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

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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.

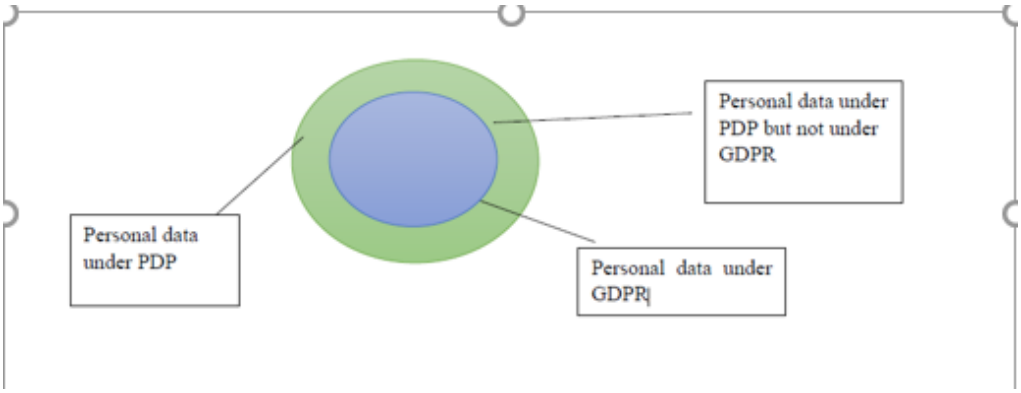
Both GDPR and PDP refer to personal data as information/data relating to

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.

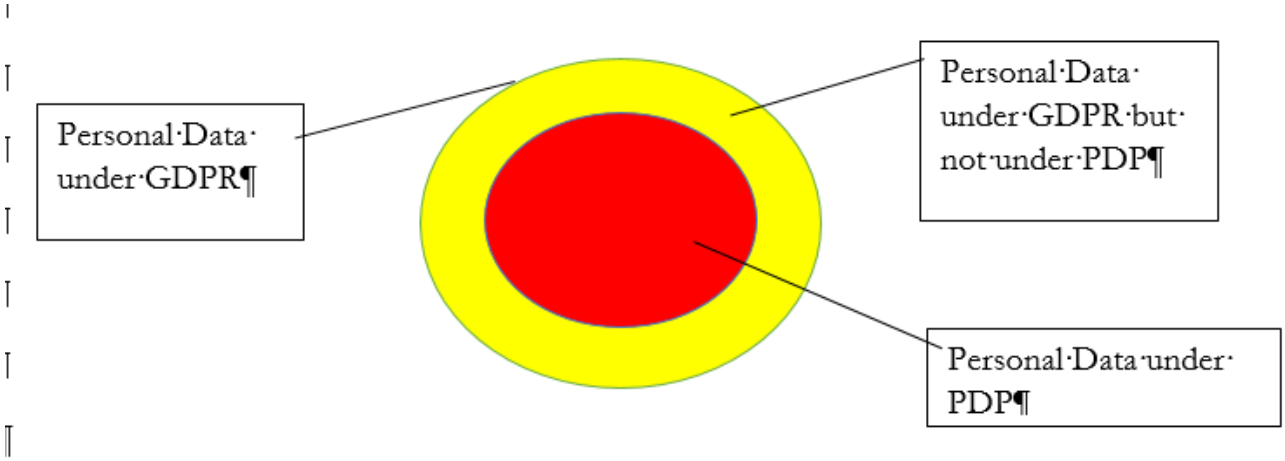
Deviation 1 – PDP provides for words such as '*any other feature of identity, a combination of such feature with other information, any inference drawn for profiling*', in the meaning of an identifiable natural person. These terms can be interpreted more liberally and will probably be explained by courts 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.

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.

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.

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		
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 *Arbitration* 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) ARTICLE 20 *Applicable Law* 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 This policy shall be governed by the laws of England. Any dispute arising from this policy shall be referred to the Courts of England."

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. This Charter Party shall be governed by and construed in accordance with English Law. The Arbitrators and Umpire shall be commercial men normally engaged in the Shipping Industry. 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 … … *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 SERVICE OF SUIT The Reinsurer hereon agrees that: 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. 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. 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. ARTICLE XIX ARBITRATION: 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. The members of the Court of Arbitration shall be active or retired executives of Insurance or Reinsurance Companies. 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. 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. The decision of the Court of Arbitration shall not be subject to appeal. The costs of Arbitration shall be paid as the Court of Arbitration directs. 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 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. …"
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. 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. 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 … (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."

