As always, the National Reports with information on relevant legal developments worldwide, News from the Hague, the case law section and also the forum are highly interesting and unique.

Out now: RabelsZ 4/2019

The latest issue of RabelsZ has just been published. It contains the following articles:

Olaf Meyer, Parteiautonomie bei Mehrrechtsstaaten (Party Autonomy in States with More than One Legal System), pp. 721 et seq

> *Where parties' choice of law in private international law is limited to states with which they have reasonably close ties, similar restrictions usually apply to their choice of local law in states having more than one legal system. However, applying the same limits to both contexts is not mandatory. On the international level there is already a connecting factor that has designated the applicability of the law of a multi-law state. At the local level it is then a question of fine-tuning within that state's legal order. To undertake this fine-tuning exercise on the basis of purely objective criteria is, however, more difficult within a single non-unified legal system than it is between two different states. This is because the relevant facts are packed more densely together and people are more mobile within the same state. Hence, the habitual residence of a person or the closest connection to the facts of a case tends to be more difficult to localise than in cases with connections to different states. Here lies an essential difference between international and inter-local conflicts of laws, which would justify a different approach to resolving them.*

Zufall, Frederike, Shifting Role of the "Place": From *locus delicti* to Online Ubiquity in EU, Japanese and U.S. Conflict of Tort Laws, pp. 760 et seq

> *This article examines the evolution of conflict rules in their perception of "place": the basis for determining jurisdiction and the applicable law. To examine this topic from a global perspective, the legal systems of the EU, Japan, and the U.S. are analyzed and contrasted as representative legal systems from around the world (I.). Europe can be seen as the cradle of the concept of locus delicti, upholding it, albeit with reinterpretation, until today. Like other Asian countries, Japan received locus delicti as a legal transplant, implementing and adapting it in its own way. Finally, the U.S. is known for pursuing a different approach and different connecting places as a result of its conflicts revolution. This study, then, aims to combine a comparative approach with conceptual analysis, tracing the evolution of locus delicti as first received from Roman law (II.), through its reinterpretation to address cross-border and multi-state torts (III.), and the adoption of different connecting approaches (IV.), to questions arising from the ubiquity raised by the Internet (V.). To ensure a comprehensive approach, this paper will cover aspects of both the applicable law and jurisdiction, while at the same time having cognizance of their conceptual differences. It will be shown that in seeking "connecting factors", "contacts", or "interests", connection to a place is increasingly lost, blurring territoriality and provoking the question of whether pursuing a fair balance between the parties should, instead, lead our legal reasoning (VI.).*

Oliver Mörsdorf, Private enforcement im sekundären Unionsprivatrecht: (k)eine klare Sache? (Private Enforcement under Secondary EU Private Law: (Not) a Clear Matter?), pp. 797 et seq

> *National private law is increasingly determined by EU legislation which either directly establishes standards of conduct between individuals or obliges Member States to do so. However, such legislation often lacks clarity as to whether private law remedies are granted in cases of non-compliance. In Van Gend & Loos the EJC held that the EEC (now EU) creates individual rights that are directly enforceable before national courts. The Court later developed this principle of direct effect into a far-reaching duty for Member States to ensure the enforcement of individual rights by providing remedies such as a right to invoke the nullity of legal provisions or contract clauses and a right to claim*

damages from public authorities and private persons. Most legal writers take a functional approach to the question of which EU laws contain individual rights, arguing that the involvement of individuals in enforcement of EU law calls for over-all recognition of individual rights. This private enforcement approach might fit primary law but cannot be transferred to secondary law, where the ECJ's recognition of individual rights goes along with a reduction of EU lawmakers' prerogative to decide on the enforcement standard. The question of whether a secondary law provision contains an individual right thus must be answered strictly by interpreting that provision, taking into account not only its wording and context but also the legislative process preceding its adoption. A prerogative to decide autonomously on the creation of individual rights should be rejected, however, regarding EU provisions that give specific expression to individual rights deriving from primary law. Even if one accepts EU lawmakers' power to define the scope of primary law to some extent, this power cannot include the very character of provisions as individual rights.

