State immunity in global COVID-19 pandemic:

State immunity in global COVID-19 pandemic: Alters, et. al. v People's Republic of China, et. al.

By Zheng Sophia Tang and Zhengxin Huo

1. Background

Four American citizens and a company filed the class-action against Chinese government for damages suffered as the result of the COVID-19 pandemic. None of the named plaintiffs were infected by the COVID-19 but they suffered financial loss due to the outbreak. The defendants include the People's Republic of China, National Health Commission of PRC, Ministry of Emergency Management of PRC, Ministry of Civil Affairs of PRC, Government of Hubei Province and Government of the City of Wuhan. The plaintiff argued that Chinese government knew COVID-19 was dangerous and capable of causing a pandemic yet covered it up for their economic self-interest and caused injury and incalculable harm to the plaintiffs. (**here**)

2. State Immunity and US Courts' Jurisdiction

The Defendant is a sovereign state and enjoys immunity from jurisdiction of other countries. Most countries, like the U.S., adopt the restrictive immunity approach, and apply exception to the immunity of a state when the disputed state's act, for example, relates to commercial activities or commercial assets, or constitutes tort. The Foreign Sovereign Immunities Act (FSIA) of 1976 provides the sole basis for obtaining jurisdiction on an action against a foreign state. (Argentine Republic v Amerada Hess Shipping Corp, 488 US 428) Plaintiffs relied on the Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. §§1602 et seq. §1605 states:
"(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
…
(5) …money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or

employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—
(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
(B)any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;"

This is not the first time for China to be sued in the US court under §1605(a)(5) of the FSIA (for example, see Youming Jin et al., v Ministry of State Security et al., 475 F.Supp. 2d 54 (2007); Jin v Ministry of State Security, 557 F.Supp. 2d 131 (2008); Walters v Industrial and Commercial Bank of China, 651 F.2d 280 (2011)), but given the impact of COVID-19 this case probably is the most influential one. The purpose of this provision is to provide the victim the right to claim damages against a foreign state for tortious activities that may be legalised by the foreign law. The U.S. court thus will apply the local law to interpret this provision. Some crucial concepts, such as "tortious act" and "discretionary function", are interpreted by the relevant US law. (Doe v Federal Democratic Republic of Ethiopia, 189 F.Supp. 3d 6 (2016)) However, since the FSIA is a unilateral domestic statute with clear impact in the foreign sovereign and international comity, it is inappropriate to apply the U.S. law, as the national law of a state of equal status, to determine if the foreign state has committed tort. This approach impliedly grants the U.S. and U.S. law the superior position over foreign states and foreign law. If the FSIA aims to protect humanity and basic rights of individuals that are universally recognised and protected, an international law standard instead of U.S. one should be more appropriate.

Anyway, although the U.S. has adopted the restrictive immunity approach and the U.S. standard to protect the tort victim against foreign government, this exception is applied with a high threshold, making the jurisdiction hurdle difficult to cross. Firstly, the alleged tort or omission must occur in the U.S. The Supreme Court in Argentine Republic v Amerada Hess Shipping, 488 US 428 (1989) articulated the "entire tort" rule, holding that the non-commercial tort exception "covers only torts occurring within the territorial jurisdiction of the United States" (Argentine v Amerada, 441) "Entire tort" means only when both tort action and damage occur in the US, jurisdiction may be asserted. (Cabiri v Government of Ghana, 165 F.3d 193 (2d Cir. 1999) Even if the damage caused by

COVID-19 occurred in the U.S., the alleged tort conduct of Chinese government were conducted exclusively out of the territory of the U.S. Arguably, the Supreme Court did not consider the situation where tort actions abroad may causing damages in the US in its 1989 judgment. However, there is no authority support extension of jurisdiction to cross-border tort.

Secondly, pursuant to the common law on tort, the plaintiffs should prove the defendants had a duty of care, breached this duty, and the breach caused the foreseeable harm. Chinese government undoubtedly owes the duty of care to Chinese citizens and residents. Does Chinese government owe any duty to non-residents? Such a duty cannot be found in Chinese domestic law. Relevant duties may be found in international conventions. Art 12 of the International Covenant on Economic, Social and Cultural Rights states a state member should recognise the right of everyone to enjoy the highest standard of health and should take steps necessary for "(t)he prevention, treatment and control of epidemic, endemic, occupational and other diseases". (Art 12(2)(c)) This duty applies to nationals and non-nationals alike. (Art 2(2)) However, none of the named plaintiffs in this suit were infected by COVID-19. The damage is sought for the damage to their commercial and business activities instead of physical or mental health. Furthermore, the International Health Regulation 2005 provides the state parties international obligations to prevent spreading of disease, such as thee duty to notify WHO of all events which may constitute a public health emergency of international concern within its territory within 24 hours of assessment of public health information (Art 6(1)) and sharing information (Art 8), but these obligations are not directly owed to individuals and cannot be directly enforced by individuals in ordinary courts. It is thus hard to argue Chinese government owes the plaintiff a duty of care.

Even if the plaintiffs seek damages for personal injury. It is difficult to prove China has breached the duty and the breach "caused" the COVID-19 outbreak in the US or other part of the world. Since COVID-19 is a new virus with many details remaining unknown, it takes time to truly understand the virus and be able to contain the spread of the disease. Therefore, when the first case of "a mysterious pneumonia" was discovered in Wuhan in December 2019, there was no enough knowledge and information to piece together an accurate picture of a yet-to-be-identified new virus, let alone to predict its risk of quick spreading and the later global pandemic. After the first case was identified on 31 December

2019, Wuhan airport started to screen passengers from 3 Jan 2020, WHO issued travel restriction instruction on 5 Jan, and COVID-19 was only identified on 7 Jan. On 8 Jan, the first suspected case was reported in Thailand. It shows that the Chinese government responded quickly and the virus spread out of China before enough information was collected to understand it. After the seriousness of COVID-19 was confirmed, China has adopted the most restrictive measures, including lockdown the City of Wuhan and put the whole country under full or partial quarantine to contain the disease, which was a critical move to slow the spread of the virus to the rest of the world by two or three weeks. It is hard to argue that Chinese government has breached the duty. It is even harder to claim that the conduct of Chinese government caused the outbreak in the US. US confirmed the first case on 21 Jan, evacuated citizens out of Wuhan on 26 Jan and started visa travel ban on Chinese travellers on 8 Feb. Only 10 cases were confirmed in the US by 10 Feb. It suggests that the later outbreak in the US was not caused by the Chinese government. As of now, China is the only country in the whole world which has brought the COVID-19 pandemic back under control.

Finally, a foreign state does no loss immunity under §1605(a)(5) of the FSIA for discretionary conducts. The discretion shield aims to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. The exception … protects only governmental actions and decisions based on considerations of public policy." (Berkovitz v US, 486 U.S. 531, 546-37) Discretion is assessed by a two-limb test. Firstly, if the defendant followed any statute, regulation, or policy specifically prescribing a course of action, the conduct was non-discretionary. Secondly, if, in the absence of regulatory guide, the defendant's decision was grounded in social, economic, or political goals, such an action is deemed the exercise of discretion. (Berkovitz, 531) An exercise of power contrary to regulatory guidance is not shielded by the discretion exemption. (Doe v Ethiopia, 26) Measures adopted to prevent epidemic are largely discretion-based, which closely related to the local economy and culture.

3. Likely Response from China

As mentioned above, it is not the first case that China was sued before an American court; therefore, the likely response from China can be predicted. A general judgment is that the Chinese government will reiterate its position in case of need that it will accept no suit against it at a domestic American court, and

China will not enter into appearance before the American court.

Unlike the U.S., China is one of the few countries that insist on absolute immunity approach. This has been clearly affirmed by the continuous assertion of absolute immunity by its central government in various occasions. (Russell Jackson et al. v People's Republic of China, 794 F.2d 1490, 1494 (11th Cir. 1986); Memorandum sent by the Chinese Embassy in Washington, DC, in Morris v. People's Republic of China, 478 F. Supp. 2d 561 (S.D.N.Y. 2007). It is worth mentioning that on 14 September2005, the then Chinese Foreign Minister signed the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (not yet in force), which is understood by some observers to be a signal that China is switching to endorse the restrictive approach in relation to the application of the principle of state immunity. Nonetheless, it is still too early to conclude that China has abandoned the absolute doctrine, and has chosen to embrace the restrictive doctrine, insofar as the Standing Committee of the NPC has not ratified the United Nations Convention on Jurisdictional Immunities of States and Their Property so far, and there is no signal to suggest the NPC should do so in the foreseeable future.

In this light, it can be predicted that China will argue that it enjoys immunity from jurisdiction of domestic American court. To be more specific, if the U.S. District Court for the District of Southern Florida authorized the summons directed to the Defendant, China's possible response may be analysed as follows, depending on specific means of the service of process.

