The Explosion of Private International Law in Asian Scholarship

The 21st century has witnessed a remarkable surge in academic scholarship on private international law in Asia. This is not to say that significant studies on the subject were absent before this period. However, in recent decades, Asian scholars have brought renewed vigour and depth to the field, establishing private international law as a critical area of legal inquiry on the continent.

A testament to this intellectual flourishing is Hart Publishing's extensive series on private international law in Asia, featuring no fewer than 16 volumes with Professors Anselmo Reyes and Paul Beaumont as Series Editors. These works serve as a rich repository of comparative legal thought, offering valuable insights that extend far beyond Asia's borders. Scholars and practitioners seeking inspiration from diverse jurisdictions will find these books to be an essential resource. Moreover, other publishers have also contributed to this growing body of literature, further amplifying Asia's voice in the global discourse on private international law.

Having read and reviewed many of these works on the blog, I am continually struck by the depth of scholarship they offer. Each new book reveals fresh perspectives, reinforcing the notion that private international law is not merely a regional concern but a truly global conversation.

As someone deeply engaged with African private international law, I have found immense value in these Asian publications. The parallels between Asia and Africa—particularly in terms of legal pluralism and cultural diversity—make these studies both relevant and instructive. The cross-pollination of ideas between these regions has the potential to strengthen the development of private international law in both continents.

What is most striking about this surge in Asian scholarship is its outward-looking nature. No longer confined to internal discussions, private international law in

Asia is now exporting ideas, influencing legal developments worldwide. This is a phenomenon that deserves both recognition and emulation. The rise of Asian scholarship in private international law is not just an academic trend—it is a pivotal force shaping the future of global legal thought.

The $24 Billion Judgment Against China in Missouri's COVID Suit

This article was written by Prof. William S. Dodge (George Washington University Law School) and first published on Transnational Litigation Blog. The original version can be found at Transnational Litigation Blog. Reposted with permission.

On March 7, 2025, Judge Stephen N. Limbaugh, Jr. (Eastern District of Missouri) entered a default judgment for more than $24 billion against the People's Republic of China and eight other Chinese defendants for hoarding personal protective equipment (PPE) during the early days of the COVID pandemic in violation of federal and state antitrust laws. The Eighth Circuit had previously held that the Foreign Sovereign Immunities Act (FSIA) barred most of Missouri's claims but that the hoarding claim fell within the act's commercial activity exception.

Missouri now has the judgment against China that it wanted. But Missouri may find that judgment hard to enforce. As discussed below, there appear to be significant procedural problems with the judgment that at least some defendants might raise. More broadly, the properties of foreign states and their agencies or instrumentalities are entitled to immunity from execution under the FSIA. Immunity from execution is broader than immunity from suit, and it is not clear that any of the defendants have property in the United States that can be used to satisfy the judgment.

The Defendants and the Claims

On April 21, 2020, Missouri brought four COVID-related claims against nine Chinese defendants: the People's Republic of China, the Chinese Communist Party, the National Health Commission, the Ministry of Emergency Management, the Ministry of Civil Affairs, the People's Government of Hubei Province, the People's Government of Wuhan City, the Wuhan Institute of Virology, and the Chinese Academy of Sciences. The original complaint asserted four claims under Missouri tort law: (1) public nuisance, (2) abnormally dangerous activity, (3) breach of duty by allowing the transmission of COVID, and (4) breach of duty by hoarding PPE. The district court initially held that all the claims were barred by the FSIA, but the Eighth Circuit reversed on the hoarding claim.

The FSIA governs the immunity of foreign states and their agencies and instrumentalities from suit in federal and state courts, as well as the immunity of their properties from execution to satisfy judgments. Some of the FSIA's provisions distinguish between foreign states and their political subdivisions on the one hand and their "agencies or instrumentalities" (including "organs" and majority state-owned companies) on the other. Other provisions extend the same immunities to both categories.

Of the nine defendants, the Eighth Circuit held that seven of them were part of the Chinese state. China itself is clearly a foreign state, and its National Health Commission, Ministry of Emergency Management, and Ministry of Civil Affairs are part of the state. The People's Government of Hubei Province and the People's Government of Wuhan City fall into the same category because they are political subdivisions. "The Chinese Communist Party may look like a nongovernmental body at first glance," the court of appeals wrote, but it is "in substance" the same body that governs China and therefore properly considered part of the state. The remaining two defendants, the Wuhan Institute of Virology and the Chinese Academy of Sciences, are legally separate from the Chinese government "but still closely enough connected" to qualify as "organs" and thus as "agencies or instrumentalities" of a foreign state covered by the FSIA.

Under the FSIA, all nine defendants are immune from suit in the United States unless an exception to immunity applies. The Eighth Circuit found that only one exception applies—the commercial activity exception in 28 U.S.C. §

1605(a)(2)—and that it applies only to Missouri’s claim for hoarding PPE. The court reasoned that hoarding was the kind of activity that private parties can engage in and that the complaint sufficiently alleged that the hoarding had a direct effect in the United States.

After the Eighth Circuit’s decision, I pointed out some of the difficulties that Missouri would face on remand trying to prove its tort claims, including whether Missouri law applied under Missouri choice-of-law rules, whether Missouri law established a duty of care for these defendants, whether the defendants breached any such duty of care, and whether any such breach was the actual and proximate cause of Missouri’s damages. I don’t know whether Missouri’s attorney general reads TLB, but on the eve of trial Missouri changed the legal basis for its hoarding claim from common-law tort to federal and state antitrust law. Antitrust claims are not subject to state choice-of-law rules.

The District Court’s Judgment

The Chinese defendants decided not to appear and defend against Missouri’s claims. Section 1608(e) of the FSIA provides: “No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.” This provision is supposed to ensure that the U.S. court does not simply accept the plaintiff’s allegations and instead tests the evidence to make sure that judgment is warranted. Some courts have held, however, that they may accept as true a plaintiff’s “uncontroverted evidence.” That is what Judge Limbaugh did here.

Relying on the plaintiff’s evidence, the district court concluded that “China engaged in a deliberate campaign to suppress information about the COVID-19 pandemic in order to support its campaign to hoard PPE from Missouri and an unsuspecting world.” The court noted that local officials closed schools and quarantined doctors and patients in December 2019, while at the same time other officials were denying that COVID could be spread between human beings. The district court further concluded that “Defendants engaged in monopolistic actions to hoard PPE through both the nationalization of U.S. factories [in China] and the direct hoarding of PPE manufactured or for sale in the United States.” The court pointed to evidence that China stopped exporting PPE and started importing a lot of it.

The court found the evidence sufficient to establish liability for monopolization under federal antitrust law. Pursuant to 15 U.S.C. § 15c, Missouri's attorney general was also permitted to bring a federal antitrust claim *parens patriae* on behalf of the citizens of Missouri. The court also found the evidence sufficient to establish liability for monopolization under Missouri antitrust law, which the court noted is to be construed "in harmony with" federal antitrust law.

Relying on an expert report on damages submitted by Missouri, the court found that between 2020 and 2051 Missouri either had lost or would lose $8.04 billion in tax revenue because of the impact of China's hoarding of PPE on economic activity. The court further found that hoarding caused Missouri to spend an additional $122,941,819 on PPE during the pandemic. The court added these amounts and multiplied by three—because federal and state antitrust laws permitted treble damages—for a total damages award of $24,488,825,457.

Problems with the District Court's Analysis

I see a number of problems with the district court's analysis. First, the court treated the defendants as an undifferentiated group, seemingly following Missouri's supplemental brief, which refers simply to the nine defendants collectively as "China." But the individual defendants in this case knew different things and did different things (and Missouri does not appear to have argued that there was a conspiracy allowing the acts of one defendant to be attributed to the others). The fact that local officials seem to have been aware that COVID could be transmitted from human to human, for example, does not establish that the central government knew this. Indeed, a U.S. intelligence report in 2020 found that local officials hid information about the virus from Beijing. Similarly, the fact that the central government was nationalizing PPE factories, limiting exports, and buying PPE abroad does not show that the Wuhan Institute of Virology or the Chinese Academy of Sciences was doing so.

Second, the damages calculations seem fanciful. The opinion contains no discussion of causation. How can one disentangle the impact of China's hoarding PPE on Missouri from other factors that contributed to the spread of the pandemic there, for example the fact that Missouri was among the last states to adopt a stay-at-home order? Establishing hoarding's impact on Missouri's economy and derivatively its impact on Missouri's tax revenues is fraught with complications, especially when estimates are projected to the year 2051.

Third, the court failed to consider whether trebling damages is allowed under the FSIA. Section 1606 provides that "a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages." In other words, while the FSIA allows the trebling of damages against the Wuhan Institute of Virology and the Chinese Academy of Sciences, it may not allow the same against China itself or the other governmental defendants.

But China did not make any of these points, or others that it would undoubtedly have thought of, because it decided not to appear. The China Society of Private International Law did file two amicus briefs, but the district court did not mention them. I can understand China's reluctance to submit to the authority of a U.S. court (including to the discovery of evidence) in a case that it no doubt feels is politically motivated. But the decision not to appear gave Missouri an enormous advantage.

What Happens Now?

So, what happens now? There are probably many possibilities, but I will discuss just three: (1) the possibility that some of the defendants might seek to set the judgment aside for improper service; (2) the possibility of enforcing the judgments against the defendants' property in the United States; and (3) the possibility of similar suits in other states.

A Rule 60(b) Motion Addressing Service of Process?

China could move to set aside the judgment under Rule 60(b)(4) on the ground that the judgment is void for lack of subject matter jurisdiction. The factors that made China decide not to appear in the first place would likely dissuade it from raising all the issues that it could raise in a 60(b) motion. But it might make sense for some of the defendants to raise service of process in such a motion, particularly the Wuhan Institute of Virology and the Chinese Academy of Sciences, which, as explained below, are likely to be the most vulnerable to enforcement of the judgment.

The FSIA has rules for serving foreign states and their agencies or instrumentalities. For foreign state and their subdivisions, Section 1608(a) lists four means of service that must be tried in order. In this case, the first three were not available. (China refused to execute a request for service under the Hague Service Convention on the ground that doing so would infringe its sovereignty, as Article 13 of the Convention allows it to do.) So, the district court ordered service through diplomatic channels, which was then made on all the defendants except the Chinese Communist Party, the Wuhan Institute of Virology, and the Chinese Academy of Sciences. I see no defects in service here.

With respect to the remaining three defendants, the district court authorized service by email pursuant to Rule 4(f)(3). There are three problems with this. First, the district court treated the Chinese Communist Party as a non-governmental defendant for purposes of service, but the Eighth Circuit later held that it is instead a foreign state for purposes of the FSIA. After the Eighth Circuit's decision, Missouri argued that its service on China through diplomatic channels should count as service on the Chinese Communist Party as China's alter ego. Judge Limbaugh seems to have accepted this assertion without discussion, but the Communist Party could certainly raise the issue in a Rule 60(b) motion.

