An anti-suit injunction in support of an arbitration agreement in light of the EU Sanction against Russia

By Poomintr Sooksripaisarnkit, Lecturer in Maritime Law, Australian Maritime College, College of Sciences and Engineering, University of Tasmania

On 24th September 2024, Mimmie Chan J handed down the judgment of the Court of First Instance of the High Court of the Hong Kong Special Administrative Region in *Bank A v Bank B* [2024] HKCFI 2529. In this case, the Plaintiff (*Bank A*) with its base of operation in Germany was under the supervision of the German Federal Financial Supervisory Authority (BaFin). Its majority shareholder was the Defendant (*Bank B*) who held 99.39% shares. In turn, the Defendant was a Russian bank whose majority shareholder was the Government of the Russian Federation.

Between the predecessor of Plaintiff (as, at the time before the court in Hong Kong, the Plaintiff bank was already in voluntary liquidation) and Defendant, there existed an ISDA agreement dated 23 July 2023. Following the war between Russia and Ukraine which broke out in February 2022, Germany followed the "Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty, and independence of Ukraine" which Article 2 provides:

> "1. All funds and economic resources belonging to, owned, held or controlled by any natural persons or natural or legal persons, entities or bodies associated with them as listed in Annex I shall be frozen.
>
> 2. No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural persons or natural or legal persons, entities or bodies associated with them listed in Annex I."

As a result, BaFin barred Plaintiff from making payments or other transfers of

assets to companies, including Defendant. Moreover, it also barred Plaintiff from accepting new deposits, granting loans, or making payments to Russian borrowers. The defendant was subsequently listed in the Annex I of the EU Regulation. On that same day, Plaintiff and Defendant entered into a Termination and Settlement Agreement (TSA) under which Plaintiff was to pay Defendant EUR 112, 634, 610. The TSA contained a choice of the English law clause and an arbitration clause for any dispute to be resolved by the Hong Kong International Arbitration Centre (HKIAC) arbitration.

After the defendant was added to Annex I, BaFin denied the defendant's right to vote in the plaintiff's meetings and also barred the plaintiff from taking any instructions from the defendant. Defendant tried to demand payment from Plaintiff according to the TSA but Plaintiff denied that, citing the infeasibility due to the EU Regulation.

The defendant hence commenced proceedings before the courts in Russia. Among other things, the Russian Court granted a 'Freezing Order' prohibiting any transfer of securities that Plaintiff had in its account with Defendant's bank. The plaintiff's attempt to challenge the jurisdiction of the Russian Court based on the arbitration clause contained in the TSA was unsuccessful. Hence, on 27 October 2023, the plaintiff sought an interim anti-suit junction from the court in Hong Kong.

Regardless of the interim anti-suit injunction, the defendant commenced again the proceedings in Russia where the Russian Court issued an anti-suit injunction prohibiting the plaintiff from continuing any proceedings in Hong Kong, and subsequently the defendant obtained another injunction prohibiting the plaintiff from initiating arbitration proceedings at the HKIAC.

In late 2023, the Russian Court gave judgment in favor of the defendant to seek the settlement payment under the TSA and granted the final injunction restraining the plaintiff from pursuing the HKIAC arbitration.

The plaintiff hence came to the court in Hong Kong seeking a final injunction to restrain the defendant from pursuing or continuing any proceedings in Russia. The defendant resisted that by raising the arguments based on Article 19 and Article 13 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted at the Third Session of the Seventh National

People's Congress on 4 April 1990 Promulgated by Order No. 26 of the President of the People's Republic of China on 4 April 1990 Effective as of 1 July 1997) (hereinafter the "Basic Law") (*which is effectively a mini-constitution for Hong Kong) SAR):*

"Article 13

> *The Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region.
>
> The Ministry of Foreign Affairs of the People's Republic of China shall establish an office in Hong Kong to deal with foreign affairs.
>
> The Central People's Government authorizes the Hong Kong Special Administrative Region to conduct relevant external affairs on its own in accordance with this Law.

Article 19

> The Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication.
>
> The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained.
>
> *The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. The certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government."

Mimmie Chan J summarised the rule concerning the anti-suit injunction which has been established through authorities in Hong Kong at [34]:

> "Foreign proceedings initiatied in breach of an arbitration agreement will ultimately be restrained by the grant of an injunction, unless there are strong reasons shown to the contrary … For contractual anti-suit injunctions, the courts have emphasized that there is no need to prove that the arbitral tribunal is the most convenient forum … Nor is there need for the Court to feel diffidence in granting the injunction, or to exercise the jurisdiction sparingly and with great caution, for fear of giving an appearance of undue interference with proceedings of a foreign court. The restraint is directed against the party which has promised not to bring the proceedings otherwise than in accordance with the arbitration agreement, and effect should ordinarily be given to the agreement in the absence of strong reasons for departing from it…"

> So far as the argument based on the act of state in Article 19 of the Basic Law is concerned, the judge found there was no proof that the defendant was a state entity despite its majority shareholder being the Government of the Russian Federation. Neither the defendant's argument that Germany was somehow involved in the plaintiff convinced the judge because, as she found in [50], Bafin was a regulatory authority. Its act was not that of the state. Since there is no doubt about neither party in the case, there is no basis to obtain the certificate from the Chief Executive according to the third paragraph of Article 19 of the Basic Law (citing the Court of Final Appeal in *Democratic Republic of Congo v FG Hemisphere Associates LLC (No 1)* (2011) 14 HKCFAR 95).

The judge then came to conclude in her *ratio decidendi* at [59] and [60]:

> "In my judgment, what is pertinent is that the question for determination by the Court in this case is simply whether there is a valid and binding arbitration agreement between the Plaintiff and the Defendant, which covers the scope of the dispute between the two parties and the claims made by them in these proceedings and in the two sets of Russian proceedings, and whether to grant the injunctions on the Plaintiff's application. It is trite, that the arbitration agreement contained in the Arbitration Clause is severable from and separate to the underlying TSA between the parties. Any illegality of the TSA, and any alleged impossbility to perform the TSA, cannot affect

> the validity and operation of the arbitration agreement. Nor does the impossibility of performance of any award obtained in the HK Arbitration affect the validity and enforceability of either the arbitration agreement, the HK Arbitration itself, or the award obtained …
>
> … It is simply not necessary for the Court to decide whether the issue and application of the EU Sanction confers a good answer to the Defendant's claim for payment under the TSA, whether the Plaintiff can be excused from payment, and the effect of the EU Sanction on the TSA are all matters which go to the merits of the claim in the HK Arbitration, and it should not be forgotten that the Court does not consider the merits of the underlying dispute when it decides the Plaintiff's claim for the injunctions – which are made solely on the basis of a valid arbitration agreement. This is also a reason to reject the Defendant's assertion that by granting the injunctions to the Plaintiff, the Court is implementing or facilitating the EU Sanction. Any injunction which the Court grants in this case is to facilitate the arbitration agreement between the parties, and nothing else".

The judge also denied that the EU Regulation is in any way contradictory to the public policy of Hong Kong or that of the People's Republic of China since it does not affect the rights or property of any Chinese entity or Hong Kong entity.

Overall, this is a fair case that the judge chose to uphold the effect of the arbitration agreement. It was somewhat curious that the parties agreed to the English law in the TSA agreement, knowing that, under the English law, the EU Regulation is likely to be effective. It is not known for what reason the Court in Russia found for the defendant regarding its entitlement to the payment under the TSA. For sure, a hard burden falls on arbitrators at the HKIAC (as per the TSA, the tribunal should consist of 3 arbitrators). There has been much discussion on the impact of any unilateral sanction upon arbitrators in recent years. Arbitrators will continue facing this challenge so long as the conflict remains, being that between Russia and Ukraine or that in the Middle East.

Compensation, y nada más – CJEU decides against Real Madrid in Case C-633/22

Just two days after losing to LOSC Lille in the Champions League, Real Madrid suffered another defeat against a French opponent. Among the 44 (!) judgments published this Friday by the CJEU – a flurry of decisions reminiscent of the madness that is the current Champions League format –, the Court decided a true 'clásico' of European private international law in Case C-633/22 *Real Madrid Club de Fútbol*.

The decision has long been awaited: eigth months after the Opinion by AG Szpunar (discussed here) has been published and almost 18 years since the facts of the case. It concerns an article published by leading French newspaper Le Monde in 2006, which claimed that both FC Barcelona and Real Madrid had retained the services of Eufemiano Fuentes, a sports doctor heavily implicated in numerous doping scandals. Real Madrid and a member of their medical team sought damages for the harm to their

reputation and were eventually awarded payment of € 390,000 to the former and of € 30,000 to the latter by a Spanish court in 2014. Their attempts to enforce those awards in France were thwarted, though, with the Paris Court of Appeal holding that they were violating French public policy by deterring the media's freedom of expression as guaranteed by Art 11. of the Charter of Fundamental Rights of the European Union. The French Cour de cassation finally referred the case to the CJEU in 2022, raising questions as to whether such a deterrent effect on freedom of expression would be a valid ground of public policy to refuse enforcement based on (what is now) Art. 45(1)(a) Brussels Ia and, if so, how it could be established.

