Bahraini High Court on Choice of Court and Choice of Law Agreements

I. Introduction

It is widely recognized that choice of court and choice of law agreements are powerful tools for structuring and planning international dispute resolution. These agreements play an important role in "increasing legal certainty for the parties in cross-border transactions and reducing incentives for (the harmful version of) forum shopping." (Alex Mills, *Party Autonomy in Private International Law* (CUP, 2018) p. 75). However, the realization of these objectives depends on the enforcement of the parties' choice. Unfortunately, general practice in the MENA (North Africa and the Middle East) region shows that, with a few exceptions, the status quo is far from satisfactory. Choice-of-court agreements conferring jurisdiction on foreign courts are often disregarded or declared null and void. Similarly, the foreign law chosen as the governing law of a contract is often not applied because of the procedural status of foreign law as a matter of fact, the content of which must be ascertained by the party invoking its application. The recent judgment of the High Court of Bahrain (a first instance court in the Bahraini judicial system) in the *Case No. 2/13276/2023/02 of 17 January 2024* is nothing but another example of this entrenched practice that can be observed in the vast majority of countries in the region.

II. Facts

X (plaintiff, an English company) entered into a pharmaceutical distribution and sales agreement with Y1 (defendant, a Bahraini company), in 2017 in Bahrain. The agreement provided that disputes arising out of or in connection with the agreement would be subject to the exclusive jurisdiction of the courts of England and Wales. The parties also agreed that English law should be the governing law.

Following Y1's failure to make due payments as agreed, X initiated legal proceedings against Y1, Y2 and Y3 (both Bahraini nationals and partners in Y1) in the High Court of Bahrain, seeking payment and some other related costs under

Bahraini law. The defendants challenged the jurisdiction of the Bahraini court based on the forum selection clause, but did not present any claim as to the merits of the case.

III. The Ruling

The High Court ruled as follow to affirm its jurisdiction and the application of Bahraini law:

[Regarding international jurisdiction]

"[The defendants] challenge the jurisdiction of the Bahraini courts to hear the dispute on the basis that the contract contains a jurisdiction clause which confers exclusive jurisdiction on the English courts to hear any dispute arising out of or relating to the contract. However, according to Articles 14 and 15 of the Code of Civil Procedure, the Bahraini courts have jurisdiction over actions brought against Bahraini nationals, regardless of the nature of the dispute, as long as they have Bahraini nationality at the time the action is brought, without any further conditions, except for in rem actions relating to immovable property located outside Bahrain. Thus, the jurisdiction of the Bahraini courts is based on personal nexus, i.e. the nationality of the defendant, and any agreement to deviate from this jurisdiction is inadmissible because of its connection with public policy. This is because it is the State that determines the jurisdiction of its courts in order to serve the public interest, i.e. to ensure justice, which is one of its primary functions, and to maintain order and peace within its territory. (Underline added).

[Since Y1 is a Bahraini limited liability company and Y2 and Y3, who are partners in Y1, are Bahraini nationals,] it is not permissible to waive the jurisdiction of the Bahraini courts, which retain jurisdiction over the [present] dispute.

[Regarding the applicable law]

It is clear from the contract that the parties agreed that any disputes arising out of the contract should be governed by the laws of England and Wales. Pursuant to Article 4 of Law No. 6 of 2015 on Conflict of Laws in Civil and Commercial Matters with Foreign Elements, the parties may choose the applicable law. [However], Article 6(a) of the same law requires the parties to the dispute to

submit the text of the applicable law, failing which Bahraini law shall be deemed applicable. [In the present case], neither party has submitted the agreed law governing the dispute, and X, which [as the foreign party] , requested the application of Bahraini law and relied on the provisions of the Bahraini Commercial Companies Law in its statement of claim. Since the court is not required to ask the parties [to provide the content] the applicable law, as this obligation rests with the parties themselves, Bahraini law shall be applied to the [present] dispute".

IV. Comments:

1. *Sources of Law*

It should be indicated from the outset that in Bahrain, rules governing international jurisdiction are primarily found in the Code of Civil and Commercial Procedure of 1971 (hereafter referred to as "CCCP," articles 14-20). Regarding choice of law rules, those concerning family law and successions (i.e., personal status) are included in the CCCP (articles 21 and 22), while those concerning civil and commercial matters, including rules pertaining to general theory, are laid down in a special Law on Conflict of Laws in Civil and Commercial Matters with Foreign Elements (Law No. 6 of 2015).[(*)]

[(*)] One may wonder about the reasons behind keeping the choice of law rules in matters of family law and successions within a law dealing with civil and commercial procedure, especially since the Bahraini legislator codified the conflict of law rules in an autonomous act dealing with conflicts of laws (choice of law). There have been some calls to consolidate all private international law rules (including choice of law, international jurisdiction) in a single act dealing with legal relationships involving foreign elements (see eg., Awadallah Shaiba Al-Hamad Al-Sayed, "An Analytical and Critical Study of the Law No. 6 of 2015 on the Conflict of Laws in Civil and Commercial Matters – Kingdom of Bahrain", *Legal Studies*, Vol. 2, 2019, pp. 224 ff (in Arabic)), however, no actions have been taken so far to implement this proposal.

2. *International Jurisdiction*

Interestingly, the rules of international jurisdiction contained in the CCCP deal *mainly* with actions brought against non-Bahraini nationals, either on the basis of their domicile/residence in Bahrain (general jurisdiction, Article 14 of the CCCP) or in certain other matters depending on the category of dispute (special jurisdiction, Article 15 of the CCCP). The fact that the rules on international jurisdiction refer only to foreign defendants raised the question of whether Bahraini courts could assume jurisdiction based on the nationality of the defendant (Cf. Hosam Osama Shaaban, *Treatises on Bahraini Private International Law* (Al-Bayan Media, 2016), p. 277 [in Arabic]).

In a number of cases, the Supreme Court has ruled in the affirmative. For example, in a decision issued in 2014, the Bahraini Supreme Court held that "*even if the Bahraini legislator did not establish the rules of international jurisdiction of the Bahraini courts in the CCCP with regard to lawsuits filed against Bahraini nationals, it is understood that the jurisdiction of the national courts over [such lawsuits] stems from the consideration of [judicial jurisdiction] as a manifestation of the sovereignty of the State, which extends to what falls under this sovereignty*" (*Supreme Court, Appeal No. 531/2013 of 15 April 2014*). In another case, the Supreme Court confirmed its ruling by considering that "*persons holding Bahraini nationality are subject to the jurisdiction of Bahraini courts as a manifestation of the state's sovereignty over its citizens*", thus recognizing the jurisdiction of Bahraini courts over Bahraini nationals even if they hold a second nationality and are not resident in Bahrain (*Supreme Court, Appeal No. 77/2017 of 11 April 2018*).

In this regard, it can be said that the High Court's decision commented here is fully consistent with the well-established case law of the Supreme Court.

3. *Choice of Court Agreements*

With respect to the admissibility of choice of court agreements, it should be noted that agreements with *prorogative* effect, i.e., choice of court agreements that confer jurisdiction on Bahraini courts that are not otherwise competent, are generally admitted (see article 17 of the CCCP [dealing with explicit or tacit submission to the jurisdiction of Bahraini courts]; article 19 of Legislative Decree

No. 30 for the year 2009 with respect to the Bahrain Chamber for Economic, Financial and Investment Dispute Resolution (BCDR) [on the jurisdiction of the BCDR based on the agreement of the parties]. See also, eg, *Supreme Court, Appeals Nos. 154 and 165/2017 of 20 May 2017* [tacit submission to the jurisdiction of Bahraini courts]).

However, with respect to agreements with *derogative* effect, although the law is silent on the matter, the Supreme Court has ruled *against* their admissibility. This is particularly the case of the Supreme Court ruling in a decision rendered in 2006 (*Supreme Court, Appeal No. 231/2005 of 27 February 2006*). The case concerned a lawsuit filed by a former foreign employee against his Bahraini employer, claiming overdue employment rights. The employer relied on a choice of forum clause in favor of the English court, arguing that Bahrain's rules on international jurisdiction (articles 14 and 15 of the CCCP) apply only in the absence of a written agreement between the parties when one of them is a foreigner, and that rules on international jurisdiction do not concern public policy; therefore, nothing should prevent the parties from displacing the jurisdiction of Bahraini courts in favor of a foreign court. The Supreme Court disagreed. However, instead of framing its decision in the particular context of the employment relationship, where the employee – as the weaker party – deserves special protection, the Court proclaimed the principle that any agreement by which the parties derogate from the jurisdiction Bahraini courts conferred under Bahraini law "shall be deemed null and void and shall not be invoked" to challenge the jurisdiction of courts in Bahraini (*Supreme Court, Appeal No. 231/2005 of 27 February 2006*).

The High Court's decision commented here is consistent with this ruling. In fact, the underlying part of the first paragraph of the High Court's decision quoted above is almost a verbatim copy from the Supreme Court's decision of 27 February 2007 mentioned above.

Finally, it should be indicated that the position of the Bahraini courts on this issue is broadly similar to that of other countries in the region, as noted in the Introduction. (For a brief overview of some relevant Supreme Court decisions from various MENA Arab countries and the implications of this position for the enforcement of foreign judgments in the region, see Béligh Elbalti, "Perspective of Arab Countries," in M. Weller et al. (eds.), *The 2019 HCCH Judgments Convention – Cornerstones, Prospects, Outlook* (Hart, 2023), p. 188.)

4. *Party Autonomy – Principle*

The principle of party autonomy is enshrined in Article 4 of Law No. 6 of 2015, which states that the "[p]arties may agree to choose the applicable law […]". Bahraini courts have recognized the principle of freedom of parties to choose the applicable law (eg, *Supreme Court, Appeal No. 641/2011 of 27 May 2011*). The courts did so even in the absence of legislative guidance prior to the adoption of the current applicable rules (see eg, *Supreme Court Appeal No. 143/1994 of 4 December 1994*). The High Court in the present case did not deviate from this "well-established" principle, which is rooted in both Bahraini statutes and case law. (For a detailed study based on Bahraini case law, see Béligh Elbalti & Hosam Osama Shabaan, "Bahrain – Bahraini Perspectives on the Hague Principles", in D. Girsberger *et al.* (eds.), *Choice of Law in International Commercial Contracts – Global Perspective on the Hague Principles* (OUP, 2021), pp. 414 ff).