The second problem is that Rule 4(f)(3) allows a district court to order alternative means of service only if those means are "not prohibited by international agreement." As Maggie Gardner and I have explained repeatedly, the Hague Service Convention prohibits service by email, at least when the receiving state has objected to service through "postal channels" as China has done. District courts are divided on this, however, and Judge Limbaugh cited a number of district court cases holding (wrongly) that email service is permitted. A Rule 60(b) motion raising this point would be unlikely to convince him, but it might succeed on appeal to the Eighth Circuit.

The third problem is that service by email in this case is inconsistent with the FSIA. For agencies and instrumentalities, like the Wuhan Institute of Virology and the Chinese Academy of Sciences, Section 1608(b)sets forth the permitted means of service. It appears that the first two were not available and that the district court relied on Section 1608(b)(3)(C), which allows service "as directed by order of the court *consistent with the law of the place where service is to be made*" (emphasis added). But Chinese law does not permit private parties to serve process by email.

When this issue arose after the Eighth Circuit's decision, Missouri argued that the language of Section 1608(b)(3)(C) "is nearly identical to Federal Rule of Civil Procedure 4(f)(3), which Missouri previously invoked in its request to serve WIV and CAS by email." This was misleading. Rule 4(f)(3) refers to means of service that are "not prohibited by international agreement," whereas Section 1608(b)(3)(C) refers to means of service that are "consistent with the law of the place where service is to be made," that is Chinese law. Even if service by email were permitted by the Hague Convention—which, as discussed above, it is not—that would not establish that service by email is consistent with Chinese law. Judge Limbaugh did not address this issue in his judgment and might be open to persuasion on a Rule 60(b) motion.

A Rule 60(b) motion limited to service of process issues might have some appeal for China. Although it would require becoming involved in the U.S. litigation, it would not involve arguing the merits of China's actions during the pandemic or submitting to U.S. discovery. China would be able to make purely legal arguments that the Chinese Community Party was not properly served under Section 1608(a) and that the Wuhan Institute of Virology and the Chinese Academy of Sciences were not properly served under Section 1608(b) because email service is prohibited by both the Hague Service Convention and by Chinese law.

Alternatively, defendants could raise the service of process issues, and perhaps other procedural defects, at the enforcement stage if and when Missouri attempts to execute the judgment against any of their properties in the United States. One advantage of waiting for enforcement is that the arguments would be heard by a different judge with no psychological commitment to past decisions. Also, if defendants were to file a Rule 60(b) motion before Judge Limbaugh and lose, they might be precluded from raising the same issues again at the enforcement stage. On the other hand, a successful Rule 60(b) motion could void the judgment once and for all for some of the defendants, whereas saving these arguments for the enforcement stage could require the defendants to raise them anew in multiple enforcement proceedings.

Immunity from Execution

Defendants also have the option of asserting that any property Missouri attempts to seize is immune from execution. As a general matter, federal court judgments are enforceable against a judgment debtor's assets anywhere in the United States. But judgments against foreign states and their agencies or instrumentalities are subject to the FSIA's rules on immunity from execution.

Specifically, Section 1610(a)(2) provides that "[t]he property in the United States of a foreign state … used for a commercial activity in the United States, shall not be immune … from execution, upon a judgment entered by a court of the United States or of a State … if … (2) the property is or was used for the commercial activity upon which the claim is based." This means that the properties in the United States of China, its ministries and subdivisions, and the Chinese Communist Party are immune from execution unless those properties were used to hoard PPE. I find it hard to imagine a situation in which that would be true.

The immunity for properties owned by agencies or instrumentalities is not as broad. Section 1610(b)(2) permits execution against "any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States" if the judgment was rendered under the FSIA's commercial activities exception (as this judgment was) "regardless of whether the property is or was involved in the act upon which the claim is based." This means that the properties in the United States of the Wuhan Institute of Virology and the Chinese Academy of Sciences would be subject to execution if those defendants are engaged in commercial activities in the United States even if the properties themselves were not used to hoard PPE. Thus, these two defendants, unless they can get the judgment set aside for improper service as discussed above, are potentially more exposed to execution than the others.

It is worth emphasizing the district court's judgment against these nine defendants is enforceable *only against properties owned by these nine defendants*. Missouri cannot execute its judgment against property in the United States simply because the property is Chinese owned. This is clear from the Second Circuit's decision in *Walters v. Industrial & Commercial Bank of China* (2011), another case involving a default judgment against China under the

FSIA, in which the court of appeals held that plaintiffs could not use assets belonging to agencies or instrumentalities of China to satisfy a judgment against China itself.

Walters relied on the Supreme Court's decision in *First National City Bank v. Banco Para El Comercio Exterior de Cuba* (*Bancec*) (1983). As Ingrid Brunk has explained, *Bancec* stands for the proposition that U.S. courts must generally respect the corporate separateness of foreign states and their agencies or instrumentalities. Indeed, the Supreme Court in *Bancec* quoted the FSIA's legislative history, which says specifically that the FSIA "will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality."

If a judgment against an agency or instrumentality of a foreign state cannot be executed against the property of another agency or instrumentality of that foreign state, it necessarily follows that the judgment cannot be executed against property *not* belonging to any agency or instrumentality of that foreign state. For example, Smithfield Foods is a major pork producer operating in Missouri. Its property cannot be seized to satisfy this judgment. Smithfield Foods is owned by a private Chinese conglomerate, but Smithfield Foods was not a defendant in this action, and so its property is not subject to execution.

Copycat Cases

In addition to Missouri's efforts to enforce this judgment, it is likely that the defendants will face copycat cases in other states. Mississippi filed a similar complaint against the same defendants in May 2020. Again, the defendants chose not to appear. On February 10, 2025, Judge Taylor B. McNeel (Southern District of Mississippi) held an evidentiary hearing. It remains to be seen whether Judge McNeel will scrutinize Mississippi's arguments more carefully than Judge Limbaugh did.

Conclusion

$24 billion is a big number. But it seems highly unlikely that Missouri will ever see a penny of it, given the FSIA's rules on immunity from execution. Missouri may, nevertheless, be able to harass these defendants—and potentially other

Chinese parties holding property in the United States—by filing actions to execute the judgment even if those actions ultimately prove unsuccessful.

Last week, friend-of-TLB Ted Folkman had this to say about the Missouri judgment over at Letters Blogatory:

> *When we think about these cases, we have to think about what it would be like if the shoe were on the other foot. In 2021, the US and other western countries were accused of hoarding the COVID vaccine. Should the United States have been amenable to suit in China or elsewhere because it prioritized the public health needs of its own people? The technical term for taking seriously the question, "what if the shoe were on the other foot?" is comity. We need more of it.*

Trending Topics in German PIL 2024 (Part 1 – Illegal Gambling and "Volkswagen")

At the end of each year I publish an article (in German) about the Conflict of Laws developments in Germany of the last twelve months, covering more or less the year 2024 and the last months of 2023. I thought it would be interesting for the readers of this blog to get an overview over those topics that seem to be most trending.

The article focuses on the following topics:

1. Restitution of Money lost in Illegal Gambling
2. Applicable Law in the Dieselgate litigation
3. The (Non-)Valitidy of Online Marriages
4. New German conflict-of-law rules regarding gender afiliation / identity
5. Reforms in international name law

I will start in this post with the two first areas that are mainly dealing with questions of Rome I and Rome II while in my follow-up post I will focus on the three areas that are not harmonized by EU law (yet) and are mainly questions of family law.

This is not a resumen of the original article as it contains a very detailed analysis of sometimes very specific questions of German PIL. I do not want to bore the readers of this blog with those specificities. Those interested in knowing those details can find the article here (no free access).

I would be really curious to hear whether these or similar cases are also moving courts in other jurisdictions and how courts deal with them. So, please write me via mail or in the comments to the post if you have similar or very different experiences on those cases.

Part 1 – Illegal Gambling and "Volkswagen"

I will start with the two areas that are mainly questions of Rome I and Rome II while in my follow-up post I will focus on the three areas that are not harmonized by EU law (yet) and are mainly questions of family law.

1. Restitution of Money lost in Illegal Gambling

Cases involving the recovery of money lost to illegal online gambling are being heard in courts across Germany and probably across Europe. Usually the cases are as follows: A German consumer visits a website offering online gambling. These websites are in German and offer German support by phone or email with German phone numbers etc. However, the provider is based in Malta or – mainly before Brexit – Gibraltar. After becoming a member, the consumer has to open a bank account with the provider. He transfers money from his (German) account to the account in Malta and uses money from the latter account to buy coins to gamble. In Germany, in order to offer online gambling, you need a licence under German law. The operators in these cases are usually licensed under Maltese law but not under German law.

- In terms of **applicable law**, Rome I and Rome II are fairly straightforward. Since the question in this case is whether the plaintiff can claim the return of money lost on the basis of an illegal and therefore void contract, Rome I is applicable as it also governs claims arising from contracts that are ineffective or of doubtful validity. It is therefore irrelevant that German law would provide for restitution on the basis of unjust enrichment (*Leistungskondiktion*), which generally is a non-contractual obligation that falls within the scope of Rome II. As we have a consumer and a professional, **Article 6 Rome I** has to be applied. As I described the case above, there are also little doubts that the website is (also) directed to Germany and therefore German law as the country of the habitual residence of the consumer applies. To this conclusion came, e.g. the German BGH, but also the Austrian OGH.
- The application of German law leads to the invalidity of the contract pursuant to sec. 134 BGB, which **declares a contract null and void if it violates a law that prohibits that contract**. In order to determine whether the law prohibits this concrete gaming contract, the question arises as to the **geographical scope of the prohibition on offering gambling/casino contracts without a German licence**. As this prohibition is based on German public law, it is limited to gambling/casino games that take place on German territory. So far, German courts have applied the German prohibition in cases where the consumer was in Germany when playing. One court (LG Stuttgart, 11.9.2024 – 27 O 137/23, 18.09.2024 – 27 O 176/23) even considered it sufficient if the consumer was in Germany when opening the bank account with the gaming provider from which the money was then transferred to the games. The court ruled that it did not matter whether the consumer played from Germany, whether the provider was located abroad or whether the bank account from which the money was finally transferred to the game was located in another country. It appears that Austrian courts have similar cases to decide, but see this point differently, the Austrian OGH decided that the Austrian rules prohibiting unlicensed gambling are limited to providers based in Austria.
- As you probably know, the Austrian OGH made a request to the CJEU to determine the place of the damage (**Article 4 para. 1 Rome II**) in a case where the consumer/player transfers the money from the local bank account to the account of the Bank in Malta and then makes payments

from this second bank account. So far, German courts were hesitant to take this road. The way over unjust enrichment resulting from a invalid contract has the charming effect that you do not have to apply Rome II's general tort rule (Article 4 para. 1 Rome II) and dive into the discussion how to determine the place of economic damages. Under German law, however, Rome II may be relevant in cases where the claim is not based on unjust enrichment but on **intentional damage inflicted in a manner offending common decency** (*vorsätzliche sittenwidrige Schädigung*), a special offence which is more difficult to prove (sec. 826 BGB). In some few cases, where sec. 826 was in question, courts still did try to avoid the discussion how to locate this economic loss. One simply applied the law of the place of the habitual residence of the consumer/gamer as the play from which the transfer from the first bank account was effected (OLG Karlsruhe 22.12.2023 – 19 U 7/23; 19.12.2023 – 19 U 14/23). Other courts avoided the discussion altogether by applying Article 4 para. 3 Rome II directly – leading to an accessory connection to the law applied to the gambling contract (LG Hagen, 5.10.2023).