Firstly, if counsel to the Plaintiffs submitted the summons to the Chinese government by mail, a common practice of American lawyers, the Chinese government may choose to ignore it. Service in United States federal and state courts on foreign sovereigns and their agencies and instrumentalities is governed primarily by the FSIA. Since there is no special agreement for service of process between China and the U.S., pursuant to the FSIA, the Hague Service Convention to which both countries are party is the applicable instrument in this case. It is worth noticing that upon accession and ratification of the Hague Service Convention, China notified the Hague Conference on Private International Law of its objection, in accordance with Article 10, sub-paragraph (a) of the Convention, to service of process via postal channels; therefore, service by counsel to the Plaintiffs of a summons on the Defendant via mail will not be effective. Hence, ignoring the request advanced by counsel to the Plaintiffs is the most reasonable

option for China.

Second, if the summons is served on the Chinese government through diplomatic channels, China will choose to turn it down by resorting to the Hague Service Convention. Pursuant to Article 13 of the Hague Service Convention, where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security. As China insists on absolute immunity approach, it is logic that China will refuse the request advanced by counsel to the Plaintiffs and returned the documents by Article 13 of the Hague Service Convention.

Last, but not least, as the present development suggests that the U.S. government is blaming China for the spread ofthe COVID-19, accusing China of delaying America's response, China would probably deem the lawsuit as a part of the American smear campaign to blame it. The possibility that China responds to this case via legal measures is further reduced. Therefore, we submit that there is a big chance that China may not enter into appearance before the court in Florida and would raise diplomatic protest.

Italian Self-Proclaimed Overriding Mandatory Provisions to Fight Coronavirus

By Ennio Piovesani. The author is a PhD Student at the Università degli Studi di Torino and at the Universität zu Köln.

1. **Summary**

The Italian Government has adopted a series of Decree-Laws [1] introducing measures to fight the emergency caused by the "new" Coronavirus.

These measures include "self-proclaimed" overriding mandatory provisions on the

reimbursement of prices paid under transport, package travel and accommodation contracts by specified persons affected by the Coronavirus.

2. **Arts. 28 of Decree-Law No. 9/2020 and 88 of Decree-Law No. 18/2020**

In particular, on 2.4.3020, the Italian Government adopted Decree-Law No. 9, titled "Urgent measures to support families, workers and businesses, in connection with the epidemiological emergency by COVID-19" [2].

Article 28 of Decree-Law No. 9/2020 provides for "Reimbursement of Travel Tickets and Travel Packages".

The first paragraph of Article 28 stipulates that, obligations arising from transport and package travel contracts, concluded by specified persons affected by the Coronavirus [3], are to be considered as impossible under Article 1463 of the Italian Civil Code [4].

Paragraphs 2 to 7 of Article 28 establish a specific procedure for obtaining and making the reimbursement of the price paid under the transport or package travel contract covered by the same Article.

The following paragraph 8 "proclaims":

"The provisions of the present article constitute overriding mandatory provisions within the meaning of Article 17 of Law of 31 May 1995, No. 218 ["Italian PIL Act"] [5, 6] and of Article 9 of Regulation (EU) No. 593/2008 of the European Parliament and of the Council, of 17 June 2008 ["Rome 1 Regulation"]".

On 17.3.2020, the Italian Government has adopted a new Decree-Law (dubbed "Heal Italy"), introducing new measures to fight the emergency caused by the Coronavirus [7].

Art. 88(1) of new Decree-Law No. 18/2020 extends the provisions of Art. 28 of Decree-Law No. 9/2020 to accommodation contracts.

3. **Short Comment**

As a short comment to the above, I note that it is not the first time that the Italian legislator enacts "self-proclaimed" overriding mandatory provisions [8].

However, as known, it is questionable whether, EU Member States can freely enact similar provisions when they fall within the material scope of Union private international law instruments, such as the Rome 1 Regulation.

In fact, this practice appears to be particularly questionable in cases such as that at issue, where the self-proclaimed overriding mandatory provisions do not appear to be "crucial" for safeguarding public interests within the meaning of Article 9(1) of the Rome 1 Regulation, but rather appear to be exclusively purported to protect private interests (for however widespread they may be).

Notes

[1] In the Italian legal order, a Decree-Law is a provisional act having force of law, adopted in extraordinary cases of necessity and urgency by the Government. A Decree-Law must be "converted" into a Law within a period of 60 days from its publication, or otherwise it loses its effects. See, in particular, Art. 77 of the Costituzione della Repubblica Italiana, Gazzetta Ufficiale No. 298 of 27.12.1947, **www.gazzettaufficiale.it/eli/id/1947/12/27/047U0001/sg**.

[2] Decree-Law of 2.3.2020, No. 9, Misure urgenti di sostegno per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da COVID-19, Gazzetta Ufficiale, Serie Generale No. 53 of 2.3.2020, **www.gazzettaufficiale.it/eli/id/2020/03/02/20G00026/sg**.

[3] See Art. 28(1)(a) to (f) of Decree-Law No. 9/2020.

[4] Article 1463 of the Italian Civil Code, headed "Total Impossibility", can be translated as follows: "In [case of] contracts with reciprocal performances, the party that is freed due to supervening impossibility of the performance owed cannot demand counter-performance, and must return that which he has already received, in accordance with the rules on undue payment". See, Royal Decree of 16.3.1942, No. 262, Approvazione del testo del Codice civile, Gazzetta Ufficiale, Serie Generale No. 79 of 4.4.1942, **www.gazzettaufficiale.it/eli/id/1942/04/04/042U0262/sg**.

[5] Law of 31.5.1995, No. 218, Riforma del sistema italiano di diritto internazionale privato, Gazzetta Ufficiale, Serie Generale No. 128 of 3.6.1995, Supplemento Ordinario No. 68, **https://www.gazzettaufficiale.it/eli/id/1995/06/03/095G0256/sg**.

[6] Article 17 of the Italian PIL Act, is the Italian (autonomous) private international law provision governing overriding mandatory provisions. Article 17, headed "Norms of necessary application", can be translated as follows: "Norms of necessary application. 1. Italian norms which, considering their object and their objective, must be applied notwithstanding reference to foreign law, prevail over the following provisions".

[7] Decree-Law of 17.3.2020, No. 18, Misure di potenziamento del Servizio sanitario nazionale e di sostegno economico per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da COVID-19, Gazzetta Ufficiale, Serie Generale No. 70 del 17.3.2020, **https://www.gazzettaufficiale.it/eli/id/2020/03/17/20G00034/sg**.

[8] See, e.g., Article 32-ter of the Italian PIL Act.

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Comment by Pietro Franzina

States occasionally declare in their legislation that a particular provision ought to be treated as an overriding mandatory provision. The author of this post submits that this practice is 'questionable'. The post is short, and few hints are provided as to what would make this practice questionable, and in which way this should matter. The question raised by the practice described is, in my view, whether States are permitted to make this kind of statements, and what the legal effects of such statements are. I would be interested in knowing the author's views on this. There is little doubt that domestic legislators are entirely free to label a given provision in their legislation as 'overriding' insofar as this characterisation affects the operation of domestic conflict-of-laws rules. The provision so characterised will then trump the operation of the latter rules as lex specialis. Truly enough, as the author of the post observes, the picture is different when it comest to conflict-of-laws provisions enacted by the EU, because Member States are not permitted to derogate from such provisions. Treating a domestic provision of substantive private law as an overriding mandatory provision amounts, in fact, to derogating from the applicable conflict-of-laws rules (or altering their effects). Article 9 of the Rome I Regulation sets forth the conditions subject to which such a derogation (or alteration) is permitted: no mandatory provision may override the conflict-of-laws rules in that Regulation, unless it fits in the definition in Article 9(1). Things being

so, I guess the only real issue is whether a given provision, no matter how labelled by the enacting legislator, fits in the said definition. If it does, then it will lawfully interfere with the relevant EU provisions on conflicts of laws in the way provided for under Article 9 of the Rome I Regulation (or under the pertinent provisions in other EU texts, depending on the circumstances). I don't see how this would be questionable. Instead, if the substantive provision concerned does not fit in the Article 9(1) definition, then the non-application (or the altered application) of the applicable EU conflict-of-laws rules will simply amount to an infringement of EU law, and would bring about the consequences that such an infringement entails (the opening of an infringement procedure, the award of damages etc.). Here, too, I wouldn't speak of a 'questionable' practice: it'd be a violation of EU law. Domestic courts have authority to assess whether a given provision fits in the Article 9(1) definition. If they consider that it does not, they have the power to disregard any legislative statements to the contrary and enforce the relevant EU rules instead. Domestic courts may even ask the Court of Justice to take a stance on the matter by a request for a preliminary ruling. The rulings in Dieter Krombach (Case C-7/98) and Unamar (C?184/12) indicate that a similar course of action is indeed possible. The preceding remarks are of a general nature. It is not the purpose of this comment to discuss whether the particular measures that have been recently adopted in Italy to tackle the coronavirus crisis represent genuine overriding mandatory provisions within the meaning of Article 9(1), or not. On this point, too, however, I have strong reservations about the author's approach and findings.

Comment by Caterina Benini (PhD Student at the Università Cattolica del Sacro Cuore di Milano)

March 27, 2020, 3:47 pm

Ennio Piovesani contends that neither Article 28 of the Italian Decree-Law 9/2020 nor Article 88 of the Decree-Law 18/2020 are genuine overriding mandatory provisions for the purposes of the Rome I Regulation. He argues that the two provisions do not appear to be crucial for safeguarding public interests, since they exclusively protect private interests. I do not share his view.