5. *Party Autonomy – Practice*

In practice, however, as demonstrated by the High Court decision, there is a gap between the affirmation of the principle of party autonomy on the one hand and the actual application of the chosen law to a concrete case on the other. This gap arises from the fact that, under Bahraini law as regularly confirmed by case law, foreign law is treated as a fact, the content of which must be determined by the party requesting its application (see eg, Article 6 of Law No. 6 of 2015. For further details and examples, see Elbalti & Shaaban, *op cit.*, at 420-421). Consequently, failure to ascertain the content of the foreign law would normally result in the application of Bahraini law. The same principle applies even in cases where the parties have made a choice of law agreement. For example, in the aforementioned Supreme Court decision in the *Appeal No. 143/1994 of December 4, 1994*, although the Court recognized that the parties had (implicitly) agreed on Pakistani law as the applicable law, it ultimately excluded the application of the chosen law because its content had not been established. (For further details and examples, see Elbalti & Shaaban, *op cit.*). The High Court did not deviate from this general approach showing by this some degree of consistency in the Bahraini courts' practice.

6. *Epilogue*

In the case commented here, the court justified the application of Bahraini law on the grounds that the content of the law chosen by the parties had not been submitted to the court. To some extent, it may be questioned whether such a justification is acceptable, as it could be argued that there was a tacit agreement to apply Bahraini law instead of the chosen law (on the issue of tacit choice of law under Bahraini law and the relevant Supreme Court cases, see Elbalti & Shaaban, *op cit.,* pp. 423-425). However, as evidenced by the facts of the case, the defendants in this case did not present any arguments on the merits, but merely challenged the jurisdiction of the Bahraini court. The mere fact that the plaintiff based its claim on Bahraini law by relying on the relevant provisions of the Bahraini Commercial Companies Law does not in itself constitute an "implied" agreement to apply Bahraini law.

On this particular point, it is interesting to compare the decision of the High Court discussed here with another decision issued by the same court just thirteen days earlier in a case involving similar legal issues, namely the admissibility of a choice of court agreement in favor of the Cayman Islands courts and the application of Cayman Islands law as the law chosen by the parties (*High Court, Case No. 5/11341/2023/02 of 4 January 2024*). In this case, the High Court ruled in exactly the same way as in the present case with regard to the admissibility of the choice of court agreement. However, with respect to the application of Cayman Islands law, the court held that there was an implied agreement to apply Bahraini law in lieu of the chosen law because both parties based their claim on the provisions of Bahraini law and relied on relevant Supreme Court decisions.

U.S. Supreme Court Decides *Great*

Lakes

On February 21, 2024, the U.S. Supreme Court handed down its decision in *Great Lakes Insurance SE v. Raiders Retreat Realty Company, LLC*.

The question presented was whether, under federal admiralty law, a choice-of-law clause in a maritime contract can be rendered unenforceable if enforcement is contrary to the "strong public policy" of the U.S. state whose law is displaced. In a unanimous opinion authored by Justice Kavanaugh, the Court concluded that the answer to this question was no. It held that choice-of-law provisions in maritime contracts are presumptively enforceable as a matter of federal maritime law. It further held that while there are narrow exceptions to this rule, state public policy is not one of them.

Facts

Great Lakes Insurance SE (GLI) is a corporation organized under the laws of the Germany that is headquartered in the United Kingdom. Raiders Retreat Realty Co., LLC (Raiders) is a company organized under the laws of Pennsylvania. GLI insured a yacht owned by Raiders. The marine insurance contract signed by the parties contained the following choice-of-law clause:

> *It is hereby agreed that any dispute arising hereunder shall be adjudicated according to well established, entrenched principles and precedents of substantive United States Federal Admiralty law and practice but where no such well-established, entrenched precedent exists, this insuring agreement is subject to the substantive laws of the State of New York.*

After the yacht ran aground in Florida and sustained significant damage, Raiders filed a claim. GLI denied the claim on the ground that the yacht's fire-extinguishing equipment had not been recertified or inspected. Although the damage to the yacht was not caused by fire, GLI took the position that Raiders had misrepresented the vessel's fire suppression system's operating ability, thereby making the policy void from inception.

After denying the claim, GLI filed an action for a declaratory judgment in the U.S.

District Court for the Eastern District of Pennsylvania. It asked the court to hold that the policy was void due to the alleged misrepresentations by Raiders with respect to the fire extinguishers. In response, Raiders asserted five counterclaims against GLI: (1) breach of contract, (2) breach of implied covenant of good faith and fair dealing, (3) breach of fiduciary duty, (4) bad faith liability under 42 Pa. Const. Stat. §8371, and (5) violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law.

GLI moved for judgment on the pleadings with respect to the fourth and fifth counterclaims. It argued that these claims were not viable because the policy's choice-of-law provision had designated New York as the governing law in the absence of applicable federal maritime law. Because the claims were based on Pennsylvania statutes, it argued, they were barred by the choice-of-law clause. Raiders opposed this motion. It argued that the choice-of-law clause was unenforceable because it was contrary to Pennsylvania's strong public policy of punishing insurers who deny coverage in bad faith.

The trial court ruled in favor of GLI. The Third Circuit ruled in favor of Raiders. The Supreme Court granted GLI's cert petition and heard oral arguments on October 10, 2023.

Decision

The Court held that the issue of whether a choice-of-law clause in a maritime contract is enforceable is governed by federal law. In support of this conclusion, the Court noted that it had previously held that the enforceability of forum selection clauses in these contracts is governed by federal law. It would be strange, the Court reasoned, to adopt a different rule with respect to choice-of-law clauses. The Court further held that choice-of-law clauses in maritime contracts were "presumptively enforceable." Again, this conclusion logically followed from the fact that the Court had previously held that forum selection clauses in maritime contracts are "prima facie valid."

After discussing why the Court's decision in *Wilburn Boat Company v. Fireman's Fund Insurance Company* (1955) did not dictate a different outcome, the Court turned its attention to the question of when a choice-of-law clause in a maritime contract should not be enforced. It held that courts should disregard these

clauses in situations where applying the chosen law would "contravene a controlling federal statute" or "conflict with an established federal maritime policy." It also held that these clauses should not be given effect when there was no "reasonable basis" for selecting the law of the chosen jurisdiction. However, the Court expressly rejected the argument advanced by Raiders that a choice-of-law clause in a maritime contract was unenforceable if applying the law of the chosen state would be contrary to a fundamental policy of a state with a greater interest in the dispute.

In rejecting this argument, the Court explained that a federal presumption of enforceability "would not be much of a presumption if it could be routinely swept aside based on 50 States' public policy determinations." It reasoned that the "ensuing disuniformity and uncertainty caused by such an approach would undermine the fundamental purpose of choice-of-law clauses in maritime contracts: uniform and stable rules for maritime actors." The Court also noted that nothing in its previous decisions relating to the enforceability of forum selection clauses in maritime contracts suggested that state public policy was relevant to whether these clauses should be given effect.

Finally, the Court declined to adopt the argument—advanced by me and Kim Roosevelt in an *amicus* brief prepared with the assistance of the North Carolina School of Law Supreme Court Program—that it should resolve the question of enforceability by looking to Section 187(2) of the Restatement (Second) of Conflict of Laws. The Court reasoned that the rule laid down in Section 187 "arose out of interstate cases and does not deal directly with federal-state conflicts, including those that arise in federal enclaves like maritime law." The Court also pointed out that Section 187 was a "poor fit" for maritime cases in part because it would "prevent maritime actors from prospectively identifying the law to govern future disputes."

Analysis

I had two great fears going into this case. Thankfully, neither was realized.

First, I was concerned that the Court might take the test it had previously articulated for determining whether a *forum selection clause* should be given effect as a matter of federal maritime law and apply that test to *choice-of-law*

clauses. This is, in essence, what the Third Circuit did in its decision below. Such an approach would, in my view, have generated a great deal of mischief. Although choice-of-law clauses and forum selection clauses are often invoked in the same breath, they are not the same and the courts should utilize different tests to evaluate whether they should be enforced. I was relieved that the Court chose not to go down this path. The test laid down in *Great Lakes* for determining whether a choice-of-law clause in a maritime contract is enforceable is distinct and different from the test for determining whether a forum selection clause laid down in *The Bremen* and *Carnival Cruise.*

Second, I was concerned that the Court's test for enforcing choice-of-law clauses might be couched in such broad language that it would eventually supplant Section 187 in non-maritime cases. This is essentially what happened when the Court decided *The Bremen* in 1972. Although that decision only applied to forum selection clauses in maritime contracts, the sweeping language utilized by the Court ultimately brought about a significant change in practice in non-maritime cases. The language in *Great Lakes*, by comparison, is much more carefully drawn. Throughout the opinion, Justice Kavanaugh consistently frames the issue as whether a choice-of-law clause is enforceable *in a maritime contract* rather than in a more general sense. The rationales articulated by the Court for declining to adopt the rule laid down in Section 187 are similarly encouraging. The Court stated that Section 187 was not the right rule because it "arose out of interstate cases and does not deal directly with federal-state conflicts." This language suggests that Section 187 should provide the relevant rule of decision in cases relating to the enforceability of choice-of-law clauses when the conflict of laws is between two states—or between a state and foreign country—rather than between state and federal law.

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Implied Jurisdiction Agreements in International Commercial Contracts

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A Introduction

In an increasingly globalised economy, commercial transactions often involve business entities from different countries. These cross-border transactions present complex legal questions, such as the place where potential disputes will be adjudicated. To provide certainty, commercial parties often conclude *ex ante* agreements on the venue for dispute resolution by selecting the court(s) of a particular state. However, what happens if no such express agreement over venue is reached for resolving a contractual dispute? Could consent to the venue be implicitly inferred from the parties' conduct or other factors?

Explicit jurisdiction clauses offer cross-border litigants the benefit of predictability by allowing them to anticipate where disputes arising from their commercial transactions will be resolved. However, business entities sometimes neglect to include express provisions for the venue, whether inadvertently or due to their inexperience. In such cases, firms may have implicitly agreed on a venue through their actions or based on their tacit understanding. This type of 'unwritten' jurisdiction agreement remains largely unexplored in the legal scholarship.

Relatively recently, the validity or enforceability of implied jurisdiction agreements arose in the Privy Council Case of Vizcaya Partners Ltd v Picard & Anor [2016] UKPC 5. In this Case, following a comprehensive survey of the existing academic and judicial authorities, Lord Collins held that since it is commonplace for a contractual agreement or consent to be implied or inferred, 'there is no reason in principle why the position should be any different in the

case of a contractual agreement or consent to the jurisdiction of a foreign court'. However, in the wake of the above Case, the notion of an implied jurisdiction agreement drew limited scholarly research attention (for instance, see Kennedy, (2023); Kupelyants, 2016). Moreover, there has been no systematic analysis of how it aligns with the needs of the international business community.