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:"] "[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." "'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 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. Thereafter: (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 (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. 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. 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." "25. Governing law and Jurisdiction 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> "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." <u>Expona Endorsement</u> "Provided that all claims which fall under the terms of this endorsement, it is agreed: (i) the limits of liability are inclusive of costs as provided under supplementary payment in this policy. (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> "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." <u>Deed of Adherence</u> "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. 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)."

Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd	[2013] WASCA 66; (2013) 298 ALR 666	Asset Sale Agreement "16.2 Governing Law and Dispute Resolution (a) This agreement is governed by the laws of Western Australia. (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. (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; (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; (2) failing settlement by negotiation, either party may, by notice to the other party, refer the dispute for resolution by mediation: (A) at the Singapore Mediation Centre (SMC) in Singapore; (B) under the SMC Mediation Procedures; (C) with one mediator; (D) with English as the language of the mediation; and (E) with each party bearing its own costs of the mediation; and (3) failing settlement by mediation, either party may, by notice to the other party, refer the dispute for final and binding resolution by arbitration: (A) at the Singapore International Arbitration Centre (SIAC) in Singapore; (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; (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; (D) with the substantive law of the arbitration being Western Australian law; (E) with one Arbitrator; (F) with English as the language of the arbitration; and (G) with each party bearing its own costs of the arbitration. (d) Nothing in this clause 16: (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 (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." Guarantee Agreement "9.9. Governing law and jurisdiction (a) This document is governed by the laws of Western Australia. (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. (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: (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; (ii) failing settlement by negotiation, any party may, by notice to the other parties, refer the dispute for resolution by mediation; and (A) at the Singapore Mediation Centre (SMC) in Singapore; (B) with one mediator; (C) with English as the language of the Mediation; and (D) with each party bearing its own costs of the mediation; and (iii) failing settlement by mediation, any party may, by notice to the other parties, refer the dispute for final and binding resolution by arbitration: (A) at the Singapore International Arbitration Centre (SIAC) in Singapore or in Hong Kong; (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; (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; (D) with the substantive law of the arbitration being Western Australian law; (E) with one arbitrator; (F) with English as the language of the arbitration; and (G) with each party bearing its own costs of the arbitration. (d) Nothing in this clause 9.9: (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 (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 "The agreed place of jurisdiction, irrespective of the amount in dispute, is Singapore." Conditions of Purchase "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."

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 (and (2012) 95 NSWLR 221; and [2019] HCA 13; (2019) 366 ALR 635)	April 2005 Deed of Obligation and Release "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." Hope Downs Deed "20. CONFIDENTIAL MEDIATION/ARBITRATION 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. 20.1 Confidential Mediation (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); (b) each of the disputing parties must attempt to agree upon a suitably qualified and independent person to undertake the mediation; (c) the mediation will be conducted with a view to: (i) identifying the dispute; (ii) developing alternatives for resolving the dispute; (iii) exploring these alternatives; and (iv) seeking to find a solution that is acceptable to the disputing parties. (d) any mediation will not impose an outcome on the disputing parties. Any outcome must be agreed to by the disputing parties; (e) any mediation will be abandoned if: (i) the disputing parties agree; (ii) any of the disputing parties request the abandonment. 20.2 Confidential Arbitration (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 arbitration for resolution ('Referral Date') and the following provisions of this clause shall apply; (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 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, (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; (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. (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. (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. (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 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. (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; (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. … [21. the deed] shall be governed by and be subject to and interpreted according to the laws of the State of Western Australia"." August 2009 Deed of Further Settlement "16. The CS Deed and this Deed will be governed by the following dispute resolution clause: (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; (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. (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; (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 (v) Despite the existence of a Dispute, the parties must continue to perform their respective obligations under this Deed."

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 "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." Promotion Agreement "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.

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

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.

Application of the Brussels I bis Regulation ratione materiae, interim relief measures and immunities: Opinion of AG Saugmandsgaard Øe in the case Supreme Site and Others, C-186/19

Written by María Barral Martínez, a former trainee at the European Court of Justice (Chambers of AG Campos Sánchez-Bordona) and an alumna of the University of Amsterdam and the University of Santiago de Compostela

The Hoge Raad Neederlanden (The Dutch Supreme Court), the referring court in the case Supreme Site Service and Others, C-186/19, harbours doubts regarding the international jurisdiction of Dutch courts under the Brussels I bis Regulation, in respect to a request to lift an interim garnishee order. An insight on the background of the case can be found here and here, while the implications of that background for admissibility of request for a preliminary ruling are addressed in section 1 of the present text.

