Japanese Supreme Court Renders Decision on Hague Abduction Convention

On December 21, 2017, the Japanese Supreme Court rendered a decision on the Hague Abduction Convention. The Court upheld a lower court decision in favor of the Japanese mother, even though she had turned back on her promise to return the kids from a visit to Japan, and even though that same court had earlier issued a return order in favor of the American father. The matter had received international press attention, and even a Congressional subcommittee hearing.

Japan had long refused to join the Hague Convention, and when it did, in 2014, critical observers already expected that courts would find ways to undermine it. Those observers see themselves vindicated.

Colin Jones reports critically on the decision; he has previously written on Japan's joining the Convention and on reluctance to enforce it. Useful background from the Law Library of Congress is here.

Japanese accession to the Convention has been a frequent scholarly topic, both in Japan and elsewhere. Yuko Nishitani, who had already written about "International Child Abduction in Japan" in (2006) 8 Yearbook of Private International Law 125-143, and who wrote a long report (in Japanese) for the Japanese Ministry in 2010, provided a brief analysis in 2011. Dai Yokomizo discussed the accession in (2012) Revue critique 799; Jun Yokohama did so in the Mélanges van Loon (2013, pp 661-72). Vol. 57 (2014) of the Japanese Yearbook of International Law contains articles by Tatsuki Nishioka and Takako Tsujisaka, Masayuki Tanamura, Masako Murakami, Martina Erb-Klünemann, and Nigel Vaughan Lowe. Takeshi Hamano helpfully explains the Japanese reluctance with regard to the Japanese ideology of the family. Outside of Japanese authors, Barbara Stark and Paul Hanley wrote most recently in the United States; the topic is also addressed in several student notes. The accession was also discussed by Bengt Schwemann (in German) and Francisco Barberán Pelegrín (in Spanish).

UKSC on Traditional Rules of Jurisdiction: Brownlie v Four Seasons Holdings Incorporated

Shortly before Christmas the UKSC released its decision on jurisdiction in *Brownlie v Four Seasons Holdings Incorporated* (available here). Almost all the legal analysis is *obiter dicta* because, on the facts, it emerges that no claim against the British Columbia-based holding corporation could succeed (para 15) and the appeal is allowed on that basis. I suppose there is a back story as to why it took a trip to the UKSC and an extraordinary step by that court (para 14) for the defendant to make those facts clear, but I don't know what it is. On the facts there are other potential defendants to the plaintiffs' claim and time will tell whether jurisdictional issues arise for them.

The discussion of the value of the place of making a contract for jurisdiction purposes is noteworthy. In para 16 two of the judges (Sumption, Hughes) are critical of using the traditional common law rules on where a contract is made for purposes of taking jurisdiction. This has been the subject of debate in some recent Canadian decisions, notably the difference in approach between the Court of Appeal for Ontario and the Supreme Court of Canada in *Lapointe Rosenstein Marchand Melançon LLP v Cassels Brock & Blackwell LLP*, 2016 SCC 30 (available here). The SCC was fine with using the traditional rules for this purpose. In *Brownlie*, I do not think it is clear as to what view the other three judges take on this point.

Even more interestingly, the UKSC judges split 3-2 on how to understand the idea of damage in the forum as a basis for jurisdiction. Three judges (Hale, Wilson, Clarke) retain the traditional broad common law view – the position in many Canadian provinces prior to *Club Resorts Ltd v Van Breda*, 2012 SCC 17 (available here) – that ongoing suffering in the forum in respect of a tort that happened abroad is sufficient. Two judges (Sumption, Hughes) reject that approach and adopt a more narrow meaning of damage in the forum (it must be direct damage only).

This 3-2 split is closer even than it might first seem, since Lord Wilson (para 57) suggests that in a different case with fuller argument on the point the court might reach a different result.

Canadian law does not get a fair description in the UKSC decision. The court notes twice (para 21 and para 67) that Canada's common law uses a broad meaning of damage for taking jurisdiction. *Club Resorts*, and the change to the law it represents on this very issue, is not mentioned. This is yet another illustration of the importance of being careful when engaging in comparative law analysis.

Conflicts – Between Domestic and Indigenous Legal Systems?

In *Beaver v Hill*, 2017 ONSC 7245 (available here) the applicant sought custody, spousal support and child support. All relevant facts happened in Ontario.

In response, the respondent asserted that the "inherent right of the Haudenosaunee and the Six Nations to govern themselves includes the right to have inter and intra-familial disputes decided through Haudenosaunee governance processes and protocols and according to Haudenosaunee laws".