In our latest article, published in the 2023 edition of the *Journal of Private International Law*, vol. 19(3), we examine the enforceability of implied jurisdiction agreements from a global comparative perspective. Therefore, our paper provides the first comparative global perspective of the enforcement of implied jurisdiction in international contracts. Our analysis reveals uncertain and subjective standards for implied jurisdiction agreements, which undermine the needs of international commerce. While limited scenarios may justify enforcing implied jurisdiction agreements, our paper advocates restraint, given that the criteria for inferring consent are complex, unpredictable, and variable across legal systems.

B Implied Jurisdiction Agreements Create Uncertainty for Business

The main thesis of our article is that implied jurisdiction undermines the core needs of business entities engaging in cross-border commercial transactions. These entities value legal certainty and predictability, in order to make informed choices and plan business activities. However, by their very nature, implied terms offer less clarity concerning the governing law and jurisdiction agreements.

Our article likewise surveys primary legal sources across common law, civil law and mixed legal systems (as well as insights from academics and practising lawyers), assessing whether implied jurisdiction agreements are widely recognised. We find limited consensus on the conduct that demonstrates implied consent or agreement to litigate in a particular forum. Factors such as previous interactions between contracting parties and trade usage in an industry are highly subjective. Even common law tests for inferring implied terms, like the 'officious bystander' and 'business efficacy' rule, fail to clarify how these terms apply specifically to international jurisdiction.

This uncertainty requires the courts to undertake a complex, case-by-case analysis of parties' unspoken intent. However, companies benefit from consistency in interpreting cross-border transactions, whereas a lack of clarity risks complicating commercial disputes, rather than resolving them efficiently.

Overall, the unclear standards surrounding implied jurisdiction agreements are incapable of delivering the stability required by global businesses when operating across legal systems.

C Treatment under International Conventions

International treaties are aimed at harmonising divergent national laws and policies on jurisdiction, applicable law, and the recognition and enforcement of foreign judgments. The 2005 Hague Convention on Choice of Court Agreements (HCCA) governs exclusive choice of court agreements from a global perspective. Articles 3(c) and 5(1) address formal and substantive validity. Our paper suggests that the requirement for the written form under Article 3(c) may present challenges in implying jurisdiction agreements. Consequently, it is difficult to envision situations where implicit jurisdiction agreements could arise under the Hague Choice of Court Convention, given that the initial hurdle is the requirement for the agreement to be in writing.

The spirit of the HCCA is further reflected in the 2019 Hague Judgments Convention, which seeks to promote express – as opposed to implicit – jurisdiction agreements between parties. For instance, Article 5 of the Convention exhaustively lists permitted grounds for establishing international jurisdiction. This provides clarity for commercial parties who are litigating abroad. Consequently, implied jurisdictions agreements are conspicuously absent and so the policy favours explicit consent. Accordingly, we argue that the emerging global consensus dictates caution around enforcing implied jurisdiction agreements that could disrupt settled jurisdictional principles in the international context.

Brussels Ia and the Lugano Convention share provisions for the validity of a jurisdiction agreement. Namely, consent must be in writing, or evidenced in writing. This aligns with the Hague frameworks: the HCCA and the Judgments Convention. While some scholars argue for the validity of implied jurisdiction agreements in specific contexts (especially trade usage and previous dealings between parties), the prevailing view requires clear and precise consent. By way of illustration, CJEU's stance in Cases like Galeries Segoura SPRL, ProfitInvestment SIM SpA and Colzani, implies a stringent approach to consent.

D Should Implied Jurisdiction Agreements be Enforced?

In section IV of our paper, we examine the justification and rationale for the recognition or otherwise of implied jurisdiction agreements, having, *inter alia,* considered the diverse approaches adopted by the many courts across the globe.

1. **Business Efficacy and Commercial Expectations**

Party autonomy, a cornerstone of private international law, emphasises the importance of upholding the presumed intentions of the contracting parties. The recognition of implied jurisdiction agreements potentially aligns with the principle of party autonomy, since it seeks to fill gaps in contracts and thereby reflect the parties' unexpressed intentions, as noted by Lord Neuberger. In the context of English law, Lord Collins relied on the business efficacy and officious bystander analogy to imply jurisdiction agreements in *Vizcaya*.

Additionally, the application of business efficacy logic can mitigate challenges such as parallel proceedings or the fragmentation of disputes. Extending a jurisdiction agreement to closely related contracts, even in the absence of explicit terms, will reduce uncertainty and meet commercial expectations. Certainty, convenience, and the efficient administration of justice are paramount considerations for rational businessmen who would rather not litigate in separate courts. Nonetheless, Cases like *Terre Neuve Sarl v Yewdale Ltd* [2020] and Etihad *Airways PJSC v Flother* [2020] reveal complexities in ascertaining commercial expectations and business efficacy. Divergent approaches to interpreting and implying terms, coupled with the challenge of defining what constitutes a reasonable businessperson, further contribute to the uncertainty and unpredictable outcomes.

2. The Choice of Law Analogy

Implied choice of law is well-established in private international law. Moreover, it is recognised in various international instruments and across common law, mixed, and civil law jurisdictions. While jurisdiction and choice of law are distinct, the underlying principle of implied choice of law may apply to implied jurisdiction agreements.

Globally, the interrelationship between jurisdiction and choice of law is acknowledged. For instance, a choice of court agreement is widely regarded as a highly significant factor in determining an implied choice of law. The applicable law of a contract, while not determinative of jurisdiction, remains significant. However, challenges arise when parties fail to expressly state the applicable law, leading to a strict standard for implying the choice of law based on a number of factors.

Despite the recognition of implied choice of law, we argue against transposing this principle directly to the question of jurisdiction. Jurisdiction involves the exercise of state powers over litigants, and while implied choice of law may indicate a governing law, it does not necessarily imply submission to the jurisdiction of a specific court. Instead, the distinct nature of jurisdiction agreements calls for a nuanced approach.

3. International Jurisdiction and the Recognition of Foreign Judgments

Implied jurisdiction agreements play a dual role, serving as a basis for establishing both direct and indirect jurisdiction. Courts often decide on the enforceability of judgments based on the existence of a jurisdiction agreement, whether express or implied.

Different thresholds apply to direct and indirect jurisdiction. This differentiation reflects the complexities involved in establishing jurisdiction in cross-border disputes. While policy considerations may influence the exercise of direct jurisdiction, recognising and enforcing foreign judgments necessitates adherence to some very specific, often stricter, criteria set by the court addressed.

The inherent connection between jurisdiction and judgments underscores the need for certainty in cross-border litigation. Implied jurisdiction agreements lack globally established criteria. This introduces ambiguity and can lead to prolonged legal proceedings, given that litigants will often draw attention to implicit jurisdiction agreements at the enforcement stage. In short, it undermines the efficiency sought in international business transactions.

On the strength of the inefficiency that can arise from an exercise of jurisdiction based on implicit agreements, we argue that the concept of implied jurisdiction agreements adds little (if any) value to the recognition and enforcement of foreign judgments. Conversely, the HCCH 2019 Judgments Convention provides clear

jurisdictional grounds, consequently averting the need for implied agreements. The Convention's carefully drafted criteria support the global pursuit of certainty and predictability in cross-border commercial legal frameworks.

E Conclusion

In closing, we argue that implied jurisdiction agreements do not align with the needs of international commerce or the emerging global consensus on international jurisdiction. Aside from the very limited recognition of implied jurisdiction agreements under certain international instruments such as Brussels Ia, our study further reveals divergent national approaches to implied jurisdiction agreements. For several reasons, we advocate caution regarding the validity of implicit agreements:

1. Consent is not genuinely mutual if one party disputes the existence of an implied agreement: genuine consent must be clear.
2. Implied agreements provide minimal value: even without them, jurisdiction can be founded on close connections between the contract and forum.
3. The emerging global consensus on jurisdiction, as seen in the HCCH Conventions, emphasises predictability through the requirement for well-defined but restricted grounds. Implied agreements therefore fail to align with the policy behind these instruments and the emerging consensus.

Our overall conclusion is that express jurisdiction agreements should remain the priority for cross-border contracts.

A note on "The BBC Nile" in the High Court of Australia – foreign arbitration agreement and choice of law clause and Article 3(8) of the Amended Hague Rules in Australia

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Introduction

On 14th February 2024, the High Court of Australia handed down its judgment in *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG* [2024] HCA 4. The case has ramifications on whether a foreign arbitration clause (in this case, the London arbitration clause) would be null and void under the scheme of the *Carriage of Goods by Sea Act 1991* (Cth) which makes effective an amended version of the International Convention on the Unification of Certain Rules of Law relating to Bills of Lading, Brussels, 25 August 1924 (the "Hague Rules"). The argument focused on the potential effect of Article 3(8) of the Amended Hague Rules, which, like the original version, provides:

"Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligent, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in *these Rules*, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability".

BRIEF FACTS OF THE CASE

The case involved a carriage of head-hardened steel rails from Port of Whyalla in South Australia to the Port of Mackay in Queensland. When the goods arrived at the Port of Mackay, it was discovered that goods were in damaged conditions to the extent that they could not be used, and they had to be sold for scrap. A bill of lading issued by the carrier, BBC, containing the following clauses:

"**3. Liability under the Contract**

- Unless otherwise provided herein, the Hague Rules contained in the International Convention for the Unification of Certain Rules Relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this Contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply. In respect of shipments to which there are no such enactments compulsorily applicable, the terms of Articles I-VIII inclusive of said Convention shall apply…."

4. **Law and Jurisdiction**

Except as provided elsewhere herein, any dispute arising under or in connection with this Bill of Lading shall be referred to arbitration in London. The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) terms. The arbitration Tribunal is to consist of three arbitrators, one arbitrator to be appointed by each party and the two so appointed to appoint a third arbitrator. English law is to apply".

The carrier, BBC, commenced arbitration in London according to Clause 4 of the bill of lading. Carmichael, on the other hand, commenced proceeding before the Federal Court of Australia to claim damages. Carmichael sought an anti-suit injunction to restrain the arbitration proceeding. BBC, on the other hand, sought a stay of the Australian proceeding.