Leon Theimer, The End of Consumer Protection in the U.S.? –Mandatory Arbitration and Class Action Waivers, pp. 841 et seq

Historically, in the early twentieth century, mandatory arbitration was almost non-existent due to the judiciary's widespread refusal to enforce arbitration agreements. This began to change slowly when Congress passed the Federal Arbitration Act (FAA) in order to provide a forum for merchants to settle fact-based contractual disputes. […] The sweeping change towards individual arbitration in consumer disputes is underpinned by the Supreme Court's jurisprudence, which over the last forty years has overwhelmingly favoured the party seeking to arbitrate. While it is beyond the scope of this article to analyse the entirety of the Supreme Court's FAA jurisprudence, Part II will trace arbitration's ascent from the enactment of the FAA in 1925 to the prominent status it enjoys today, particularly focusing on and critically analysing key decisions rendered in the last four decades. Part III will discern some of the most important implications of the status quo and discuss what is left of consumer protection in the arbitration context in the United States today. Lastly, Part IV will explore some approaches that would enhance consumer protection in arbitration along with their prospects, criticisms and justifications.

3rd IBA Litigation Committee Conference on Private International Law

On 24 and 25 October, the 3rd IBA Litigation Committee Conference on Private International Law will take place in Palazzo Turati, Milan, Italy. It will deal with Brexit, International Commercial Courts and Sanctions. More information are available on the IBA conference website.

The programme reads as follows:

Welcome remarks

- Angelo Anglani *NCTM, Rome; Co-Chair, IBA Litigation Committee*
- Vinicio Nardo *Chairman, Consiglio dell'Ordine degli Avvocati di Milano, Milan*

Keynote address
International dispute resolution in turbulent times – is there a role for private international law?

Professor Fausto Pocar *Università degli Studi di Milano, Milan*

Session One

Brexit – the impact on jurisdiction and private international law

With just one week until the deadline, we will check the status of the most controversial event in the history of the European Union. The session will focus on the impact of Brexit on jurisdiction and private international law and look at the possible effects on solutions and perspectives in international commercial disputes.

Session Chair

Carlo Portatadino *Weigmann, Milan; Secretary, IBA Litigation Committee*

Speakers

- Professor Stefania Bariatti *Università degli Studi di Milano, Milan*
- Alexander Layton QC *Twenty Essex, London*

Session Two

The mushrooming of International Commercial Courts throughout Europe – reasons and perspectives

In 2016, on the occasion of the 2nd IBA Litigation Committee Conference on Private International Law, we explored the new phenomenon of the International Commercial Courts and discussed whether the 2005 Hague Convention on Choice of Court Agreements could enhance their role in international commercial dispute resolution. Since that time, and also in light of Brexit we have been assessing the mushrooming of International Commercial Courts throughout Europe. This session will examine the experiences of several jurisdictions and focus on the future perspective on the phenomenon in Europe.

Session Chair
Jacques Bouyssou *Alerion, Paris; Treasurer, IBA Litigation Committee*

Speakers

- Martin Bernet *Bernet Arbitration / Dispute Management, Zurich*
- Hakim Boularbah *Loyens & Loeff, Brussels*
- Jean Messinesi *Honorary President, Tribunal de Commerce de Paris, Paris*
- Duco Oranje *President, NCC Court of Appeal, Amsterdam*
- Professor Giesela Rühl *Friedrich-Schiller-Universität Jena, Jena*
- Mathias Wittinghofer *Herbert Smith Freehills, Frankfurt*

Session Three

Sanctions – politics, procedures and private international law

This session will consider the increasing impact of sanctions on politics and economics. The panellists will present the workings of the European and US sanctions systems and illustrate the resulting consequences on international trade

and cross-border disputes. The session will also focus on how clients approach and deal with the matter.