In replying to a preliminary ruling request made by that court, AG Saugmandsgaard Øe issued his Opinion. Advocate General concluded that a flexible approach should be taken when interpreting the concept of "civil and commercial matters" within the meaning of Article 1(1) of the Brussels I bis Regulation. AG was of the view that an action for interim measures as the one brought by SHAPE, aimed at obtaining the lifting of a garnishee order, qualifies as civil and commercial matters, within the meaning of Article 1(1), provided that such garnishee order had the purpose of safeguarding a right originating in a contractual legal relationship which is not characterised by an expression of public powers, a matter that is left to the referring court to verify. For presentation of AG reasoning and its analysis in relation to interim measures, see section 2.

Moreover, according to AG, alleged claims of immunity enjoyed under international law by one of the parties to the proceedings had no significance, when it comes to the analysis of the material scope of the Brussels I bis Regulation. Against this background, the case provides a good opportunity to explore jurisdictional issues in the face of immunities, such as the debate regarding international jurisdiction preceding the assessment of immunities, and what can be inferred from the case-law of the Court of Justice and the European Court of Human Rights in that respect. Next, it requires us to determine whether the case-law developed in relation to State bodies and their engagement in *acta iure imperii* can be applied mutatis mutandis to the international organisations. Finally, it revives the concerns on whether the scope of the Brussels I bis Regulation should be determined in a manner allowing to establish international jurisdiction under that Regulation even though enforcement against public authorities stands little chances, be that international organisations as in the present case. These issues are discussed in section 3.

1. Admissibility of the preliminary reference

Advocate General Saugmandsgaard Øe made some remarks on the admissibility of the preliminary ruling and on whether a reply of the Court of Justice would be of any avail to the referring court.

It should be recalled that at national level, two sets of proceedings were initiated in parallel. In the first set, – the proceedings on the merits – Supreme, the private-law companies, sought a declaratory judgment that it was entitled to the payment of several amounts by SHAPE, an international organisation. These proceedings were under appeal before the Den Bosch Court of Appeal because SHAPE challenged the first instance court's jurisdiction. In the second set – the proceedings for interim measures where the preliminary ruling originated from – SHAPE brought an action seeking the lift of the interim garnishee order and requesting the prohibition of further attempts from Supreme to levy an interim garnishee order against the escrow account.

In the opinion of AG, the preliminary ruling was still admissible despite the fact that the Den Bosch Court of Appeal ruled on the proceedings on the merits granting immunity of jurisdiction to SHAPE in December 2019 – the judgment is under appeal before the Dutch Supreme Court. He opined that the main proceedings should not be regarded as having become devoid of purpose until the court renders a final judgment on the question whether SHAPE is entitled to invoke its immunity from jurisdiction, in the context of the proceedings on the merits and whether that immunity, in itself, precludes further garnishee orders targeting the escrow account (point 35).

2. Civil and commercial matters in respect of substantive proceedings or interim relief proceedings?

The Opinion addressed at the outset the question on whether the substantive proceedings should fall under the material scope of the Brussels I bis Regulation in order for the interim relief measures to fall as well within that scope. As a reminder, the object of the proceedings on the merits, is a contractual dispute over the payment of fuels supplied by Supreme to SHAPE, in the context of a military operation carried out by the latter.

As AG signalled, to answer the question several hypotheses have been put forward by the parties at the hearing held at the Court of Justice. The first hypothesis, supported by the Greek Government and Supreme, proposed that in order to determine if an action for interim measures falls within the scope of the Regulation, the proceedings on the merits should fall as well under the material scope of the Regulation. In particular, the characteristics of the proceedings on the merits should be taken into account. The second hypothesis, supported by SHAPE, considered that the analysis should be done solely in respect to the proceedings for interim measures. The European Commission and the Dutch and Belgian Governments opined that in order to determine if the action for interim measures can be characterised as civil and commercial matters, it is the nature of the right which the interim measure was intended to safeguard in the framework of the interim relief proceedings that matters.

Endorsing the latter hypothesis, AG indicated that an application for interim measures cannot be regarded as automatically falling within or outside the scope of the Brussels I bis Regulation, depending on whether or not the proceedings on the merits fall within that scope, simply because it is ancillary to the proceedings on the merits (point 51). To support his conclusion, AG followed the line of reasoning developed by the Court in the context of the instruments preceding the Brussels I bis Regulation. In that regard, the Court has held that to ascertain that provisional/protective measures come within the scope of the Regulation, it's not the nature of the measures that should be taken into account but the nature of the rights they serve to protect. To illustrate this: in Cavel I, the Court held that interim measures can serve to safeguard a variety of rights which may or may not fall within the scope of the now Brussels I bis Regulation (then the Brussels Convention) depending on the nature of the rights which they serve to protect. This has been confirmed in Cavel II: "ancillary claims accordingly come within the scope of the Convention according to the subject-matter with which they are concerned and not according to the subject-matter involved in the principal claim". Further, in Van Uden, the Court held that "provisional measures are not in principle ancillary to arbitration proceedings but are ordered in parallel to such proceedings and are intended as measures of support. They concern not arbitration as such but the protection of a wide variety of rights". This case-law has been also confirmed in recent judgments of the Court, namely in Bohez – where a penalty payment was imposed as a measure to comply with the main judgment – and Realchemie Nederland concerning an action brought for alleged

patent infringement in the context of interim proceedings, where a prohibition in the form of payment of a fine was ordered.