ARGUMENTS IN THE HIGH COURT OF AUSTRALIA

Carmichael contended that Clause 4 should be null and void because of Article 3(8) of the Amended Hague Rules. First, there is a risk that London arbitrators will follow the position of the English law in *Jindal Iron and Steel Co Ltd and Others v Islamic Solidarity Shipping Co. Jordan Inc* (*The "Jordan II"*) [2004] UKHL 49 and found the carrier's duty to properly stow and care for the cargo under

Article 3(2) of the Hague Rules to be a delegable duty, as opposed to an inclination of the court in Australia, as shown in the New South Wales Court of Appeal decision in *Nikolay Malakhov Shipping Co Ltd v SEAS Sapfor Ltd* (1998) 44 NSWLR 371. Secondly, there is a risk that the London arbitrators would construe Clause 3 as incorporating Article I-III of the Hague Rules, instead of the Amended Hague Rules of Australia. This would result in reducing the package limitation defence. Thirdly, there would be more expenses and burdens on the part of Carmichael to have to pursue its claim against BBC in London.

REASONING OF THE HIGH COURT OF AUSTRALIA

Whether Article 3(8) is applicable, the High Court of Australia found as a matter of principle that the court must consider all circumstances (being past, present, or future) whether a contractual clause relieves or lessen the carrier's liability. The standard of proof to be applied in considering such circumstances is the civil standard of the balance of probability. The court drew support from section 7(2) and section 7(5) of the *International Arbitration Act 1974* (Cth), as the parties relied on this piece of legislation in seeking an anti-suit injunction or a stay of the proceeding. In section 7(2), the language is that the court "shall" stay the proceedings if a matter is capable of settlement by arbitration. In section 7(5), again, there is a word "shall" in that the court shall not stay the proceedings under subsection (2) if the court finds the arbitration agreement to be null and void. As the High Court of Australia emphasised in paragraph 25 of its judgment: "For an Australian court to 'find' an arbitration agreement null and void … it must be able to do so as a matter of law based on agreed, admitted, or proved fact". Such proof is on the balance of probabilities pursuant to the *Evidence Act 1995* (Cth). Moreover, the Amended Hague Rules in Australia ultimately has the nature of an international convention. The interpretation of which must be done within the framework of the Vienna Convention on the Law of Treaties 1969 which requires that relevant rules of international law must be considered. The burden of proof which international tribunals usually adopt is that of "preponderance of evidence", which is no less stringent than that of the balance of probabilities. This supports what the High Court of Australia found in paragraph 32 of its judgment that "references to a clause 'relieving' a carrier from liability or 'lessening such liability' are to be understood as referring to facts able to be found in accordance with the requisite degree of confidence…" Also, the High Court of Australia found the overall purpose of the Hague Rules is to provide a set of rules which are

certain and predictable. Any attempt to apply Article 3(8) to the circumstances or facts which are not agreed or admitted or proved would run against the overall objective of the Hague Rules.

A reference was also made to an undertaking made by BBC before the Full Court of the Federal Court of Australia that it would admit in the arbitration in London that the Amended Hague Rules would be applicable to the dispute and BBC did consent to the Full Court of the Federal Court of Australia to make declaration to the same effect. It was argued by Carmichael that the undertaking and the subsequent declaration should not be considered because they came after BBC had commenced the arbitration pursuant to Clause 4. However, the High Court of Australia, emphasised in paragraph 59 that the agreed or admitted or proved facts *at the time the court is deciding whether to engage Article 3(8)* are what the courts consider. The effect of the undertaking and the declaration are that it should be amounted to the choice of law chosen by the parties within the meaning of section 46(1)(a) of the Arbitration Act 1996 and should effectively supersede the choice of the English law in Clause 4 of the bills of lading.

All the risks pointed out by Carmichael are unreal. First, the indication of the New South Wales Court of Appeal in the *Nikolay Malakhov* case in respect of Article 3(2) of the Hague Rules was not conclusive as it was *obiter* only. There is no clear legal position on this in Australia. Secondly, the language of Clause 3 is that Article I-VIII are to be applied if there are "no such enactments". But the country of shipment in this case (namely Australia) enacts the Hague-Rules. Moreover, there is no ground for any concern in light of the undertaking and the declaration. Lastly, Article 3(8) of the Amended Hague Rules concerns with the carrier's liability. It is not about the costs or burdens in the enforcement process. Hence, the Australian proceeding is to be stayed.

COMMENT

As the High Court of Australia emphasised, whether Article 3(8) of the Amended Hague Rules is to be engaged depending upon facts or circumstances at the time the court is deciding the question. This case was pretty much confined to its facts, as could be seen from the earlier undertaking and the declaration which the High Court of Australia heavily relied upon. Nevertheless, the door is not fully closed. There is a possibility that the foreign arbitration and the choice of law clause can be found to be null and void pursuant to Article 3(8) if the facts or circumstances

are established on the balance of probabilities that the tribunals will apply the foreign law which has the effect of relieving or lessening the carrier's liabilities.

French Supreme Court ruling in the Lafarge case: the private international law side of transnational criminal litigations

Written by Hadrien Pauchard (assistant researcher at Sciences Po Law School)
In the *Lafarge* case (Cass. Crim., 16 janvier 2024, n°22-83.681, available here), the French Cour de cassation (chambre criminelle) recently rendered a ruling on some criminal charges against the French major cement manufacturer for its activities in Syria during the civil war. The decision addresses several key aspects of private international law in transnational criminal lawsuits and labour law.

From 2012 to September 2014, through a local subsidiary it indirectly controlled, the French company kept a cement plant operating in a Syrian territory exposed to the civil war. During the operation, the local employees were at risk of extortion and kidnapping by armed groups, notably the Islamic State. On these

facts, in 2016, two French NGOs and 11 former Syrian employees of *Lafarge*'s Syrian subsidiary pressed criminal charges in French courts against the French mother company. Charges contend financing a terrorist group, complicity in war crimes and crimes against humanity, abusive exploitation of the labour of others as well as endangering the lives of others.

After lengthy procedural contortions, the *chambre d'instruction* of the Cour d'appel de Paris (the investigating judge) confirmed the indictments in a ruling dated May 18th, 2022. Here, the part of the decision of most direct relevance to private international law concerns the last incrimination of endangering the lives of others. The charge, set out in Article 223-1 of the French Criminal Code, implicates the act of directly exposing another person to an immediate risk of death or injury likely to result in permanent mutilation or infirmity through the manifestly deliberate violation of a particular obligation of prudence or safety imposed by law or regulation. The *chambre d'instruction* found that the relationship between *Lafarge* and the Syrian workers was subject to French law, which integrates the obligations of establishing a single risk assessment report for workers' health and safety (Articles R4121-1 and R4121-2 of the French Labour Code) and a mandatory safety training related to working conditions (Article R4141-13 of the French Labour Code). On this basis, it upheld the mother company's indictment for violating the aforementioned prudence and safety obligations of the French Labour Code. Following this ruling, the Defendants petitioned to the French Supreme Court to have the charges annulled, arguing that French law did not apply to the litigious employment relationship.

By its decision of January 16, 2024, the French Cour de cassation (chambre criminelle) ruled partly in favour of the petitioner. By applying Article 8 of the Rome I regulation, it decided that the employment relationship between *Lafarge* and the Syrian workers was governed by Syrian law, so that, French law not being applicable, the conditions for application of Article 223-1 of the French Criminal Code were not met. Thus, the *Cour de cassation* quashed *Lafarge*'s indictment for endangering the lives of others, while upholding the remaining charges of complicity in war crimes and crimes against humanity.

The *Lafarge* case highlights the stakes of transnational criminal law and its interplay with private international law.

Interactions between criminal jurisdiction and conflict of laws.

Because of the solidarity between criminal jurisdiction and legislative competence, the field is in principle exclusive of conflict of laws. However, this clear-cut frontier is often blurred.

In *Lafarge*, a conflict appeared incidentally via the specific incrimination of endangering the lives of others. In a transnational context, the key legal issue concerns the scope of the legal and regulatory obligations covered by the incrimination. A flexible interpretation including foreign law would lead to a (too) broad extension of French courts' criminal jurisdiction. In the present decision, the *Cour de cassation* logically ruled, notably on the basis of the principle of strict interpretation of criminal law, that an obligation of prudence or safety within the meaning of Article 223-1 "necessarily refers to provisions of French law".

Far from exhausting issues of private international law, this conclusion opens the door wide to conflict of laws. Indeed, the court then had to determine whether such French prudence or safety provisions applied to the case.

Under Article 8§2 of the Rome I regulation, absent a choice of law in an employment contract, the law applicable to the employment relationship between *Lafarge* and the Syrian workers should be the law of the country in which the employees habitually carry out their work –*i.e.* Syrian law. However, French law could be applicable in two situations: either if it appears that the employment relationships have a closer connection with France (article 8§4 Rome I), or because French law imposes overriding mandatory provisions (article 9 Rome I).

On the one hand, the *Cour de cassation* dismissed the argument that the employment relationship had a closer connection with France. Previously, the *chambre d'instruction* considered that the parent company's permanent interference ("*immixtion*") in the management of its Syrian subsidiary (based on a body of corroborating evidence, in particular, the subsidiary's financial and operational dependence on the parent company, from which it was deduced that the latter was responsible for the plant's safety) resulted in a closer connection between France and the employment contracts of the Syrian employees. Referring to the ECJ case law, which requires such connection to be assessed on the basis of the circumstances "as a whole", the Supreme Court conversely held

that considerations relating solely to the relationship between the parent company and its subsidiary were not sufficient to rule out the application of Syrian law. Ultimately, the *Cour de cassation* found that none of the alleged facts was such as to characterize closer links with France than with Syria.

On the other hand, the *Cour de cassation* rejected the characterization of Articles R4121-1, R4121-2 and R4141-13 of the French Labour Code as overriding mandatory provisions ("*lois de police*"). Here, the Criminal division of the *Cour* is adopting the solution set out by the Labour disputes division (chambre sociale) in an opinion issued on the present Lafarge case. In its opinion, the Social division noted that, while the above-mentioned provisions do indeed pursue a public interest objective of protecting the health and safety of workers, the conflict of laws rules set out in Article 8 Rome I are sufficient to ensure that the protection guaranteed by these provisions applies to workers whose contracts have enough connection with France -a questionable utterance in the light of the reasoning of the Cour de cassation in the decision under comment and its strict interpretation of the escape clause.

As a result, the employment relationship between *Lafarge* and the Syrian workers was governed by Syrian law, with French law not imposing any obligation of prudence or safety to the case. The Supreme court thereby concluded that the conditions for application of Article 223-1 of the French Criminal Code were not met.

Implications.

The *Lafarge* decision will have broad implications for transnational litigations.