This took the court in some very interesting directions. It held "One of the novel issues that this case raises is whether general conflict of laws jurisdiction

principles are also relevant on a more 'micro-level,' to an intra-provincial jurisdiction dispute between two Ontario citizens. In my view, these principles remain relevant in this case, even though the dispute has arisen at the intra-provincial level. Although the Respondent is not alleging that the Haudenosaunee or the Six Nations constitute a sovereign nation or other type of territorial entity within Ontario, his jurisdictional challenge is based on an alleged right to be governed by a complete system of dispute resolution, adjudicative processes and laws for handling Family Law matters that is independent of Ontario's court system, processes and laws. This broad claim has raised basic preliminary issues about the appropriate forum for decision-making and the applicable laws. These are precisely the types of disputes that conflict of laws principles are intended to address." (para 53)

I think the reaction to this analysis will be mixed. It seems possible that a court could have held exactly the opposite: that conflict of laws principles have nothing at all to do with the objections raised by the respondent. Instead, some form of public or constitutional law analysis is required to determine whether the respondent's objections to Ontario jurisdiction and law are valid. But I also understand that some scholars have suggested an approach that accords with the court's: that private international law principles can be used to address conflicts within one jurisdiction between the domestic legal system and indigenous legal systems or approaches. See for example Sara L. Seck, "Treaties and The Emancipatory Potential of International Law" in Michael Coyle and John Borrows, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017).

NIKI continued (now in Austria)

Written by Lukas Schmidt, Research Fellow at the Center for Transnational Commercial Dispute Resolution (TCDR) of the EBS Law School, Wiesbaden, Germany

The Regional Court Korneuburg has opened a main insolvency proceeding – not a

secondary insolvency proceeding that the German provisional administrator has applied for – on the assets of NIKI Luftfahrt GmbH in Austria (see here). Therefore, it obviously shares the view of the Regional Court of Berlin that NIKI's COMI is located in Austria and not Germany.

However, it will be possible to lodge an appeal ("Rekurs") against the Regional Court's decision within the next 14 days.

As the German Federal Court of Justice still has to decide about the appeal against the ruling of the Regional Court of Berlin, we now see a main (preliminary) insolvency proceeding in Germany and one in Austria. It is not entirely clear under the EIR how to deal with such a positive conflict of jurisdiction. Depending on the decision of the German Federal Court it might just dissolve (if it locates NIKI's COMI in Austria as well). Otherwise it should be – from my point of view – solved by cooperation and coordination in the spirit of Art. 42 EIR between the German and Austrian courts.

Interestingly the Regional Court Korneuburg has stated that since the decision of the Regional Court of Berlin no main insolvency proceeding is upheld in Germany. However, the Regional Court of Berlin has stated that, due to the fact that it has admitted an appeal ("Rechtsbeschwerde") to the German Federal Court against its ruling, it has no legal force yet (see here).

US Court Refused to Apply the Chosen Chinese Law due to Public Policy Concern

In Fu v. Fu, 2017 IL App (1st) 162958-U, a father brought a claim against his son to revoke an unconditional gift of $590,000 that he donated to his son for the later to pursue an EB-5 Visa to immigrate to the US. Both parties are Chinese citizens and the defendant is currently a resident of Massachusetts. The gift agreement was entered into in China, drafted in Chinese and contained a clause specifying

PRC law should apply. The money was held by the International Bank of Chicago. The plaintiff brought the action in Illinois.

Under the US Law (Title 8 of the Code of Federal Regulations, § 204.6) a foreign national must invest at least $500,000 in the US to be considered for an EB-5 Visa, and must 'show that he has invested his own capital obtained through lawful means.' (Matter of Ho, 22 I&N Dec. 206, 210 (AAO 1998)) After a few denied EB-5 approval, the plaintiff sought to recover the money, by claiming that the defendant was estranged from his parents, including the donor and refused to support them, and the purpose of the gift contract was for the defendant to obtain an EB-5 Visa but the defendant failed to do so.