In brief, what matters in this discussion on interim measures falling or not within the scope of the Brussels I bis Regulation, is not the relation between the main proceedings and the interim measures, the crucial factor being the **purpose – determined from a procedural law standpoint –** of the interim relief measure vis-à-vis the proceedings on the merits: **an interim measure falling within the scope of the Regulation has to safeguard the substantive rights at stake in the main proceedings**. In the present case, the substantive right in question is a credit arising from a contractual obligation that Supreme holds against SHAPE.

3. Whether immunities play a role in determining if an action can qualify as "civil and commercial matters" within the meaning of Article 1(1) of the Regulation

One of the particularities of the case is that in the second set of proceedings where the preliminary ruling originated, SHAPE and JFCB (NATO) have introduced an action for interim relief measures, based on immunity from execution. SHAPE alleged that its immunity from execution flowing from the 1952 Paris Protocol trumps any jurisdiction derived from that Regulation.

It is against this background that the Dutch Supreme Court asked the Court of Justice if the fact that an International Organisation claims to enjoy immunity from execution under public international law, bars the application of the Brussels I bis Regulation or has an impact on its application *ratione materiae*. In his Opinion, Advocate General considered that the referring court is concerned by the actions relating to "acts or omissions in the exercise of state authority" linked to the concept of "*acta iure imperii*" – a concept which is also used in international law in relation to the principle of State immunity.

The Opinion tackled the question of immunities under public international law and concluded that a dispute where an International Organisation is a party, should not be automatically excluded from the material scope of the Brussels I bis Regulation. Interestingly, some aspects of the reasoning that allowed to reach that conclusion echo the doctrinal debates on the interplay between the

jurisdictional rules of EU private international law, on the one hand, and the immunity derived from public international law, on the other hand.

Does immunity precede the jurisdiction under EU PIL?

At point 72, AG rejected the arguments advanced by the Austrian Government, who argued that the Brussels I bis Regulation should not apply to the case at hand. In the view of this government, if an international organisation takes part in a dispute, the immunity that this organisation enjoys on the basis of customary international law or treaty law, characterizes the nature of the legal relationship between the parties. In other words, a criterion based on the nature of a party (*scil*. the fact that it is an international organization that is a party to proceedings) should suffice to decline jurisdiction under the Brussels I regime.

In that respect, AG made some interesting remarks: first, by applying the Brussels I bis Regulation to a dispute where an International Organisation is a party, there is no breach of Article 3(5) TUE and of the obligation to respect public international law enshrined in that provision. Second, if, based on the Brussels I bis regime, a national court declares its international jurisdiction over a dispute, potential immunity claims advance by the parties will not be affected, as they are to be considered at a later stage of the proceedings. AG departed from the premise that the assessment on immunities should take place after the national judge seised with the case looks into the substance of the merits, including party allegations. This is therefore, at a second stage, after the national court has decided over its international jurisdiction within the first stage, that the immunity needs to be ascertained and its limits set (point 69).

This approach resonates with the idea that national courts are not supposed to engage in an in-depth analysis of the substance at that very first stage, when they are determining their own jurisdiction. They should not be undertaking a mini-trial, ascertaining jurisdiction requires only a first approximation to the facts of the case, solely for the purpose of determining jurisdiction. In FlyLaL II, a case concerning jurisdictional issues pursuant to the Brussels I Regulation, in respect of an action for damages brought for infringement of competition law, the Court observed that at the stage of determining jurisdiction “the referring court must confine itself to a prima facie examination of the case without examining its

substance". The statement draws on AG Bobek's Opinion presented in the aforementioned case: "[d]etermination of jurisdiction should be as swift and easy as possible. Thus, a jurisdictional assessment is by definition a prima facie one. […] The jurisdictional assessment will, in practice, require a review of the basic factual and legal characteristics of the case at an abstract level."

From the ECtHR case-law (see, most notably, Waite and Kennedy v. Germany) dealing with immunities of international organizations and the right to a remedy enshrined in Article 6 ECHR, a similar reading can be extracted. National courts deciding on granting of an immunity – be [it] immunity of jurisdiction or from execution – and performing the "reasonable alternative means" test, inevitably engage in a substantive analysis of the merits. **To ensure that the claimant's right to access justice is not breached, requires more than an abstract examination of the facts**. This would seem to favour the idea **that determination of international jurisdiction precedes a substantive analysis of the circumstances of the case in respect to any alleged claim of immunities made by the parties**.