One footnote to the whole scenario: There is a case pending at the CJEU that might make the whole discussion superfluous (Case C-440/23). The German practice of distributing gambling licences might be classified as unlawful under EU law at least for some older cases. The question by the CJEU to be decided is whether this results in a ban on reclaiming losses from this gambling.

2. Place of Damage in Volkswagen Cases

The Volkswagen emission scandal cases, in German dubbed "Dieselgate", are about claims for damages that end customers are asserting against Volkswagen (or other vehicle manufacturers). The damage is that they bought a car with a manipulated defeat device which, under certain conditions of the type-approval test, resulted in lower emissions than in normal operation. As a result, vehicles with higher emissions than permitted were registered and marketed. Volkswagen is currently being sued throughout Europe. Most cases are initiated by consumers who did not buy directly from the manufacturer but through a local dealer, so there is no direct contractual link. As German law is in some respects restrictive in awarding damages to final consumers, it seems to be a strategy of Volkswagen to come to German law.

- **Rome I**: As far as Volkswagen argued that there is an implicit contract between Volkswagen and the end consumer resulting from a warranty contract in case with a Spanish end buyer, a German court did not follow that argument or at least came to the conclusion that this is a question of Spanish law as such a warranty contract would have to be characterized as a consumer contract in the sense of Article 6 para. 1 Rome I Regulation (LG Ingolstadt 27.10.2023 – 81 O 3625/19)
- In general German courts apply Article 4 para. 1 Rome II and determine the law of the damage following the CJEU decision in VKI and MA v FCA Italy SpA: The place of damage is where the damaging contract is concluded or, in case the places are different, where the vehicle in question is handed over. The BGH (and lower instance courts, e.g. OLG Dresden, 07.11.2023 – 4 U 1712/22 – not free available online) followed that reasoning. One court had to consider whether, instead, Article 7 Rome II Regulation (**environmental damages**) would be applicable, as the increased emissions would also damage the environment. The LG Ingolstadt did not follow that line of argument, as the damage claimed in the concrete case was a pure economic loss, not an environmental damage.

What are your thoughts? How do courts treat these cases in your jurisdictions (I guess there are many cases as well)? Do you have different or similar issues in discussion?

Stay tuned for the second part of this article which will move to trending topics in family law…

Chinese Judicial Practice on Asymmetric Choice of Court Agreements in International Civil & Commercial Disputes

By Yuchen Li, a PhD student at Wuhan University.

A. Introduction

An asymmetric choice of court agreement is commonly used in international commercial transactions, especially in financial agreements, which usually allows one party (option holder) an optional choice about the forum in which proceedings may be brought but the other (non-option holder) an exclusive choice to sue in a designated court.[1] A typical example is as follows:

'(A) The courts of England have exclusive jurisdiction to settle any disputes ….

(B) The Parties agree that the courts of England are the most appropriate and convenient courts … to settle Disputes and accordingly no Party will argue to the contrary.

(C) This Clause is for the benefit of the Finance Parties only. As a result, no Finance Party shall be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Finance Parties may take concurrent proceedings in any number of jurisdictions.' ***[2]***

In recent years, issues concerning asymmetric choice of court agreements have been controversial in cases within some jurisdictions.[3] Despite the significant amount of research on asymmetric choice of court agreements, little attention has been paid to Chinese stance on this topic. With Chinese private parties actively engaging in international transactions, Chinese attitude towards such clauses is important for commercial parties and academic researchers. This article gives a glimpse of how Chinese courts handle asymmetric choice of court agreements in international and commercial civil litigations.[4]

B. Characterization

Chinese courts have demonstrated mainly four different views in characterizing asymmetric choice of court agreements.

Firstly, some courts classify this kind of agreement as asymmetric jurisdiction agreements.[5] In *Hang Seng Bank Ltd. v. Shanghai Tiancheng Storage Co., Ltd. & Lin Jianhua,* Shanghai Financial Court reasoned that a jurisdiction clause which allows one party to sue in multiple jurisdictions and requires the other to only bring the dispute to a specific jurisdiction should be characterized as an asymmetric jurisdiction clause.[6]

Second, several courts characterize the agreement as non-exclusive jurisdiction clause.[7] In *Hwabao Trust Co., Ltd. v. Xiao Zhiyong*, Shanghai High People's Court observed that, according to the jurisdiction clause in issue, the option holder could either choose to initiate proceedings in the designated court or other competent courts, hence the clause is non-exclusive.[8]

Thirdly, it is notable that in *GOOD VANTAGE SHIPPING LIMITED v. Chen Fuxiang et al*, Xiamen Maritime Court classified the disputed clause as an 'asymmetric exclusive jurisdiction clause'. The court held that, under the disputed clause, only when the option holder chooses to take the proceedings in the designated court will that court have exclusive jurisdiction, but this does not exclude the right of the option holder to sue in other competent courts.[9]

Last, a number of cases overlook the particularity of asymmetric choice of courts agreements and broadly classify them as jurisdiction agreements.[10]

C. Choice of Law

Most Chinese courts tend to apply *lex fori* on the effectiveness of asymmetric choice of court agreements. Relying on Article 270 of Chinese Civil Procedure Law (hereinafter referred to as 'CPL') which provides that this Law applies to foreign-related civil actions within PRC,[11] Chinese courts normally take the view that the ascertainment of jurisdiction is a procedural matter and apply *lex fori*.[12]

D. Effectiveness

a. Validity

By far, the validity of asymmetric choice of court agreements has not been addressed by Chinese legislation. However, in 2022, the Supreme People's Court of PRC (hereinafter referred to as 'SPC') issued Summary of National Symposium on Foreign-Related Commercial and Maritime Trials of Courts (hereinafter referred to as 'the Summary'). The Summary regulates that unless an asymmetric choice of court agreement involves the rights and interests of consumers and workers or violates CPL's provisions on exclusive jurisdiction, the people's court should reject the parties' claim that the agreement is invalid on the ground of unconscionability. Although the Summary is not an official source of law, it serves as an important reference and guideline for courts in the absence of legislation.

Chinese courts generally support the view that an asymmetric choice of court agreement will not be deemed invalid for its asymmetry. The validity of such an agreement is commonly upheld for three reasons. First, such an agreement itself is not contrary to Chinese law.[13] In *Winwin International Strategic Investment Funds Spc v. Chen Fanglin*, Fujian High People's court held that such a clause does not violate CPL and recognized its validity. [14] Second, party autonomy in civil and commercial litigations should be protected.[15] In *Sun Jichuan v. Chen Jianbao*, Beijing Fourth Intermediate People's Court pointed out that CPL allows parties to a contract the right to select the court by agreement, which reflects party autonomy in civil procedure law. The aim of protecting this right is to safeguard that both parties are treated equally by the court, but this does not mean they have to choose the exact same court. As a result, a choice of court agreement is valid so long as it does not violate mandatory rules and expresses the true intention of the parties.[16] Third, it is necessary to mention that in a domestic case where the validity of an asymmetric choice of court clause in a loan contract is in dispute, Pudong New Area People's Court of Shanghai analyzed the positions of both the borrower (non-option holder) and the bank (option holder) and concluded that the borrower's position under an asymmetric jurisdiction clause is no weaker than under an exclusive one.[17]

In a small number of cases, Chinese courts refuse to recognize the validity of standard asymmetric choice of court agreements for violating specific rules of standard clause under Chinese law.[18] In *Picc Xiamen Branch v. A.P. Moller – Maersk A/S*, Zhejiang High People's Court ruled that the disputed standard jurisdiction clause in the Bill of Lading lacks explicit, obvious forms to distinguish from other clauses, and the carrier (option holder) failed to establish that the jurisdiction clause had been negotiated with or given full notice and explanation to the shipper (non-option holder).[19] Therefore, if the drafting party fails to prompt or explain the standard asymmetric choice of court agreement to the other party, Chinese court may consider that this clause fails to represent the true intention of the parties and determine that the clause does not constitute a part of the contract.[20]

b. Effects

An asymmetric choice of court agreement has different effects upon option holder and non-option holder. For the non-option holder, the jurisdiction clause has an exclusive effect, restricting the party to taking the proceedings to the designated court only.[21]

As for the option holder, Chinese courts have two different explanations. On the one hand, an asymmetric choice of court agreement has both exclusive and non-exclusive effects on the option holder. While the designated court has exclusive jurisdiction when the option holder brings the case to the designated court, the option holder could also choose to sue the non-option holder in other competent courts.[22] On the other hand, some courts analyze that, apart from the designated court, the option holder could also sue in other competent courts, hence the clause is non-exclusive for the option holder. [23]

E. Construction

In *Bank of Communications Trustee Ltd. v. China Energy Reserve and Chemicals Group Company Ltd.*, whether the jurisdiction clause in a guarantee agreement is an asymmetric one is in dispute. The clause provides:

The guarantor agrees (i) for the benefit of the trustee and bondholder, the courts of Hong Kong have exclusive jurisdiction to settle any disputes arising out of or relating to this Guarantee Agreement; (ii) the courts of Hong Kong are the most appropriate and convenient courts; and (iii) as a result, the guarantor will not argue that other courts are more appropriate or more convenient to accept service of process on its behalf. ***[24]***

The SPC established that, when determining whether the parties' agreement constitutes an asymmetric jurisdiction clause, the people's court should construe the parties' intention in a strict manner. The wording of the asymmetric choice of court clause should be clear and precise. The court reasoned as follows:

*In general, contractual parties share equal rights and obligations, and therefore their rights regarding jurisdiction of litigation should also be equal. For this reason, their right to select a court should be the same unless the parties specifically agree otherwise. Under the principle of disposition of procedural rights, parties are allowed to agree on an asymmetric jurisdiction clause whereby one party's right to choose the court is restricted while the other party is not. An asymmetric jurisdiction clause constitutes a significant, exceptional restriction on one party's procedural rights, which should be determined through the parties' clear and explicit intention. Otherwise, unequal or unfair rights and obligations shall not be presumed.**[25]***

Therefore, the SPC decided that the disputed jurisdiction clause is not an asymmetric one because it only highlights the exclusive jurisdiction of Hong Kong courts and doesn't specify that the guarantee has the right to bring the proceedings to other competent courts.