In its decision (not yet available in English), the Court largely follows the Opinion of its Advocate General. After reiterating the importance of striking the right balance between swift recognition and enforcement of judgments between Member States and the defendant's right of defence (paras. 29–31), the Court emphasises that – except in exceptional circumstances – the courts of the Member State of enforcement must not review the substance of the foreign decision (paras. 36–39) and may even have to presume that the fundamental rights of the defendant, including those derived from EU law, have been respected (paras. 42–43). Yet, a violation of the freedom of expression enshrined in Art. 11 of the Charter (and Art. 10 of the European Convention of Human Rights) may constitute such exceptional circumstances (paras. 45–53).

Focusing on the present case, the Court then goes on to emphasise the role of the press as a 'public watchdog' (using the English term even in the French original), not least with regard to reporting on doping in professional sports, and the risks of a deterring effect, relying extensively on jurisprudence by the European Court of Human Rights (paras. 54–56). According to the Court, it follows that in this context,

> *'toute décision accordant des dommages-intérêts pour une atteinte causée à la réputation doit présenter un rapport raisonnable de proportionnalité entre la somme allouée et l'atteinte en cause.' (para. 57)*

In order to establish the existence of such a reasonable proportion, the courts of the Member State of enforcement may indeed consider, in particular, the amount awarded: if it exceeds the material and immaterial damage, or if it is significant in

comparison to the ressources of the defendant, a deterrent effect may be found (paras. 62–64). What is more, the courts may also take into the account *'la gravité de la faute [des personnes condamnées]*' (para. 68).

While it remains for the French courts to apply these criteria to the Spanish decision – and to potentially refuse enforcement to the extent (!) that it has a deterrent effect on freedom of expression (i.e. not entirely; see para. 72) on this basis –, the Court of Justice certainly appears open towards the possibility of such a deterring effect being found to exist in the present case.

The Dubai Supreme Court on Indirect Jurisdiction – A Ray of Clarity after a Long Fog of Uncertainty?

I. Introduction

It is widely acknowledged that the recognition and enforcement of foreign judgments depend, first and foremost, on whether the foreign court issuing the judgment was competent to hear the dispute (see Béligh Elbalti, "The Jurisdiction of Foreign Courts and the Enforcement of Their Judgments in Tunisia: A Need for Reconsideration", 8 *Journal of Private International Law* 2 (2012) 199). This is often referred to as "indirect jurisdiction," a term generally attributed to the renowned French scholar Bartin. (For more on the life and work of this influential figure, see Samuel Fulli-Lemaire, "Bartin, Etienne", in J. Basedow *et al.* (eds.), *Encyclopedia of Private International Law – Vol. I* (2017) 151.)

Broadly speaking, indirect jurisdiction refers to the jurisdiction of the foreign court in the context of recognizing and enforcing foreign judgments. Concretely, the court being asked to recognize and enforce a foreign judgment evaluates

whether the foreign court had proper jurisdiction to hear the dispute. The term "indirect" distinguishes this concept from its legal opposite: direct jurisdiction. Unlike indirect jurisdiction, direct jurisdiction refers to the authority (international jurisdiction) of a domestic court to hear and adjudicate a dispute involving a foreign element (see Ralf Michaels, "Some Fundamental Jurisdictional Conceptions as Applied in Judgment Conventions," in E. Gottschalk et al. (eds.), *Conflict of Laws in a Globalized World* (2007) 35).

While indirect jurisdiction is universally admitted in national legislation and international conventions on the recognition and enforcement of foreign judgments, the standard based on which this requirement is examined vary at best running the gamut from a quite loose standard (usually limited *only* to the examination of whether the dispute fall under the exclusive jurisdiction of the requested court as legally determined in a limitative manner), to a very restrictive one (excluding the indirect jurisdiction of the rendering court every time the jurisdiction of the requested court – usually determined in a very broad manner – is verified). The UAE traditionally belonged to this latter group (for a comparative overview in MENA Arab Jurisdictions, see Béligh Elbalti, "Perspective of Arab Countries," in M. Weller *et al.* (eds.), *The 2019 HCCH Judgments Convention – Cornerstones, Prospects, Outlook* (2023) 187-188; *Idem* "The Recognition of Foreign Judgments as a Tool of Economic Integration – Views from Middle Eastern and Arab Gulf Countries, *in* P Sooksripaisarnkit and S R Garimella, *China's One Belt One Road Initiative and Private International Law* (2018) 226-229). Indeed, despite the legal reform introduced in 2018 (see *infra*), UAE courts have continued to adhere to their stringent approach to indirect jurisdiction. However, as the case reported here shows this might no longer be the case. The recent Dubai Supreme Court's decision in the *Appeal No. 339/2023 of 15 August 2024* confirms a latent trend observed in the UAE, particularly in Dubai, thus introducing a significant shift towards the liberalization of the recognition and enforcement requirements. Although some questions remain as to the reach of this case and its consequences, it remains a very important decision and therefore warrants attention.

II. Facts

The summaries of facts in UAE courts' decisions are sometimes sparse in details.

This one particularly lacks the information necessary to fully understand the case.

What can be inferred from the description of facts in the decision is that the dispute involved two Polish parties, a company as a plaintiff (hereafter referred to as "X") and a seemingly a natural person as a defendant (hereafter referred to as "Y") who has his "residence [*iqamah*]" in Dubai.

X was successful in the action it brought against Y in Poland and obtained a judgment ordering the latter to pay a certain amount of money. Later, X sought to enforce the Polish judgment in Dubai.

X's enforcement petition was first admitted by the Execution Court of Dubai. On appeal, the Dubai Court of Appeal overturned the enforcement order on the ground that the international jurisdiction over the dispute lied with Dubai courts since Y had his "residence" in Dubai. Dissatisfied, X filed an appeal before the Dubai Supreme Court.

Before the Supreme Court, X argued that Y's residence in the UAE does not prevent actions from being brought against him in his home country, where the "event [*waqi'a*]" giving rise to the dispute occurred, particularly since both parties hold the same nationality. In addition, X claimed that it was not aware that Y's residence was in the UAE.

III. The Ruling

The Supreme Court admitted the appeal and overturned the appealed decision with remand.

In its ruling, and after recalling the basic rules on statutory interpretation, the Supreme Court held as follows:

"According to Article 85 paragraph [……] of the Executive Regulation of the Civil Procedure Act (issued by Cabinet Decision No. 57/2018,[i] applicable to the case in question), [……], "enforcement shall not be ordered unless the following is verified: "UAE courts do not have exclusive jurisdiction over the dispute [……], and that the foreign rendering court had jurisdiction according to its own laws."

"This clearly indicates that the legislator did not allow enforcement orders to be

granted [……] unless UAE courts do not have exclusive jurisdiction over the dispute in which the foreign judgment to be declared enforceable was rendered. Therefore, in case of concurrent jurisdiction between UAE courts and the foreign rendering court, and both courts are competent to hear the dispute, this does not, by itself, prevent the granting of the enforcement order. This marks a departure from the previous approach prior to the aforementioned Executive Regulation, where, under the provisions of Article 235 of Federal Act on Civil Procedure No. 11/1992,[ii] it was sufficient to refuse the enforcement of a foreign judgment if the UAE courts were found to have jurisdiction over the dispute—even if their jurisdiction was not exclusive. [This continued to be the case until] the legislator intervened to address the issue of the jurisdiction that is exclusive to UAE courts [as the requested State] and concurrent jurisdiction that shared the foreign rendering court whose judgment is sought to be enforced [in UAE]. [Indeed,] the abovementioned 2018 Executive Regulation resolved this issue by clarifying that what prevents from declaring a foreign judgment enforceable is [the fact that] UAE courts are conferred exclusive jurisdiction over the dispute in which the foreign judgment was rendered. This was reaffirmed in [……] in [the new] Article 222 of the Civil Procedure Law issued by Federal Decree-Law No. 42 of 2022,[iii] which maintained this requirement [without modification].

[…] the appealed decision departed from this point view, and overturned the order declaring the foreign judgment in question enforceable on the ground that Y resides UAE, which grants jurisdiction to Dubai courts over the dispute […], despite the fact that [this] basis [of jurisdiction] referred to by the appealed decision [i.e. – the defendant's residence in the UAE] does not grant exclusive jurisdiction to UAE courts to the exclusion of the foreign rendering court's jurisdiction. Therefore, the ruling misapplied the law and should be overturned." (underline added)

IV. Analyses

The conclusion of the Dubai Supreme Court must be approved. The decision provides indeed a welcome, and a *much-awaited clarification* regarding what can be considered one of the most controversial requirements in the UAE enforcement system. In a previous post, I mentioned indirect jurisdiction as one of the common grounds based on which UAE courts have often refused to recognize

an enforce foreign judgments in addition to reciprocity and public policy.[iv] This is because, as explained elsewhere (Elbalti, *op. cit*), the UAE has probably one of the most stringent standard to review a foreign court's indirect jurisdiction.