Pursuant to Article 9(1) of the Rome I Regulation, overriding mandatory provisions are provisions that are regarded by the enacting State as crucial for the protection of public interests.

The test appears to have two prongs. One is subjective in nature, in the sense that it rests on a finding by the enacting State that the provision concerned is crucial. The other is objective, and requires assessing whether the provision pursues a public interest.

As to the first prong, one must arguably content itself with determining whether the provision ranks among those that the enacting State considers to be particularly important for the community it governs. By labelling the provision as an overriding mandatory rule, the enacting State shows precisely that it considers that provision to be crucial for its interests. Where this occurs, the first prong of the test is satisfied. Otherwise stated, self-characterisation by the enacting State, while not being enough for a provision to be regarded as an overriding mandatory provision for the purposes of Article 9(1), simplifies the task of courts and interpreters which consists in assessing whether the enacting State considers the provision to be crucial.

As to the second prong, one should assess whether, irrespective of any self-characterisation, the provision objectively pursues the protection of a public interest. This prong of the test is essential to preserve the effectiveness of the normally applicable EU conflict-of-laws rules. It is at this stage of the test that the nature of the interests protected by the provision comes into play. In this connection, contrary to Ennio Piovesani, I do not consider that the above Italian provisions are merely concerned with private interests, that is, the interests of the parties to the contracts concerned. By declaring that the spread of the epidemic makes the performance of obligations impossible within the meaning of Article 1463 of the Italian Civil Code, the legislator aimed at fostering the compliance with the governmental measures adopted to fight the coronavirus. It did so by exempting the parties from their obligations under transport and accommodation contracts, arguably on the assumption that this would reduce the risk that the concern for the unfettered performance of those obligations could undermine the strict compliance of the measures taken by the government to restrict the movement of people. Seen from this angle, the above provisions, while affecting as such the individual rights and obligations of the parties, are meant to safeguard the public health by reducing the movement of people and lowering the risk of any further spread of the virus.

Based on the foregoing, my view is that the above provisions should be labelled as overriding mandatory rules within the meaning of Article 9(1) of the Rome I

Regulation.

Comment by Margherita Salvadori

March 27, 2020, 7:46 pm

I would first like to thank Mr Piovesani for having signalled the newly adopted Italian provisions and for having raised this very interesting point.

A huge number of emergency rules have been enacted by the Italian government (v., a collection of this rules: https://www.gazzettaufficiale.it/dettaglioArea/12).

From a non-Italian perspective, it should be underlined, as already noted, that all the rules found in the Decree-Laws will need to be "converted" into Law by the Parliament. This is an aspect of particular importance, since in that moment the Italian Parliament will have the chance to consider all the emergency rules with perhaps greater attention.

However, it is necessary to immediately consider whether these rules are compatible within the EU framework.

This is particularly important for all the provisions that have an impact on fundamental freedoms of the European Union, including freedom of services and goods, and an impact on the intra-EU instruments. Furthermore, uniform EU law exists in the fields covered by the emergency rules and even if each Member State may be allowed to take emergency rules, the following provisions should be consistent with EU law

Some of the matters covered by the emergency rules are already governed by EU law protecting companies and families. In my view, what should be truly "overriding mandatory" is that, in the current emergency, EU Member States take shared solutions in said matters of EU law, including transport, travel package and accommodation contracts.

Comment by Ennio Piovesani

March 27, 2020, 8:36 pm

My comment was perhaps too short and I would like to: 1. provide some more information on the refund procedure introduced by the self-proclaimed overriding

mandatory provisions; 2. clarify the reasons why I consider the practice of self-proclaiming questionable; 3. add some remarks as to the compatibility of the provisions at issue with Union law; 4. share my views on the possible interests underlying the same provisions.

1. As mentioned, the self-proclaimed overriding mandatory provisions introduce a procedure for the refund of prices paid under transport (namely, carriage of persons), package travel and accommodation contracts. This newly introduced procedure is more favourable to the carrier, travel organiser or innkeeper, for the reasons that follow: Arts. 28(2) and 88(1) introduce a time-limit within which the passenger/guest must notify his request of refund to the carrier/innkeeper; Arts. 28(3) and 88(1) leave to the carrier/innkeeper the choice of refunding either by returning the price paid or by issuing a credit note (referred to as "voucher") to be used within one year; Art. 28(4) introduces the possibility for the travel organiser to refund the traveller through a voucher to be used within one year. Incidentally, "Corona-vouchers" (as dubbed by certain companies) have been implemented also in the legislation of other EU Member States to support tour operators who are suffering "strains on liquidity […] because of missing new bookings coupled with reimbursement claims" (EU Commission, Information on the Package Travel Directive in Connection With the Covid-19, 19.3.2020, revised version, replaces the version of 5.3.2020 – see further on the point below).
2. I question the practice of self-proclaiming for the following reasons. In the first place, as noted, self-proclaiming provisions which do not fit within the definition of Art. 9(1) may lead to an infringement of Union law . In particular, in the case of the Rome 1 Regulation, the infringement would concern the conflict rules contained in the Regulation discarded by the alleged overriding mandatory provision. The risk of infringing Union law which the national legislator takes when self-proclaiming seems to me sufficient to consider the practice questionable. That said, it is understood that Art. 9(1) also covers provisions that protect individual/private interests, as far as the main objective is to promote a collective/public interest. Therefore, in the second place, I share Mankowski's fear that self-proclaiming entails the "theoretical-dogmatic danger" that individual/private interests be "par ordre du mufti" transformed into

super-individual/public interests (Bar/Mankowski, IPR, Vol. I,2nd edn. 2003, mn. 99). Thirdly, still from a broader perspective, I might beover-pessimistic, but I also fear that self-proclaiming may trigger a race to the bottom and a proliferation of overriding mandatory provisions, which should instead remain a limited number. In my eyes these are the reasons why this practice may be referred to as questionable, or, at best as risky.

3. Apart from the compatibility with Art. 9 Rome 1 Regulation, the self-proclaimed provisions could be incompatible with other provisions of Union law, namely those contained in the Regulations on passengers' rights and inthe Package Travel Directive. In particular, as concerns transport contracts, I note what follows. If I understand correctly, Art. 28(1) provides that the carrier's obligation is impossible under Art. 1463 Italian Civil Code, when the passenger cannot travel because self-isolated, quarantined, hospitalized, or otherwise confined due to the coronavirus (and the containment measures taken by the Italian authorities to fight the pandemic). Termination of contract under Art. 1463 Italian Civil Code occurs ex lege, without the need for any activity by the parties or the judge. Accordingly, the judge merely ascertains that total impossibility occurred, with a decision having ex tunc (retroactive) effects. Take for instance the case where a passenger was quarantined and later the flight company, for independent reasons, cancelled the flight. Considering that, following Art. 28(1), the carrier's obligation became impossible under Art. 1463 before the flight's cancellation, I wonder whether the passenger will be able to rely on Regulation (EC) No. 261/2004.Therefore, I fear that the self-proclaimed overriding mandatory provisions may by incompatible with the Regulations on passengers' rights, in particular to the extent that they seem to prevent passengers from resorting to the more-favourable refund procedures provided for in the same Regulations. Moreover, as concerns package travel contracts, I note what follows. The Package Travel Directive is a full harmonization directive (see Art. 4 thereof). Following AG Wahl's opinion delivered in the cited Unamar case (see, particularly, points 40-43 thereof), I doubt as to the validity of self-proclaiming overriding mandatory provisions in matters governed by full harmonisation directives such as the Package Travel Directive. That said, by allowing refund through a voucher in cases referred to in Art. 12(2) Package Travel Directive, Art. 28(4) appears to be less favourable to the traveller. In fact, with reference to the Corona-vouchers implemented in

Belgium in the field of package travel contracts, Mr. Didier Reynders (European Commissioner for Justice) has recently underlined the measure's incompatibility with Union law (Un voucherplutôt qu'un remboursement? Didier Reynders recadre la Belgique sur lesvoyages organisés annulés, http://www.rtbf.be, 25.3.20120). For the record, Belgium has not felt the need of self-proclaiming the provisions in question overriding mandatory (see 19 MARS 2020. – Arrêté ministériel relatif auremboursement des voyages à forfait annulés, Publié le 2020-03-20, Numac2020040676, http://www.ejustice.just.fgov.be/eli/arrete/2020/03/19/2020040676/moniteur).

4. Finally, some thoughts on the public interests which the self-proclaimed overriding mandatory provisions allegedly promote. I'm not convinced that the provisions are aimed at promoting the containment measures adopted by the Italian Government. If this were the case, then I would doubt that said provisions could be considered as "crucial" for the purpose of safeguarding the relevant public interest (here: limiting the circulation of persons). In fact, that public interest appears to be sufficiently and well-protected by the containment measures alone. Incidentally, infringing the containment measures leads to a criminal (now administrative) sanction. Rather, considering that the self-proclaimed overriding mandatory provisions allow for refund with Corona-vouchers (rather than in money), in my view, the interest underlying the provisions may be that of supporting companies belonging to the tourism sector, which — as noted above — are suffering strains on liquidity due to the coronavirus emergency. Perhaps I might have been once more too concise. In any case, given the large number of issues involved, I refer any other consideration to a separate article.