F. Conclusion

It seems that Chinese courts take a liberal stance on asymmetric choice of court agreements, showing their respect to party autonomy and freedom to contract in international civil and commercial jurisdiction. In 2024, reviewed and approved by the SPC, two cases[26] recognizing the validity of asymmetric choice of court agreements are incorporated into the People's Court Case Database as reference cases.[27] What's more, as has been mentioned before, the Summary recognizes the validity of asymmetric choice of court agreements based on the assumption that those agreements are compatible with CPL's provisions on exclusive jurisdiction or do not infringe certain weaker parties' interests. Asymmetric choice of court agreements are ubiquitous in international civil and commercial contracts, especially in international financial contracts. Chinese courts are adapting to the development trends of international commercial practice and are getting prepared to deal with complicated civil and commercial disputes.

Nonetheless, there is still a long journey to go for Chinese courts to establish a sophisticated mechanism to handle such agreements. As for now, Chinese judicial practice regarding asymmetric choice of court agreements remains inconsistent. Additionally, most cases only involve simple disputes concerning whether Chinese courts have jurisdiction under such agreements. Things may get really complicated when other mechanisms in international civil procedure like *lis* *pendens* rule apply to such agreements. A proper solution to those issues relies on a unified and nuanced standard for courts to apply. Whether there will be a judicial interpretation or legislation regarding asymmetric choice of court agreements, and how Chinese courts will handle complex disputes related to such agreements remain to be observed in the future.

For practitioners, it is noteworthy that Chinese courts tend to apply *lex fori* on asymmetric choice of court agreements. The asymmetric nature of the jurisdiction clause should be precisely and clearly expressed. Additionally, if the asymmetric choice of court agreement is a standard one, under the Civil Code of PRC, it is suggested that the drafting party, when concluding a contract, should prompt the jurisdiction clause through conspicuous indicators such as distinctive words, symbols, or fonts that are sufficient to bring the clause to the other party's attention. Upon the other party's request, the drafting party should also fully explain the jurisdiction clause to the other party.

[1] See Mary Keyes and Brooke Adele Marshall, 'Jurisdiction agreements: Exclusive, Optional and Asymmetrical' (2015) 11 Journal of Private International Law 345, 349.

[2] See Louise Merrett, 'The Future Enforcement of Asymmetric Jurisdiction Agreements' (2018) 67 International and Comparative Law Quarterly 37, 40-41.

[3] See e.g., *Ms X v. Banque Privee Edmond de Rothschild Europe (Societe)*, French Cour de cassation (Supreme Court) (First Civil Chamber) September 2012, Case 11-26.022, *Commerzbank Aktiengesellschaft v Pauline Shipping Limited and Liquimar Tankers Management Inc* [2017] EWHC 161 (Comm).

[4] Although asymmetric choice of court agreements may take various forms, the typical example abovementioned in note 2 is the most common type in practice. Therefore, asymmetric choice of court agreements in this article only refer to agreements under which one party may bring proceedings only in the chosen court but the other party may bring proceedings in other courts as well. See Brooke Marshall, *Asymmetric Jurisdiction Clauses*, (Oxford University Press 2023) 17; Trevor Hartley & Masato Dogauchi, *Explanatory Report on the Convention of 30 June 2005 on Choice of Court Agreements* (HCCH Publications 2013) 85.

[5] See *Hang Seng Bank Ltd. v. Shanghai Tiancheng Storage Co., Ltd. & Lin Jianhua*, (2019) Hu 74 Min Chu 127 Hao [(2019)?74??127?]; *Sun Jichuan v. Chen Jianbao*, (2021) Jing Min Xia Zhong 76 Hao [(2021)????76?]; *XYZ Co. v. Chen & Su*, (2022) Lu Min Zhong 567 Hao [(2022)???567?].

[6] See *Hang Seng Bank Ltd. v. Shanghai Tiancheng Storage Co. Ltd. & Lin Jianhua*, (2019) Hu 74 Min Chu 127 Hao [(2019)?74??127?], paras. 94.

[7] See *DBS Bank (Hong Kong) Limited v. Forward (Zhaoqing) Semiconductor Co., Ltd. et al*, (2011) Yue Gao Fa Li Min Zhong Zi Di 82 Hao [(2011)????????82?]; *Suen Kawi Kam v China Dragon Select Growth Fund*, (2019) Jing Min Xia Zhong 279 Hao [(2019)????279?]; *Hwabao Trust Co., Ltd. v. Xiao Zhiyong*, (2021) Hu Min Xia Zhong 60 Hao [(2021)????60?].

[8] See *Hwabao Trust Co., Ltd. v. Xiao Zhiyong*, (2021) Hu Min Xia Zhong 60 Hao [(2021)????60?], para. 10.

[9] See *GOOD VANTAGE SHIPPING LIMITED v. Chen Fuxiang et al*, (2020) Min 72 Min Chu 239 Hao [(2020)?72??239?], paras. 13, 15.

[10] See *Beijing Huahai Machinery Co., Ltd. v. KAMAT GmbH & Co. KG*, (2017) Jing 02 Min Zhong 4019 Hao [(2017)?02??4019?]; *Winwin International Strategic Investment Funds Spc v. Chen Fanglin*, (2019) Min Min Xia Zhong 151 Hao [(2019)????151?]; *Antwerp Diamond Bank v. Weinstock Michel*, (2013) Yue Gao Fa Li Min Zhong Zi Di 467 Hao [(2013)????????467?]; *Guosen Securities (Hong Kong) Financial Holdings Co., Ltd v. Yunnan Zhongyuan Industrial Group Co., Ltd. et al*, (2017) Zui Gao Fa Min Xia Zhong 423 Hao [(2017)??????423?]; *Picc Xiamen Branch v. A.P. Moller – Maersk A/S*, (2017) Zhe Min Xia Zhong 119 Hao [(2017)????119?]; *Zhu Yuquan v. AxiCorp Financial Services Pty Ltd*, (2021) Jing Min Zhong 893 Hao [(2021)???893?].

[11] Article 270 of CPL provides: ‘This Part (Part 4 of CPL, Special Provisions on Foreign-Related Civil Procedures) shall apply to foreign-related civil actions within the People’s Republic of China. For issues not addressed in this Part, other provisions of this Law shall apply.’

[12] See *Antwerp Diamond Bank v. Weinstock Michel*, (2013) Yue Gao Fa Li Min Zhong Zi Di 467 Hao [(2013)????????467?]; *Suen Kawi Kam v. China Dragon Select Growth Fund*, (2019) Jing Min Xia Zhong 279 Hao [(2019)????279?]; *GOOD*

VANTAGE SHIPPING LIMITED v. Chen Fuxiang et al, (2020) Min 72 Min Chu 239 Hao [(2020)?72??239?]; *Hwabao Trust Co., Ltd. v. Xiao Zhiyong*, (2021) Hu Min Xia Zhong 60 Hao [(2021)????60?]; *Guosen Securities (Hong Kong) Financial Holdings Co., Ltd v. Yunnan Zhongyuan Industrial Group Co., Ltd. et al*, (2017) Zui Gao Fa Min Xia Zhong 423 Hao [(2017)??????423?]; *Picc Xiamen Branch v. A.P. Moller – Maersk A/S*, (2017) Zhe Min Xia Zhong 119 Hao [(2017)????119?]; *Zhu Yuquan v. AxiCorp Financial Services Pty Ltd*, (2021) Jing Min Zhong 893 Hao [(2021)???893?].

[13] See e.g. *Sun Jichuan v. Chen Jianbao*, (2021) Jing Min Xia Zhong 76 Hao [(2021)????76?]; *XYZ Co. v. Chen & Su*, (2022) Lu Min Zhong 567 Hao [(2022)???567?]; *GOOD VANTAGE SHIPPING LIMITED v. Chen Fuxiang et al*, (2020) Min 72 Min Chu 239 Hao [(2020)?72??239?]; *Zhu Yuquan v. AxiCorp Financial Services Pty Ltd*, (2021) Jing Min Zhong 893 Hao [(2021)???893?].

[14] See *Winwin International Strategic Investment Funds Spc v. Chen Fanglin*, (2019) Min Min Xia Zhong 151 Hao [(2019)????151?], para. 2.

[15] See *Antwerp Diamond Bank v. Weinstock Michel*, (2013) Yue Gao Fa Li Min Zhong Zi Di 467 Hao [(2013)????????467?]; *Sun Jichuan v. Chen Jianbao*, (2021) Jing Min Xia Zhong 76 Hao [(2021)????76?].

[16] See *Sun Jichuan v. Chen Jianbao*, (2021) Jing Min Xia Zhong 76 Hao [(2021)????76?], para. 15.

[17] 'On the one hand, the borrower's exclusive choice could facilitate the enforcement of judgements. On the other hand, the bank's right to choose the competent court could reduce commercial costs, which will eventually benefit ordinary clients (including the borrower). In this sense, the borrower's position is no weaker than under an exclusive jurisdiction clause.' See *Bank of Tianjin CO., LTD. Shanghai Branch v. Gong Chongfang et al*, (2022) Hu 0115 Min Chu 87551 Hao [(2022)?0115??87551?], para. 7.

[18] See *Shaoxing Haoyi Trading Co., Ltd. v. GMA-CDMS et al*, (2016) Zhe Min Xia Zhong [(2016)????294?]; *Picc Xiamen Branch v. A.P. Moller – Maersk A/S*, (2017) Zhe Min Xia Zhong 119 Hao [(2017)????119?].

[19] See *Picc Xiamen Branch v. A.P. Moller – Maersk A/S*, (2017) Zhe Min Xia Zhong 119 Hao [(2017)????119?], para. 10.

[20] Article 496, paragraph 2 of the Civil Code of PRC provides: ‘Upon concluding a contract, where a standard clause is used, the party providing the standard clause shall determine the parties’ rights and obligations in compliance with the principle of fairness, and shall, in a reasonable manner, call the other party’s attention to the clause concerning the other party’s major interests and concerns, such as a clause that exempts or alleviates the liability of the party providing the standard clause, and give explanations of such clause upon request of the other party. Where the party providing the standard clause fails to perform the aforementioned obligation of calling attention or giving explanations, thus resulting in the other party’s failure to pay attention to or understand the clause concerning its major interests and concerns, the other party may claim that such clause does not become part of the contract.’ See Civil Code of the People’s Republic of China, The State Council of the People’s Republic of China, https://english.www.gov.cn/archive/lawsregulations/202012/31/content_WS5fedad98c6d0f72576943005.html, visited on 10th March, 2025.

[21] See *Sun Jichuan v. Chen Jianbao*, (2021) Jing Min Xia Zhong 76 Hao [(2021)????76?].

[22] See *Winwin International Strategic Investment Funds Spc v. Chen Fanglin*, (2019) Min Min Xia Zhong 151 Hao [(2019)????151?]; *GOOD VANTAGE SHIPPING LIMITED v. Chen Fuxiang et al*, (2020) Min 72 Min Chu 239 Hao [(2020)?72??239?].

[23] See *Suen Kawi Kam v. China Dragon Select Growth Fund*, (2019) Jing Min Xia Zhong 279 Hao [(2019)????279?]; *Hwabao Trust Co., Ltd. v. Xiao Zhiyong*, (2021) Hu Min Xia Zhong 60 Hao [(2021)????60?].