1. Indirect jurisdiction – Standard of control

The standard for recognizing foreign judgments under UAE law involves three layers of control (former article 235 of the 1992 FACP). First, UAE courts must not have jurisdiction over the case in which the foreign judgment was issued(former article 235(2)(a) first half of the 1992 FACP). Second, the foreign court must have exercised jurisdiction in accordance with its rules of international jurisdiction (former article 235(2)(a) second half of the 1992 FACP). Third, the foreign court's jurisdiction must align with its domestic law, which includes both subject-matter and territorial jurisdiction, as interpreted by the court (former Article 235(2)(b) of the 1992 FACP).

a) Traditional (stringent) position under the then applicable provisions

The interpretation and application of the first rule have been particularly problematic as UAE courts. The courts have, indeed, often rejected foreign courts' indirect jurisdiction when UAE jurisdiction can be justified under the expansive UAE rules of direct jurisdiction (former articles 20 to 23 of the 1992 FACP), even when the foreign court is validly competent by its own standards (*Dubai Supreme Court, Appeal No. 114/1993 of 26 September 1993* [Hong Kong judgment in a contractual dispute – defendant's domicile in Dubai]). Further complicating the issue, UAE courts tend to view their jurisdiction as mandatory and routinely nullify agreements that attempt to derogate from it (article 24 of the 1992 FACP, current article 23 of the 2022 FACP. See e.g., *Federal Supreme Court, Appeals No. 311 & 325/14 of 20 March 1994*; *Dubai Supreme Court, Appeals No. 244 & 265/2010 of 9 November 2010*; *Abu Dhabi Supreme Court, Appeal No. 733/2019 of 20 August 2019*).

b) Case law application

While there are rare cases where UAE courts have accepted the indirect jurisdiction of a foreign court, either based on the law of the rendering state (see e.g., *Abu Dhabi Supreme Court, Appeal No. 1366/2009 of 13 January 2010*) or by determining that their own jurisdiction does not exclude foreign jurisdiction unless the dispute falls under their exclusive authority (see e.g., *Abu Dhabi Supreme Court, Appeal No. 36/2007 of 28 November 2007*), the majority of cases have adhered to the traditional restrictive view (see e.g., *Federal Supreme Court, Appeal No. 60/25 of 11 December 2004*; *Dubai Supreme Court, Appeal No. 240/2017 of 27 July 2017* ; *Abu Dhabi Supreme Court, Appeal No. 106/2016 of 11 May 2016*). This holds true even when the foreign court's jurisdiction is based on a choice of court agreement (see e.g., *Dubai Supreme Court, Appeal No. 52/2019 of 18 April 2019*). Notably, UAE courts have sometimes favored local interpretations over international conventions governing indirect jurisdiction, even when such conventions were applicable (see e.g., *Dubai Supreme Court, Appeal No. 468/2017 of 14 December 2017*; *Abu Dhabi Supreme Court, Appeal No. 238/2017 of 11 October 2017*. But *contra*, see e.g., *Dubai Supreme Court, Appeal No. 87/2009 of 22 December 2009*; *Federal Supreme Court, Appeal 5/2004 of 26 June 2006*).

2. The 2018 Reform and its confirmation in 2022

The 2018 reform of the FACP introduced significant changes to the enforcement of foreign judgments, now outlined in the 2018 Executive Regulation (articles 85–88) and later confirmed in the new 2022 FACP (articles 222~225). One of the key modifications was the clarification that UAE courts' exclusive jurisdiction should only be a factor when the dispute falls under their exclusive authority (Art. 85(2)(a) of the 2018 Executive Regulation; article 222(2)(a) of the new 2022 FACP). While courts initially continued adhering to older interpretations, a shift toward the new rule emerged, as evidenced by a case involving the enforcement of a Singaporean judgment (which I previously reported here in the comments). In this case, Dubai courts upheld the foreign judgment, acknowledging that their jurisdiction, though applicable, was not exclusive (*Dubai Court of First Instance, Case No. 968/2020 of 7 April 2021*). The Dubai Supreme Court further confirmed this approach by dismissing an appeal that sought to challenge the judgment's enforcement (*Appeal No. 415/2021 of 30 December 2021*). This case is among the first to reflect a new, more expansive interpretation of UAE courts' recognition of

foreign judgments, aligning with the intent behind the 2018 reform.

3. Legal implications of the new decision and the way forward

The Dubai Supreme Court's decision in the case reported here signifies a clear shift in the UAE's policy toward recognizing and enforcing foreign judgments. This ruling addresses a critical issue within the UAE's enforcement regime and aligns with broader trends in global legal systems (see Béligh Elbalti, "Spontaneous Harmonization and the Liberalization of the Recognition and Enforcement of Foreign Judgments" 16 *Japanese Yearbook of Private International Law* (2014) 273). As such, the significance of this development cannot be underestimated.

However, there is a notable caveat: while the ruling establishes that enforcement will be granted if UAE courts do not have exclusive jurisdiction, the question remains as to which cases fall under the UAE courts' exclusive jurisdiction. The 2022 FACP does not provide clarity on this matter. One possible exception can be inferred from the 2022 FACP's regulation of direct jurisdiction which confers broad jurisdiction to UAE courts, "except for actions relating to immovable located abroad" (article 19 of the 2022 FACP). Another exception is provided for in Article 5(2) of the Federal Act on Commercial Agencies,[v] which subjects all disputes regarding commercial agencies in UAE to the jurisdiction of the UAE courts (see e.g., *Federal Supreme Appeal No. 318/18 of 12 November 1996*).

Finally, one can question the relevance of the three-layer control of the indirect jurisdiction of foreign courts, particularly regarding the assessment of whether the foreign court had jurisdiction based on its own rules of both domestic and international jurisdiction. It seems rather peculiar that a UAE judge would be considered more knowledgeable or better equipped to determine that these rules were misapplied by a foreign judge, who is presumably well-versed in the legal framework of their own jurisdiction. This raises concerns about the efficiency and fairness of such a control mechanism, as it could lead to inconsistent or overly stringent standards in evaluating foreign judgments. These requirements are thus called to be abolished.

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[i] The 2018 Executive Regulation Implementing the 1992 Federal Act on Civil Procedure (Cabinet decision No. 57/2018 of 9 December 2018, as subsequently amended notably by the Cabinet Decision No.75/2021 of 30 August 2021; hereafter referred to as "2018 Executive Regulation".)

[ii] The 1992 Federal Act on Civil Procedure (Federal Law No. 11/1992 of 24 February 1992, hereafter "1992 FACP").

[iii] The 2022 Federal Act on Civil Procedure (Federal Legislative Decree No. 42/2022 of 30 October 2022). The Act abolished and replaced the 2018 Executive Regulation and the 1992 FACP (hereafter "2022 FACP").

[iv] However, since then, there have been subsequent developments regarding reciprocity that warrant attention as reported here.

[v] Federal Law No. 3/2022 of 13 December 2022 regulating Commercial Agencies, which repealed and replaced the former Federal Law No. 18/1982 of 11 August 1981.

How many monetary judgments that Chinese courts decided to enforce are successfully enforced?

It is necessary to distinguish (1) a court's decision to acknowledge the validity of a foreign judgment (judgment recognition and enforcement), and (1) whether a judgment creditor successfully recovers the awarded amount in practice.

For example, *Kolmar Group AG v. Jiangsu Textile Industry (Group) Import & Export Co., Ltd*. is notable because it was the first case where a foreign monetary judgment was recognized based on the principle of *de facto* reciprocity in China.

However, the recognition and enforcement of the judgment does not necessarily mean that Kolmar Group actually recovered the money.

Up to 10 September 2023, there had been 63 cases in total concerning the recognition and enforcement of foreign judgments on the grounds of reciprocity or judicial assistance treaties ratified by China in civil or commercial matters. Of these, 26 were successful cases where the Chinese courts decided to recognize and enforce foreign judgments while 3 were partially successful cases (the Chinese courts recognized compensatory damages but rejected punitive damages); the recognition and enforcement of foreign judgments were rejected in the remaining 34 cases.

Have the creditors of the 29 foreign judgments recovered their money in China?

After extensive empirical research, the findings can be divided into three groups.