However, it is still not clear how this reasoning can be reconciled with judgments of the Court of Justice in the cases Universal Music International Holding and Kolassa. There, the Court of Justice held that according to the objective of the sound administration of justice which underlies the Brussels I Regulation, and respect for the independence of the national court in the exercise of its functions, a national court in the framework of ascertaining its international jurisdiction pursuant to the Brussels I regime, must look at all the information available to it. Although such an assertion seems to be construed in very general terms, one may well wonder what exactly a court assessing its international jurisdiction under the Brussels I bis Regulation is required to look at. Should it be a minimal review of the substance or a prima facie analysis strictly focused on the nature of the elements of the action – relevant in the context of the connecting factors used by the rules on jurisdiction –,including all the information available before the court?

If the answer would be the latter, that means that in the case at hand, the immunity from execution relied on by SHAPE in support of its action should be taken into account.

A reading of paragraphs 53 to 58 in the Court of Justice's recent judgment in Rina, hints that in order to establish its own jurisdiction under the Brussels I bis

Regulation, a national court has to take into consideration all available information. In the case at issue, party allegations where a party (Rina) invokes immunity of jurisdiction. While at first glance this instruction does not steer away from the judgments in Universal Music International Holding and Kolassa, what the Court proposes here is definitely more complex than a first approximation to the facts of the case. At paragraph 55 the Court notes "a national court implementing EU law in applying [the Brussels I Regulation] must comply with the requirements flowing from Article 47 of the Charter. […] The **referring court must satisfy itself that, if it upheld the plea relating to immunity from jurisdiction, [the claimants] would not be deprived of their right of access to the courts**, which is one of the elements of the right to effective judicial protection in Article 47 of the Charter." If the national courts were to engage in such analysis – in a similar fashion as the ECtHR established in regards to Article 6 ECHR – it will certainly go beyond a mere examination *in abstracto*, implying rather a deep dive on the merits.

Moreover, the judgment in Rina seems to suggest that the analysis of international law cannot be avoided even when it comes only to the question whether the Brussels I regime applies or not. At paragraph 60, the Court of Justice explained "[t]he principle of customary international law concerning immunity from jurisdiction does not preclude the national court seised from exercising the jurisdiction provided for by that regulation in a dispute relating to such an action, where that court **finds that such corporations have not had recourse to public powers** within the meaning of international law." Again, for the examination of these matters in the framework of determining international jurisdiction, a greater level of scrutiny is required. A national judge would have to dig dipper in the facts and party allegations to come to the conclusion that a certain party did not have recourse to public powers. Something that is everything but a swift and easy exercise.

Does the case-law developed in the context of State bodies apply to international organisations?

Be that as it may, while an immunity claim does not automatically rule out the application of the Brussels I bis Regulation according to AG Saugmandsgaard Øe, the key question in his analysis is to determine if actions related to *acta iure imperii* under Article 1(1) of the Regulation are applicable to international

organisations. It flows from the Court of Justice well-settled case-law that disputes between a State body and a person governed by private law come within the scope of civil and commercial matters, if the public authority in question does not act in the exercise of its public powers. At point 75 of his Opinion, AG made a reference to the judgment in Eurocontrol and indicated that exceptions under Article 1(1) *in fine* can extend to acts and omissions carried out by an international organisation. He remarked that, the concept of "public powers" established under the Court's case-law, not only relates to State responsibility but refers also to those situations where a public authority acts under the umbrella of its public powers.

Advocate General moved then to analyse the Court of Justice case-law concerning liability of the State for acts and omissions carried out in the exercise of sovereign authority. Here matters get a bit complicated.

On the one hand, **it remains to be seen how that case-law could be applied mutatis mutandis to international organisations**. Leaving aside the question of immunities and putting emphasis on the notion of "civil and commercial matters" within the meaning of Article 1(1) of the Brussels I bis Regulation, the acts and omissions of an international organization are strictly connected with the powers conferred to the organisation for its proper functioning. Thus, one could wonder whether a functional test would be more suitable to determine if the acts or omissions were carried out by an international organization in the exercise of its public powers: a demarcating line could be drawn between non-official (non-related to the mission of the organization) acts and omissions and those of official nature, therefore necessary to fulfil the organisation's mandate.

On the other hand, concerning the criteria applied by the Court when analysing if a public authority has exercised its powers of State authority, there is no "one size fits all" solution. As AG rightly pointed out at point 84 of his Opinion, the Court has still to sort out the interplay between different criteria: matters characterising the legal relationship between the parties, the subject-matter of the dispute and the basis of the action and the detailed rules governing the action brought.