Service of Documents on

Insurance Companies: The ECJ in the Corporis/Gefion Insurance Case

The Court of Justice of the European Union on 27th February 2020 delivered its judgment in ***Corporis/Gefion Insurance*, Case C-25/19**. The case concerned rules surrounding service of documents in a specific, yet increasingly common context.

Corporis is a Polish insurance company, who was assigned damages by the owner of a vehicle following a car accident for the value of 30 euro. *Gefion* was the Danish insurance company covering the risk related to the accident. Under the **Solvency II Directive**, insurance undertakings may provide services in other Member States without having there an agency or an establishment – yet, for compulsory motor insurance coverages they must appoint a representative with "*sufficient powers to represent the undertaking … including the payment of such claims, and to represent it or, where necessary, to have it represented before the courts and authorities of that Member State in relation to those claims*" (Art 152). The Polish representative of *Gefion* was *Crawford Polska*.

When *Corporis* wanted to start judicial proceedings, it served legal documents upon the prospective defendant, in Denmark. Documents were not translated, and the recipient of the documents, according to Art 8 of the **Service of Documents Regulation (no. 1393/2007)**, refused to accept service on the ground that it was in not in the condition to understand the content of the documents.

Polish courts suspended proceedings, requesting *Corporis* advanced payment for translation for 1.500 euro. Failing such payment, the court dismissed the case.

On appeal, the court of appeal questioned whether the Service of Documents Regulation was applicable, as its recital 8 states that it "*should not apply to service of a document on the party's authorised representative in the Member State where the proceedings are taking place regardless of the place of residence of that party*".

The Court of Justice was thus called to rule on whether the rules on the

appointment of representatives contained in the Solvency II Directive and the scope of application of the Service of Documents Regulation as reconstructed in light of its recital extend the competence and duties of said representative to receive service of documents in the language of that specific host State for which he has been appointed.

The Court of Justice has confirmed that the Service of Documents Regulation is not applicable to service of a document on the party's authorized representative in the Member State where the proceedings are taking place (para 28 f). The applicability of the regulation is set aside in light of its recital 8, according to which it should not be applied "*to service of a document on the party's authorised representative in the Member State where the proceedings are taking place regardless of the place of residence of that party*". This sets the difference from the previous case law of the court, namely the **Alder judgment Case C-325/11**, where there was no local representative of the foreign defendant, nor a legal obligation to appoint such a representative.

Yet, in the Court's eye, the non-application of the Service of Documents Regulation in the case at hand does not mean that EU law remains silent in general. The Solvency II Directive creates a harmonized regime for the pursuit of insurance activities between Member States. Amongst its goals, not only the promotion of cross-border services, but the protection of persons as well. The necessity for an insurance undertaking to appoint a representative in a State where it decides to offer services without opening an agency or an establishment is pre-ordered at the protection of persons; even though the Solvency II Directive is silent on the matter, according to the Court, not recognizing the right to victim to serve documents in his own language to the representative with whom it has already taken preliminary steps would, in essence, deprive the provisions of their *effet utile*.

Interestingly, in terms of legal narrative, the matter is mostly constructed in positive terms. The Court speaks of the "*possibility for that representative to accept service*" (para 37); it stress the negative consequences of excluding "*the powers* [of the] *representative to accept service of documents*" (para 42). Evidently, from the perspective of the foreign insurance company and its representative, this is more a matter of legal obligation to accept service.

The approach and the perspective followed by the Court becomes apparent in the

conclusion. The Court does not clearly say that the representative has an obligation to accept service – it says that the rules on appointment in the Solvency II Directive include the power to receive service of documents. An argumentative style that appears to little prejudice to the conclusion: insurance companies now know that when they appoint a representative in another Member State under Artt. 152 Solvency II Directive, persons will have the possibility to serve documents to that representative, and avoid a cross-border service of documents.

Mareva injunctions in support of foreign proceedings

In *Bi Xiaoqing v China Medical Technologies* [2019] SGCA 50, the Singapore Court of Appeal provided clarity on the extent of the court's power to grant Mareva relief in support of foreign proceedings.

The first and second respondents were companies incorporated in the Cayman Islands and the British Virgin Islands. The action was pursued by the liquidators of the first respondent against the appellant, a Singapore citizen, who was formerly involved in the management of the respondents and allegedly misappropriated funds from them.

Hong Kong proceedings were commenced first and a worldwide Mareva injunction was granted against, inter alia, the appellant. The terms of the Hong Kong injunction specifically identified assets in Singapore.

Two days after the Hong Kong injunction was obtained, the respondents commenced action in Singapore and applied for a Mareva injunction to prevent the defendants from disposing of assets in Singapore. The action in Singapore covered substantially the same claims and causes of action as those pursued in Hong Kong. After the grant of a Mareva injunction on an *ex parte* basis, the respondents applied to stay the Singapore proceedings pending the final determination of the Hong Kong proceedings on the basis that Hong Kong was the most appropriate forum for the dispute. The High Court granted the stay and

confirmed the Mareva injunction in *inter partes* proceedings.

The issues before the Court of Appeal were: (1) whether the court had the power to grant a Mareva injunction and (2) whether it should grant the Mareva injunction. In other words, the first question dealt with the existence of the court's power to grant a Mareva injunction and the second question dealt with the exercise of the power.

The Singapore court's power to grant an injunction can be traced back to section 4(10) of the Civil Law Act which is in these terms: "A Mandatory Order or an injunction may be granted or a receiver appointed by an interlocutory order of the court, either unconditionally or upon such terms and conditions as the court thinks just, either unconditionally or upon such terms and conditions as the court thinks just, in all cases in which it appears to the court to be just or convenient that such order should be made." The Court of Appeal clarified that section 4(10) of the Civil Law Act should be read as conferring on the court the power to grant Mareva injunctions, even when sought in support of foreign proceedings. Two conditions had to be satisfied: (1) the court must have *in personam* jurisdiction over the defendant; and (2) the plaintiff must have a reasonable accrued cause of action against the defendant in Singapore.

Given the stay of the Singapore proceedings, the Court of Appeal had to consider if the Singapore court still retained the power to grant Mareva relief. There had been conflicting first instance decisions on this point: see *Petroval SA v Stainsby Overseas Ltd* [2008] 3 SLR(R) 856 cf *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR(R) 1000. The Court of Appeal preferred the *Multi-Code* approach, taking the view that the court retains a residual jurisdiction over the underlying cause of action even when the action is stayed. This residual jurisdiction grounds the court's power to grant a Mareva injunction in aid of foreign proceedings. Further, a party's intentions on what it would do with the injunction had no bearing on the existence of the court's power to grant the Mareva injunction.

Party intentions, however, was a consideration under the second question of whether the court should exercise its power to grant the injunction. Traditionally, a Mareva injunction is granted to safeguard the integrity of the Singapore court's jurisdiction over the defendant so that, if judgment is rendered against the defendant, that jurisdiction is not rendered toothless. The court commented that

where it appears that the plaintiff is requesting the court to assume jurisdiction over the defendant for the collateral purpose of securing and safeguarding the exercise of jurisdiction by a foreign court, the court should not exercise its power to grant Mareva relief. On the facts, the court held that it could not be said that the respondents had such a collateral purpose as there was nothing on the facts to dispel the possibility that the respondents may later request for the stay to be lifted. This conclusion suggests that the court would generally take a generous view of litigation strategy and lean towards exercising its power in aid of foreign proceedings.

Given the requirement that the plaintiff must have a reasonable accrued cause of action against the defendant in Singapore, a Mareva injunction is not free-standing relief under Singapore law. The court emphasized that a Mareva injunction in aid of foreign court proceedings is still ultimately premised on, and in support of, Singapore proceedings. This stance means that service in and service out cases may end up being treated differently. If the defendant has been served outside of jurisdiction and successfully sets aside service of the writ, there would no longer be an accrued cause of action in Singapore on which to base the application for a Mareva injunction. See for example, *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun* [2018] SGHC 64, [2018] 4 SLR 1420 (see previous post **https://conflictoflaws.net/2018/mareva-injunctions-under-singapore-law/**). On the other hand, if the defendant had been served as of right within jurisdiction and the action is stayed (as in the present case), the court retains residual jurisdiction to grant a Mareva injunction.

After a restrictive court ruling in relation to the court's power to grant free-standing Mareva relief in aid of foreign arbitrations, the legislature amended the International Arbitration Act to confer that power to the courts. It remains to be seen if the legislature would act similarly in relation to the court's power to grant free-standing Mareva relief in aid of foreign proceedings.

To a certain extent, this lacuna is plugged by the recent amendments to the Reciprocal Enforcement of Foreign Judgments Act ("REFJA") (see previous post **https://conflictoflaws.net/2019/reform-of-singapores-foreign-judgment-rules/**). Under the amended REFJA, a judgment includes a non-monetary judgment and an interlocutory judgment need not be "final and conclusive". In the Parliamentary Debates, the minister in charge made the point that these specific

amendments were intended to enable the court to enforce foreign orders such as Mareva injunctions. Only judgments from certain gazetted territories qualify for registration under the REFJA. To date, HK SAR is the sole listed gazetted territory although it is anticipated that the list of gazetted territories will expand in the near future. While the respondents had in hand a Hong Kong worldwide Mareva injunction, the amendments to REFJA only came into force after the case was decided.