Firstly, the (partially) successful enforcement group includes both voluntary and compulsory enforcement cases. Among the 9 judgments, 3 were to appoint insolvency administrators and with no or limited enforcement contents. For example, in the case of *In re DAR*, real property owned by the German insolvent company had already been fully paid for and been occupied by the company associated with the creditor before the German insolvency judgment was recognized in China. As this real property was the only property owned by the insolvent company in China, there was no other property to be collected or debt to be paid by the insolvency administrator. Another 3 judgments in this group were rendered against the same party. The plaintiffs, when applying for US judgments to be recognized and enforced in China, successfully requested the Guangzhou Intermediate People's Court to preserve a significant amount of the defendant's assets in China in order to pay the judgment debts. Importantly, the cases in this group do not necessarily mean that the judgment creditors will have their foreign judgments completely satisfied.

Secondly, 7 cases are in the group of unsuccessful compulsory enforcement, where all of the compulsory enforcement proceedings had been closed due to the debtors having no assets for enforcement. In *Kolmar Group AG v. Jiangsu Textile Industry (Group) Import & Export Co., Ltd,* although the Chinese court decided to recognize and enforce the Singaporean judgment, the debtor did not voluntarily fulfill the obligations under the judgment. Consequently, the creditor applied to

the Chinese court for compulsory enforcement, and the court docketed the case on 21 December 2016. On 24 January 2017, the same court made a civil ruling and accepted another Chinese company's application to reorganize the debtor due to the latter's insolvency. On 8 December 2017, the court made a series of civil rulings approving the merger and reorganization plan of the debtor and terminating the insolvency proceedings. On 28 December 2017, the creditor withdrew its application for the compulsory enforcement of the judgment. From the publicly available documents, the relationship between the judgment creditor and the Chinese company that merged with the judgment debtor is unknown. However, if the judgment creditor had received the payment from the insolvency reorganization proceedings, the Chinese Judgment Enforcement Decision would have contained this information.

Thirdly, 13 cases are in the group containing an unknown enforcement status. This group covers three circumstances. (1) The foreign judgments have been voluntarily enforced by judgment debtors so compulsory enforcement decisions are unnecessary. (2) The judgment creditors have not applied for compulsory enforcement and the foreign judgments remain outstanding. (3) The judgment creditors have applied for compulsory enforcement, but the relevant compulsory enforcement decisions are not available to the public, so the enforcement status remains unknown.

As a conclusion, although the empirical study only covered 29 foreign judgments, which is a relatively small number, it exhausts all foreign judgments that the Chinese courts have decided to recognize and enforce up to September 2023. It reflects that, for a judgment creditor, obtaining a Chinese court's decision to recognize and enforce a foreign judgment is only the first step to recovering funds in China.

All comments are welcome.

For detailed information about this research, please refer to section 5.3.1 of 'Jie (Jeanne) Huang, Developing Chinese Private International Law for Transnational Civil and Commercial Litigation: The 2024 New Chinese Civil Procedure Law, Netherlands International Law Review (2023).'

Insights and Future Directions of PIL Based on the 2024 Online Summer Courses at The Hague Academy of International Law

By Birgit van Houtert, Assistant Professor of Private International Law at Maastricht University

From 29 July till 16 Augustus 2024, the Summer Courses on Private International Law (PIL) were held at the 93rd session of the summer courses of the Hague Academy of International Law. The PIL courses were followed by 250 onsite attendees and remotely 61 attendees from 74 different countries. The inaugural lecture was presented by Lord Lawrence Collins of Mapesbury (Former Justice at the United Kingdom Supreme Court) on the "Use and Abuse of Comity in International Litigation". In the next three weeks, the general course was given by Charalambos Pamboukis (Professor at the National and Kapodistrian University of Athens) titled "The Metamorphoses of Private International Law". During these three weeks, six special courses were given by Alessandra Zanobetti (Professor at the University of Bologna) on "The Effects of Economic Sanctions and Counter-Measures on Private Legal Relationships"; Natalie Y. Morris-Sharma (Director at the Attorney-General's Chambers of Singapore) on "The Singapore Convention and the International Law of Mediation"; Carlos Esplugues Mota (Professor at the University of Valencia) on "New Dimensions in the Application of Foreign Law by Courts (and Arbitrators) and Non-judicial Authorities"; Jack Coe (Professor at Pepperdine Caruso School of Law) on "Non-ICSID Convention Investor-State Awards in Domestic Courts"; Eva Lein (Professor at the University of Lausanne) on "Breathing Space in International Commercial Litigation"; Andrew Dickinson (Professor at the University of Oxford) on "Natural Justice in Recognition and Enforcement of Foreign Judgements". These PIL experts provided very interesting and valuable insights, including future (desirable) directions on PIL that can guide and inspire students, researchers, legal

practitioners, courts, and legislators. The courses will be published by Brill in the series *Collected Courses of The Hague Academy of International Law / Recueil des cours de l'Académie de La Haye*. The fact that the courses commonly focused on PIL globally, by including national, regional and international PIL, is particularly laudable in view of our interconnected world. This blog aims to describe common threads of the 2024 Online Summer Courses on PIL that may encourage you to read the Hague Academy Collected Courses and inspire further research.[1]

The interaction between public international law and PIL

All lectures showed that there cannot be drawn a sharp distinction between public international law and PIL.[2] Several lecturers have illustrated the current interaction between these two fields of law. On the basis of case law in England and the U.S. involving private parties, Collins argued that the principle of comity has often been misused in favour of the interests of the forum state. For instance, in a case involving a request for evidence from French airplane manufacturing companies by victims of an airplane crash, instead of a first resort to the Hague Evidence Convention, the U.S. Supreme Court ruled that comity requires an assessment of the interests of the foreign nation involved and the requesting nation.[3] Collins argued that in practice, U.S. and English courts do not give effect to foreign blocking statutes, like the French Blocking Statute, but have ruled in favor of disclosure of documents and information. As the main abuse of comity, Collins pointed out that the Court of Appeals for the Second Circuit in New York has rejected the enforcement of arbitral awards for reasons of *forum non conveniens*. With respect to the grant of anti-suit injunctions, courts nonetheless ruled that comity requires caution as these injunctions involve an indirect interference with proceedings of foreign courts unless the injunction aims to prevent a breach of a choice of court agreement or arbitration agreement.[4] Another illustration on the interplay between public and private international law can be drawn from the Zanobetti's lectures who argued that economic sanctions may set aside the *lex contractus* by means of the public policy exception in PIL. In the context of investor-state arbitration, Coe and Morris-Sharma have referred to the intersection between PIL and public international law. Coe in particular demonstrated the common features between business-to-business arbitration and non-ICSID (International Centre for Settlement of Investment Disputes) arbitration, both types of arbitration result in awards to which the New York

Convention applies. Morris-Sharma has argued that although the investor-state dispute settlement regime mainly concerns state-to-state obligations, a foreign (private) investor may bring a claim directly against the state. While Morris-Sharma gave her lectures on the United Nations Convention on International Settlement Agreements Resulting from Mediation, adopted in 2018, (the Singapore Convention on Mediation, SCM), she noted that whereas this treaty concerns a public international law instrument, it has as subject matter the regulation of private relationships and therefore concerns issues of PIL. In view of current global issues, Morris-Sharma emphasised the importance of "continuing conversations" between public and private international law to bring order into global governance. In addition to research, Maastricht University shows that education could also be a tool to foster these type of conversations as students of the European Law School are taught PIL integrated into courses of European and international law.[5]

The global governance role of PIL[6]

Several courses have demonstrated the increasing role that contemporary PIL plays regarding global goals, varying from the protection of human rights, such as to guarantee the right of a fair hearing in the context of the recognition of foreign judgements as indicated by Dickinson and Lein, to trans-human goals like the protection of the environment as pointed out by Pamboukis. Pamboukis also emphasised the importance of the 'peacemaking' role of contemporary PIL, in the sense of the pacification of different values, which facilitates pluralism and the acceptance of the 'otherness'.[7] However, Pamboukis argued that the trend of anti-globalisation may lead to other metamorphoses of PIL. Esplugues Mota pointed out that there already exist a trend of "nationalisation of transnational situations" fostered by PIL. For instance, as a result of the anti-immigration trend in western countries, the connecting factor of the nationality has increasingly been changed into the 'habitual residence' to nationalise situations. Nonetheless, in view of the current global problems, such as climate crises, war and economic sanctions, Jean-Marc Thouvenin (Secretary-General of The Hague Academy of International Law, Professor at the University Paris Nanterre) made in his welcome speech of the 2024 Summer Course the bold statement that "private international law is faring better these days than public international law". The lectures given by Lein showed that PIL can indeed be a valuable global governance tool in this era of "polycrises"[8] as it facilitates international trade by

providing “breathing space” mechanisms to international contractual parties. For instance, parties can generally make a choice for a national contract law that enables them to renegotiate or adapt their contract in case unforeseen circumstances impede the performance of contractual obligations.