Firstly, the *Cour de cassation* confirms the strict interpretation of the escape clause in Article 8§4 of the Rome I regulation. Making extensive reference to the ECJ case law, the Court recalled that when applying Article 8§4, courts must take account of all the elements which define the employment relationship and single out one or more as being, in its view, the most significant (among them: the country in which the employee pays taxes on the income from his activity; the country in which he is covered by a social security scheme and pension, sickness insurance and invalidity schemes; as well as the parameters relating to salary determination and other working conditions).

More importantly, the French Supreme Court limits the consequences of parent

companies' interference (*immixtion*) in international labour relations and value chain governance. The criterion of interference is commonly used to try to lift the corporate veil for imputing obligations and liability directly to a parent company. By establishing that the parent company's interference was insufficient to characterize the existence of a closer connection with France, the *Cour de cassation* circumscribes the spatial scope of French labour law and maintains the territorial compartmentalization of global value chains. It is regrettable, in that respect, that the Supreme court did not precisely discuss the nature of the relationship between *Lafarge* and the Syrian workers. This solution is nevertheless consistent with the similarly restrictive approach to co-employment adopted by the French courts, which requires a "permanent interference" by the parent company leading to a "total loss of autonomy of action" on the part of the subsidiary. Coincidentally, in the absence of overriding mandatory provisions, the ruling empties of all effectiveness similar transnational criminal actions based on Article 223-1 of the French Criminal Code.

While the *Cour de cassation* closed the door of criminal courts, French law on corporate duty of care (*Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*) offers an effective alternative in the field of civil liability. The aim of this text is precisely to impose on lead companies a series of obligations purported to identify risks and prevent serious violations of human rights and fundamental freedoms, human health and safety, and the environment, throughout the value chain. The facts of the *Lafarge* case are prior to the enactment of this law. Nevertheless, future litigations will likely prosper on this ground, all the more so with the forthcoming adoption of a European directive on mandatory corporate sustainability due diligence.

Looking but not Seeing the

Economic Unit in Cartel Damage Claims – Opinion of Advocate General in Case C-425/22, MOL Magyar Olaj- és Gázipari Nyrt. v Mercedes-Benz Group AG

By Professor András Osztovits*

I. Introduction

The heart of European economic integration is the Single Market, which can only function properly and provide economic growth and thus social welfare if effective competition rules ensure a level playing field for market players. The real breakthrough in the development of EU competition policy in this area came with Regulation 1/2003/EC, and then with Directive 2014/104/EU which complemented the public law rules with private law instruments and made the possibility to bring actions for damages for infringement of competition law easier.

It is not an exaggeration to say that the CJEU has consistently sought in its case-law to make this private enforcement as effective as possible, overcoming the procedural and substantive problems that hinder it. It was the CJEU which, in the course of its case law, developed the concept of the economic unit, allowing victims to bring an action against the whole of the undertaking affected by the cartel infringement or against certain of its subsidiaries or to seek their joint liability.

The concept of an economic unit is generally understood to mean that a parent company and its subsidiary form an economic unit where the latter is essentially under the dominant influence of the former. The CJEU has reached the conclusion in its case law that an infringement of competition law entails the joint and

several liability of the economic unit as a whole, which means that one member can be held liable for the acts of another member.

II. The question referred by the Hungarian Supreme Court

However, there is still no clear guidance from the CJEU as to whether the principle of economic unit can be interpreted and applied in the reverse case, i.e. whether a parent company can rely on this concept in order to establish the jurisdiction of the courts where it has its registered seat to hear and determine its claim for damages for the harm suffered by its subsidiaries. This was the question raised by the Hungarian Supreme Court (Kúria) in a preliminary ruling procedure, in which this issue was raised as a question of jurisdiction. More precisely Article 7 (2) of the Brussels Ia Regulation had to be interpreted, according to which a person domiciled in a Member State may be sued in another Member State, 'in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur'.

The facts of the case were well suitable for framing and answering this question. The applicant is a company established in Hungary. It is either the majority shareholder or holds another form of exclusive controlling power over a number of companies established in other EU Member States. During the infringement period identified by the Commission in its decision of 19 July 2016, those subsidiaries purchased indirectly, either as owners or under a financial leasing arrangement, 71 trucks from the defendant in several Member States.

The applicant requested, before the Hungarian first-instance court, that the defendant be ordered to pay EUR 530 851 with interest and costs, arguing that this was the amount that its subsidiaries had overpaid as a consequence of the anticompetitive conduct established in the Commission Decision. Relying on the concept of an economic unit, it asserted the subsidiaries' claims for damages against the defendant. For that purpose, it sought to establish the jurisdiction of the Hungarian courts based on Article 7(2) of Regulation No 1215/2012, claiming that its registered office, as the centre of the group's economic and financial interests, was the place where the harmful event, within the meaning of that provision, had ultimately occurred. The defendant objected on the ground that the Hungarian courts lacked jurisdiction. The courts of first and second instance

found that they lacked jurisdiction, but the Curia, which had been asked to review the case, had doubts about the interpretation of Article 7(2) of the Regulation and referred the case to the CJEU.

III. The Opinion of Advocate General

In his Opinion delivered on 8 February 2024, Advocate General Nicholas Emiliou concluded that the term 'the place where the harmful event occurred', within the meaning of Article 7(2) of Regulation No 1215/2012, does not cover the registered office of the parent company that brings an action for damages for the harm caused solely to that parent company's subsidiaries by the anticompetitive conduct of a third party.

In his analysis, the Advocate General first examined the jurisdictional regime of the Brussels Ia Regulation, then the connecting factors in the context of actions for damages for infringements of Article 101 TFEU, and finally the question of whether the place of the parent company's seat can be the place where the damage occurred in the case of damage suffered by a subsidiary. He recalled that, according to the relevant case-law of the CJEU, rules of jurisdiction other than the general rule must be interpreted restrictively, including Article 7. He pointed out that 'the place where the harmful event occurred' within the meaning of that provision does not cover the place where the assets of an *indirect victim* are affected. In the Dumez case, two French companies, having their registered offices in Paris (France), set up subsidiaries in Germany in order to pursue a property development project. However, German banks withdrew their financing, which lead to those subsidiaries becoming insolvent. The French parent companies sought to sue the German banks in Paris, arguing that this was the place where they experienced the resulting financial loss. According to the Advocate General, the applicant in the present action is also acting as an indirect victim, since it is seeking compensation for damage which first affected another legal person.

Recalling the connecting factors in actions for damages for infringement of Article 101 TFEU, the Advocate General pointed out that there were inconsistencies in the case law of the CJEU, which needed to be clarified in a forthcoming judgment. Both types of specific connecting factors (place of purchase and the victim's

registered seat) could justify the application of the rule of jurisdiction under Article 7(2) of the Regulation. The Advocate General referred to the Volvo judgment, where the CJEU qualified 'the place where the damage occurred' is the place, within the affected market, where the goods subject to the cartel were purchased. The Court has simultaneously reaffirmed, in the same judgment, the ongoing relevance of the alleged victim's registered office, in cases where multiple purchases were made in different places. According to the Advocate General, the applicant seeks to extend the application of that connecting factor to establish jurisdiction in relation to its claim in which it seeks compensation for harm suffered solely by other members of its economic unit.

The Advocate General referred to the need for predictability in the determination of the forum in cartel proceedings, although he acknowledged that when it comes to determining the specific place 'where the harm occurred', the pursuit of the predictability of the forum becomes to some extent illusory in the context of a pan-European cartel.

In examining the Brussels Ia Regulation, the Advocate General recalled that it only provides additional protection for the interests of the weaker party in consumer, insurance and individual contracts of employment, but that cartel victims are not specifically mentioned in the Regulation, and therefore, in its interpretation, the interests of the claimants and defendants must be considered equivalent. Even so, the parent company has a wide range of options for claiming, the victim can initiate the action not only against the parent company that is the addressee of the respective Commission decision establishing an infringement but also against a subsidiary within that parent company's economic unit. That creates the possibility of an additional forum and may therefore further facilitate enforcement. The victim also has the option of bringing proceedings before the court of the defendant's domicile under the general rule of jurisdiction, which, while suffering the disadvantages of travel, allows him to claim the full damages in one proceeding. In these circumstances, the Advocate General failed to see in what way the current jurisdictional rules fundamentally prevent the alleged victims of anticompetitive conduct from asserting their rights.

IV. In the concept of economic unit we (don't) trust?

Contrary to the Advocate General's opinion, several difficulties can be seen which may prevent the victim parent companies from enforcing their rights if they cannot rely on Article 7(2) of the Brussels Ia Regulation. The additional costs arising from geographical distances and different national procedural systems may in themselves constitute a non-negligible handicap to the enforcement of rights, although this is true for both parties to the litigation. However, the aim must be to minimise the procedural and substantive obstacles to these types of litigation, whose economic and regulatory background makes them inherently more difficult and thus longer in time. It is also true that the real issue at stake in this case is the substantive law underlying the jurisdictional element: whether the parent company can claim in its own name for the damage caused to its subsidiaries on the basis of the principle of economic unit. If so, then Article 7(2) of the Brussels Ia Regulation applies and it can bring these claims in the court of its own registered office. Needless to say, having a single action for damages in several Member States is much better and more efficient from a procedural point of view, and is therefore an appropriate outcome from the point of view of EU competition policy and a more desirable outcome for the functioning of the Single Market. The opportunity is there for the CJEU to move forward and further improve the effectiveness of competition law, even if this means softening somewhat the relevant jurisprudence of the Brussels Ia Regulation, which has interpreted the special jurisdictional grounds more restrictive than the general jurisdiction rules. The EU legislator should also consider introducing a special rule of jurisdiction for cartel damages in the next revision of the Brussels Ia Regulation at the latest.

The fullt text of the opinion is available here (original language: English)

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„El clásico“ of Recognition and Enforcement – A Manifest Breach of Freedom of Expression as a Public Policy Violation: Thoughts on AG Szpunar 8.2.2024 – Opinion C-633/22, ECLI:EU:C:2024:127 – Real Madrid Club de Fútbol

By Madeleine Petersen Weiner, Research Fellow and Doctoral Candidate at Heidelberg University

Introduction

On 8 February 2024, Advocate General (AG) *Szpunar* delivered his Opinion on C-633/22 (AG Opinion), submitting that disproportionate damages for reputational harm may go against the freedom of expression as enshrined in Art. 11 Charter of Fundamental Rights of the European Union (CFR). The enforcement of these damages therefore may (and at times *will*) constitute a violation of public policy in the enforcing state within the meaning of Art. 34 Nr. 1 Brussels I Regulation. The AG places particular emphasis on the severe deterring effect these sums of damages may have – not only on the defendant newspaper and journalist in the case at hand but other media outlets in general (AG Opinion, paras. 161-171). The decision of the Court of Justice of the European Union (CJEU) will be of particular topical interest not least in light of the EU’s efforts to combat so-called “Strategic Lawsuits Against Public Participation” (SLAPPs) within the EU in which typically financially potent plaintiffs initiate unfounded claims for excessive sums of damages against public watchdogs (see COM(2022) 177 final).