The judgment may be found at: **https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/ca-188-2018-j—bi-xiaoqiong-pdf.pdf**

Coronavirus, force majeure certificate and private international law

Coronavirus outbreak and force majeure certificate

Due to the outbreak, China has adopted a number of public health measures, including closing schools and workplaces, limiting public gatherings, restricting travel and movement of people, screening , quarantine and isolation. At least 48 cities were locked down by 14 Feb 2020. (here) More than two thirds of China's migrant workers were unable to return to work, (see here) leaving those firms that have restarted operation running below capacity.

Coronavirus and the emergency measures significantly affect economic activates in China. The China Council for the Promotion of International Trade (CCPIT), a quasi-governmental entity, issued 3,325 force majeure certificates covering the combined contract value of $38.5bn to exempt Chinese companies from their contractual obligations.

Issuing force majeure certificates is a common practice of trade councils or

commercial chambers in the world. These certificates are proof of the existence of relevant events that may constitute force majeure and impinge the company's capacity to perform the contract. The events recorded in the certificates would include the confirmation of coronavirus outbreak, the nature, extent, date and length of governmental order for lockdown or quarantine, the cancellation of any transportation, etc. These certificate, however, are not legal documents and do not have direct executive or legal effects. They only attest the factual details instead of certifying those events are indeed force majeure in law. They are also called 'force majeure factual certificate' by the CCPIT. The CCPIT states in its webpage that:

The force majeure factual certificate is the proof of objective, factual circumstances, not the 'trump card' to exempt contractual obligations. The CCPIT issues relevant force majeure factual certificates to Chinese enterprises that are unable to perform contracts due to the impact of the new coronavirus epidemic. The certificate can prove objective facts such as delayed resumption of work, traffic control, and limited dispatch of labour personnel. An enterprise can request for delaying performance or termination of the contract based on this certificate, but whether its obligation can be fully or partially exempt depends on individual cases. The parties should take all the circumstances and the applicable law into consideration to prove the causal link between 'the epidemic and its prevention and control measures' and the 'failure to perform'.

Force Majeure in Different Governing Law

The force certificate is thus mainly used to demonstrate to the other party the existence of certain factual difficulties that hamper performance and seek understanding to privately settle the dispute. If the disputes are brought to the court, the court should consider whether the outbreak and the relevant emergency measure constitute force majeure events pursuant to the governing law, treating the force majeure certificate as evidence of fact. There is no international uniform doctrine of force majeure and different countries adopt different doctrines to allocate contractual risk in unforeseeable change of circumstances. China is a member of the UN Convention on the International Sale of Goods (CISG), which shall apply if the other party has its place of business in another contracting state, or the parties choose CISG by agreement. Article 79 of the CISG provides that a party is exempted from paying damages if the breach is due to an impediment beyond its control, and either the impediment could not

have been reasonably foreseen at the time of the conclusion of the contract, or the party could not reasonably avoid or overcome the impediment or its consequences. Although the disease outbreak is unforeseeable, it can only be an impediment if it makes performance impossible. Therefore, if the outbreak only makes production more difficult or expensive, it is not an impediment. There is no consensus as to whether an event that makes performance excessively burdensome can also be counted as an impediment in CISG. In addition, the impediment must uncontrollable. If a Chinese firm could not perform its contractual obligation due to the compulsory lockdown ordered by its local government, this event is out of control. The same applies if a firm manufacturing facial masks cannot deliver on time due to government requisition. On the other hand, when the Chinese State Council announced the extension of the Chinese New Year holiday to 2 Feb 2020, it was not a compulsory ban and if a firm 'chose' not to operate during the extension without additional compulsory order from any authorities, substantive risk of infection in its place of business, or irreparable labour shortage, the impediment may not be considered as uncontrollable. For the same reason, if a company decided to lock down after a worker tested positive for coronavirus in order to reduce the risk of spreading the disease among its workers, without the high risk and with alternative and less extreme prevention measures available, the impossibility to perform may be considered 'self-inflicted' instead of 'uncontrollable'. Consideration should always be given to the necessity and proportionality of the decision. Furthermore, if the local government imposed compulsory prohibition for work resumption to prevent people gathering, a firm cannot claim uncontrollable impediments if working in distance is feasible and possible for the performance of the contract.

If the other party is not located in a CISG contracting state, whether the coronavirus outbreak can exempt Chinese exporters from their contractual obligations depends on the national law that governs the contracts. Most China's major trade partners are contracting states of CISG, except India, South Africa, Nigeria, and the UK. Chinese law accepts both the force majeure and hardship doctrines. The party that breaches the contract may be discharged of its obligations fully or partially if an unforeseeable, uncontrollable and insurmountable causes the impossibility to perform. (Art 117 of the Chinese Contract Law 1999) The party can also ask for the alternation of contract if un unforeseeable circumstance that is not force majeure makes performance clearly inequitable. (Art 26 of the SPC Contract Law Interpretation (II) 2009) The 'force

majeure factual certificate' can also be issued if CCPIT considers a event not force majeure but unforeseeable change of circumstances in Art 26 of the Interpretation (II). For example, in Jiangsu Flying Dragon Food Machinery v Ukraine CF Mercury Ltd, CCPIT issued the certificate even after recognising that the poorly maintained electricity system of the manufacturer that was damaged by the rain was not a force majeure event. In contrast, other national law may adopt a more restrictive standard to exempt parties their obligations in unforeseeable circumstances. In England, for example, the court will not apply force majeure without a force majeure clause in the contract. A more restricted 'frustration' may apply instead.

Jurisdiction and Enforcement

In theory, a Chinese court should apply the same approach as other jurisdictions to apply the governing law and treat the force majeure certificates issued by CCPIT as evidence of fact. in practice, Chinese courts may prefer applying Chinese law if the CISG does not apply and the parties do not choose the law of another country, grant more weight to the CCPIT certificate than other courts, and be more lenient to apply the force majeure criteria to support Chinese companies' claim in relation to the coronavirus outbreak.

Finally, if the dispute is heard in a non-Chinese court or international arbitral tribunal, the judgment holding the Chinese company liable need to be enforced in China unless the Chinese company has assets abroad. Enforcing foreign judgments in China is generally difficult, though there are signs of relaxation. If judgments can be enforced pursuant to bilateral treaties or reciprocity, they may be rejected based on public policy. The question is whether the coronavirus outbreak and the government controlling measures can be public policy. According to the precedents of the Supreme People's Court, (eg. *Tianrui Hotel Investment Co., Ltd. (Petitioner) v. Hangzhou Yiju Hotel Management Co., Ltd. (Respondent)*, (2010) Min Si Ta Zi 18) breach of mandatory administrative regulations *per se* is not violation of public policy. But public policy undoubtedly includes public health. If Chinese courts consider the Chinese company should not resume production to prevent spread of disease event without compulsory government order, the public policy defence may be supported.

Indigenous Claims to Foreign Land: Update from Canada

By Stephen G.A. Pitel, Faculty of Law, Western University

In 2013 two Innu First Nations sued, in the Superior Court of Quebec, two mining companies responsible for a mega-project consisting of multiple open-pit mines near Schefferville, Quebec and Labrador City, Newfoundland and Labrador. The Innu asserted a right to the exclusive use and occupation of the lands affected by the mega-project. They claimed to have occupied, since time immemorial, a traditional territory that straddles the border between the provinces of Quebec and Newfoundland and Labrador. They claimed a constitutional right to the land under s. 35 of the *Constitution Act, 1982*.

The mining companies and the Attorney General of Newfoundland and Labrador each moved to strike from the Innu's pleading portions of the claim which, in their view, concerned real rights over property situated in Newfoundland and Labrador and, therefore, fell under the jurisdiction of the courts of that province.

In *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, the Supreme Court of Canada held (by 5-4 majority) that the motion to strike failed and that the Quebec court had jurisdiction over the entire claim advanced by the Innu.

Quebec's private international law is contained in Book Ten of the Civil Code of Quebec. Jurisdiction over the mining companies was based on their being domiciled in Quebec. However, as a special rule of jurisdiction, Division III governs what are called real and mixed actions (para. 18). The general rule is that Quebec has jurisdiction to hear a real action only if the property in dispute is situated in Quebec (art. 3152). In the case of a mixed action, Quebec must have jurisdiction over both the personal and real aspects of the matter: see *CGAO v Groupe Anderson Inc.*, 2017 QCCA 923 at para. 10 (para. 57). These rules required the court to properly characterize the Innu's action.