Justice as objective of PIL

The courses showed that PIL is increasingly providing justice and PIL should also aim to serve justice. Yet, as mentioned by Pamboukis, the notion of justice is broad.[9] According to Pamboukis, justice is fairness, which includes equality. In the context of PIL, he illustrated that equality is, *inter alia,* visible by the multilateral character of conflict-of-laws rules and rules that protect weaker parties. Based on natural justice, Dickinson also referred to the importance of the principle of equality for the law that includes both substantive and procedural aspects. To safeguard this principle, he pointed out the public policy exception regarding the recognition and enforcement of foreign judgments.

As the meta-metamorphosis of the traditional, Von Savigny-based, conflict-of-laws rule, Pamboukis pointed out the change of its purpose from conflictual justice, i.e. justice based on geographically closest connection, to substantive justice in the sense of a just, fair result by means of a more flexible conflict-of-laws rule and methods. Pamboukis advocated the increasing important role of the method of recognition, in particular with respect to acquired rights and personal status. He also referred to adaptation and a more flexible application of *conflit mobile* to achieve a just result *in concreto*. Furthermore, Pamboukis argued to apply in PIL the principle of proportionality as balancing the concrete interests involved should lead to a fair result. The decision of the French Supreme Court on 17 November 2021, which opened up the possibility of recognising a foreign bigamous marriage in a particular case,[10] seems to be in line with the direction of PIL as advocated by Pamboukis.

With respect to the interpretation of justice in PIL, human rights are also increasingly playing an important role. As indicated by Dickinson and Lein, fair trail rights in human right treaties, like the right to be heard, have influenced the interpretation of the public policy exception in the context of the recognition of foreign judgements. Esplugues Mota nonetheless pointed out the “human rights discourse” regarding the recognition of personal situations abroad as a factor militating against the application of foreign law.[11] The recent Anti-SLAPPs

('Strategic lawsuits against public participation') Directive (EU) 2024/1069 could also be seen as an expression of the human rights impact on PIL that influences the concept of justice in the PIL.[12]

Several lecturers highlighted the importance of justice at procedural level. Zanobetti called for further research on the issue whether the 'no-claim' clause related to economic sanctions is contrary to the right to have access to courts. Lein argued that PIL provides various tools that facilitate access to justice in times of crises, such as the change of a choice of court clause that can easily be done according to various PIL instruments[13]. Dickinson advocated to pursue natural justice by recognising and enforcing foreign judgements unless they are unjust or inconsistent with the core values of the requested state. Furthermore, the procedure that resulted into the foreign judgement should have complied with procedural principles of natural justice such as due process, and the competence of the court of origin should be in accordance with these principles such as jurisdiction based on the parties' consent. Dickinson illustrated that several national legal systems and treaties reflect natural right-based principles with respect to the recognition of foreign judgements.[14] On the basis of natural law, Dickinson also advocated that states and courts should pursue multi-dimensional justice when developing rules of recognition and enforcement, which requires an assessment on different levels of relational perspectives, including the parties to the dispute, states, and other human beings. Morris-Sharma argued that access to justice is also facilitated by alternative dispute resolution mechanism. However, Esplugues Mota pointed out that the risk of "second class justice" is high in case arbitrators apply foreign law wrongly, as this application is generally even not subject to control.

The changed state-based approach in PIL

While in international civil disputes, PIL traditionally indicates in which state, or states, the court is competent and the law of which country, or countries, applies, most of the lecturers addressed the growing role of arbitrators with respect to the application of foreign law, including non-state law. Nonetheless, Dickinson's lectures on the principle of peaceful dispute resolution derived from natural law pointed out the importance of access to an independent and impartial judge who provides binding solutions and the possibility of appeal. As mentioned earlier, Esplugues Mota emphasised the risk of "second class justice" in case of alternative dispute resolution. Several lecturers referred to the use of AI

technologies in dispute resolution, including AI courts. However, as indicated by Lein, judgements based on the use of AI technologies run the risk of not being recognised on the basis of the public policy exception. This risk seems high considering the fact that AI technologies are not (yet) accurate and fully impartial as they are based on human biases, like gender bias.

Several courses showed that the application of non-state law is playing an increasing role with respect to cross-border disputes between private parties.[15] As explained by Esplugues Mota, the application of non-state law may entail difficulties as regards its meaning, content, characterisation, and level of certainty. Esplugues Mota nonetheless asserted that certain non-state rules, namely the law of the *societas mercatorium*,[16] religious law,[17] and indigenous law,[18] are increasingly taken into account, or even applied by non-state and state authorities. In this way, PIL facilitates legal pluralism.

Concluding remarks

As argued by Pamboukis, PIL generally became more open, flexible. The courses indicated the need for PIL to remain open to the influence of human rights, pluralism, non-state law, including the law of nature, and the 'otherness'. Fingers crossed that this openness of PIL continuous to grow in spite of the upcoming movement of anti-globalization, nationalism, including right-wing extremism. Therefore, international cooperation in PIL remains highly important.

[1] As I followed the courses online, this blog does not concern the seminars or elective courses that were given onsite at the Hague Academy of International Law. The assignment for writing this blog was given by Maastricht University, which made it possible for me to attend these courses.

[2] The scholar Alex Mills has frequently published on the blurry distinction between public international law and private international law.

[3] See *Societe Nationale Industrielle Aerospatiale v. U.S. District Court* 482 US 522 (1987).

[4] Collins referred to the *Laker Airways* litigation, *inter alia, Laker Airways Ltd v Sabena Belgian World Airways,* 731 F. 2d 909 (DC Cir 1984).

[5] On the combination of teaching of public and private international law, see

also Poomintr Sooksripaisarnkit and Dharmita Prasad, "Private International Law and Public International Law-Increasing Convergence or Divergence as Usual?", in: Poomintr Sooksripaisarnkit and Dharmita Prasad (eds.), *Blurry boundaries of public and private international law: towards convergence or divergent still?*, Singapore: Springer 2022.

[6] Robert Wai and Horatia Muir-Watt are among the scholars who frequently published on the role of global governance role of PIL.

[7] With respect to the concept of pluralism and the 'otherness', Pamboukis referred to the scholar Santi Romano. On this interesting topic, see also Horatia Muir Watt who has published her 18th Rabel Lecture in November 2002 on Alterity in the Conflict of Laws-An Onthology of the In-Between.

[8] Lein defined the term 'polycrises' as "the simultaneous occurrence of several catastrophic events" such as pandemics, environmental disasters, and armed conflicts. Lein referred in this context to Catherine Kessedjian, "Chapter 12, International Law and Crisis Narratives after the Covid-19 Pandamic", in: Mbengue, d'Aspremont, *Crises Narratives in international Law* 2022, pp. 132 ff.

[9] With respect to various views on the concept of justice in PIL, see also Michael S. Green, Ralf Michaels, Roxana Banu (eds), *Philosophical Foundations of Private International Law,* Oxford University Press 2024.

[10] See the EAPIL blog post, on 6 January 2022, "French Supreme Court Opens Door for Recognition of Foreign Bigamous Marriage" by Marion Ho-Dac.

[11] Esplugues Mota referred in this context to the *Wagner and J.M.W.L. v. Luxembourg* case of 2007 involving the right to have a family on the basis of Article 8 European Convention on Human Rights.

[12] With respect to improvements and challenges of the Anti-SLAPPs Directive (EU) 2024/1069 in the context of PIL, see my forthcoming article in *Nederlands Internationaal Privaatrecht* no. 4, 2024.

[13] In this context, Lein referred to, *inter alia,* Article 25(2) Brussels I Regulation (EU) 1215/2012.

[14] Dickinson referred to, *inter alia,* the criterion of "fundamental principles of

procedural fairness" in Article 7(1)(c) of the 2019 Hague Judgements Convention.

[15] Ralf Michaels has frequently published on non-state law in the context of PIL. See, *inter alia*, Ralf Michaels, "The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge From Global Legal Pluralism", 51 *Wayne Law Review* 1209-1259, 2005.

[16] In this context Esplugues Mota referred, *inter alia,* to Article 13. III of the Private International Law Act of Uruguay of 2020; Article 3 Hague Principles on Choice of Law in International Commercial Contracts of 2015.

[17] Esplugues Mota referred to, *inter alia,* the decision of the French Cour de cassation on 6 May 1985 that awarded damages to a divorced Jewish woman as she could not remarry within the Jewish faith because her husband did not 'give the Get'.

[18] In this context Esplugues Mota referred, *inter alia,* to Article 1(1) of the South African Law of Evidence Amendment Act 45 of 1988 on judicial notice of law of foreign state and of indigenous law.

The Public Law-Private Law Divide and Access to Frozen Russian Assets

By Csongor István Nagy, Professor of Law at the University of Galway, Ireland, and at the University of Szeged, Hungary, and research professor at the HUN-REN Center for Social Sciences, Hungary.