Under the Illinois law, a valid gift requires 'delivery of the property by the donor to the donee, with the intent to pass the title to the donee absolutely and irrevocably, and the donor must relinquish all present and future dominion and power over the subject matter of the gift." (Pocius v. Fleck, 13 Ill. 2d 420, 427 (1958)). Furthermore, the gift agreement between the parties also used the language that the gift was 'unconditional'. However, the plaintiff argued that under the PRC law, gifts may be revocable after the transfer of ownership, if the donee 'has the obligation to support the donor but does not fulfil it', or a donnee 'does not fulfill the obligations as stipulated in the gift agreement.' (PRC Contract Law, Art 192)

The Appellate Court of Illinois First Judicial District affirmed the judgment of the circuit court of Cook County that the gift agreement was irrevocable. The plaintiff failed to successfully prove Chinese law. And even if the plaintiff properly pled PRC law, such interpretation was 'oppressive, immoral, and impolitic'. Under the US law on EB-5 Visa application, the foreign citizen must prove ownership of those funds to be eligible for an EB-5 Visa. The signed agreement stating the gift 'unconditional' would help the defendant to prove he legally owned the funds to acquire an EB-5 visa. If the governing PRC law indeed allows a gift to be given unconditionally and revoked after delivery and acceptance, as argued by the plaintiff, it would facilitate a deception on the US Government and is against public policy.

The full judgment can be found here.

NIKI continued

Written by Lukas Schmidt, Research Fellow at the Center for Transnational Commercial Dispute Resolution (TCDR) of the EBS Law School, Wiesbaden, Germany

The Spanish airline Vueling Airlines S.A. is still intending to acquire large parts of the NIKI business. Vueling is part of the European aviation group IAG, which also includes British Airways, Iberia, Aer Lingus and LEVEL. The provisional insolvency administrator of NIKI Luftfahrt GmbH, therefore, will continue to drive forward the sales process. Vueling has provided interim financing of up to € 16.5 million to finance the NIKI business until the closing of the purchase agreement. This funding is only sufficient for a few weeks.

Meanwhile, NIKI has lodged an appeal with the Federal Court against the ruling by the Regional Court of Berlin. Due to the legal complaint of the NIKI management against the decision, it does not have legal force yet. The preliminary insolvency proceeding in Germany therefore continues.

NIKI is expected to apply for the opening of secondary insolvency proceedings in Austria by the end of the week, as well. According to the provisional insolvency administrator of NIKI this procedure is an important step to ensure the orderly processing of NIKI in Austria. In addition, the purchase agreement for the NIKI business should now be secured at short notice via this Austrian secondary process (see here).

It remains to be seen how the German Federal Court deals with the question of the rebuttal of the assumption that NIKI's COMI is located in Austria (the place of its registered office). It is even possible that the ECJ has to deal with this question for a second time after the Eurofood IFSC (Case C-341/04) case. As we will probably see a secondary proceeding commenced in Austria (NIKI seems to be one of the rare cases where the insolvency administrator of the main proceeding finds the commencement of a secondary proceeding useful for the success of the administration) we might even witness the application of some of the new rules of

the EIR on the cooperation and coordination of main and secondary proceedings.

NIKI, COMI, Air Berlin and Art. 5 EIR recast

Written by Lukas Schmidt, Research Fellow at the Center for Transnational Commercial Dispute Resolution (TCDR) of the EBS Law School, Wiesbaden, Germany.

The Regional Court of Berlin has, on the basis of the immediate appeal against the order of the provisional insolvency administration on the assets of NIKI Luftfahrt GmbH (under Austrian law), repealed the decision of the District Court of Charlottenburg (see here) as it finds that international jurisdiction lies with Austrian and not German courts. In its decision, the regional court has dealt with the definition of international jurisdiction, which is based on the debtor's centre of main interests ('COMI'). According to the provisions of the European Insolvency Regulation, that is the place where the debtor usually conducts the administration of its interests and that is ascertainable by third parties.

The court has founded its decisions on the following arguments:
Since the debtor is based in Austria, it is assumed that the centre of their interests is also there (see Art. 3 II EIR recast). If this presumption is to be rebutted, high demands must be made to ensure legal certainty. According to the case-law of the European Court of Justice, objective and, for a third party, recognizable circumstances that would prove that the place of the head office is not located at the registered office are necessary.
The various factors should be considered in their entirety. In the present case, it can not be established with sufficient certainty on the basis of the arguments put forward by the debtor, on the one hand, and the complainant on the other hand, that the COMI is indeed located in Germany. Rather, no uniform picture is recognizable that could justify refuting the presumption.
The place from which the essential business activities of the debtor

are controlled, namely Berlin, is not a solely decisive criterion. The fact that Air Berlin had been practically NIKI's only customer, and thus the sales were particularly generated in Germany, was not automatically decisive, as well.
Then again, the fact that the debtor maintains offices in Vienna, in which amongst other things NIKI's financial accounting is conducted, argues for a COMI in Austria. Likewise, the competent supervisory authority is located in Vienna and the debtor has an Austrian operating license and the airworthiness of the aircraft is monitored from there. In addition, approximately 80% of the employment contracts concluded by the debtor are subject to Austrian employment law.
Finally, the debtor's own behaviour also indicates that it assumes its COMI in Austria. It had not informed the creditors and the public that it had relocated its COMI to Germany. Furthermore, in an insolvency proceeding opened at the request of a creditor before the Korneuburg Regional Court (file reference 35 Se 323 / 17k) in Austria, the debtor did not raise the objection that there was no international competence in Austria.