The majority held that the claim was a mixed action (para. 56). This was because the Innu sought both the recognition of a *sui generis* right (a declaration of Aboriginal title) and the performance of various obligations related to failures to respect that right. However, the claim was not a "classical" mixed action, which would require the court to have jurisdiction over both the personal and real aspects of the matter. Rather, this was a "non-classical" mixed action that involved the recognition of *sui generis* rights and the performance of obligations (para. 57). Put another way, the nature of the indigenous land claims made them different from traditional claims to land. Accordingly, the claim did not fall within the special jurisdiction provisions in Division III and jurisdiction could simply be based on the defendants' Quebec domicile.

The majority was influenced by access to justice considerations, being concerned about requiring the Innu to litigate in both Quebec and Newfoundland and Labrador. It noted that "[t]he Innu have argued that separating their claim along provincial borders will result in higher — perhaps prohibitive — costs caused by "piecemeal" advocacy, and inconsistent holdings that will require further resolution in the courts. … These are compelling access to justice considerations, especially when they are coupled with the pre-existing nature of Aboriginal rights" (paras. 46-47).

The dissenting reasons are lengthy (quite a bit longer than those of the majority). Critically, it held that "Aboriginal title and other Aboriginal or treaty rights are "real rights" for the purposes of private international law, which is to say that they *resemble* or are at least *analogous* to the domestic institution of real rights" (emphasis in original) (para. 140). Labeling them as *sui generis* was not sufficient to avoid the jurisdictional requirement for a mixed action that the land had to be in Quebec: "the fact that Aboriginal title is *sui generis* in nature does not mean that it cannot be a proprietary interest or a real right strictly for the purposes of private international law" (para. 155).

In the view of the dissent, " if Quebec authorities were to rule directly *on the title* that the Innu believe they hold to the parts of Nitassinan that are situated outside Quebec, the declarations would be binding on *no one*, not even on the defendants … , precisely because Quebec authorities lack jurisdiction in this regard" (emphasis in original) (para. 189).

On the issue of access to justice, the dissent stated that "access to justice must be

furnished within the confines of our constitutional order. Delivery of efficient, timely and cost-effective resolution of transboundary Aboriginal rights claims must occur within the structure of the Canadian legal system as a whole. But this is not to suggest that principles of federalism and provincial sovereignty preclude development by superior courts, in the exercise of their inherent jurisdiction, of innovative *yet* constitutionally sound solutions that promote access to justice" (emphasis in original) (para. 217). It went on to proffer the interesting procedural option that both a Quebec judge and a Newfoundland and Labrador judge could sit in the same courtroom at the same time, so that the proceedings were heard by both courts without duplication (para. 222).

There are many other issues in the tension between the majority and the dissent, including the role of Newfoundland and Labrador as a party to the dispute. It was not sued by the Innu and became involved as a voluntary intervenor (para. 9).

The decision is very much rooted in the private international law of Quebec but it has implications for any Indigenous claims affecting land in any legal system. Those systems would also need to determine whether their courts had jurisdiction to hear such claims in respect of land outside their territory. Indeed, the decision offers a basis to speculate as to how the courts would handle an Indigenous land claim brought in British Columbia in respect of land that straddled the border with the state of Washington. Is the court's decision limited to cases that cross only internal federation borders or does it extend to the international realm? And does there have to be a straddling of the border at all, or could a court hear such a claim entirely in respect of land in another jurisdiction? The court's decision leaves much open to interesting debate.

Dubious Cross-Border Insolvency Framework in India: The Need of a

new Paradigm?

By Gaurav Chaliya and Nishtha Ojha. The authors are third year students at the National Law University, Jodhpur, India.

Introduction

In 2018, around 47 entities forming the part of corporate groups were reported to be in debt which reflects the necessity of having an effective cross-border legal framework. The flexibility in the framework of cross border insolvency helps in overcoming the hurdles encountered in cross border disputes. This framework essentially girdles around the principle of coordination and cooperation and in consonance with these principles the National Company Law Appellate Tribunal ["**NCLAT**"] in *Jet Airways* case has extended these principles by providing sufficient rights to Dutch trustee and observed that–

"*as per law, he (Dutch Trustee) has a right to attend the meeting of the Committee of Creditors*"

However, despite effective coordination and cooperation, the proceedings against one entity is questioned to be extended to others as *first*, the elemental issue concerned is that each entity is managed by its own interests and such extension may be prejudicial to the interest of other entities and *second*, the legal conundrum associated in determining the Centre of Main Interest ["**COMI**"] of an entity. With regards to the first question, it is imperative that extension of insolvency proceeding is not prejudicial to the interests of the other entities as it is only extended in case of existence of reasonable nexus between entities in terms of financial and commercial relationship which makes them interdependent on each other. The authors would elaborate upon the second question in the subsequent section.´

Deficient Regulatory Framework

Section 234 and 235 of the Insolvency and Bankruptcy Code, 2016 ["**IBC**"] governs the cross border disputes in India. Section 234 empowers the government to enter into bilateral agreements with another country and Section 235 provides that Adjudicating Authority can issue a letter of request, to a country with which bilateral agreement has been entered into, to deal with assets situated thereto.

As is evident, the impediments associated with this regulatory framework are: *first*, it does not provide for a legal framework for foreign representatives to apply to the Indian courts and most importantly these sections are not notified yet and *second*, the current legal framework under IBC provides for entering into bilateral treaties which is uncertain and in addition is a long term negotiation process. For instance, in Australia the regulatory framework therein was not sufficient to deal with the complexities associated with cross-border insolvencies as bilateral treaties can provide some solution but they are not easy to negotiate and have intrinsic intricacies. Consequently, it passed the Cross Border Insolvency Act, 2008 which provides adoption and enactment of the United Nations Commission on International Trade Law ["**Model law**"]. In light of same, India should also consider the enactment of the Model law though with modifications, one of which is suggested and dealt in the next section.

Resolving the Complications

Complications in the field of International Insolvency are never-ending primarily due to the lack of a comprehensive legal framework. The Model Law seeks to alleviate these complications by providing a pragmatic legal framework. As asserted earlier, *Jet Airways* case acknowledges and applies the principles enshrined under the Model Law. The Model Law, unlike any treaty or convention, is a model form of legislation which is adopted by 46 nations till date.

The Model Law sets out the principle of Centre of Main Interest ["**COMI**"] for determining the jurisdiction of the proceedings.
Interestingly, it does not define the COMI and therefore, determining COMI possesses the greatest challenge. Also, the principal concern that remains is that the debtor can escape its liability by changing its COMI according to its favourable outcome. However, the Model law safeguards the rights of the creditor by providing that *first*, as per Article 16 of the Model Law, COMI corresponds to the place where debtor has its registered office and *second*, COMI is dependent on many other factors viz. seat of an entity having major stake in terms of control over assets and its significant operations, which is basically dependent upon the transparent assessment by the third parties. Consequently, the debtor cannot escape its liability by changing COMI as determination of the same is dependent upon assessment by third parties. Hence, the Model Law addresses the prime issues which are present in the current regulatory framework.

In India, the Report of Insolvency Law Committee ["**ILC**"] was constituted to examine the issues related to IBC, which recommended the impending need to adopt the Model Law. However, the proposed draft disregards the objective of coordination and cooperation among all nations by mandating the requirement of *reciprocity*.
The authors subscribe to the view, that, until the Model Law has been adopted to a significant extent by other counties, the absolute requirement of reciprocity as postulated under the draft should be done away with and courts should be given the discretion on *case to case* basis. As such an absolute requirement of reciprocity i.e. entering into a treaty with other countries take us back to the present legal framework in India by limiting adjudicating authority's power to only 46 countries. For instance, in case the corporate debtor has COMI in country A, which has adopted the Model Law, whereas his assets are located in country B, which has not adopted the Model Law. In such a situation, if the requirement of reciprocity is imposed then the administration of assets in country B would become difficult, as an entity in country B would always be reluctant to become a part of the insolvency proceedings relying on probable defences such as of lex situs and absence of bilateral agreements.

In essence, this whole process would be detrimental to the interest of the creditor as it would hamper the maximization of the value of assets. Moreover, in *Rubin v. Eurofinance*, the Supreme Court of U.K. has observed that the court is allowed to use the discretion provided to it by the system. Hence, by this approach courts are allowed to cooperate and coordinate with those countries that are acquiescent to return the favour. It is pertinent to clarify that by granting discretion to court, the authors do not concede to the practice of Gibb's principle. Rather the said principle is inherently flawed as it does not recognise the foreign insolvency process preceding over English law per contra courts generally expects other jurisdictions to accept their judgements.

Concluding Remarks

After a careful analysis of present cross border legal framework in India, it can be ascertained that current system is highly ineffective and in light of instances provided, the adoption of the Model Law with modifications seems to be a better alternative. The Model Law provides an orderly mechanism as it recognises the interest of the enforcing country by taking into account its public policy and national interest. The Appellate Tribunal in *Jet Airways* case has attempted to extend the principles of the Model Law into domestic case laws therefore it is optimal time that India adopts such legislation. Though with regards to the problem of reciprocity as pointed earlier, the absolute requirement or non-requirement of the reciprocity would not solve the problem and according to *Rubin's* case, discretion should be given to the courts which would widen the scope of the application of the law, thereby, being in consonance with the objectives of the principles i.e. of effective cooperation and coordination among all nations. Hence, the Model law contains enough of the measures to prevent any misuse of the process and adopting it with modifications would resolve the problem associated.