The overwhelming majority of the international community condemned Russia's war against Ukraine as a gross violation of international law and several countries introduced unilateral measures freezing Russian assets. It has been argued that countries should go beyond that and use these assets for the indemnification of

Ukrainian war damages. Confiscation would, however, be unprecedented and raise serious international law concerns. While states have, with good reason, been reluctant to react to one wrongful act with another, this question has given rise to intensive debate. Recently, the EU authorized the use of net profits from the frozen assets but not the assets themselves to support Ukraine.

In my paper forthcoming in the University of Pennsylvania Journal of International Law I argue that this question should be approached from the perspective of the public law-private law divide and international investment law may open the door to the use of a substantial part of the frozen assets for the purpose of war reparations. The pre-print version is available at SSRN.

Under international law, sovereign immunity rules out confiscation both as a countermeasure and a compensatory measure responding to *acta jure imperii*, such as military operations. Nonetheless, sovereign immunity does not extend to commercial matters, where judgments and awards can be enforced against state assets. Investment treaties, including the Russia-Ukraine BIT (RUBIT), "commercialize" *acta jure imperii*. They convert public law violations into *quasi*-commercial claims "immune from sovereign immunity." Although not the norm, mass claims are not unknown in investment arbitration. This implies that if Ukrainian claims for war damages can be submitted to investment arbitration and incorporated into an arbitral award, they may have a solid legal basis for enforcement against Russian assets. A good part of these assets can be used for this purpose. Although "non-commercial" assets, such as the property of diplomatic missions, military assets, cultural property, items displayed at an exhibition and, most importantly, the property of the central bank are immune from enforcement due to sovereign immunity, sovereign direct investments, airplanes, ships and the assets of persons attributable to the state can be used to satisfy investment awards.

The key issue of the RUBIT's applicability is territorial scope. Although, at first, the idea that Ukrainians may be awarded compensation on the basis of the RUBIT may raise eyebrows, in the Crimea cases arbitral tribunals just did that. They consistently applied the RUBIT to Russian measures and treated Crimea (strictly

for the purpose of the BIT!) as the territory of Russia on account of de facto control and legal incorporation. The foregoing principles should be valid also outside Crimea in cases where Russia occupies a territory and/or unilaterally incorporates (annexes) it. And if these territories can be treated as a territory for which Russia bears responsibility under international law, Ukrainians may be able to rely on this responsibility.

The Crimea arbitral awards' notion of territorial scope is not unprecedented in international law at all. For instance, in *Loizidou v. Turkey* and in *Cyprus v Turkey*, the European Court of Human Rights applied the European Convention on Human Rights to Turkey by reason of its occupation of Northern Cyprus. In *Al-Skeini v. United Kingdom*, it found the Convention applicable to the UK's operations in Iraq on account of the occupation of the country.

Although the RUBIT was recently terminated by Ukraine, it remains in force until January 27, 2025, and has a "continuing effects" clause in Article 14(3), which sustains investment claims for ten years after termination.

Tesseract: Don't Over-React! The High Court of Australia, Proportionate Liability,

Arbitration, and Private International Law

By Dr Benjamin Hayward
Associate Professor, Department of Business Law and Taxation, Monash Business School
X: @LawGuyPI, @MonashITICL

On 7 August 2024, the High Court of Australia handed down its long-awaited decision in *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24. The dispute arose out of a domestic commercial arbitration seated in South Australia, where the C*ommercial Arbitration Act 2011* (SA) is the relevant lex arbitri. That Act is a domestically focused adaptation of the UNCITRAL Model Law on International Commercial Arbitration (with its 2006 amendments).

The respondent to the arbitration sought to rely upon proportionate liability legislation found in the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) and in the *Competition and Consumer Act 2010* (Cth). The High Court was asked to determine whether those proportionate liability regimes could be applied in the arbitration. A very practical difficulty arose here, reflected in Steward J noting (in dissent) that the High Court was 'faced with an invidious choice': see [228]. Were the proportionate liability laws not to apply in the arbitration, the respondent might find themselves liable for 100% of the applicant's loss, when they would not be liable to that same extent in court proceedings applying the same body of South Australian law. But were the proportionate liability laws to apply, the applicant might find themselves able to recover only a portion of their loss in the arbitration, and might then have to then pursue court proceedings against another third party wrongdoer to recover the rest: given that joinder is not possible in arbitration without consent.

By a 5-2 majority, the High Court decided that these proportionate liability regimes were to be applied in the arbitration. There has been much commentary published already as to what this means for arbitration law in Australia – including here, and here. What might be of most interest for this blog's audience, however, is to note that the High Court's reasoning was grounded in the application of private international law.

All of the High Court's judgments in *Tesseract* – both majority and dissenting – recognised that whether or not the substantive law aspects of the two relevant proportionate liability regimes applied in the arbitration was a question of applicable law, to be resolved via South Australia's implementation of Art. 28 Model Law. This is not the first time that this provision has been addressed by the High Court of Australia. The High Court was also required to analyse its effect in a failed constitutional challenge to Australia's implementation of the Model Law in the international commercial arbitration context in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533. In that case, it was confirmed that Art. 28 Model Law does not require arbitrators to apply the law correctly. It was also confirmed that there is no separate term implied into an arbitration agreement having that effect.

It does not appear that the relationship between *TCL* and *Tesseract* has been appreciated in some existing commentaries on Tesseract, including in this blog which asks '[i]f the arbitrator gets it wrong, will that open the award to an enforcement challenge[?]' Viewing Tesseract in light of *TCL*'s previous analysis, it appears that there should be no recourse against an award if an arbitrator correctly identifies the law of an Australian jurisdiction as applicable, but incorrectly applies (or even completely fails to apply) that jurisdiction's proportionate liability laws. It is now trite law in Australia, as around the world, that errors of law do not ground recourse against an award under either the Model Law or the New York Convention.

Interestingly, the fact that Art. 28 Model Law was the key provision underpinning the High Court's analysis in *Tesseract* should also answer a matter identified in some other commentaries – including here, here, and here – around Queensland law prohibiting parties from contracting out of its proportionate liability regime, and Victorian, South Australian, ACT, and Northern Territory law being silent on that contracting out issue. Since Art. 28(1) Model Law permits parties to choose rules of law, and not only law in the sense of a complete State legal system, it is arguably open to arbitrating parties to exclude the operation of proportionate liability laws in all Australian jurisdictions regardless of what they say about contracting out. In such cases, the parties would simply be choosing rules of law – which is a type of choice that Art. 28(1) Model Law permits.

Thus, whilst one of the first questions asked about *Tesseract* has been '[i]s the decision arbitration-friendly?', it is perhaps not too controversial to suggest that

Tesseract was a case less about arbitration itself, and more about private international law.

Recent U.S. Developments Concerning the Hague Judgments Convention and COCA

Although the United States signed Hague Convention on Choice of Court Agreements (COCA) in 2009, it has yet to ratify it. In this post, I report on some recent developments that offer a basis for (cautious) optimism that the United States may soon take the necessary steps to ratify both COCA and the Hague Judgments Convention.

History

On January 19, 2009, the United States signed COCA. In the years that followed, the State Department had conversations with the Uniform Law Commission (ULC) about how COCA should be implemented. The ULC is a non-partisan, non-profit, unincorporated association comprised of volunteer attorneys appointed by each state of the United States plus the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Its mission is to promote uniformity in the law among these jurisdictions to the extent desirable and practicable.

Because the enforcement of foreign money judgments has been governed by state law in the United States since 1938, and because the ULC has promulgated widely adopted uniform state legislation on this topic, the ULC argued that COCA should be implemented—at least in part—through state law. In particular, the ULC proposed that the treaty be implemented through "cooperative federalism." Under this approach, there would be parallel federal legislation and state legislation implementing the treaty, with a reverse preemption provision in the

federal legislation allowing state law to govern if the state had passed the appropriate act.

This proposal ultimately foundered due to disagreements between the State Department and the ULC as to whether federal courts sitting in diversity would apply the state or federal legislation. Stasis ensued. The State Department was reluctant to present the treaty to the Senate without the support of the ULC. And the ULC was reluctant to endorse an implementation framework that displaced existing state law.

A Shift on COCA

On March 2, 2022, the United States signed the Hague Judgments Convention (HJC), a multilateral agreement that seeks to facilitate the recognition and enforcement of judgments more generally. Shortly thereafter, the ULC approved a Study Committee, chaired by Bill Henning and Diane Boyer-Vine, to consider how best to implement the HJC in the United States. The goal was to find a method of implementation that would minimize the disruption to state law while representing sound public policy. About a year after the Study Committee was created, it sought and received permission to revisit the question of how best to implement COCA. I served as the Reporter for the Study Committee.