This should be the first case of application of the 'new' Art. 5 I EIR recast, that regulates the examination of international jurisdiction. It is very likely not the last, as the case shows that the COMI-concept is still controversial. It waits to be seen if the case will even be referred to the German Federal Court of Justice (the Regional Court has admitted the appeal to the German Federal Court of Justice which may be lodged within a period of one month).

The press release of the Regional Court of Berlin can be found here.

Implementation of the EAPO in Greece

By virtue of Article 42 Law 4509/2017, a new provision has been added to the Code of Civil Procedure, bearing the title of the EU Regulation. Article 738 A CCP features 6 paragraphs, which are (partially) fulfilling the duty of the Hellenic Republic under Article 50 EAPO. In brief the provision states the following:

- 1: The competent courts to issue a EAPO are the Justice of the Peace for those disputes falling under its subject matter jurisdiction, and the One Member 1st Instance Court for the remaining disputes. It is noteworthy that the provision does not refer to *the court*, but to its respective *judge*, which implies that no oral hearing is needed.
- 2: The application is dismissed, if

1. it does not fulfil the requirements stipulated in the Regulation, or if
2. the applicant does not state the information provided by Article 8 EAPO, or if
3. (s)he does not proceed to the requested amendments or corrections of the application within the time limit set by the Judge.

Notice of dismissal may take place by an e-mail sent to the account of the lawyer who filed the application. E-signature and acknowledgment of receipt are pre-requisites for this form of service.

The applicant may lodge an appeal within 30 days following notification. The hearing follows the rule established under Article 11 EAPO. The competent courts are the ones established under the CCP.

- 3: The debtor enjoys the rights and remedies provided by Articles 33-38 EAPO. Without prejudice to the provisions of the EU Regulation, the special chapter on garnishment proceedings (Articles 712 & 982 et seq. CCP) is to be applied.
- 4: If the EAPO has been issued prior to the initiation of proceedings to the substance of the matter, the latter shall be initiated within 30 days following service to the third-party.

If the applicant failed to do so, the EAPO shall be revoked ipso iure, unless the applicant has served a payment order within the above term.

- 5: Upon finality of the judgment issued on the main proceedings or the payment order mentioned under § 4, the successful EAPO applicant acquires full rights to the claim.
- 6: The liability of the creditor is governed by Article 13 Paras 1 & 2 EAPO. Article 703 CCP (damages against the creditor caused by enforcement against the debtor) is applied analogously.

Some additional remarks related to the Explanatory Report would provide a better insight to the foreign reader.

1. There is an explicit reference to the German and Austrian model.
2. The placement of the provision (i.e. within the 5th Book of the CCP, on Interim Measures) clarifies the nature of the EAPO as an interim measure, despite its visible connotations to an order, which is regulated in the 4th chapter of the 4th Book, on Special Proceedings. Nevertheless, the explanatory report acknowledges resemblance of the EAPO to a payment order.
3. There is no need to provide information on the authority competent to enforce the EAPO, given that the sole person entrusted with execution in Greece is the bailiff.

The initiative taken by the MoJ is more than welcome. However, a follow-up is imperative, given that Article 738 A CCP does not provide all necessary information listed under Article 50 EAPO.

Mutual Recognition and Enforcement of Civil and Commercial Judgments among China (PRC), Japan and South Korea

Written by Dr. Wenliang Zhang, Lecturer in the Law School of Renmin U, China (PRC)

Against the lasting global efforts to address the issue of recognition and enforcement of civil and commercial judgments ("REJ"), some scholars from

Mainland China, Japan and South Korea echoed from a regional level, and convened for a seminar on "Recognition and Enforcement of Judgments between China, Japan and South Korea in the New Era". The seminar was held in School of Law of Renmin University of China on December 19, 2017 and the participants were involved in discussing in depth the status quo and the ways out in relation to the enduring REJ dilemma between the three jurisdictions, especially that between China and Japan.