[24] See *Bank of Communications Trustee Ltd. v. China Energy Reserve and Chemicals Group Company Ltd.,* (2021) Zui Gao Fa Min Zai 277 Hao [(2021)?????277?], para. 25.

[25] See *Bank of Communications Trustee Ltd. v. China Energy Reserve and Chemicals Group Company Ltd.,* (2021) Zui Gao Fa Min Zai 277 Hao [(2021)?????277?], para. 26.

[26] See *Bank of Communications Trustee Ltd. v. China Energy Reserve and Chemicals Group Company Ltd.,* (2021) Zui Gao Fa Min Zai 277 Hao

[(2021)?????277?]; *XYZ Co. v. Chen & Su*, (2022) Lu Min Zhong 567 Hao [(2022)???567?].

[27] According to Article 19 of Procedures for the Construction and Operation of the People's Court Case Database, the people's courts should refer to similar cases of the Database when hearing cases. However, this reference may not be used as a basis of the adjudication. See Susan Finder, Update on the People's Court Case Database, Supreme People's Court Monitor, https://supremepeoplescourtmonitor.com/2024/12/, visited on 26th February 2025.

China's New Civil Procedure Law and the Hague Choice of Court Convention: One Step Forward, Two Steps Back?

By Sophia Tang, Wuhan University

China's New Civil Procedure Law adopted in 2023 and taking effect from 1 Jan 2024 introduces significant changes to the previous civil procedure law regarding cross-border litigation. One of the key changes pertains to choice of court agreements. In the past, Chinese law on choice of court agreements has been criticized for being outdated and inconsistent with international common practice, particularly because it requires choice of court clauses to be in writing and mandates that the chosen court must have "practical connections" with the dispute. After China signed the Hague Choice of Court Convention, there was hope that China might reform its domestic law to align with the Hague Convention's terms and eventually ratify the Convention.

The New Civil Procedure Law retains the old provision on choice of court agreements, stating that parties can choose a court with practical connections to the dispute in writing (Article 35). This provision is included in the chapter dealing with jurisdiction in domestic cases, but traditionally, Chinese courts have applied the same requirements to choice of court clauses in cross-border cases.

The 2023 Amendment to the Civil Procedure Law introduces Article 277 as a new provision specifically addressing choice of court agreements in cross-border cases. It states that if parties in cross-border civil disputes choose Chinese courts in writing, Chinese courts will have jurisdiction. Notably, this provision does not require that the chosen Chinese courts have practical connections with the dispute. In other words, it may imply that when parties in cross-border disputes choose Chinese courts, Chinese courts will accept jurisdiction regardless of whether they have any connection to the dispute. The removal of the practical connection requirement is intended to encourage overseas parties to choose Chinese courts as a neutral forum for resolving disputes. This is a crucial step in enhancing the international reception of the Chinese International Commercial Court (CICC) and advancing China's goal of becoming a dispute resolution hub for Belt and Road initiatives.

This change aligns with the Hague Choice of Court Convention, which respects party autonomy and reduces the requirements for making parties' consent to the competent court effective. Additionally, the New Civil Procedure Law prevents Chinese courts from declining jurisdiction based on *forum non conveniens* (Art 282(2)) or *lis pendens* (Art 281(1)) when a choice of Chinese court clause exists, consistent with the duty of the chosen state under Article 5(2) of the Hague Choice of Court Convention.

However, controversy remains. Since Article 277 explicitly applies to situations where Chinese courts are chosen, it does not address the choice of foreign courts. The New Civil Procedure Law does not include a specific provision addressing the prerequisites for choosing foreign courts. It is likely that the prerequisites for choosing foreign courts will follow the general rule on prorogation jurisdiction in Article 35. Pursuant to this interpretation, if parties choose a foreign court, the choice is valid only if it is made in writing and the chosen court has practical connections with the dispute. This creates an asymmetric system in international jurisdiction, making it easier for parties to choose Chinese courts than foreign courts. It leaves room for Chinese court to compete with a chosen foreign court, which may demonstrate China's policy to promote the international influence of Chinese courts and to protect the jurisdiction of Chinese courts in China-related disputes.

This asymmetric system is barely compatible with the Hague Choice of Court Convention, which is based on reciprocity. If China ratifies the Hague Convention, the asymmetric system cannot function effectively. Under Article 6 of the Convention, a non-chosen court of a Contracting State must suspend or dismiss proceedings. Even if a choice of foreign court clause is invalid under Chinese law, it would not meet any of the exceptional grounds listed in Article 6. The lack of a practical connection with the chosen court cannot be interpreted as leading to a "manifest injustice" or being "manifestly contrary to the public policy" of China.

Of course, because the New Civil Procedure Law does not clarify the prerequisites for choosing foreign courts, alternative interpretations are possible. Article 280 provides that if parties conclude an exclusive choice of court clause selecting a foreign court, and this choice does not violate Chinese exclusive jurisdiction or affect China's sovereignty, security, and public interest, Chinese courts may decline jurisdiction if the same dispute has been brought before them. This suggests that China does not intend to create a significant difference between the choice of foreign and Chinese courts. If this is indeed the legislative intention, one alternative interpretation is that Article 35 should apply exclusively to choice of court clauses in domestic proceedings. In the absence of clear rules governing choice of foreign court clauses in cross-border proceedings, this situation can be analogized to the choice of Chinese courts in such proceedings. Consequently, the same conditions outlined in Article 277 should apply equally to the choice of foreign courts. This interpretation would enhance the law's compatibility with the Hague Choice of Court Convention.

It is not yet clear which interpretation will ultimately be accepted. The Supreme People's Court (SPC) should provide judicial guidance on this matter. Hopefully, bearing in mind the possibility of ratifying the Hague Choice of Court Convention, the SPC will adopt the second interpretation to pave the way for China's ratification of the Convention

---

The problematic exclusivity of the UPC on provisional measures in relation with PMAC arbitrations

Guest post by Danilo Ruggero Di Bella (Bottega Di Bella)

This post delves into the issues stemming from the exclusive jurisdiction of the Unified Patent Court (UPC) on interim relief in relation with the judicial support of the arbitrations administered by the Patent Mediation and Arbitration Centre (PMAC).

Risks of divesting State courts of competence on interim measures

On one hand, article 32(1)(c) UPC Agreement (UPCA) provides for the exclusive jurisdiction of the UPC to issue provisional measures in disputes concerning classical European patents and European patents with unitary effect. Under article 62 UPCA and Rules 206 and 211 of the UPC Rules of Procedure (UPC RoP), the UPC may grant interim injunctions against an alleged infringer or against an intermediary whose services are used by the alleged infringer, intended to prevent any imminent infringement, to prohibit the continuation of the alleged infringement under the threat of recurring penalties, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the patent holder. The UPC may also order the provisional seizure or delivery up of the products suspected of infringing a patent so as to prevent their entry into, or movement, within the channels of commerce. Further, the UPC may order a precautionary seizure of the movable and immovable property of the defendant (such its bank accounts), if an applicant demonstrates circumstances likely to endanger the recovery of damages, as well as an interim award of costs. Additionally, under article 60 UPCA, the UPC may order provisional measures to preserve evidence in respect of the alleged infringement and to inspect premises.

On the other hand, PMAC arbitrations can be seated everywhere in the world (Rule 4 PMAC Rules of Operation) and its arbitral awards can be enforced practically everywhere around the world (under the NY Convention). This means that the competent State court for the assistance and supervision of the arbitration may not necessarily coincide with a court of a UPC Contracting Member State. Such State courts play three fundamental functions in support of the arbitral proceedings, including – for what matters here – the issuance of provisional measures (the other two functions being the judicial appointment of arbitrators and the taking of evidence). Normally, the competent State court for the issuance of the provisional measures is the State court at the place where the arbitral award will be enforced or the court at the place where the measures are to be executed (e.g., article 8 of Spain's Arbitration law which is largely based on the UNCITRAL Model Law on International Commercial Arbitration).

Hence, it is difficult to reconcile the *exclusive* competence of the UPC on interim measures with the world reach of PMAC arbitrations, since a literal interpretation of article 32(1)(c) UPC Agreement would prevent any State courts from issuing any necessary interim measures. Arguably, while such exclusivity granted to the UPC would not prevent PMAC arbitral tribunals from ordering provisional measures, it does exclude the jurisdiction of other State courts for obtaining interim relief. Thus, this may leave the plaintiff with no protection at the outset of the dispute when the panel of a PMAC arbitration is not already in place to entertain the case yet.

This raises the question whether such exclusivity on provisional measures is desirable, especially, where the interim relief is meant to be executed in a jurisdiction beyond the territory of the UPC, where the UPC provisional measure may not be enforceable at all, and the defendant may object the competence of the State court seized of the application on interim relief because of the UPC exclusivity on such measure.

For instance, in case a dispute arises between two parties who had contractually agreed to solve their differences by way of a PMAC arbitration to be seated in London, it may prove difficult for the plaintiff to apply to English courts for an urgent interim relief to be enforced in the UK (for example, to seize certain products suspected of infringing its patent that have landed at Heathrow airport) pending the constitution of the arbitral tribunal. The defendant may indeed argue that English courts are excluded from ordering any interim relief because of article 32(1)(c) UPC Agreement giving the UPC an exclusive jurisdiction on provisional measures. Therefore, the plaintiff may apply to the UPC for such an interim measure. However, since the UK is not a Contracting Member to the UPCA, English courts may not be obliged to enforce the interim relief granted by the UPC. Consequently, the plaintiff seeking such an urgent interim measure may find itself in a situation without an effective legal protection.

In this respect, it is interesting to recall the so-called "long-arm jurisdiction" of the UPC established by article 71b(2) of the Regulation (EU) ? 542/2014 of 15 May 2014 amending Regulation (EU) No 1215/2012 as regards the rules to be applied with respect to the UPC and the Benelux Court of Justice. This article equips the UPC with extraterritorial jurisdiction by enabling the UPC to grant provisional measures against a third-State domiciled defendant, even if the courts of a third State have jurisdiction as to the substance of the matter. In other words, article 71b(2) shows that the UPC may attempt to retain jurisdiction with respect to provisional measures even when another court has jurisdiction on a given case. If we transpose the implications of this provision to an arbitration setting where an arbitral tribunal seated in a third State is entrusted with deciding on the merits of the case, the UPC may still seek to retain jurisdiction with respect to provisional measures pending the constitution of the arbitral panel. In essence, Article 71b(2) corroborates that in principle the UPC can grant provisional measures even when the main proceedings are taking place in a third country. The problem arises when a party seeks to enforce the UPC-ordered provisional measures in such a third country. Indeed, it remains doubtful whether the UPC provisional measure can be enforced in the relevant third State.