The Facts of the Case and Procedural History

Soccer clubs *Real Madrid* and *FC Barcelona*, two unlikely friends, suffered the

same fate when both became the targets of negative reporting: The French newspaper *Le Monde* in a piece titled "Doping: First cycling, now soccer" had covered a story alleging that the soccer clubs had retained the services of a doctor linked to a blood-doping ring. Many Spanish media outlets subsequently shared the article. *Le Monde* later published *Real Madrid's* letter of denial without further comment. *Real Madrid* then brought actions before Spanish courts for reputational damage against the newspaper company and the journalist who authored the article. The Spanish courts ordered the defendants to pay 390.000 euros in damages to *Real Madrid*, and 33.000 euros to the member of the club's medical team. When the creditors sought enforcement in France, the competent authorities were disputed as to whether the orders were compatible with French international public policy due to their potentially interfering with freedom of expression.

The *Cour de Cassation* referred the question to the CJEU with a request for a preliminary ruling under Art. 267 TFEU, submitting no less than seven questions. Conveniently, the AG summarized these questions into just one, namely essentially: whether Art. 45(1) read in conjunction with Arts. 34 Nr. 1 and 45(2) Brussels I Regulation and Art. 11 CFR are to be interpreted as meaning that a Member State may refuse to enforce another Member State's judgment against a newspaper company and a journalist based on the grounds that it would lead to a manifest infringement of the freedom of expression as guaranteed by Art. 11 CFR.

Discussion

The case raises a considerable diversity of issues, ranging from the relationship between the European Convention on Human Rights (ECHR), the CFR, and the Brussels I Regulation, to public policy, and the prohibition of *révision au fond*. I will focus on whether and if so, under what circumstances, a breach of freedom of expression under Art. 11 CFR may lead to a public policy violation in the enforcing state if damages against a newspaper company and a journalist are sought.

Due to the Regulation's objective to enable free circulation of judgments, recognition and enforcement can only be refused based on limited grounds – public policy being one of them. Against this high standard (see as held recently in C-590/21 *Charles Taylor Adjusting*, ECLI:EU:C:2023:633 para. 32), AG *Szpunar*

submits first (while slightly circular in reasoning) that in light of the importance of the press in a democracy, the freedom of the press as guaranteed by Art. 11 CFR constitutes a fundamental principle in the EU legal order worthy of protection by way of public policy (AG Opinion, para. 113). The AG rests this conclusion on the methodological observation that Art. 11(2)CFR covers the freedom and plurality of the press to the same extent as Art. 10 ECHR (ECtHR, Appl. No. 38433/09 – *Centro Europa and Di Stefano/Italy*, para. 129).

Under the principle of mutual trust, the Regulation contains a prohibition of *révision au fond*, Art. 45(2) Brussels I Regulation, i.e., prevents the enforcing court from reviewing the decision as to its substance. Since the assessment of balancing the interests between the enforcement creditors and the enforcement debtors had already been carried out by the Spanish court, the AG argues that the balancing required in terms of public policy is limited to the freedom of the press against the interest in enforcing the judgment.

Since the Spanish court had ordered the defendants to pay a sum for damages it deemed to be *compensatory* in nature, in light of Art. 45(2) Brussels I Regulation, the enforcing court could not come to the opposing view that the damages were in fact *punitive*. With respect to punitive damages, the law on enforcement is more permitting in that non-compensatory damages may potentially be at variance, in particular, with the legal order of continental states (*cf.* Recital 32 of the Rome II Regulation). In a laudable overview of current trends in conflict of laws, taking into account Art. 10(1) of the 2019 Hague Judgments Convention, the Résolution de L'Institut de Droit International (IDI) on infringements of personality rights via the internet (which refers to the Judgments Convention), and the case law of the CJEU and the ECtHR (AG Opinion, paras. 142-158), AG *Szpunar* concludes that, while generally bound by the compensatory nature these damages are deemed to have, the enforcing court may only resort to public policy as regards compensatory damages in exceptional cases if further reasons in the public policy of the enforcing Member State so require.

The crux of this case lies in the fact that the damages in question could potentially have a deterring effect on the defendants and ultimately prevent them from investigating or reporting on an issue of public interest, thus hindering them from carrying out their essential work in a functioning democracy. Yet, while frequently referred to by scholars, the CJEU (see e.g., in C-590/21 *Charles Taylor Adjusting*, ECLI:EU:C:2023:633 para. 27), and e.g., in the preparatory work for

the Anti-SLAPP Directive (see the explanatory memorandum, COM(2022) 177 final; see also Recital 11 of the Anti-SLAPP Recommendation, C(2022) 2428 final), it is unclear what a deterring effect actually consists of. Indeed, the terms "deterring effect" and "chilling effect" have been used interchangeably (AG Opinion, para. 163-166). In order to arrive at a more tangible definition, the AG makes use of the ECtHR's case law on the deterring effect in relation to a topic of public interest. In doing so, the deterring effect is convincingly characterized both by its *direct effect* on the defendant newspaper company and the journalist, and the *indirect effect* on the freedom of information on society in the enforcing state as a whole (AG Opinion, para. 170). Furthermore, in the opinion of the AG it suffices if the enforcement is likely to have a deterring effect on press freedom in the enforcing Member State (AG Opinion, para. 170: "*susceptible d'engendrer un effet dissuasif*").

As to the appropriateness of the amount of damages which could lead to a manifest breach of the freedom of the press, there is a need to differentiate: The newspaper company would be subject to a severe (and therefore disproportionate) deterring effect, if the amount of damages could jeopardize its economic basis. For natural persons like the journalist, damages would be disproportionate if the person would have to labor for years based on his or her or an average salary in order to pay the damages in full. It is convincing that the AG referred to the ECtHR's case law and therefore applied a gradual assessment of the proportionality, depending on the financial circumstances of the company or the natural person. As a result, in case of a thus defined deterring effect on both the defendants and other media outlets, enforcing the decision would be at variance with public policy and the enforcing state would have to refuse enforcement in light of the manifest breach of Art. 11 CFR (AG Opinion, para. 191).

Conclusion

The case will bring more clarity on public policy in relation to freedom of expression and the press. It is worth highlighting that the AG relies heavily on principles as established by the ECtHR. This exhibits a desirable level of cooperation between the courts, while showing sufficient deference to the ECtHR's competence when needed (see e.g., AG Opinion, para. 173). These joint efforts to elaborate on criteria such as "public participation" or issues of "public interest" – which will soon become more relevant if the Anti-SLAPP Directive

employs these terms –, will help bring legal certainty when interpreting these (otherwise partially ambiguous) terms. It remains to be seen whether the CJEU will adopt the AG's position. This is recommended in view of the deterrent effect of the claims for damages in dispute – not only on the defendants, but society at large.

Dubai Supreme Court Admits Reciprocity with the UK and Enforces an English Judgment

Introduction:

I have been reporting on this blog some recent cases from the Dubai Supreme Court (DSC) regarding the recognition and enforcement of foreign judgments (see here, here and here). Reading these posts may have given the legitimate impression that the enforcement of foreign judgments in the UAE, and especially in Dubai, is particularly challenging. This post aims to mitigate that perception by shedding light on a very recent case in which the Dubai courts, with the approval of the DSC, ruled in favor of the enforcement of an English judgment. As the comments below indicate, this is probably the very first case in which the DSC has *positively* ruled in favor of the enforcement of an English judgment by declaring that the judgment in question met all the requirements set out in UAE law, and in particular, the reciprocity requirement.

The facts:

As mentioned above, this case concerns the enforcement of an English judgment. In that judgment, the English court ordered the division and transfer of property as part of the distribution of matrimonial property on divorce. However, some of the disputed properties concerned two immovables located in Dubai. The underlying dispute before the English court appears to involve a British national

(the wife and petitioner in the Dubai proceedings, hereinafter "X") and a Pakistani national (the respondent husband, hereinafter "Y"). The parties entered into their marriage in Pakistan in accordance with Pakistani law. The marriage was later registered in the UK "after a long period of time" since its conclusion.

According to the DSC's decision, the English judgment recorded Y's "consent" to transfer the two aforementioned disputed properties to X under the Matrimonial Causes Act 1973 (but erroneously referred to it as "Matrimonial Causes Act 1937"). Subsequently, X sought to enforce the English judgment in the UAE by filing a petition to that effect with the Dubai Execution Court. The Execution Court granted the petition and ordered the enforcement of the English judgment. The decision was confirmed on appeal.

Y appealed to the DSC.

Before the DSC, Y contested the appealed decision mainly on the following grounds:

1) The case falls within the jurisdiction of the Dubai courts as the court of the place where the property is located, because the case concerns *in rem* rights relating to the transfer of ownership of immovable property located in Dubai, notwithstanding the fact that the foreign judgment was rendered in a personal status dispute concerning the financial effects of a divorce under English law.

2) The foreign judgment is contrary to public policy because it violates Islamic Sharia law, individual property rights and the distribution of property under UAE law.

3) The parties have not (yet) been divorced under Pakistani law or Islamic Sharia.

4) As the marriage was contracted in Pakistan and later registered in the UK, the marriage and its financial effects should be governed by Pakistani law.

Ruling:

In its ruling dated 25 January 2024 (*Appeal No. 592/2023*), the DSC dismissed the appeal by reasoning as follows:

First, the DSC recalled the legal framework for the enforcement of foreign judgments, citing almost verbatim Article 222 of the new Federal Civil Procedure Act of 2022 (the English translation can be found here). The DSC also recalled that the law applicable to the personal and financial effects of marriage and its dissolution, as well as the impact that public policy and Islamic Sharia may entail on the application of the governing law (articles 13 and 27 the Federal Act on Civil Transactions, as subsequently amended.*)

(* It should be noted, however, that the DSC erroneously cited the provisions in force prior to the 2020 amendment to the Federal Civil Transactions Act. This amendment is important because it replaced the nationality of the husband as a connecting factor with the place where the marriage was concluded in matters relating to the effects and dissolution of the marriage. For a brief commentary on this amendment, see Lena-Maria Möller's post here on this blog. See also *idem*, "One Year of Civil Family Law in the United Arab Emirates: A Preliminary Assessement", *Arab Law Quarterly*, Vol. 37 (2023), pp. 5-6. The English translation of the Federal Civil Transactions Law with its latest amendments can be found here).