Claims Against Corporate Defendant Founded on Customary International Law Can Proceed in Canada

By Stephen G.A. Pitel, Faculty of Law, Western University

Eritrean mine workers who fled from that country to British Columbia sued the mine's owner, Nevsun Resources Ltd. They sought damages for various torts including battery, false imprisonment and negligence. They also sought damages for breaches of customary international law. Their core allegation was that as conscripted labourers in Eritrea's National Service Program, they were forced to work in the mine in intolerable conditions and Nevsun was actively involved in this arrangement.

Nevsun moved to strike out all of the claims on the basis of the act of state doctrine. It also moved to strike out the proceedings based on violations of customary international law because they were bound to fail as a matter of law.

In its decision in *Nevsun Resources Ltd v Araya*, 2020 SCC 5, the Supreme Court of Canada has held (by a 7-2 decision) that the act of state doctrine is not part of Canadian law (para. 59) and so does not preclude any of the claims. It has also held (by a 5-4 decision) that the claims based on customary international law are not bound to fail (para. 132) and so can proceed.

Act of State Doctrine

Justice Abella, writing for five of the court's nine judges, noted that the act of state doctrine had been heavily criticized in England and Australia and had played no role in Canadian law (para 28). Instead, the principles that underlie the doctrine were subsumed within the jurisprudence on "conflict of laws and judicial restraint" (para 44).

In dissent, Justice Cote, joined by Justice Moldaver, held that the act of state doctrine is not subsumed by choice of law and judicial restraint jurisprudence (para. 275). It is part of Canadian law. She applied the doctrine of justiciability to the claims, finding them not justiciable because they require the determination that the state of Eritrea has committed an internationally wrongful act (para. 273).

This division raises some concerns about nomenclature. How different is "judicial restraint" from "non-justiciability"? Is justiciability an aspect of an act of state doctrine or is it a more general doctrine (see para. 276)? Put differently, it appears that the same considerations could be deployed by the court either under an act of state doctrine or without one.

The real division on this point is that Justice Cote concluded that the court "should not entertain a claim, even one between private parties, if a central issue is whether a foreign state has violated its obligations under international law" (para. 286). She noted that the cases Justice Abella relied on in which Canadian courts have examined and criticized the acts of foreign states are ones in which that analysis was required to ensure that Canada comply with its own obligations as a state (para. 304). In contrast, in this case no conduct by Canada is being called into question.

In Justice Abella's view, a Canadian court can indeed end up determining, as part of a private civil dispute, that Eritrea has engaged in human rights violations. She did not, however, respond to Justice Cote's point that her authorities were primarily if not all drawn from the extradition and deportation contexts, both involving conduct by Canada as a state. She did not squarely explain why the issue of Eritrea's conduct was justiciable or not covered by judicial restraint in this particular case. Having held that the act of state doctrine was not part of Canadian law appears to have been sufficient to resolve the issue (para. 59).

Claims Based on Violations of Customary International Law

The more significant split relates to the claims based on violations of customary international law. The majority concluded that under the "doctrine of adoption", peremptory norms of customary international law are automatically adopted into Canadian domestic law (para. 86). So Canadian law precludes forced labour, slavery and crimes against humanity (paras. 100-102). Beyond that conclusion,

the majority fell back on the hurdle for striking out claims, namely that they have to be bound ("plain and obvious") to fail. If they have a prospect of success, they should not be struck out. The majority found it an open question whether these peremptory norms bind corporations (para. 113) and can lead to a common law remedy of damages in a civil proceeding (para. 122). As a result the claims were allowed to proceed.

Four of the judges dissented on this point, in reasons written by Brown and Rowe JJ and supported by Cote and Moldaver JJ. These judges were critical of the majority's failure to actually decide the legal questions raised by the case, instead leaving them to a subsequent trial (paras. 145-147). In their view, the majority's approach "will encourage parties to draft pleadings in a vague and underspecified manner" which is "likely not to facilitate access to justice, but to frustrate it" (para. 261). The dissent was prepared to decide the legal questions and held that the claims based on violations of customary international law could not succeed (para. 148).

In the dissent's view, the adoption into Canadian law of rules prohibiting slavery, forced labour and crimes against humanity did not equate to mandating that victims have a civil claim for damages in response to such conduct (para. 172). The prohibitions, in themselves, simply did not include such a remedy (para. 153). The right to a remedy, the dissent pointed out, "does not necessarily mean a right to a particular form, or kind of remedy" (para. 214).

Further, as to whether these rules can be directly enforced against corporations, the dissent was critical of the complete lack of support for the majority's position: "[i]t cites no cases where a corporation has been held civilly liable for breaches of customary international law anywhere in the world" (para. 188). As Justice Cote added, the "widespread, representative and consistent state practice and *opinio juris* required to establish a customary rule do not presently exist to support the proposition that international human rights norms have horizontal application between individuals and corporations" (para. 269).

On this issue, one might wonder how much of a victory the plaintiffs have achieved. While the claims can now go forward, only a very brave trial judge would hold that a corporation can be sued for a violation of customary international law given the comments of the dissenting judges as to the lack of support for that position. As Justices Brown and Rowe put it, the sole authority

relied on by the majority “is a single law review essay” (para. 188). Slender foundations indeed.

ERA: Recent European Court of Human Rights Case Law in Family Matters (conference report)

Report written by Tine Van Hof, researcher at the University of Antwerp

On the 13th and 14th of
February 2020, the Academy of European Law (ERA) organized a conference on ‘Recent ECtHR Case Law in Family Matters’. This conference was held in Strasbourg and brought together forty participants coming from twenty-one different countries. This report will set
out some of the issues addressed at the conference.

The presentation, made by ***Ksenija Turkovi?***, Judge at the European Court of Human Rights, focused
on children on the move and more specifically on minors in the context of migration. On this topic the European Court of Human Rights (ECtHR) has developed
a child-specific human rights approach. This approach implies taking into account three particular concepts: vulnerability, best interests and autonomy. Judge Turkovi? pointed to the interesting discussion on whether vulnerability could
only apply to young migrant children. On this discussion, there is now agreement that the vulnerability applies to all children under the age of 18 and regardless whether they are accompanied by adults. The ECtHR made very clear in its case law
that migrant children are especially vulnerable and that this vulnerability is a decisive factor that takes precedence over the children’s migrant status. This

vulnerability also plays a role in the cases on the detention of children. The more vulnerable a person is, the lower the threshold for a situation of detention to fall within the scope of Article 3 of the European Convention on Human
Rights (ECHR), encompassing the prohibition of torture.

Family unification and the free movement of family
status was the second topic of the day. ***Michael Hellner***,
professor at Stockholm University, discussed several cases of the ECtHR (Ejimson v Germany) and the Court of Justice of the EU (CJEU) (K.A. v Belgium, Coman and S.M.). He concluded that family life does not automatically create a right of residence but it can create such a right in certain circumstances. In the Coman case for example, the CJEU decided that Romania had to recognize the marriage between the two men for the purpose of enabling such persons to exercise the rights they enjoy under EU law (i.e. free movement). Professor Hellner noted that it seems to be quite easy to circumvent national law in the future if one looks at the Coman case. He considered it positive if the consequence was that same-sex marriages and surrogacy arrangements created abroad
were recognized. However, he made the interesting observation that it might be a very different story if one thinks about child marriages and the recognition thereof.

Maria-Andriani Kostopoulou,
consultant in family law for the Council of Europe, thereafter shared her insights on parental rights, pre-adoption foster care and adoption. She discussed i.a. the evolution in the case law of the ECtHR on the representation of the child before the Court. In the Strand-Lobben case, the Court stated that the issue of representation does not require a restrictive or technical approach and thus made clear that a certain level of flexibility is necessary. In the Paradisio and Campanelli case, the ECtHR provided three criteria that should be taken into account for assessing the representation of the child: the link between the child and the representative, the subject-matter of the case and any potential conflict of interests between the interests of the child and those of the representative. The latest case, A. and B. against Croatia, introduced a security safeguard. In this case, the ECtHR asked the Croatian Bar Association to appoint a legal representative for the child for the procedure

before the ECtHR since the Court was not sure that there were no conflict of interests between the child and the mother, who proposed to be the representative.

To end the first conference day, ***Dmytro Tretyakov***, lawyer at the Registry of the ECtHR, enlightened us about the misconceptions and best practices of submitting a case to the Court. His most important tips for a submission to the Court are the following:

- Use the current application form and not an old one;
- Submit well in time and certainly within the six-month period;
- Summarize the facts of the case on the three pages provided. This summary has to be clear, readable (for those that do it in handwriting) and comprehensible;
- To state claims, refer to the relevant Article from the ECHR (do not cite it) and explain what the specific problem is with regard to that Article;
- Support each claim with documents; and
- Sign the form in the correct boxes and carefully look where the signature of the applicant and where the signature of the representative is required.