On this issue, some UPCA provisions on provisional measures are somehow conscious of the territorial limitations of the UPC jurisdiction. For instance, part of article 61 UPCA – dealing with on freezing orders – is expressly directed at ordering a party not to remove from the UPC jurisdiction any assets located therein (precisely, to avoid that the infringer may escape liability by moving its assets beyond the UPC jurisdiction). However, article 61.1 UPC Agreement *in fine* seems to intentionally neglect the territorial limits of the UPC jurisdiction by enabling the UPC to order a party not to deal in any assets, whether located within its jurisdiction *or not*.

Admittedly, article 32 UPCA contains a carve-out to the exclusivity of the UPC competence by providing for the residual competence of the national courts of the Contracting States for any actions which do not fall within the exclusive competence of the UPC. Nevertheless, the various provisional measures available under the UPCA as detailed in its articles 60, 61, 62 (and elaborated further in Rules 206-211 UPC RoP) do not leave much to the residual competence of the national courts of the Contracting States.

Emergency arbitration as procedural solution

To somehow downsize this procedural issue, the adoption by the PMAC of an emergency arbitrator mechanism would be a welcome amendment in line with the best modern practices of international commercial arbitration. As the need for adopting provisional measures often arises at the outset of the arbitral proceedings, an emergency arbitrator – appointed before the arbitral tribunal is constituted – is in the position to order any interim relief. Further, unlike a State court, the arbitrator would not be prevented from adopting such interim relief by the exclusive competence of the UPC on such measures, since the exclusivity is directed only at excluding other State courts. Moreover, the emergency arbitrator's provisional measure adopted in the form of an interim award may be more likely to be enforced than UPC orders in jurisdictions beyond the territory of the UPC. For example, the Singapore High Court has confirmed in 2022 that a foreign seated emergency arbitrator award was enforceable under the Singapore International Arbitration Act 1994.

This mechanism could be implemented by the PMAC in its arbitration rules. By way of comparison, for instance, article 43 of the WIPO Expedited Arbitration Rules provides for a detailed procedural framework on "Emergency Relief Proceedings." According to such framework a party seeking urgent interim relief prior to the establishment of the arbitral tribunal can submit a request for such emergency relief to the Arbitration Institution, which within two days appoints a sole emergency arbitrator who may in turn order any interim measure it deems necessary.

Final remarks

With the view of resizing this procedural problem – which originates from the exclusive competence of the UPC on interim relief in relation to PMAC arbitrations seated in third countries where UPC provisional measure may not be enforceable – it is important to remark that the UPCA contains already a self-correcting mechanism. Namely, by providing at article 62 UPCA for the payment of a recurring penalty in case of non-compliance with a given provisional measure, the UPCA gives the applicant for an interim relief a pecuniary alternative that the UPC can order and enforce within its jurisdiction on the assets of the non-compliant defendant. However, the problem may reemerge in case of provisional measures aimed at preserving evidence located in a third country. In this case the payment of a recurring penalty may not serve its purpose and play only a mild deterrent effect. In such cases, the UPC may draw negative inferences from the lack of cooperation of the defendant, although neither the UPCA nor the UPC RoP expressly provide so.

A Plea for Private International Law

A new paper by Michael Green, *A Plea for Private International Law (Conflict of Laws)*, was recently published as an Essay in the *Notre Dame Law Review Reflection*. Michael argues that although private international law is increasingly important in our interconnected world, it has fallen out of favor at top U.S. law schools. To quote from the Essay:

> *Private international law has not lost its jurisprudential import. And ease of travel, communication, and trade have only increased in the last century. But in American law schools (although not abroad), private international law has started dropping out of the curriculum, with the trend accelerating in the last*

> *five years or so. We have gone through US News and World Report's fifty top-ranked law schools and, after careful review, it appears that twelve have not offered a course on private international law (or its equivalent) in the last four academic years: Arizona State University, Boston University, Brigham Young University, Fordham University, University of Georgia, University of Minnesota, The Ohio State University, Pepperdine University, Stanford University, University of Southern California, Vanderbilt University, and University of Washington. And even where the course is taught, in some law schools—such as Duke, New York University, and Yale—it is by visitors, adjuncts, or emerita. It is no longer a valued subject in faculty hiring.*

I could not agree more. Nor am I alone. Although Michael did the bulk of the research and writing for the Essay, he shared credit with a number of scholars who endorse the arguments set forth therein. This list of credited co-authors includes:

> *Lea Brilmayer (Yale Law School)*
> *John Coyle (University of North Carolina School of Law)*
> *William S. Dodge (George Washington University Law School)*
> *Scott Dodson (UC Law San Francisco)*
> *Peter Hay (Emory School of Law)*
> *Luke Meier (Baylor Law School)*
> *Jeffrey Pojanowski (Notre Dame Law School)*
> *Kermit Roosevelt III (University of Pennsylvania Carey Law School)*
> *Joseph William Singer (Harvard Law School)*
> *Symeon C. Symeonides (Willamette University College of Law)*
> *Carlos M. Vázquez (Georgetown University Law Center)*
> *Christopher A. Whytock (UC Irvine School of Law)*
> *Patrick Woolley (University of Texas School of Law).*

In addition to his empirical findings about the declining role of Conflict of Laws in the U.S. law school curricula, Michael seeks to explain precisely why the class matters so much and why it has fallen out of favor. He argues convincingly that part of the decline may be attributed to poor branding:

> *We suspect that part of the problem is that many American law professors and law school administrators are unaware that conflict of laws is private*

> *international law. One of us is an editor of a volume on the philosophical foundations of private international law, and in conversation several law professor friends (we won't name names) told him that they weren't aware that he worked on private international law, even though they knew that he worked on conflicts. Reintroducing conflicts to the law school curriculum might be as simple a matter as rebranding the course to make its connection with international law clear, as Georgetown has done.*

He also considers—and rightly rejects—the notion that this is an area about which practicing attorneys can easily educate themselves. To quote again from the Essay:

> *Another argument that the disappearance of conflicts from the law school curriculum is not a problem is that a practitioner can identify a choice-of-law issue and get up to speed on the relevant law in short order. The truth, however, is that one is unlikely to recognize a choice-of-law issue without having taken conflicts. We have often been shocked at how law professors without a conflicts background (again, we are not naming names) will make questionable choice-of-law inferences in the course of an argument, based on nothing more than their a priori intuitions. They appear to be unaware that there is law—and law that differs markedly as one moves from one state or nation to another—on the matter. One can recognize a choice-of-law issue only by knowing what is possible, and someone who has not taken conflicts will not know the universe of possibilities.*

The Essay contains a host of additional insights that will (fingers crossed) help to reinvigorate the field of private international law in the United States. Anyone with an interest in conflicts (or private international law) should read it. It can be downloaded here.

A version of this post also appears at Transnational Litigation Blog.

CJEU's first ruling on the conformity of asymmetric jurisdiction clauses with the Brussels I recast regulation and the 2007 Lugano Convention

by Guillaume Croisant, Claudia Cavicchioli, Nicole Rölike, Alexia Kaztaridou, and Julie Esquenazi (all Linklaters)

In a nutshell: reinforced legal certainty but questions remain

In its decision of yesterday (27 February 2025) in the *Lastre* case (Case C-537/23), the Court of Justice of the European Union (CJEU) handed down its long-awaited first judgment on the conformity of asymmetric jurisdiction clauses with the Brussels I recast regulation and the 2007 Lugano Convention.

The Court ruled that the validity of asymmetric jurisdiction clauses is assessed in the light of the autonomous rules of Article 25 of the regulation (rather than Member States' national laws) and confirmed their validity where the clause can be interpreted as designating courts of EU or Lugano States.

This decision dispels some of the previous uncertainties, particularly arising from the shifting case law of the French Supreme Court. The details of the decision and any possible impact, in particular the requirement for the clause to be interpreted as designating courts of EU or Lugano States, will need to be analysed more closely, but on the whole the CJEU strengthened foreseeability and consistency regarding unilateral jurisdiction clauses under the Brussels I regulation and the

Lugano convention.

Besides other sectors, this decision is of particular relevance in international financing transactions, including syndicated loans and capital markets, where asymmetric jurisdiction clauses in favour of the finance parties have been a long-standing practice.

Background

A so-called asymmetric or unilateral jurisdiction clause allows one party to choose any competent court to bring proceedings, while the other party is restricted to a specific jurisdiction. Such clauses are common in financial agreements, like international syndicated loan transactions, where lenders, bearing most of the financial risk, reserve the right to enforce claims wherever the borrower may have assets.

Article 25 of the Brussels I recast regulation provides autonomous conditions for the formal validity of jurisdiction clauses designating EU courts. By contrast, for the jurisdiction clause's substantive validity, Article 25 refers to the law of the Member State designated by the jurisdiction clause. While one of the Brussels I recast regulation's predecessors, the 1968 Brussels Convention, referred to jurisdiction clauses "*concluded for the benefit of only one of the parties*", the regulation is silent on the validity of asymmetrical jurisdiction clauses. Their precise working under Article 25, particularly in relation to the substantive validity rule, awaited authoritative consideration by the CJEU.

In the absence of relevant national case law in many Member States and diverging approaches in jurisdictions where decisions had been rendered, today's judgment brings welcomed clarity and legal certainty. For instance, in *Commerzbank AG v Liquimar Tankers Management Inc*, the English Commercial Court considered (pre-Brexit, when EU jurisdiction law still applied in the UK) that asymmetric jurisdiction clauses are valid under Article 25, whereas the evolving jurisprudence of the French Supreme Court (discussed below) has led to many debates.

Arbitration is excluded from the scope of application of the Brussels I recast regulation, meaning that the validity of asymmetric *arbitration* clauses generally depends on the law applicable to the arbitration clause (*lex arbitri*). Under some laws, they are accepted if no consent issues, such as duress, arise (see e.g. under

English law the *NB Three Shipping* case).

Discussions in France spur crucial CJEU review

In the case at hand, an Italian and a French company entered into a supply agreement including an asymmetric jurisdiction clause, similar to clauses often seen in financial documentation favouring the lenders:

> *"The jurisdiction of the court of Brescia (Italy) shall apply to any dispute arising from this contract or related to it, [the Italian supplier] reserving the right to proceed against the buyer before another competent court in Italy or abroad."*

When a dispute arose, the French company brought proceedings before the French courts. The supplier challenged the competence of French courts on the basis of the unilateral jurisdiction clause. The French courts dismissed this objection, declaring the clause unlawful due to its lack of foreseeability and one-sided nature.

The case was brought before the French Supreme Court (*Cour de cassation*). In the past, its First Civil Chamber had ruled, in its 2012 *Rothschild* decision, that jurisdiction clauses giving one party the right to sue the other before "*any other competent court*" are invalid both under the French civil code and the Brussels I regulation, on the ground that this would be "*potestative*" (i.e. that the execution of the clause would depend on an event that solely one contracting party has the power to control or to prevent).