The DSC then approved the appealed decision in considering that:

– The foreign judgment did not contain a violation of public policy and good morals because it did not violate any undisputed Sharia rule;

– Y, who was a foreign national, had agreed in the English court to transfer the ownership and beneficial interest in the two Dubai properties to X, and therefore the enforcement of the foreign judgment consisted only in carrying out what Y had agreed before the foreign court,

– The dispute did not fall within the exclusive jurisdiction of the Dubai courts,

– Reciprocity was established with the UK.

Finally, the DSC held that the following arguments made by Y were meritless:

– that the dispute fell within the jurisdiction of the Dubai courts. However, the DSC considered that the case did not concern a dispute over the property located in Dubai, but the transfer of shares in Y's property to X on the basis of Y's consent;

– that the law applicable to the marriage and its financial effects should be Pakistani law and not English law because the marriage was contracted in Pakistan and then registered in the UK after a long period of time. However, the DSC considered that the marriage and divorce between X and Y took place in the UK and Y did not contest the application of English law.

Comments:

The case is in many regards…. *exceptional*. In particular, given the usual challenges associated with the enforcement of foreign judgments in the UAE, it is somewhat interesting to observe how the main obstacles to the enforcement of foreign judgments – notably, reciprocity, indirect jurisdiction and public policy – were easily overcome in the case at hand. (For an overview of past practice with some relevant case law, see the author's earlier comment here). While these aspects of the case (as well as some others, such as the reference to choice-of-law rules and the surprisingly erroneous reference by the DSC to the nationality of the husband as a connecting factor in matters of effects and dissolution of marriage) deserve detailed analysis, space constraints require that we focus on one notable aspect: reciprocity with the UK.

As mentioned in a previous post, Dubai courts traditionally find reciprocity where the party seeking enforcement demonstrates that the enforcement rules of the rendering state are identical to or less restrictive than those of the UAE. This typically requires the party seeking enforcement to prove the content of the rendering state's foreign judgment enforcement law for comparison with the UAE's requirements (see some relevant cases here). In order to alleviate the rigor of this rule and facilitate the enforcement of UK judgments in Dubai, the UAE Ministry of Justice (MOJ) issued a letter on September 13, 2022, stating that reciprocity with the UK could be established as English courts had accepted the enforcement of UAE judgments.

In a previous post, I expressed doubts about the impact of this letter on Dubai court practice, citing instances where the DSC had rejected to enforcement an English judgment. These doubts were somewhat justified. Indeed, in a case that later came to my attention and also involved the enforcement of an English judgment, the DSC reversed and remanded a decision of the Dubai Court of

Appeal on the ground, *inter alia*, that the court failed to consider the existence of reciprocity with the UK. (The Court of Appeal simply held that reciprocity was not a requirement for the enforcement of foreign judgments in the UAE) (*DSC, Appeal No. 356/2022 of 7 December 2022*). The DSC also criticized the Court of Appeal for failing to address the need for the party seeking enforcement to prove the content of English law on the enforcement of UAE judgments in the UK in order to demonstrate that there is reciprocity with the UK. (The Court of Appeal simply considered that English courts wold not oppose the enforcement of UAE judgments as long as they meet the conditions for their enforcement). Subsequent developments in the case show that the whole issue was somehow avoided, as the Court of Appeal – as the court of remand – dismissed the case on the ground that the appeal was filed out of time. This decision was later upheld by the DSC (*Appeal No. 847/2023 of 7 November 2023*), which ultimately resulted in the upholding of the initial first instance court's decision to enforce the English judgment in question. (For details of this case, see the comments posted by one of the lawyers representing the party seeking enforcement of the English judgment, Hesham El Samra, "Enforcing the First Judgment From the English Courts in Dubai Courts (November 17, 2023). One can read with interest how the representatives of the party seeking enforcement relied on the aforementioned MOJ letter to establish reciprocity with the UK).

In the case commented here, it is unclear on what basis the Dubai courts recognized reciprocity with the United Kingdom. Indeed, the DSC merely upheld the Court of Appeal's conclusion that "reciprocity with the UK was established". It is likely, however, that the courts relied on the MOJ letter to reach this conclusion. In any event, as noted in the introduction, this case represents the first Supreme Court decision *explicitly* recognizing reciprocity with the UK. This development is likely to have a significant impact on the enforcement of English judgments in Dubai and the UAE. One can also expect that this decision may influence the assessment of reciprocity requirements where enforcement of foreign judgments in general is sought in Dubai/UAE.

Book review: Research Handbook on International Abortion Law (Cheltenham: Edward Elgar Publishing, 2023)

RESEARCH HANDBOOK ON

International Abortion Law

Edited by
Mary Ziegler

RESEARCH HANDBOOKS IN LAW AND SOCIETY

Written by Mayela Celis

Undoubtedly, Abortion is a hot topic. It is discussed in the news media and is the subject of heated political debate. Indeed, just when one thinks the matter is settled, it comes up again. In 2023, Elgar published the book entitled "**Research Handbook on International Abortion Law**", ed. Mary Ziegler (Cheltenham: Edward Elgar Publishing Limited, 2023). For more information, click here. Although under a somewhat misleading name as it refers to *international* abortion law, this book provides a wonderful comparative overview of national abortion laws as regulated by States from all the four corners of the world and internal practices, as well as an analysis of human rights law.

This book does not deal with the conflict of laws that may arise under this topic. For a more detailed discussion, please refer to the post Singer on Conflict of Abortion Laws (in the U.S.) published on the blog of the European Association of Private International Law.

In this book review, I will briefly summarise 6 parts of this book (excluding the introduction) and will provide my views at the end.

This book is divided into 7 parts:

Part I – Introduction

Part II – Histories of liberalization

Part III – The promise and limits of decriminalization

Part IV – Abortion in popular politics

Part V – Movements against abortion

Part VI – Race, sex and religion

Part VII – The role of international human rights

Part II – Histories of Liberalization

Part II begins with a historical journey of the abortion reform in Sweden in the

1930s and 1940s. It highlights the limited legalization of abortion in Sweden in 1938 and the revised abortion law in 1946 introducing a "socialmedical" indication. In particular, it underscores how the voices of women were absent from the process.

It then moves on to a comparative study of the history of abortion in the USA and Canada from 1800 to 1970, that is before Roe (USA) and Morgentaler (Canada). It analyses the distinct approaches of Canada and the USA when dealing with abortion (legislative vs. court-based). Furthermore, it provides a very interesting historical account on how the right of abortion came about in both countries – it sets the stage for Roe v. Wade (pp. 50-52).

Finally, Part II examines the situation in South Africa by calling it "unfinished business". In South Africa, Abortion is a right codified in law: The Choice on Termination of Pregnancy Act 92 of 1996. However, this article argues that the legislative response is not enough. Factors such as lack of enough health facilities that perform abortions, gender inequality etc. are an obstacle to making safe abortion a reality.

Part III – The promise and limits of decriminalization

This Part analyses several laws regarding abortion. First, it explores Malawi's 160-year-old law that criminalises abortion based on a UK law, as well as the failed tentative attempt to adopt a new law in 2020. Interestingly, this article analyses CEDAW resolutions against the UK, which promptly complied with the resolution (pp. 92-93).

Secondly, it studies the recently adopted law in Thailand on 7 February 2021 that makes abortion available up to 12 weeks' gestation period. However, this article criticises that the law creates a loophole as the abortion must be performed by a physician or a registered medical facility and in compliance with the law, greatly medicalizing abortion.

Finally, this Part examines Australian laws and policy over the past 20 years and while acknowledging the significant advances in reproductive rights, it notes that a number of barriers to abortion still remain. This chapter is better read in conjunction with Chapter 10, also about Australia.

Part IV – Abortion in popular politics

This Part begins with an excellent comparative public policy study between France and the United States. In particular, it discusses the weaknesses of Roe v. Wade, underlining the role and analysis of the late justice Ruth Bader Ginsburg. It also puts into context the superiority of the French approach regarding abortion, which is proven with the reversal of Roe.

It then analyses abortion law in China, a State that has the most lenient abortion policies in the world. It discusses the Chinese one-child policy, which then changed to two and even three children-policy, as well as sex-selective abortions.

Subsequently, it recounts how South Australia became the last Australian jurisdiction to modernise its abortion laws and underlines the fact that laws in Australian jurisdictions on this topic are uneven and no two laws are the same.

Finally, it examines abortion history in Israel noting that apart from health reasons, abortions on no specific grounds are mainly intended for out-of-wedlock pregnancies. As a result, abortion is restricted to married women unless they claim adultery, a ground that must be reviewed by a Committee. Apparently, this leads married women to lie to get an abortion and go through the shameful process of getting approval by a Committee.

Part V – Movements against abortion

This Part begins with abortion politics in Brazil and the backlash that occurred with the government of former president Bolsonaro who, as is well known, is against abortion. It recounts a case where a priest filed an habeas corpus in favour of a foetus who had a severe birth defect. Although the case arrived at the Federal Supreme Court, it was not decided as the child died 7 minutes after being born (p. 232).

Secondly, a history scholar recounts the pro-life movement across continents and analyses what drives them (*i.e.* gender and religion).

Finally, it deals with abortion law in Poland and Hungary and the impact of illiberal courts. In particular, it discusses the trends against abortion and goes on to explain an interesting concept of “illiberal constitutionalism”. The authors argue that they do not see Poland and Hungary as authoritarian systems but as illiberal States, an undoubtedly interesting concept.

Part VI – Race, sex and religion

This Part begins examining the sex-selective abortions in India. In particular, the authors recommend an equality-based approach instead of anti-discriminatory approach in order to avoid recognising personhood to the foetus.

It then continues with an analysis of abortion law in the Arab world. The authors note that there is scant but emerging literature and that abortion laws in this region are – unsurprisingly – punitive or very restrictive. Interestingly, the position of Tunisia differs from other Arab States.

Finally, it discusses the struggles in Ecuador where a decision of the constitutional court of 2021 decriminalising abortion in cases of rape. It declared unconstitutional an article of the Ecuadorian Criminal Code, and in 2022 the legislature approved a bill based on this ruling. It also refers to teenage pregnancy and violence.