Session Chair
Christopher Tahbaz *Debevoise & Plimpton, New York*

Speakers

- Shannon Lazzarini *Group Deputy General Counsel & Head of Group Litigation, Unicredit, Milan*
- Richard Newcomb *DLA Piper, Washington DC*
- Michael O'Kane *Peters & Peters, London*
- Marco Piredda *Senior Vice-President, International Affairs, ENI, Rome*
- Professor Hans van Houtte *KU Leuven, Leuven, Belgium*

Closing remarks

Tom Price *Gowling WLG, Birmingham; Co-Chair, IBA Litigation Committee*

Out now: Punitive Damages and Private International Law: State of the Art and Future Developments

Written by Zeno Crespi Reghizzi, Associate Professor of International Law at the University of Milan

The recognition of punitive damages represents a controversial issue in Europe. For many years, due to their conflict with fundamental principles of the *lex fori*,

punitive damages have been found to be in breach of public policy by some European national courts. This has prevented the recognition and enforcement of foreign judgments awarding them, or (more rarely) the application of a foreign law providing for these damages.

More recently, the negative attitude of European courts vis-à-vis punitive damages has been replaced, at least in some States, by a more open approach. The latest example is offered by a *revirement* of the Italian Supreme Court case law as per its judgment no 16601 of 5 July 2017.

This book – edited by Stefania Bariatti, Luigi Fumagalli, and Zeno Crespi Reghizzi and published by Wolters Kluwer-CEDAM – intends to explore the relationship between punitive damages and European private international law from different angles. After introducing the topic from a comparative law perspective, the chapters of this book examine, in particular, the purpose and operation of public policy as applied to punitive damages, the solutions adopted by the case law of various European States, the treatment of punitive damages in international commercial arbitration, and the emerging trends in EU and ECHR law.

The contributions have been prepared by leading legal scholars from different jurisdictions and are based on papers presented at a conference that took place on 11 May 2018 at the Department of Italian and Supranational Public Law of the State University of Milan, with the support of the SIDI Interest Group on Private International Law and the "Rivista di diritto internazionale privato e processuale".

8th Journal of Private International Law Conference

2019 in Munich

Written by Christiane von Bary, Ludwig-Maximilians-University Munich

The 8th edition of the biannual Journal of Private International Law Conference took place at the Ludwig-Maximilians-Universität in Munich from 12-14 September 2019, organized by Professor Anatol Dutta in cooperation with the editors of the journal, Professor Paul Beaumont and Professor Jonathan Harris.

The call for papers by the organisers resulted in a record number of applications and thus papers presented. More than 190 participants registered for the conference and delivered 114 papers over the course of the three days in Munich. With participants coming from around 50 jurisdictions ranging from Australia to Venezuela, all speakers had a truly international audience and were able to benefit from questions, insights and remarks by a very diverse group of private international law scholars. The diversity of the participants and speakers not only covered a wide variety of geographical backgrounds but also every stage of the academic career from doctoral candidate to senior professor. Due to the unexpectedly high interest in the conference, sadly some people who were interested could not attend due to space constraints – even despite a video transmission of the plenary session.

On Thursday and Saturday, a total of 28 parallel sessions took place. Blocks of seven alternative sessions happened at the same time and participants where free to choose according to their interests. This was a challenge not only for the participants who were spoilt for choice but also from an organisational perspective. In each session, up to four speakers presented their papers on related topics. There were several panels on topics related to jurisdiction, judgments or family law but also on subjects like child abduction, judicial cooperation, arbitration, technology or CSR. The presentations were all followed by lively and fruitful discussions each chaired by an expert in the relevant field. The animated debate often continued in the cafeteria and the sunny courtyard during the coffee breaks. Two speakers who were unable to attend in person even had the chance to participate via video call and answered questions remotely.

The plenary sessions on Friday allowed for a larger audience for four panels.

Particularly interesting and thought provoking was the session on “Women and Private International Law” with Professors Roxana Banu, Mary Keyes, Horatia Muir Watt, Yuko Nishitani and Marta Pertegás Sender. Their contributions focussed on gender issues in private international law and provided a broad variety of perspectives in an area that has – so far – been largely neglected by the private international law community. The very existence of this community was addressed by Professor Ralf Michaels and Dr. Veronica Ruiz Abou-Nigm who spoke about what the heart of the endeavour of private international law is. During the days in Munich, which were not only filled by intellectual debate but also by colleagues and friends (re)connecting, the existence of an international community of private international law felt very much real.

The conference website (https://jprivintl2019.de/) will remain active and offers an overview of all papers as well as abstracts from many speakers. Finally, it was revealed that the next Journal of Private International Law Conference will take place in Singapore in 2021, organised by Professor Adeline Chong, which will be the first time the private international law community gathers in Asia.