Unfortunately, despite the immense volume of civil and commercial interactions, China and Japan have been stuck in the REJ deadlock ever since China first refused to recognize Japanese judgments in the infamous 1994 case Gomi Akira. After this misfortune, both Chinese and Japanese courts have waged rounds of repeated refusals or revenges, forming a vicious circle in the guise of the so-called reciprocity. The Sino-Japanese REJ stalemate is considered to be illustrative of the most formidable blockades lying on the way to free movement of judgments. Between China and South Korea, the REJ future is promising. Although China refused to recognize, at least in one case, Korean judgments for lack of reciprocity, Korean courts have nevertheless recognized Chinese courts on a reciprocity basis. The positive move by Korean courts may well pave the way for Chinese courts to recognize Korean judgments in the future.

For smooth REJ, understanding must be ensured between the three jurisdictions and mutual trust should also be established. In light of China's recent positive movement in applying reciprocity, there may exist a way out for the REJ deadlock if the other two jurisdictions could well join the trend. The papers presented for the seminar will appear in a special 2018 issue of Frontiers of Law in China:

1. Yuko Nishitani, Coordination of Legal Systems by Recognition of Judgments ? Rethinking Reciprocity in Sino-Japanese Relationships
2. Kwang Hyun Suk, Recognition and Enforcement of Foreign Judgments among China, Japan and South Korea: Korean Law Perspective
3. Qisheng He, Wuhan University Law School Topic: Judgment Reciprocity among China, Japan and South Korea: Some Thinking for Future Cooperation
4. Wenliang Zhang, To break the Sino-Japanese Recognition Feud – Lessons Learnt As Yet
5. Lei Zhu, The Latest Development on the Principle of Reciprocity in the Recognition and Enforcement of Foreign Judgments in China
6. Yasuhiro Okuda, Unconstitutionality of Reciprocity Requirement for

Recognition and Enforcement of Foreign Judgments in Japan.

The ECtHR rules on the compatibility with the right to respect for private and family life of the refusal of registration of same-sex marriages contracted abroad

By a judgment *Orlandi and Others v. Italy* delivered on December 14 the ECtHR held that the lack of legal recognition of same sex unions in Italy violated the right to respect of private and family life of couples married abroad.

The case concerned the complaint of six same sex-couples married abroad (in Canada, California and the Netherlands). Italian authorities refused to register their marriages on the basis that registration would be contrary to public policy. They also refused to recognize them under any other form of union. The complaints were lodged prior to 2016, at a time when Italy did not have a legislation on same-sex unions.

The couples claimed under articles 8 (right to respect of private and family life) and 14 (prohibition of discrimination) of the Convention, taken in conjunction with article 8 and 12 (right to marry), that the refusal to register their marriages contracted abroad, and the fact that they could not marry or receive any other legal recognition of their family union in Italy, deprived them of any legal protection or associated rights. They also alleged that "*the situation was discriminatory and based solely on their sexual orientation*" (§137).

Recalling that States are still free to restrict access to marriage to different sex-

couples, the Court indicated that nonetheless, since the *Oliari and others v. Italy* case, States have an obligation to grant same-sex couples "*a specific legal framework providing for the recognition and the protection of their same-sex unions*" (§192).

The Court noted that the "*the crux of the case at hand is precisely that the applicants' position was not provided for in domestic law, specifically the fact that the applicants could not have their relationship – be it a de facto union or a de jure union recognized under the law of a foreign state – recognized and protected in Italy under any form*" (§201).

It pointed out that although legal recognition of same-sex unions had continued to develop rapidly in Europe and beyond, notably in American countries and Australia, the same could not be said about registration of same-sex marriages celebrated abroad. Giving this lack of consensus, the Court considered that the State had "*a wide margin of appreciation regarding the decision as the whether to register, as marriage, such marriages contracted abroad*" (§204-205).

Thus, the Court admitted that it could "*accept that to prevent disorder Italy may wish to deter its nationals from having recourse in other States to particular institutions which are not accepted domestically (such as same-sex marriage) and which the State is not obliged to recognize from a Convention perspective*" (§207).

However, the Court considered that the refusal to register the marriages under any form left the applicants in "*a legal vacuum*". The State has failed "*to take account of the social reality of the situation*" (§209). Thus, the Court considered that prior to 2016, applicants were deprived from any recognition or protection. It concluded that, "*in the present case, the Italian State could not reasonably disregard the situation of the applicants which correspond to a family life within the meaning of article 8 of the Convention, without offering the applicants a means to safeguard their relationship*". As a result, it ruled that the State "*failed to strike a fair balance between any competing interests in so far as they failed to ensure that the applicants had available a specific legal framework providing for the recognition and the protection of their same-sex union*" (§ 210).

Thus, the Court considered that there had been a violation of article 8. It considered that, giving the findings under article 8, there was no need to examine

the case on the ground of Article 14 in conjunction with article 8 or 12. (§212).