To illustrate this point: in Préservatrice Foncière TIARD, the Court looked mainly at the legal relationship between the parties, while in Baten and Sapir and Others the Court did not refer to the legal relationship between the parties but focused

on the subject-matter of the dispute and the basis of the action brought. Hence, the alternative or cumulative use of these criteria – or a flexible one- seem to reflect the need to provide an adequate response to the case-specific factual context of a particular case.

In that sense, AG pointed out that the criterion concerning the basis of the action is not relevant in all cases, it will be determinant in situations where is not established that the substantive basis of the claim is an act carried out in the exercise of public powers. For that reason, at 90, AG considered more appropriate that **the action is based on a right originating from an act of public authority or in a legal relationship characterized by a manifestation of public power**.

- ## Does the perspective of anticipated recognition/enforcement influence the interpretation of the notion of "civil and commercial matters"?

It is worth mentioning that some commentators (see also Van Calster, G., European Private International Law, Hart Publishing, 2016, p. 32) pointed out that, in the light of the judgment in Eurocontrol, the scope of application of the Brussels I bis Regulation should be interpreted by taking into account the perspectives of recognition and enforcement. Thus, if immunity bears no significance at the stage of determining jurisdiction, but it is later granted/recognised resulting in refusal of recognition and/or enforcement, concerns are raised regarding what is the practical use of exercising jurisdiction under the Brussels I bis Regulation against public authorities when there are little chances of recognition/enforcement.

On this point, the Spanish Supreme Court – in a case concerning the enforcement of a judgment rendered in Germany in favour of a private party against the Republic of Argentina –, held that a declaration of enforceability issued in relation to a general enforcement order does not breach the rules on immunity of execution. The Spanish Court precised that only when specific legal attachment measures are taken, a court should determine if the property in question is subject to execution. Thus, **the issue of immunity of execution and the assessment whether the property to be executed is for commercial or official purposes would be at stake at a second stage of the enforcement**

procedure, not interfering with the application of the Brussels I regime.

Enforcing Outbound Forum Selection Clauses in U.S. State Court

Written by John Coyle, the Reef C. Ivey II Distinguished Professor of Law, Associate Professor of Law at the University of North Carolina School of Law, and Katherine C. Richardson, Law Clerk, U.S. Court of Appeals for the Sixth Circuit, 2020-21 Term

European legal scholars have long bemoaned the difficulty in identifying "black letter rules" when it comes to U.S. private international law. One area where this law is famously opaque relates to state enforcement of "outbound" forum selection clauses. Outbound clauses—which are known as derogation clauses in the rest of the world—state that a dispute must be heard by a court other than the one where the suit was brought. State courts in the United States generally refused to enforce these provisions prior to 1972. After the U.S. Supreme Court rendered its seminal decision in *The Bremen*, however, attitudes began to change. Today, it is generally acknowledged that state courts are far more likely to enforce outbound forum selection clauses than they were fifty years ago. To date, however, nobody has attempted to determine empirically the extent to which state court practice has shifted since the early 1970s. Our new paper seeks to accomplish this goal.

State Practice by the Numbers

We reviewed every published and unpublished state court decision addressing the enforceability of outbound forum selection clauses decided after 1972. Our analysis of these decisions revealed the following:

1. State courts in the United States enforce outbound forum selection clauses approximately 77% of the time when one party challenges the enforceability of the clause.

2. The enforcement rate is remarkably consistent across large states in the United States. In California, the enforcement rate was 80%. In Texas, it was 79%. In New York, it was 79%. In Florida, it was 78%. In Ohio, it was 78%. In Illinois, it was 74%.

We are currently gathering data about federal court practice. Our preliminary results suggest that the enforcement rate is at least as high, if not higher, when the enforceability of an outbound clause is challenged in federal court.

In addition to looking at enforcement rates, we also examined the rationales proffered by state courts in cases when they declined to enforce outbound clauses. Knowing how often state courts enforce these clauses, and more importantly, *why* they do not enforce them, offers valuable insights for contract drafters, judges, and scholars. We found that when a state court refuses to enforce an outbound clause, it is almost always because the clause is contrary to public policy (8% of all cases) or unreasonable (12% of all cases). What does it mean, however, for a clause to be contrary to public policy? And what are the situations when a clause will be deemed unreasonable? The cases in our data set shed light on both of these questions.