Following more than eighteen months of discussion and reflection, the Study Committee recommended that the ULC revisit its earlier position on COCA implementation. Specifically, the Study Committee recommended that the ULC abandon the cooperative federalism approach and leave the method of implementing COCA to the discretion of the State Department. This recommendation, which included an endorsement of COCA, was made subject to several uncontroversial caveats relating to the preservation of state law. The recommendation was approved by the ULC's Executive Committee on July 18, 2024.

These developments should make it easier for the State Department to obtain the advice and consent of the Senate should it choose to push for ratification of COCA. Historically, the Senate has been sensitive to issues of federalism and sometimes hesitant to give its advice and consent for conventions that displace state law. The endorsement of the ULC, an organization formed by the states with

a mission of preserving state law, will signal to the Senate that any disruption of state law is acceptable and in the public interest.

The Hague Judgments Convention

The Study Committee's initial charge was to consider the best method of implementing the Hague Judgments Convention (HJC). Whereas COCA seeks to facilitate the recognition and enforcement of judgments rendered by courts selected in an exclusive choice-of-court agreement, the HJC seeks to facilitate the recognition and enforcement of other judgments. Because the enforcement of foreign money judgments in the United States has long been governed by state law, the Study Committee sought to identify a path to ratification that would preserve existing state law to the extent possible. It concluded that this path ran through Article 15 of the HJC.

Article 15 reads as follows:

> *Subject to Article 6 [dealing with judgments based on rights in rem in real property], this Convention does not prevent the recognition or enforcement of judgments under national law.*

This language makes clear that ratifying countries may be more generous when it comes to the recognition and enforcement of foreign judgments than the Convention requires. It follows that state law may continue to be used to recognize and enforce foreign judgments in the United States so long as applying that law produces outcomes consistent with the minimum standards laid down by the HJC.

With this insight in mind, the Study Committee recommended that the ULC "endorse ratification of the Hague Judgments Convention as long as the United States preserves the ability of litigants to seek recognition and enforcement of money judgments rendered in another country under existing state law . . . in cases where applying state law would produce results that are consistent with the requirements of the Convention." This recommendation was approved by the ULC's Executive Committee on July 18, 2024.

How might this work in practice? Imagine the following scenario. Immediately

after the United States ratifies the HJC, Congress enacts a statute listing the minimum standards that must be met for a foreign judgment to be enforced via the HJC in the United States. Thereafter, judgment creditors would have a choice. On the one hand, they could seek recognition and enforcement under the federal statute. On the other hand, they could seek recognition and enforcement under state law. The benefit of this approach is that it preserves the ability of judgment creditors to rely on (what most observers describe as) a simple and efficient system of state law to recognize and enforce foreign judgments. The minimum standards laid down in the federal statute ensure that the application of state law in such cases will not take the United States out of compliance with the HJC. And if the judgment creditors prefer to enforce under the federal statute, they are free to do so.

Next Steps

With the Study Committee having completed its work, the action will now shift to the State Department's Advisory Committee on Private International Law, which will hold its next meeting at Texas A&M University School of Law in Fort Worth, Texas on Thursday and Friday, October 24-25, 2024. At that meeting, the State Department will be seeking input and guidance with respect to efforts toward U.S. ratification of COCA, the HJC, and the Singapore Convention.

First Thai Monetary Judgment Enforced in China, Highlighting Presumptive Reciprocity in China-ASEAN Region

This post is kindly provided by Dr. Meng Yu, lecturer at China University of Political Science and Law, and co-founder of China Justice Observer.

Key Takeaways:

- In June 2024, the China-ASEAN Free Trade Area Nanning International Commercial Tribunal under the Nanning Railway Transportation Intermediate Court in Guangxi ruled to recognize and enforce a Thai monetary judgment (*Guangxi Nanning China Travel Service, Ltd. v. Orient Thai Airlines Co., Ltd.* (2023) Gui 71 Xie Wai Ren No. 1).
- Apart from being the first case of enforcing Thai monetary judgments in China, it is also the first publicly reported case confirming a reciprocal relationship based on "presumptive reciprocity".
- The Chinese court's confirmation that "presumptive reciprocity", as outlined in the Nanning Statement, is a form of mutual consensus between China and ASEAN countries helps to promote the circulation of judgments within the China-ASEAN region.

On 18 June 2024, the China-ASEAN Free Trade Area Nanning International Commercial Tribunal under the Nanning Railway Transportation Intermediate Court, Guangxi (hereafter the "Nanning Court"), ruled to recognize and enforce a Thai monetary judgment.

This case marks the first time that a Chinese court has recognized and enforced a Thai monetary judgment. It is also the first publicly reported case to confirm a reciprocal relationship based on "presumptive reciprocity". The "presumptive reciprocity" test, outlined in the Nanning Statement of the 2nd China-ASEAN Justice Forum in 2017, has now been confirmed by the Nanning Court as a form of reciprocal consensus [1] between China and ASEAN countries. This explains the use of the term "presumptive reciprocity consensus" in the Chinese news report (cf. Guangxi High People's Court's news).

Although the full text of the judgment has not yet been made publicly available, the Chinese news report and related court announcements provide valuable details about the case. This case marks the latest application of the new reciprocity requirement by Chinese courts and actively promotes the circulation of judgments within the China-ASEAN region.

I. Case background

In July 2015, Guangxi Nanning China Travel Service Co., Ltd. ("Nanning China Travel"), a Chinese company, and Orient Thai Airlines Co., Ltd. ("Orient Thai Airlines"), a Thai company, entered into an airline ticket sales contract based on their long-term cooperation in charter flights. The contract was signed in Nanning and stipulated that disputes would be settled by the court where the Orient Thai Airlines was located. Subsequently, disputes arose between the parties, and Nanning China Travel filed a lawsuit against Orient Thai Airlines in the Central Intellectual Property and International Trade Court of Thailand ("Thai Court").

On 16 September 2019, the Thai Court issued a civil judgment No. GorKor 166/2562 (the "Thai Judgment"), ordering Orient Thai Airlines to pay CNY 18,002,676 (approx. USD 2,476,330) plus interest to Nanning China Travel.

In February 2023, in order to enforce the rights confirmed by the Thai Judgment, and considering that Orient Thai Airlines has multiple branches in China that may have executable assets, Nanning China Travel applied to the Nanning Court for recognition and enforcement of the Thai Judgment.

On 18 June 2024, the Nanning Court rendered the civil ruling (2023) Gui 71 Xie Wai Ren No. 1 to recognize and enforce the Thai Judgment.

II. Court's views

Although China and Thailand have signed the "Treaty on Judicial Assistance in Civil and Commercial Matters and on Cooperation in Arbitration", the treaty does not contain provisions on judgment recognition and enforcement. In the absence of a treaty, as this is the case with Thailand, recognition and enforcement can be pursued on the basis of the principle of reciprocity (New Art. 299 of the PRC Civil Procedure Law [former article 288 of the 2021 Amendment of the PRC Civil Procedure Law]).[2]

Determining whether reciprocity exists between China and Thailand is, therefore, a crucial first step.

As Judge Huayan Wang of the Nanning Court explained, "We (the court) examined two issues: the time limit of the application for recognition and enforcement, and the existence of reciprocity. The key to this case is the

determination of reciprocal consensus, in the absence of *de jure* reciprocity and *de facto* reciprocity".

In doing so, the Nanning Court referred to the presumptive reciprocity test proposed in the Nanning Statement as a form of reciprocal consensus, and ultimately determined that reciprocity existed between China and Thailand.

III. Comments

1. "Presumptive reciprocity" in this case

Interestingly, the Nanning Statement was adopted in Nanning in June 2017, and seven years later, in a striking coincidence, a local intermediate court in the same city confirmed the reciprocity between China and Thailand, relying on presumptive reciprocity proposed the Nanning Statement.

Simply put, the so-called "presumptive reciprocity" means that, unless proven otherwise, reciprocity is presumed to exist between the requested State and the State of origin, to the extent permitted by domestic law of the requested State.[3] Here, "proven otherwise" refers to any existing case where the judgments from the requested State have been refused enforcement in the State of origin on the ground of the lack of reciprocity. Since no such cases were found by the Nanning Court, reciprocity is presumed to exist between Thailand and China.

It is, however, still unclear how Thai courts would react to the "first move" from Chinese courts: will they follow suit or not? Given that it is unlikely, if not impossible, to have any foreign judgment recognized and enforced in Thailand, as discussed in an post provided by Asian Business Law Institute (ABLI), should a Thai court refuse to recognize and enforce a Chinese judgment on the ground of lack of reciprocity one day, the presumed reciprocity might have to be reviewed, or even revoked. By then, will there be any other way out? More issues need to be clarified and settled in future cases.

2. Wider Implication: reciprocal understanding or consensus in China-ASEAN region

What is more noteworthy is that the reciprocity consensus applied by Nanning court is considered to be a subcategory of "reciprocal understanding or consensus", which is one of the three new reciprocity tests in addition to de jure reciprocity and reciprocal commitment.