Conflict of Laws Section of the American Association of Law Schools (AALS) Panel on Jan. 4, 2020 in Washington, DC

On January 4, 2020, the Conflict of Laws Section of the American Association of Law Schools (AALS) will host a panel at the AALS Annual Meeting in Washington, DC. Registration is available here.

Sessions Information
January 4, 2020

10:30 am – 12:15 pm

Room: Maryland Suite B
Floor: Lobby Level
Hotel: Washington Marriott Wardman Park Hotel

Description: The biggest development in conflict of laws in the last 100 years is the move to party autonomy. The panel will discuss issues relating to the interpretation and enforcement of choice-of-law clauses, forum selection clauses, and arbitration clauses. It will also discuss the reasons why parties may choose to arbitrate or litigate future disputes at the time of contracting.

Speakers

Moderator: John F. Coyle, University of North Carolina School of Law

Speaker: Pamela Bookman, Fordham Law School

Speaker: Christopher R. Drahozal, University of Kansas School of Law

Speaker: Laura E. Little, Temple University, James E. Beasley School of Law

Speaker: Julian Nyarko, Stanford Law School

Singapore Convention on Mediation

Forty-six countries have signed up to the United Nations Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention on Mediation") today. The signatory countries included Singapore, China, India, South Korea and the USA. The Convention, which was adopted by the UN General Assembly in December 2018, facilitates the cross-border enforcement of international commercial settlement agreements reached through mediation. It complements existing international dispute resolution enforcement frameworks in arbitration (the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards) and litigation (the Hague Convention on

Choice of Court Agreements and the recently concluded Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters). Article 1(3) of the Singapore Convention carves out settlement agreements which may fall within the scope of these other instruments to avoid an overlap. The Convention does not prescribe the mode of enforcement, but leaves it to each Contracting State to do so "in accordance with its rules of procedure and under the conditions laid down in this Convention" (Article 3(1)). Formal requirements to evidence the settlement agreement are specified although the competent authority in the state of enforcement is also granted flexibility to accept any other evidence acceptable to it (Article 4). The settlement agreement may only be refused enforcement under one of the grounds listed in Article 5. These grounds include the incapacity of a party to the settlement agreement, the settlement agreement is null and void under its applicable law and breaches of mediation standards. Only two reservations are permitted: one relating to settlement agreements to which a government entity is a party and the other relating to opt-in agreements whereby the Convention applies only to the extent that the parties to the settlement agreement have agreed to the application of the Convention (Article 8).

While mediation currently commands a much smaller slice of the international dispute resolution mode pie compared to arbitration or litigation, some countries are making concerted efforts to promote mediation. To that end, the Singapore Convention will assist to increase mediation's popularity among litigants in international commercial disputes.

Arbitrating Corporate Law Disputes: A Comparative Analysis

of Turkish, Swiss and German Law

Written by Cem Veziroglu

Cem Veziroglu, doctoral candidate at the University of Istanbul and research assistant at Koc University Law School has provided us with an abstract of his paper forthcoming in the European Company and Financial Law Review.

Arbitrating Corporate Law Disputes: A Comparative Analysis of Turkish, Swiss and German Law

The resolution of corporate law disputes by arbitration rather than litigation in national courts has been frequently favoured due to several advantages of arbitration, as well as the risks related to the lack of judicial independence, particularly in emerging markets. While the availability of arbitration appears to be a major factor influencing investment decisions, and there is a strong commercial interest in arbitrating corporate law disputes, the issue is unsurprisingly debated in respect of certain characteristics of the joint stock company as a legal entity. Hence the issue comprises a series of legal challenges related to both corporate law and arbitration law.

In a paper forthcoming in the European Company and Financial Law Review, I tackle *the arbitrability of corporate law disputes* and *the validity of arbitration clauses stipulated in the articles of association* ("AoA") of joint stock companies. The study compares Turkish law with that of Germany and Switzerland and in particular tries to shed light on the current position of Turkish law with respect to (i) arbitrability of corporate law disputes, such as validity of general assembly resolutions and requests for corporate dissolution, (ii) validity and binding nature of an arbitration clause provided in the AoA. The paper also suggests practicable legislative recommendations as well as a model arbitration clause.