Although the First Chamber later abandoned any reference to the "*potestativité*" criteria, there now appear to be diverging positions among the chambers of the French Supreme Court regarding the validity of asymmetric jurisdiction clauses. On the one hand, further to several decisions, the latest being in 2018, the First Civil Chamber of the Cour de Cassation appears to hold that asymmetric jurisdiction clauses are invalid if the competent courts are not identifiable through objective criteria or jurisdiction rules within a Member State. On the other hand, the Commercial Chamber of the French Supreme Court ruled in 2017 that such clauses are valid if the parties have agreed to them, regardless of predictability.

In this case, the *Cour de cassation* sought guidance from the CJEU through a preliminary ruling reference. The *Cour de cassation* requested the CJEU's position on:

- whether the lawfulness of asymmetric jurisdiction clauses should be evaluated under (i) the autonomous principles of the Brussels I recast regulation or (ii) the applicable national law;
- if the Brussels I recast regulation applies, whether this regulation permits such asymmetric clauses;
- if national law is applicable, how to determine which Member State's law should take precedence.

After the hearing, the Court deemed a prior opinion from the Advocate General not necessary.

CJEU upholds asymmetric clauses… under conditions

On the first question, the CJEU ruled that, in the context of the assessment of the validity of a jurisdiction clause, complaints alleging the imprecision or asymmetry of that agreement must be examined in the light of autonomous criteria which are derived from Article 25 of the Brussels I recast regulation. Matters of substantive validity, for which the law of the relevant Member States shall apply, only concern causes which vitiate consent, such as error, deceit, fraud or violence, and incapacity to contract.

Turning to the interpretation of these autonomous criteria under Article 25, the Court confirmed the validity of asymmetric jurisdiction clauses designating courts of EU Member States or States that are parties to the Lugano Convention.

The Court first confirmed that parties are free to designate several courts in their jurisdiction clauses, and that a clause referring to "any other competent court" meets the requirements of foreseeability, transparency and legal certainty of the Brussels I recast regulation and the Lugano Convention since it refers to the general rules of jurisdiction provided for by these instruments.

However, the Court importantly held that these requirements are met only insofar as the jurisdiction clause can be interpreted as conferring jurisdiction to the court designated in the clause (in the case at hand, Brescia) and the competent courts of the EU/Lugano States to hear disputes between the parties. EU law alone would not make it possible to confer jurisdiction to a court of third countries, as this designation would depend on the application of their own private international law rules. The exact implications of this requirement will require careful assessment, in particular where non-EU/Lugano parties are involved.

With respect to the alleged “unbalanced” nature of such clause, the Court stressed that the Brussels I recast regulation and the Lugano Convention are based on the principle of contractual autonomy and thus allow asymmetric clauses, as long as they respect the exceptions foreseen by these instruments, in particular with respect to exclusive jurisdiction (Art. 24 Brussels I recast regulation) as well as the protective rules in insurance, consumer and employment contracts (Arts. 15, 19 and 23 Brussels I recast regulation).

Going International: The SICC in Frontier Holdings

By Sanjitha Ravi, Jindal Global Law School, OP Jindal Global University, Sonipat, India

The Singapore International Commercial Court (“SICC”) in *Frontier Holdings Ltd v. Petroleum Exploration (Pvt) Ltd* overturned a jurisdictional ruling by an International Chamber of Commerce (“ICC”) arbitral tribunal, holding that the tribunal did, in fact, have jurisdiction to hear the dispute. The SICC’s decision focused on interpreting the arbitration provisions in the Petroleum Concession Agreements (“PCAs”) and Joint Operating Agreements (“JOAs”), which had created ambiguity regarding whether disputes between foreign parties, i.e., Foreign Working Interest Owners (“FWIOs”), and Pakistan parties, i.e., Pakistani Working Interest Owners (“PWIOs”), were subject to international arbitration. The arbitral tribunal, by majority, had concluded the PCAs restricted ICC arbitration to disputes between FWIOs *inter se* or between FWIOs and the President of Pakistan, thereby excluding disputes between FWIOs and PWIOs. The SICC rejected this reasoning and concluded that the provisions should be applied with necessary modifications to fit the JOAs’ context by conducting an in-depth construction of the dispute resolution provisions of the different agreements involved. The court found that a reasonable interpretation of these provisions indicated an intention to submit FWIO-PWIO disputes to ICC arbitration rather than Pakistani domestic arbitration.

The (Un)Complicated Fact Pattern

The dispute arose from an oil and gas exploration agreement in Pakistan, where Frontier Holdings Limited ("FHL"), a company incorporated in Bermuda, sought to challenge a jurisdictional ruling made by an arbitral tribunal under the auspices of the ICC. FHL's claim was based on JOAs and PCAs signed in 2006 between PEL and the President of Pakistan, which governed oil exploration and production in the Badin South and Badin North Blocks. These agreements contained provisions regarding arbitration and dispute resolution, specifically Article 28, which stipulated that disputes that the International Centre for Settlement of Investment Disputes did not take jurisdiction over were to be resolved by arbitration under the ICC. Article 28.3 clearly stated that Article 28 was only applicable to a dispute between FWIOs *inter se* or between the FWIOs and the President of Pakistan. The JOAs, which were annexed to the PCAs, further stated under Article 17 that any dispute arising out of the JOAs was to be dealt with *mutatis mutandis* in accordance with Article 28 of the PCAs. Furthermore, Article 29.6 stated that where matters were not specifically dealt with in the PCAs, the matters would be governed by, among other things, the Pakistan Petroleum (Exploration and Production) Rules 2001 ("Rules"). These Rules, as per Rule 74 required that any dispute regarding a petroleum right or anything connected to such right was to be resolved by arbitration in Pakistan under Pakistani law. Article 18.1 and 1 of the PCAs stipulated that in case of a conflict between the JOA and PCA, the JOA would be regarded as modified to conform to the PCA, and in case of inconsistency or difference in such terms, the terms of the PCAs would prevail, respectively. FHL acquired a 50% working interest in the Blocks through a Farm In Agreement ("FIA") and Deed of Assignment. In 2022 and 2023, PEL, as the operator, sought to forfeit FHL's interest due to non-compliance with cash calls. FHL initiated arbitration under ICC rules, but PEL contended that the arbitral tribunal lacked jurisdiction, arguing that the applicable arbitration provisions under the PCAs and JOAs did not cover disputes between FWIOs and PWIOs. The arbitral tribunal, by majority, ruled that it had no jurisdiction. This led to FHL challenging the tribunal's ruling before the SICC.

Judicial Analysis by the SICC

At the outset, there was no dispute between the parties on two aspects: first, that Pakistani law was the proper law of the contract, and second, that the incorporation of Article 28 of the PCAs into the JOAs by Article 17 of the latter agreements demonstrated that each of FHL and PEL consented to resolve disputes arising out of the JOAs by arbitration *per se* to the exclusion of litigation before domestic courts (hence, an agreement to arbitrate *per se* existed). The core issue before the court was whether the tribunal had jurisdiction to hear the dispute between FHL and PHL. To do this, the SICC engaged in the interpretation of Article 28 of the PCAs and Article 17 of the JOAs. The court analysed the textual ambiguities and how the provisions should be construed in light of the overall intent of the agreements.

Pakistan is a partial integration jurisdiction, meaning that the court could go beyond the words of the agreement to construe its meaning only when such words were ambiguous. In the event of ambiguity, the court could consider the contract's commercial purpose and the factual background against which that contract was made. If the words of the agreement on their plain and ordinary meaning led to inconsistency within the document or absurdity, the plain and ordinary meaning of those words could be reasonably modified to avoid absurdity and inconsistency and reflect the parties' intention.

In understanding the parties' intention, the SICC concluded that upon reading Article 28 of the PCAs as a whole, the intention that disputes involving FWIOs were to be dealt with in a manner other than by Pakistani arbitration (which was specifically stipulated for disputes between PWIOs *inter se* or between PWIOs and the President) even though it did not specifically deal with FWIO-PWIO disputes. Furthermore, because the JOA was annexed to each of the PCAs which were in turn envisaging assignments of interests, there existed an understanding that parties other than the original Pakistani parties could become parties to the JOAs and become subject to the dispute resolution provision in Article 17 of the JOAs. The SICC concluded that FHL became a party to the PCAs and JOAs when it acquired its interest and noted that in the Assignment Agreement between FHL, PEL and the President, there was an ICC arbitration clause. Reading Article 28 of the PCAs and Article 17 of the JOAs with Article 29.6 of the PCAs sand Rule 74 of the Rules, the court concluded that to say that FWIO-PWIO fell under Article 29.6 would render the words "mutatis mutandis" in Article 17 otiose. The court concluded that Article 28.3 of the PCAs applied, moulded by the use of the words "*mutatis mutandis*," by substituting "Pakistan Working Interest Owner" for "THE PRESIDENT" in Article 28.3. This was the approach which commended itself to the England and Wales Court of Appeal ("EWCA") in *Hashwani and others v. OMV Maurice Energy* [2015] EWCA Civ 1171 wherein a similar fact pattern was examined. The SICC further noted that there was a clear intention that disputes involving FWIOs were to be resolved by arbitration outside Pakistan because the expression could not be given effect otherwise. There was no inconsistency with Article 18 and Article 1 and this as per the SICC. Article 29.6 and Rule 75 of the Rules were default provisions and did not alter the meaning of Article 28 of the PCAs and Article 17 of the JOAs.

The contention that FHL was not a party to the original PCAs was irrelevant, and the SICC held that PEL was incorrect in drawing a parallel to the factual matrix in *Hashwani* in this regard. In *Hashwani*, the EWCA had allowed the party which sought to invoke ICC arbitration even though they were not a party to the original contract. Furthermore, it was a strained construction of Article 17 to say that despite its express incorporation of Article 28, the resolution of the dispute was not governed by Article 28 of the PCAs but by a default provision. Finally, that the FIAs contained an ICC arbitration clause provided support for the contention that the parties' intention at the time FHL entered into the PCAs and became a party to the JOAs was for FWIO-PWIO disputes under the JOAs to be governed by international arbitration. In the circumstances, the SICC held that the majority of the tribunal was incorrect in contending that the tribunal had no jurisdiction to hear or determine the dispute and that FHL was entitled to pursue its claim.

The Ruling's Implications on Commercial Contracts

The court emphasised that reading the arbitration clauses in a restrictive manner, as the tribunal's majority had done, undermined commercial certainty and the purpose of arbitration in cross-border energy contracts. By setting aside the tribunal's ruling, the SICC reinforced the principle that arbitration agreements should be interpreted in a manner that upholds international commercial arbitration, particularly when foreign investors are involved in contracts with state-linked entities. The decision provides clarity on jurisdictional disputes in international contracts, ensuring that parties engaging in cross-border investments can rely on neutral arbitration forums rather than being subjected to domestic dispute resolution mechanisms.