Chart – Reciprocity tests in China

Compared to the other two current reciprocity tests—de jure reciprocity and reciprocal commitment—reciprocal understanding or consensus is a more easily overlooked test, because it is neither as well-known as *de jure* reciprocity nor as novel as the reciprocal commitment (cf. other related posts including: (i) De jure reciprocity – The First Time China Recognizes English Judgment, Implementing 2022 Judicial Policy in Full; (ii) Reciprocal commitment – First Case of Reciprocal Commitment: China Requests Azerbaijan to Enforce its Judgment Based on Reciprocity; (iii) How Chinese Courts Determine Reciprocity in Foreign Judgment Enforcement – Breakthrough for Collecting Judgments in China Series (III); (iv) China's 2022 Landmark Judicial Policy Clears Final Hurdle for Enforcement of Foreign Judgments.)

Although the presumptive reciprocity proposed in the Nanning Statement is considered the best example of reciprocal consensus, from the time the Nanning Statement was adopted in 2017 until June 2024, the "presumptive reciprocity" remained largely theoretical. Prior to this case, there were no publicly reported cases indicating whether, and if so, how, Chinese courts applied "presumptive reciprocity" when dealing with cases involving the recognition and enforcement of judgments from ASEAN countries.

This case changed this situation.

The “presumptive reciprocity” outlined in the Nanning Statement, as a form of reciprocal consensus between China and ASEAN countries, has been confirmed by the Chinese court in this case. This means that for the ten ASEAN countries, apart from Laos and Vietnam, which already have applicable bilateral treaties with China, the remaining eight countries—Brunei Darussalam, Burma, Cambodia, Indonesia, Malaysia, the Philippines, Singapore, and Thailand—can have their civil and commercial judgments recognized and enforced in China based on the presumptive reciprocity.

In addition, for monetary judgments from Singapore, there is also the China-Singapore Memorandum of Guidance (MOG), which can be considered another example of “reciprocal understanding or consensus”. This MOG serves as a practical guideline for Chinese courts on how to recognize and enforce Singaporean monetary judgments. (Cf. other related posts including: (i) Series – Singapore-China Judgments Recognition and Enforcement; (ii) Chinese Court Recognizes Singaporean Judgment Again: No Bilateral Treaty But Only Memorandum?).

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[1] Since the 2000s, the standards to establish reciprocity have evolved significantly, reflecting China’s efforts to liberalize its rules on the recognition and enforcement of foreign judgments. The 2021 “Conference Summary of the Symposium on Foreign-related Commercial and Maritime Trials of Courts Nationwide” issued by China’s Supreme People’s Court introduces new standards for determining reciprocity that replace the previous de facto reciprocity test. The new reciprocity standards include de jure reciprocity, reciprocal understanding or consensus, and reciprocal commitment. These standards coincide with possible outreaches of legislative, judicial, and administrative branches.

[2] Art. 299: “After examining an application or request for recognition and enforcement of a legally effective judgment or ruling of a foreign court *in accordance with an international treaty concluded or acceded to by the People’s Republic of China or under the principle of reciprocity*, a people’s court shall render a ruling to recognise the legal force of the judgment or ruling and issue an order for enforcement, as needed, to enforce the judgment or ruling in

accordance with the relevant provisions of this Law, if the people's court deems that the judgment or ruling neither violates the basic principles of the laws of the People's Republic of China nor damages the sovereignty, security, and public interest of the State" (emphasis added).

[3] Below is the original statement from the Nanning Statement:"If two countries have not been bound by any international treaty on mutual recognition and enforcement of foreign civil or commercial judgments, both countries may, subject to their domestic laws, *presume the existence of their reciprocal relationship*, when it comes to the judicial procedure of recognizing or enforcing such judgments made by courts of the other country, provided that the courts of the other country had not refused to recognize or enforce such judgments on the ground of lack of reciprocity."(emphasis added)

Travel destination in another (Member) State's territory in an otherwise purely domestic case triggers application of Art. 18(1) Brussels Ia

By Salih Okur, University of Augsburg

Earlier today, the CJEU rendered its long anticipated decision in Case C-774/22 (FTI Touristik) on whether Art. 18(1) Brussels Ia Regulation concerns "matters relating to a travel contract where both the consumer, as a traveller, and the other party to the contract, the tour operator [,] have their seat in the same Member State, but the travel destination is situated not in that Member State but abroad […]".

In accordance with the Opinion of AG Emiliou, the Court held that it does.

1. International Scope of the Brussels Ia Regulation

The question goes straight to the problem of the international scope of the Brussels Ia Regulation. In Case C-281/02 (Owusu), the CJEU had held that the application of the Brussels Ia Regulation always required an "international element" – otherwise the national rules of the Member State apply.

Whether this international element exists is particularly problematic in cases like the one at hand, where the parties of the dispute are domiciled in the same Member State but certain elements of the case are situated abroad.

With today's decision, the CJEU has now adjudicated on two of the most practically relevant situations in quick succession: Only recently, in Case C-566/22 (Inkreal), the CJEU held that the **choice of another Member State's court** is enough to establish the international element of a case, even if the parties are both domiciled in the same Member State, triggering the application of Art. 25 Brussels Ia Regulation.

In the present Case C-774/22 (FTI Touristik), the CJEU had to decide whether the **travel destination** of consumer package travel contracts is enough to establish an international element in the sense of the Brussels Ia Regulation, which would open up the consumer forum of Art. 18 Brussels Ia Regulation.

2. Facts

The parties to the dispute, JX, a private individual domiciled in Nuremberg (Germany), and FTI Touristik, a tour operator established in Munich (Germany), concluded a package travel contract for a trip to Egypt. JX brought proceedings against FTI before the Local Court of Nuremberg, claiming that he was not informed properly of the visa requirements in Egypt.

JX claimed that the Local Court of Nuremberg has international and territorial jurisdiction pursuant to Art. 18(1) Brussels Ia Regulation. FTI, on the other hand, argued that the case lacked any international element, meaning that not the Brussels Ia Regulation but the German Code of Civil Procedure (*ZPO*) was applicable. Under the latter, the Local Court of Nuremberg would not have had jurisdiction over the dispute as German law does not contain a general consumer

forum.

3. The Court’s decision

According to previous decisions of the CJEU, the existence of the international element is not only reserved to cases where the parties to the dispute are domiciled in different Member States (**para. 29**).

Thus, according to the Court, the place of performance being abroad can on its own raise questions relating to the determination of international jurisdiction and thus establish an international element, triggering the application of the Brussels Ia Regulation (**para. 30**).

Specifically for consumer contracts, this interpretation is confirmed by Art. 18(1) Brussels Ia Regulation, which applies “regardless of the domicile of the other party” (**para. 31**) and by Art. 19(3) Brussels Ia Regulation, which addresses choice of law agreements entered “by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State“ (**para. 32**).

Finally, the Court refers to the general purpose of the Brussels Ia Regulation, which seeks to establish rules of jurisdiction which are highly predictable and thus pursues an objective of legal certainty which consists in strengthening the legal protection of persons established in the European Union, by enabling both the applicant to identify easily the court before which he or she may bring proceedings and the defendant reasonably to foresee the court before which he or she may be sued (**para. 33**).

These arguments lead the Court to the conclusion that the foreign travel destination of a package travel contract triggers the application of the Brussels Ia Regulation even if both parties are domiciled in the same Member State (**para. 40**).

4. Commentary

While this interpretation of the international element in the sense of the Brussels Ia regulation is in line with the opinion of AG Emiliou, it is difficult to square with the Court’s interpretation in Case C-566/22 (Inkreal): There, the Court primarily relied on the existence of a conflict of (international) jurisdiction to establish the

international element (**para. 31**): if the courts of two or more different Member States could find international jurisdiction under their domestic rules, it would disturb legal certainty. In that case, the application of the Brussels Ia Regulation is justified as it restores said legal certainty by unifying the rules on international jurisdiction.

Case C-774/22 (FTI Touristik) lacks this potential for a conflict of international jurisdiction. Within the European Union, no other court would have international jurisdiction under Art. 18(1) and 18(2) Brussels Ia Regulation as the domiciles of the parties to the consumer contract are situated in the same Member State – pursuant to Art. 17(1) Brussels Ia Regulation, Art. 7(1) Brussels Ia Regulation doesn't apply. Thus, within the European Union there cannot be a conflict of international jurisdiction; consequently, the Brussels Ia Regulation shall not apply. This argument does not seem to resonate with the Court, though; instead, the Court argues that the nature of the relevant provision of the Brussels Ia Regulation does not play a role when establishing the international element (**para. 39**).

Still, it cannot be denied that this decision immensely benefits consumers. The Brussels Ia Regulation now applies to all (package) travel contracts for trips abroad, meaning that pursuant to Art. 18(1) Brussels Ia Regulation, consumers may at all times bring proceedings against the tour operator at their domicile.