Arbitrability of Corporate Law Disputes

Under Turkish law corporate law disputes are, in principle, considered to be arbitrable, whereas disputes concerning the *validity of general assembly resolutions* and *corporate dissolution* are still heavily debated. I argue that both types of disputes are arbitrable, albeit judicial dissolution requests accommodate practical hurdles due to the magnitude of remedial power granted to judges by

law. Moreover, I suggest that arbitral awards should be granted an *erga omnes* effect (the effects exceeding the parties to the dispute), as long as the interested third parties are provided with the necessary procedural protection. These procedural mechanisms may include the pending and consolidation of all actions filed before the arbitral tribunal and collective – or impartial – selection of arbitrators in multy-party arbitral proceedings.

It seems that the case law has thus far followed the distinction adopted by the orthodox doctrine in general terms; namely disputes concerning the validity of general assembly resolutions and corporate dissolution are deemed inarbitrable. However, considering the ever-growing pro-arbitration tendency in Turkey –in parallel with many other jurisdictions– it would not be surprising if a more flexible approach is eventually adopted in case law as well.

Place of the Arbitration Clause: Articles of Association or Shareholders Agreement?

It is necessary to provide an arbitration clause in the AoA of the company, rather than a shareholders' agreement ("SHA"), in order to (**i**) prevent contradicting judgments handed down in parallel proceedings, (**ii**) be able to request claims peculiar to corporate law and (**iii**) ensure the binding effect *vis-à-vis* the company, board members and new shareholders as well as the current shareholders.

Validity of an Arbitration Clause Provided in the AoA

There is no rule under Turkish corporate law that restricts contractual freedom within the AoA of privately held joint stock companies that has the effect of restraining arbitration clauses. An arbitration clause can, therefore, be validly provided either in the original AoA or by way of an amendment thereof by way of a unanimous vote. However, the binding effect of the arbitration clause in question depends on its legal nature, namely, 'corporative' or 'formal' (contractual).

Addressing this issue, the paper proposes to adopt a two-step test and concludes that if an arbitration clause stipulated in the AoA is deemed corporative in nature, the company, the board members, the new shareholders, and the current shareholders are bound by such an arbitration clause. In the event that the arbitration clause in question is deemed to be a formal provision, it may still remain effective only among the parties as a purely contractual term.

Policy Recommendations

The arbitrability of corporate law disputes, the validity of arbitration clauses stipulated in the AoAs and the procedural standards to protect third parties' interests should be clarified by an explicit legal provision. In fact, Article 697n of the Swiss Draft Code of Obligations dated 23 November 2016[1] and Italian Legislative Decree of 17 January 2003 No. 5 Articles 34-37 may offer motivating examples in this respect.

According to German Federal Court's decision in 2009[2], an arbitration clause in the AoA is valid, provided that the protections and the opportunity of shareholders to participate in the proceedings comparable to those in national court proceedings are respected. Therefore Turkish courts should examine the arbitration clause in question in terms of the protection provided to shareholders, rather than applying an outright ban on such clauses in the AoA.

The leading arbitration institutions should draft and publish rules for corporate law disputes as annexes to their existing rules of arbitration. These should consider the issues peculiar to corporate law disputes. Hence, they should provide such mechanisms as the pending and consolidation of actions filed before the arbitral tribunal; collective -or impartial- selection of arbitrators so as to provide the minimum legal procedural protection granted to shareholders. A comprehensive example is the German Arbitration Institution's 'DIS-Supplementary Rules for Corporate Law Disputes 09'[3].

With a view to facilitating the incorporation of applicable and valid arbitration clauses into the AoA, a model arbitration clause for corporate law disputes should be published by leading arbitration institutions. Such a model clause may be inspired by the draft model clause found in the paper referenced above.

[1] https://www.admin.ch/opc/fr/federal-gazette/2017/625.pdf.

[2] BGH, 6 April 2009, II ZR 255/08, BGHZ 180, 221.

[3] The said rules can be found at: http://www.disarb.org/en/16/rules/dis-supplementary-rules-for-corporate-law-disputes-09-srcold-id15.