The SICC's ruling in *Frontier Holdings* carries significant implications for commercial contracts, particularly in international energy and infrastructure agreements. It underscores the necessity for clarity in arbitration agreements, emphasising that parties must explicitly define jurisdictional provisions to avoid ambiguity. The ruling highlights the careful use of terms like "*mutatis mutandis*", which, if not properly drafted, can lead to interpretational disputes. This becomes so much more of a zone of ambiguity because of other provisions in the contract which provide for other means of dispute resolution in a different set of circumstances, such as between a combination of specific parties in a multi-party agreement or based on the subject matter of the dispute. India, another partial integration jurisdiction, has faced similar challenges regarding arbitral jurisdiction in cross-border commercial disputes. Several key cases illustrate how Indian courts have approached arbitration agreements in international contracts. For instance, in *Enercon (India) Ltd v. Enercon GmbH* (2014) 5 SCC 1, the Supreme Court of India ruled that arbitration agreements must be interpreted in a way that ensures disputes are effectively resolved through arbitration. Similarly, in *Cairn India Ltd v. Union of India* (2019 SCC OnLine Del 10792), the Delhi High Court emphasised that arbitration clauses should be construed in favour of international arbitration, especially in contracts involving foreign investment. The implications of the SICC's approach, as seen in *Frontier Holdings*, suggest that partial integration courts could adopt similar reasoning in cases involving foreign and Indian entities in commercial contracts. That said, parties would be in a much better position if they drafted provisions, especially those as pertinent as the dispute resolution terms, in clear terms.

Additionally, the decision reinforces the importance of international arbitration, affirming the preference for neutral forums in resolving cross-border commercial disputes, especially where foreign investors are involved. By setting aside the arbitral tribunal's restrictive interpretation, the judgement further strengthens protections for foreign investments, ensuring that foreign investors are not subjected to domestic arbitration in host states, particularly in cases where state-owned entities are parties to the dispute.

Enforcing Foreign Judgments in Egypt: A Critical Examination of Two Recent Egyptian Supreme Court Cases

I. Introduction

The recognition and enforcement of foreign judgments in the MENA region can sometimes be challenging, as it often involves navigating complex legal frameworks (domestic law v. conventions). In addition, case law in this field has encountered difficulties in articulating the applicable guiding principles and is sometimes ambiguous, inconsistent, or even contradictory. Two recent decisions rendered by the Egyptian Supreme Court highlight this issue, alhoutgh – it must be admitted – the Court did provide some welcome clarifications. In any event, the cases reported here highlight some key issues in the recognition and enforcement of foreign judgment and offer valuable insights into the evolving landscape of this area of law in Egypt.

II. The Cases

1. Case 1: Ruling No. 12196 of 23 November 2024

a. Facts

The first case concerns the enforcement of a court-approved settlement deed (*saqq*) issued by a Saudi court. While the underlying facts of the case are not entirely clear, it appears that the parties involved seem to be Egyptian nationals. The original case, initiated in Saudi Arabia, concerns a claim for maintenance to be paid by the husband, 'Y' (defendant/respondent), to his wife and children, 'Xs' (plaintiffs/appellants). Before the Saudi court, the parties reached a settlement, which was recorded in a court-issued deed (*saqq*). Under this agreement, Y was obligated to pay a monthly alimony to Xs, with payment to be made by way of bank transfer to the wife's account from November 2009. However, as Y failed to make the payment and returned to Egypt, Xs filed an action before Egyptian courts in 2019 to enforce the Saudi court's settlement deed in Egypt (however, it remains unclear when Y stopped making the alimony payment or when he returned to Egypt).

The Court of first instance ruled in favor of Xs. However, the decision was overturned on appeal. Xs then appealed to the Supreme Court. According to Xs, the court of appeal refused to enforce the Saudi court's settlement deed on the grounds that it violated Islamic sharia and the Constitution. This was based on the fact that Xs continued to reside in Saudi Arabia, the children had obtained university degrees and were employed—along with their mother—in Saudi Arabia, while Y had left the country after his retirement. Xs argued that, in doing so, the Court of Appeal went beyond a formal examination of the enforcement requirements and instead engaged into re-examining the substantive merits of the case.

b. The Court's Ruling (summary):

The Supreme Court accepted the arguments made by Xs on the following grounds:

First the Supreme Court recalled the general principles governing the recognition and enforcement of foreign judgments in Egypt. It made a clear distinction between the "recognition" of foreign judgments and their "enforcement" and determined their respective legal regimes.

Regarding the enforcement of the Saudi court-approved settlement deed, the Supreme Court considered that the deed in question was “*a final judicial decision rendered by a competent judicial authority, in the presence of both parties and after they were given the opportunity to present their defense*”. Accordingly, such a judgment should be given effect in accordance with the conditions and procedures specified by Egyptian law (Arts. 296~298 of the Code of Civil Procedure (CCP)). If these conditions are met, Egyptian courts are required to declare the foreign judgment enforceable; otherwise the courts’ role is limited to rejecting enforcement, without reassessing the substantive reasoning of the foreign judgment. The Court concluded that Court of appeal had gone beyond its authority by failing to adhere to the above principles and instead re-examined the judgment’s reasoning.

2. Case 2: Ruling No. 2871 of 5 December 2024

a. Facts

The second case concerns the enforcement of a Kuwaiti money judgment. Here, too, the underlying facts of the case are not entirely clear. However, it appears that the dispute involved a Kuwaiti company, ‘X’ (plaintiff/respondent), and an Egyptian national ‘Y’ (defendant/appellant).

X initiated a lawsuit against Y in Kuwait, seeking the payment of a certain amount of money. Based on the arguments submitted by Y, it seems that by the time the lawsuit was filed, Y had already left Kuwait to return to Egypt. X prevailed in the Kuwaiti lawsuit and then sought to enforce the Kuwaiti judgment in Egypt.

The court of first instance ruled in favor of X and this decision was upheld on appeal. Y then appealed to the Egyptian Supreme Court. Before the Supreme Court, Y contested the lower courts’ rulings on the ground that he was not properly summoned in the original Kuwaiti case, as the notification was served to the Public Prosecution in Kuwait, despite his having already left Kuwait before the lawsuit was filed.

b. The Court's Ruling (summary):

The Supreme Court accepted Y's argument on the following grounds:

The Court first recalled that proper notification of the parties is a fundamental requirement for recognizing and enforcing a foreign judgment, that is explicitly stated in Article 298(2) of the Egyptian CCP and Article 27(3) of the 2017 Judicial Cooperation Agreement between Egypt and Kuwait. The Court also referred to Article 22 of the Egyptian Civil Code (ECC), according to which procedural matters (including service of process) are governed by the law of the country where the proceedings take place.

The Court then observed that, although Y had already left Kuwait before the lawsuit was filed, the Court of Appeal ruled that the service was valid under Kuwaiti law. However, the Supreme Court emphasized that, according to Kuwaiti CCP, a summons must be served to the defendant's last known address, workplace, or residence, whether in Kuwait or abroad. This law also addresses situations where the defendant has or has not a known domicile abroad. Since Y had left Kuwait, the lower court should have verified whether the notification complied with these requirements. The Supreme Court concluded that the lower courts had incorrectly relied on notification via the Kuwaiti Public Prosecution without confirming whether this method met the requirements established by Kuwaiti law for notifying defendants abroad.

III. Comments

The reading of the two cases leaves a mixed impression.

i. On the hand, one can appreciate the general framework outlined by the Supreme Court in both decisions. Notably, in the first case, the distinction between recognition and enforcement of foreign judgments is noteworthy, as Egyptian courts have reached divergent conclusions on whether the "recognition" of foreign judgments can operate independently from their "enforcement" (for the situation in the UAE, which has a similar legal framework, see here).

Moreover, the Supreme Court's reaffirmation of the principle of prohibition of *révision au fond* is also commendable. Although the principle is generally accepted in Egyptian law, what sets this case apart is that the Court did not merely affirm a general principle, but it actively overturned the appealed decision for violating it.

In the second case, the Court's correct reference to the applicable convention is particularly noteworthy, given that it has failed to do so in some previous cases (for a general overview, see my previous post here).

ii. On the other hand, the Court's approach in both cases raise certain questions, and even doubts.

a) Regarding the first case, one may question the applicability of the Court's general stance to the specific issue addressed. It should be noted that the case concerned the enforcement of a *court-approved settlement deed*, which is the equivalent to a "judicial settlement" (*sulh qadha'i – transaction judiciaire*) under Egyptian law. While foreign judicial settlements can be declared enforceable in Egypt (Article 300 of the CCP), they do not constitute – contrary to the Court's affirmation – "final judgments" *per se*, and therefore, do not carry *res judicata* effect, which – if recognized – would preclude any review of the "merits". The Court's reasoning appears difficult to justify given the longstanding position of Egyptian courts that judicial settlements lack *res judicata* effect and that the fact that they are approved by the court has no implication on their characterisation as "settlements" (and not decisions). This is because, while judicial settlements involve the intervention of the court, the court's involvement is not based on its adjudicative function but rather serve a probative purpose. The Court's failure to acknowledge this distinction is particularly striking in light of the established case law.

It is also regrettable that the Supreme Court failed to apply the correct legal framework. Indeed, both Saudi Arabia and Egypt are contracting states of the 1983 Riyadh Convention, and the case falls within its scope of application. This is particularly relevant given that the 1983 Riyadh Convention explicitly prohibits any review of the merits (Article 32), and – unlike, for example, the 2019 HCCH judgments Convention (Article 11) – allows for the *"recognition"* of judicial settlements (Article 35).

Finally, doubts remain as to whether the Supreme Court was justified in overturning the appealed decision for allegedly engaging in a prohibited *révision au fond*, or whether the Court of Appeal's approach can be considered a review of the merits at all. It should be noted that the settlement was reached in 2009, while the enforcement lawsuit was filed as decade later. Moreover, Y argued that his children had already graduated from university and were employed in Saudi Arabia. Taking this significant change of circumstances into account should not necessarily be regarded as a "review of the merits", but rather as a legitimate consideration in assessing whether enforcement remains appropriate. Therefore, such a change in circumstances could reasonably justify at least a partial refusal to enforce the Saudi court-approved settlement deed.

b) With respect to the second case, the Supreme Court's stance to overturn the appealed decision on the ground that the court of appeal failed to confirm whether the service complied with the requirements established by Kuwaiti law for notifying defendants has a number of drawbacks. Two main issues arise from this position:

(1) One might question how Egyptian judges could be more qualified than Kuwaiti judges in applying their own procedural rules, especially if it is admitted that Kuwaiti procedural law is applicable (article 22 of the ECC).

(2) The Court overlooked that the 2017 Egyptian-Kuwaiti Convention, which it explicitly cited, contains a chapter specifically dealing with service of process (Chapter II). Therefore, the validity of the service should not be evaluated based on Kuwaiti procedural law, as the Court declared, but rather in accordance with the rules established by the Convention, as the Supreme Court itself had previously ruled (see the cases cited in my previous post here) . Given that this Convention is in force, there was no need to refer to domestic law, as – according to Egyptian law – when an international convention is applicable, its provisions take precedence over conflicting national laws (Article 301 of the CCP), a principle that has been repeatedly confirmed by the Supreme Court itself on numerous occasions.