Public Policy

With respect to public policy, state courts most frequently refuse to enforce an outbound clause because there is a state statute directing them to ignore it. Forty-nine states have enacted states declaring outbound clauses unenforceable in consumer leases. Twenty-eight states have enacted statutes announcing a similar rule with respect to clauses in construction contracts. All told, we identified more than 175 state statutes directing courts to refuse to enforce outbound clauses across a wide range of agreement types. Our paper includes a detailed chart that shows which statutes are in force in which states.

U.S. courts also sometimes refuse to enforce a clause on public policy grounds by citing an "anti-waiver" statute. Anti-waiver statutes provide that certain rights conferred by state law are non-waivable. When a state court is presented with a contract that contains an outbound forum selection clause, and when the forum court concludes that the courts in the chosen jurisdiction are unlikely to give effect to non-waivable rights conferred by the forum state, the forum court may refuse to enforce the forum selection clause on public policy grounds. On this account, the enforcement of the clause is contrary to the public policy of the forum not because the legislature has specifically directed the courts to ignore it. Instead, these clauses go unenforced because their enforcement would result in the waiver of non-waivable rights.

Reasonableness

The most common basis cited by state courts in refusing to enforce an outbound forum selection clause is a lack of reasonableness. The most common reason why state courts strike down clauses on reasonableness grounds is that the clause would result in duplicative litigation. Courts are reluctant to enforce the clause—and send litigation elsewhere—if it means the plaintiff would have to

litigate the same set of facts in two different fora.

Second, many state courts refuse to uphold forum selection clauses if it means the plaintiff cannot secure effective relief in the chosen forum. Typical examples of this type of concern include procedural or jurisdictional problems in the chosen forum, claims that are so small as to make it uneconomical for a plaintiff to pay the costs to travel to pursue them, and fora that constitute a "serious inconvenience" to the plaintiff. We should note here that most state courts do not refuse to enforce clauses because it would be expensive for the plaintiff to maintain the lawsuit in another state. However, when the plaintiff presents an extremely small claim or an extreme expense to litigate, some courts will take pity the plaintiff and refuse to enforce the outbound clause.

In several other categories of cases, state courts refuse to uphold outbound clauses when (1) the plaintiff has no notice of the clause, or (2) the chosen forum bears no reasonable relationship to the parties. The notice issue arises most frequently in cases of form passage tickets, mostly for cruise lines, and in online "clickwrap" agreements. Some courts have been reluctant to hold plaintiffs responsible for forum selection clauses in these two scenarios when the defendant did not reasonably communicate the clause to the plaintiff. In addition, some courts refuse to uphold outbound clauses against unsophisticated parties where the clause is buried in fine print amid other legal jargon. We note, however, that simply because a forum selection clause is contained in a contract of adhesion does not make it unreasonable. This scenario was obviated by the Supreme Court's ruling in *Carnival Cruise Lines, Inc. v. Shute*, where the Court upheld a forum selection clause on the back of a preprinted cruise ticket. Finally, the typical contract defenses, such as fraud, unconscionability, and problems with formation, all apply to forum selection clauses as well, with some variation among the states.

Equality of the parties in investment arbitration – public international law aspects

Written by Silja Vöneky, University of Freiburg

Note: This blogpost is part of a series on „Corporate social responsibility and international law" that presents the main findings of the contributions published in August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020.

I. Introduction

1. The question of the status of transnational corporations in investment arbitration is of central importance for the division of spheres of responsibility, for the pursuit and enforcement of values, and thus for the bases of legitimation of the international legal order today.

2. The promotion of foreign direct investments and the deepening of economic cooperation between States to promote economic development with the common welfare objective of increasing the prosperity of the peoples of the contracting States parties has been the legitimating basis of the ICSID Convention, which is central to investment protection under international law, and of the bilateral investment protection agreements.

3. Investment protection law, as part of public international law – from its basis and purpose – should not be understood as a departure from a state-centered international order.

4. From the point of view of international law, the following questions have to be answered: What are the implications for the investment protection regime and investment arbitration as its core

a) if the triad justifying economic globalization (foreign private investment –

promotion of economic development – promotion of prosperity) loses its persuasiveness as a paradigm for its justification in a normative sense, and

b) if a discourse of delegitimization prevails that accuses profit-oriented transnational corporations in their role as investors of irresponsible conduct, which is incompatible with the public welfare, and States of enabling this conduct to the detriment of their own population by means of international treaties establishing investment arbitration?

5. The aim to align investment treaties with the principle of sustainable development can be seen by the reforms initiated by States, groups of States, and the United Nations Conference on Trade and Development; besides, this aim should have an impact on already existing investment treaties and investment arbitration as far as it is coherent with international law.