The second day of the conference started with the presentation of ***Nadia Rusinova***, attorney-at-law and lecturer at the Hague University of Applied Science, on international child abduction. She discussed i.a. the issue of domestic violence in child abduction cases. Several questions can be raised in this regard, for example: what constitutes domestic violence? When should a court accept the domestic violence to be established? What is adequate protection in light of the Hague Convention on International Child Abduction (1980) and who decides on this? In the case O.C.I. and others v Romania, one of the questions was whether there is such a thing as light violence that does not amount to a grave risk in the sense of Article 13(1)(b) of the Hague Convention. The ECtHR approached this issue very critically and stated that no form of corporal punishment is acceptable. Regarding the adequate measures, the Court stated that domestic authorities have a discretion

to decide what is adequate but the measures should be in place before ordering the return of the child. Another point raised by Ms. Rusinova is the time factor that is required. If one looks at Article 11(2) of the Hague Convention and at Article 11(3) of the Brussels IIbis Regulation together, six weeks is the required time period for the return proceedings. The Brussels IIbis Recast clarified that the procedure should take no more than six weeks per instance. However, according to Ms. Rusinova it is hardly possible to do the procedures in six weeks; it will only work when the proceeding is not turned into an adversarial proceeding in which all kinds of claims of both parents are dealt with.

Samuel Fulli-Lemaire, professor at the University of Strasbourg, addressed the interesting evolution of reproductive rights and surrogacy. In the case of C. and E. v France, the French Court of Cassation asked the ECtHR for an advisory opinion on the question whether the current state of the case law in France was compatible with the obligations under Article 8 ECHR (the right to respect for private and family life). The status of the French case law was that the genetic parent was fully accepted but the other intended parent was required to adopt the child if he or she wished to establish parentage links. The ECtHR replied that the obligation under Article 8 entailed that there must be a possibility of recognition of the parent-child relationship but that it is up to the States to decide how to do this. Adoption is a sufficient method of recognizing such relationship, provided that it is quick and effective enough. The Court also refers to the possibility of transcription of the birth certificate as an alternative to adoption. However, professor Fulli-Lemaire pointed out that there is a misconception on what transcription means under French law. The mere transcription of the birth certificate does not establish legal parentage in France. The fact that the ECtHR says that an intended parent can adopt or transcribe the birth certificate is therefore tricky because under French law the effects of the two methods are not at all the same.

The very last presentation of the conference was given by ***Gabriela Lünsmann***, attorney-at-law and member of the Executive Board of the Lesbian and Gay Federation in Germany. She spoke about LGBTQI

rights as human rights and hereby focused i.a. on transsexuals' gender identity and the case of X. v North-Macedonia. The question raised in that case is whether the state must provide for a procedure to recognize a different gender. The applicant had tried to change their gender but North-Macedonia did not offer any possibility to undergo an operation or to have medical treatment in that regard.
The applicant then went abroad for treatment. Back in North-Macedonia, he had his name changed but it was not possible to change his officially registered gender.
The applicant claimed that this amounted to a violation of Article 8 ECHR and specially referred to the obligation of the state to respect a person's physical and psychological integrity. The Court found that there was indeed a violation. What is as yet unclear, and is thus an interesting point for reflection, is whether states are under an obligation to provide for a procedure for the recognition of a change of gender without the person having had an operation.

The author would like to thank ERA for the excellent organization of the conference and for the interesting range of topics discussed.

Common law recognition of foreign declarations of parentage

This note addresses the question whether there is a common law basis for the recognition of foreign declarations of parentage. It appears that this issue has not received much attention in common law jurisdictions, but it was the subject of a relatively recent Privy Council decision (*C v C* [2019] UKPC 40).

The issue arises where a foreign

court or judicial authority has previously determined that a person is, or is not, a child's parent, and the question of parentage then resurfaces in the forum (for example, in the context of parentage proceedings or maintenance proceedings).

If there is no basis for recognition of the foreign declaration, the forum court will have to consider the issue de novo (usually by applying the law of the forum: see, eg, Status of Children Act 1969 (NZ)). This would increase the risk of "limping" parent-child relationships (that is, relationships that are recognised in some countries but not in others) – a risk that is especially problematic in the context of children born by way of surrogacy or assisted human reproduction technology.

The following example illustrates the problem. A baby is born in a surrogacy-friendly country to a surrogate mother domiciled and resident in that country, as the result of a surrogacy arrangement entered into with intending parents who are habitually resident in New Zealand. The courts of the foreign country declare that the intending parents are the legal parents of the child. Under New Zealand law, however, the surrogacy arrangement would have no legal effect, and the surrogate mother and her partner would be treated as the child's legal parents upon the child's birth. Unless the foreign judgment is capable of recognition in New Zealand, the only way for the intending parents to become the child's legal parents in New Zealand is to apply for adoption (see, eg, *Re Cobain* [2015] NZFC 4072, *Re Clifford* [2016] NZFC 1666, *Re Henwood* [2015] NZFC 1541, *Re Reynard* [2014] NZFC 7652, *Re Kennedy* [2014] NZFLR 367, *Re W* [2019] NZFC 2482, *Re C* [2019] NZFC 1629).

So what is the relevance of a foreign declaration on parentage in common law courts? In *C v C* [2019] UKPC 40, [2019] WLR(D) 622, the Privy Council decided that there was a basis in the common law for recognising such declarations, pursuant to the so-called *Travers v Holley* principle. This principle, which has traditionally been applied in the context of divorce and adoption, calls for recognition of foreign judgments on the basis of "jurisdictional reciprocity" (at [44]). The Privy Council

applied the principle to recognise a declaration of parentage made in Latvia, in relation to a child domiciled and habitually resident in Latvia, for the purposes of maintenance proceedings in the forum court of Jersey. Lord Wilson emphasised that, although foreign judgments may, in some cases, be refused on grounds of public policy, recognition will not be refused lightly: "a court's recognition of a foreign order under private international law does not depend on any arrogant attempt on that court's part to mark the foreign court's homework" (at [58]).

As a matter of policy, my first impression is that the Privy Council's decision is to be welcomed. Common law jurisdictions have traditionally taken a conservative, relatively "closed" approach to the recognition of foreign laws and judgments on parentage (see Hague Conference on Private International Law *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements* (Prelim Doc No 3C, 2014)). Such an approach has become increasingly indefensible in a world that is witnessing unprecedented levels of cross-border mobility and migration. The conflict of laws should, as a matter of priority, avoid limping parent-child relationships: for example, a child who was declared by the courts of their place of birth to be the child of the intending parents, but who is nevertheless treated as the surrogate mother's child under New Zealand law. The ability to recognise foreign judgments on parentage may not amount to *much* progress, given that it can apply only where the foreign court has, in fact, made a declaration of parentage: it would have no application where the relevant parent-child relationship simply arises by operation of law or through an administrative act (such as entry of the intending parents in the birth register). There is no doubt that an international solution must be found to the problem as a whole. But it is surely better than nothing.

Another question is what to make of the Privy Council's reliance on the *Travers v Holley* principle. Based on the decision in *Travers v Holley* [1953] P 246 (CA), the principle enables recognition of foreign judgments by virtue of reciprocity: the forum court will recognise a foreign judgment if the forum court itself would have had jurisdiction to grant the judgment had the facts been reversed (ie had the

forum court been faced with the equivalent situation as the foreign court). In the context of divorce, the principle has since been subsumed within a wider principle of "real and substantial connection" (*Indyka v Indyka* [1969] 1 AC 33 (HL)). In the context of adoption, the principle has been applied to recognise "the status of adoption duly constituted … in another country in similar circumstances as we claim for ourselves" (*Re Valentine's Settlement* [1965] Ch 831 (CA) at 842).

Perhaps it is not a big step from adoption to parentage more generally. The Privy Council recognised that the latter primarily represents "a conclusion of biological fact", while adoption "stamps a person with a changed legal effect" (at [39]). But the Privy Council did not seem to consider that this distinction should warrant a different approach in principle. In *C v C*, the issue of parentage involved a relatively straightforward question of paternity. Had the case involved a question of surrogacy or human assisted reproduction, the answer might well have been different. There is an argument that a parent-child relationship created under foreign law can only be recognised in the forum if the foreign law is substantially similar to forum law. Thus, in the context of adoption, it has been asked whether the concept of adoption in the foreign country "substantially conform[s] to the English concept" (*Re T & M (Adoption)* [2010] EWHC 964, [2011] 1 FLR 1487 at [13]). This requirement might not be made out where, for example, the law of the forum does not recognise parentage by way of surrogacy (as is the case in New Zealand).

The Privy Council cautioned that the Board did not receive full argument on the issue and that the reader "must bear the lack of it in mind" (at [34]). It seems especially important, then, for conflict of laws scholars to give the issue further consideration. This note may serve as a careful first step – I would be interested to hear other views. Perhaps the most encouraging aspect of the Board's reasoning, in my mind, is its openness to recognition. The Board's starting point was that the declaration could be recognised. Arguably, this was because counsel seemed to have largely conceded the point. But to the extent that it cuts through an assumption that questions of parentage are generally left to the law of the forum, it nevertheless strikes me as significant – even more so since the UK Supreme Court's previous refusal

to extend the *Travers v Holley* principle beyond the sphere of family law (*Rubin v Eurofinance SA* [2012] UKSC 46, [2012] 3 WLR 1019 at [110], [127]).