Part VII – The role of international human rights

For those interested in international human rights, this will be the most fascinating Part of the book. Part VII calls for the decriminalization of abortion in *all circumstances* and it supports this argument by making reference to several human rights documents such as those issued by the Human Rights Committee (in particular, General Comment No 36 – Article 6: Right to life) and the Committee on the Elimination of Discrimination against Women (referring to a myriad of general comments and concluding observations).

Subsequently, this Part challenges the classification of European abortion law as *fairly liberal* and provides some convincing arguments (including the setbacks in Poland in this regard and other procedural or legal barriers to access abortion in more liberal States) and some surprising facts such as the practice in the Netherlands (see footnote 60). The authors -fortunately- dared to say that this chapter is drafted from a feminist perspective as opposed to the current "male norm" in legal doctrinal scholarship.

Finally, this Part explains the history of abortion laws including the fascinating recent developments in Argentina and Ireland (referred to as "small island"!) and the influence (or the lack thereof) of international human rights law. In particular, it makes reference to the Argentinian Law 27,610 of 2020 (now unfortunately in

peril with the new government) and the repealing by referendum of the 8th Amendment in Ireland in 2018.

Below are a few personal thoughts and conclusions that particularly struck me from the book:

Starting from the beginning: the title of the book and the definitions.

In my view, and as I previously mentioned, the title of the book is somewhat misleading. Strictly speaking, there is no such thing as "international" abortion law but rather abortion prompts a discussion of international human rights, such as women's rights and the right to life, and whether or not national laws are compliant with these rights or are coherent within their own national legal framework. This is in contrast to international child abduction / adoption laws where international treaties regulate those very topics.

While perhaps counterintuitive, the definition of a "woman" has been controversial; see for example the Australian versus the Thai approaches. The Australian approach deals with gender identification and the fact that persons who do not identify as a woman can become pregnant (p. 124, footnote 1). While the Thai approach defines a woman as those capable of bearing children (p. 112). Needless to say, the definition of a woman is essential when legislating on abortion and unavoidably reflects the cultural and political complexities of a particular society. A brief reference is made to men and gender non-conforming people and their access to abortion (p. 374, footnote 2).

A surprising fact is the pervasive sex-selective abortion in some countries (sadly against female foetuses), such as India and China, and which arguments are invoked by scholars to avoid them, without falling into the "trap" of recognising personhood to the foetus.

More importantly, this book shows that the abortion discussion is much more than the polarised "pro-life" and "pro-choice" movements. The history of abortion is complicated, full of intricacies. And what is frustrating to some, this area is rapidly evolving sometimes at the whim of political parties.

Most authors seem to agree that a legislative approach to abortion is more

recommended than a court-based approach. Indeed, there is a preference for democratically elected lawmakers when it comes to dealing with abortion. This is evident from the recent setbacks that occurred in the USA.

Having said that, those expecting an in-depth analysis of the landmark US decision Dobbs v. Jackson Women's Health Organization 597 U.S. 215 (2022), which overturned Roe v. Wade, will be disappointed (only referred to very briefly in the introduction and Chapters 8, 11 and 13). Instead, however, you will be able to immerse yourself into a multidisciplinary study of abortion law, including topics such as politics, sociology, constitutional law, health law and policy, history, etc. In addition, you will read unexpected facts such as the role of Pierre Trudeau (former Prime Minister (PM) of Canada and father of current Canadian PM, Justin Trudeau – p. 56 *et seq.*) in abortion law in Canada or the delivering of abortion pills via drones (p. 393).

Because of all the foregoing, and whatever one's standpoint on abortion is, I fully recommend this book. But perhaps a cautionary note: people in favour of reproductive rights will be able to enjoy the book more fully.

I would like to end this book review with the words of the French writer and philosopher Simone de Beauvoir, which appear in her book entitled the Second Sex and which are also included in chapter 8 (p. 159) of this book:

"Never forget that a political, economic or religious crisis would suffice to call women's rights into question"

Full citation:

"Rien n'est jamais définitivement acquis. Il suffira d'une crise politique, économique ou religieuse pour que les droits des femmes soient remis en question. Votre vie durant, vous devrez rester vigilantes."

PIL and (De)coloniality: For a Case-by-Case Approach of the Application of Postcolonial Law in European States

Written by Sandrine Brachotte who obtained a PhD. in Law at Sciences Po, Paris and is a Guest Lecturer at UCLouvain (Saint-Louis, Brussels).

1. PIL and (De)coloniality in Europe

This post follows Susanne Gössl's blog post series on 'Colonialism and German PIL' (especially s. 3 of post (1)) and offers a French perspective of the issue of PIL and (de)coloniality – not especially focused on French PIL but based on a francophone article to be published soon in the law and anthropology journal *Droit et Culture*. This article, called 'For a decolonisation of law in the global era: analysis of the application of postcolonial law in European states', is addressed to non-PIL-specialist scholars but builds on a European debate about PIL and (de)coloniality that has been nourished by scholars like Ralf Michaels, Horatia Muir Watt, Veronica Ruiz Abou-Nigm, as well as by Maria Ochoa, Roxana Banu, and Nicole Štýbnarová, notably at the occasion of the 2022 Edinburgh conference (reported about on this blog, where I had the chance the share a panel with them in relation to my PhD dissertation (see a short presentation on the EAPIL blog)).

The PIL and (de)coloniality analysis proposed in this post is based on decolonial theory and postcolonial studies, which I will here call 'decoloniality'. Given this framework (notably nicely presented here), I shall preliminarily stress that it requires acknowledging the limit of the contribution I can make to the debate on PIL and (de)coloniality as a Western jurist. Therefore, this post aims at encouraging non-Western and/or non-legal scholars to contribute to the discussion. It also urges the reader to consider that the non-West and non-legal scholarship about law and (de)coloniality is extremely rich and should not be

missed by the Western PIL world.

2. For a Case-by-Case Approach

Against this background, the argument made here is that the decolonisation of Western PIL, if it is to happen (which decoloniality demands, based on the concept of global coloniality), should be based on a certain methodology (see eg the decolonial legal method elaborated by Tchepo Mosaka). Such methodology may require a case-by-case approach, to complement the study of the applicable legal framework. This seems at least necessary in the context, studied in the aforementioned article, where **a postcolonial law is to be applied as foreign law by the Western forum** (typically but not only in the context of migration), given that 'postcolonial law' hides a form of legal pluralism. It thus potentially covers not only state law, but also customary law and/or religious law.

To study this kind of situation, I argue, a case-by-case approach is needed because the legal pluralism of each postcolonial state is idiosyncratic. Notably, the postcolonial state law may refer to some religious or customary norms (which is a form of official legal pluralism); or these non-state norms may be followed by the population because the state institution is deficient or because a large part of the population simply does not follow the state legal standards (which is a form of de facto legal pluralism); or yet, certain state legal concepts or standards may reflect some custom or religious norms or practices.

More generally, the case-by-case approach allows a more nuanced (although also more complex) analysis of the (de)colonial character of current Western PIL standards. For PIL rules and judicial practices may appear colonial (ie, as imposing a Western 'worldview') or decolonial (ie, as granting space to 'colonised' worldviews) depending on the case, rule and/or judicial practice concerned. In addition, the case-by-case approach enables the consideration of the personal experience and possible vulnerable position of the parties – something that is also demanded by decoloniality. Therefore, **the case-by-case approach seems appropriate to also study other questions** than the application of postcolonial law discussed here, such as the limits of the Western definition of some important PIL concepts (like family and habitual residence, discussed in Susanne Gössl's post (2), or party autonomy, of which I have shown a colonial aspect via a case study in my PhD dissertation (see here) and that is also discussed in Susanne Gössl's post (4)).

3. The Example of *X v Secretary of State for the Home Department* ([2021] EWHC 355 (Fam))

To illustrate the argument, I choose a UK case that enters into a direct dialogue with Susanne Gössl's reflection about the notion of habitual **residence** (see post (2)). In this case, *X v Secretary of State for the Home Department* ([2021] EWHC 355 (Fam)), the claimant demanded the recognition by the UK authorities of her child's adoption in Nigeria. Under the applicable UK PIL rules, this adoption had to be recognised in the UK if it complied with the Nigerian law, ie Article 134(b) of the 2004 Child Rights Law. This article provides that the adopter and the adopted must have their residence in the same state. In the absence of any Nigerian caselaw interpreting the notion of residence under Article 134(b), the question came as to whether it had to be interpreted based on **UK law** or on **local customary norms**.

Pursuant to the relevant customary law, two circumstances should be considered that could lead to locate the claimant's residence in Nigeria. On the one hand, the claimant had an 'ancestral history and linkage' with Nigeria. One the one hand, as she lived most of the time in the UK to work, she entrusted her adopted child to her mother but took full financial responsibility for the child and made all decisions relating to the child's upbringing. Pursuant to UK law, more specifically *Grace* ([2009] EWCA Civ 1082), in case where someone lives in between several countries, the notion of residence had to be interpreted following a 'flexible nuanced approach' (para. 84(5)).

In February 2021, the UK judge recognised the adoption established in Nigeria, based on the interpretation of residence in UK law. To this end, the judge used the **presumption, which is part of UK PIL, of similarity between foreign law and domestic law**. Following *Brownlie* ([2021] UKSC 45), the judge applied the presumption because, like the UK, Nigeria is a common law system. Then, referring to *Grace*, the judge located the claimant's residence in Nigeria. In this regard, she considered the claimant's 'close cultural and family ties' with Nigeria, the fact that she maintained a home there for her mother and children, and the circumstance that '[h]er periods of time in [Nigeria] were not by chance, but regular, family focused and with a clear purpose to spent time with her children' (para. 84(6)).

4. A PIL and Decoloniality Analysis: Opening the Floor

From a PIL and decoloniality perspective, several points can be made. Notably, from a strict legal point of view (lacking anthropological insights), the judge's interpretation of the UK law notion of residence in this case seems flexible enough to include various, Western and non-Western, worldviews. Yet, one may question the application of the UK legal presumption. Because Nigerian state law is common law indeed, but it shares legality with customary laws and Sharia. Therefore, from a decolonial point of view, the judge could have usefully investigated the question as to whether, to interpret similar laws as the Child Rights Law, Nigerian courts consider customary law (and potentially, the judge did so (see para. 84(5)), but then it would have been welcome to mention it in the judgment). If so, she could have interpreted the notion of residence, not based on UK law, but based on the relevant local customary norms.

These case comments are made just to start a wider discussion – not only about this case but also about other cases. For, in my view, the PIL and (de)coloniality debate is a great occasion to have another, alternative, look at some rules and caselaw, and to open the floor to non-Western and/or non-PIL scholars.