II. Transnational corporations as equal parties under international law within the framework of investment arbitration

6. A necessary condition for the equality of the host State and an investing foreign corporation as parties is that both by consent agree to arbitration in respect of a legal dispute directly related to an investment, i.e. that the State, which is a contracting party to the ICSID Convention and a subject of international law, besides ratifying the convention additionally gives its written consent (Art. 25 (1), Art. 36 (2) ICSID Convention), which has a threefold function (legitimating element, transformative element and constitutive element).

7. For various reasons, the procedural equality of the host State and the transnational corporations within the framework of a concrete arbitration procedure is justified and thus legitimate with regard to the international legal order as a whole. In particular, it complies with the principle of fair trial and the rule of law as enshrined in international law.

8. The principle of the equality of the parties does not preclude that transnational corporations are given preferential access to arbitration on the basis of international treaties and that arbitration is open only to transnational corporations.

9. The principle of the equality of the parties is inter alia observed during the composition of an arbitral tribunal if the judges are appointed by both parties in

the same manner and each judge fulfils criteria which plausibly ensure impartiality. However, the appointment by the parties is not a necessary condition for the equality of the parties.

10. Questions about how to implement the principle of the equality of the parties arise in the arbitral proceedings themselves, in particular with regard to the possibility that several investors seek to bring their claims against the same host State, with regard to the admissibility of a counterclaim by the host State, with regard to the admissibility of "amicus curiae briefs" (third person submissions), with regard to the so-called equality of arms, and with regard to the problem of safeguarding confidentiality interests (in particular State secrecy).

11. Questions of the applicable law within the scope of the merits, such as the possibility of the host State to invoke justifications under international law (e.g. necessity) and the principles of interpretation of the investment protection agreements, are not considered to be questions of the principle of the equality of the parties.

III. (Un)justified unequal treatment to the detriment of transnational corporations as parties with regard to corruption problems

12. The decisions of arbitral tribunals, which deny their jurisdiction or the admissibility of the investor claim if the defendant host State asserts corruption, are convincing (only) with regard to limited types of cases.

13. The lack of jurisdiction of the tribunal or the inadmissibility of the investor's claim does not seem to be justified even if the transnational corporation's act of corruption made the investment possible in the first place: The contrary reasoning in investment arbitration decisions, based inter alia on the wording of bilateral investment treaties, the scope of the host State's consent and/or a violation of fundamental general principles (such as, inter alia, the so-called "clean hands" principle, the "international public policy" or "transnational public policy", or the principle that no one shall profit from his/her own wrong) is not convincing for various reasons .

14. The same is true even more – in accordance with recent investment arbitration decisions – if the foreign investor acted corruptly after the investment had already been initiated in the host State.

15. Instead, corruption should be taken into account in the decision on the merits of a case in accordance with the objectives and principles of the international legal order in such a way that central values of investment protection are not disproportionately undermined, but nevertheless relevant disadvantages arise for transnational corporations if they engage in acts of corruption abroad for or during investments. This can be achieved if the amount of investors compensation is reduced for example by a multiple of the sum of the corruption.

16. When considering acts of corruption in the merits of a case, the arbitral tribunal should therefore consider the distribution of responsibility, the pursuit and enforcement of global values, and the bases of legitimacy of the current international legal order, also taking into account the state's anti-corruption obligations, in particular as enshrined in anti-corruption conventions and human rights treaties.

IV. Concluding remarks

17. The procedural equality of host States and transnational corporations within the framework of an investment arbitration procedure has no implications on the status of transnational corporations in the international legal order as a whole; other views, which argue that transnational corporations are (full or partial) subjects of international law in a normative sense, exceed the – *de lege lata* – narrowly limited equality.

18. The risks associated with a normative enhancement of transnational corporations in the international legal order present another argument against the view that corporations are (full or partial) subjects of international law. These risks are hinted at in the delegitimization discourse, which grants profit-oriented companies less influence in the international legal order of the 21st century.

19. Even without the status as subjects of international law, transnational corporations can be bound by norms of international law (international law in the narrow sense and so-called soft law). The UN Guiding Principles for the Business and Human Rights are, inter alia, of particular relevance.

20. If – with good reasons – foreign direct investments by transnational corporations continue to be promoted via international law as a means of increasing prosperity in the participating States for the benefit of the respective population, the public-good orientation of international investment arbitration

tribunals should be further developed, on the one hand, by reforming the constitutional aspects of the arbitral procedure, and, on the other hand, by further focusing their jurisprudence on public-good aspects including the proportionate protection of responsible investments.

Full (German) version: *Silja Vöneky,* Die Stellung von Unternehmen in der Investitionsschiedsgerichtsbarkeit unter besonderer Berücksichtigung von Korruptionsproblemen – Unternehmen als völkerrechtlich gleichberechtigte Verfahrensparteien?, in: August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020, pp. 339 et seq.