Australia's statutist orthodoxy: High Court confirms the extraterritorial scope of the Australian Consumer Law in the Ruby Princess COVID-cruise case

The *Ruby Princess* will be remembered by many Australians with disdain as the floating petri dish that kicked off the spread of COVID-19 in Australia. The ship departed Sydney on 8 March 2020, then returned early on 19 March 2020 after an outbreak. Many passengers became sick. Some died. According to the BBC, the ship was ultimately linked to at least 900 infections and 28 deaths.

Ms Susan Karpik was a passenger on that voyage. She and her husband became very sick; he ended up ventilated, intubated and unconscious in hospital for about four weeks.

Ms Karpik commenced representative proceedings—a class action—in the Federal Court of Australia. She asserted claims in tort and under the Australian Consumer Law (**ACL**) in schedule 2 to the *Competition and Consumer Act 2010* (Cth) (**CCA**) against companies behind the ship: Carnival plc and its subsidiary, Princess Cruise Lines Ltd (together, **Princess**). She sought damages for loss and damage allegedly suffered by either passengers of the ship or their relatives.

The case has an obvious cross-border flavour. The respondents are foreign companies: Princess Cruise Lines Ltd is incorporated in Bermuda and headquartered in California; Carnival plc is a UK company which functions together with a Panama-incorporated US-headquartered company, and is dual listed on the New York Stock Exchange and the London Stock Exchange. The ship is registered in Bermuda. The ~2,600 passengers on the diseased voyage included many Australians but also passengers from overseas. They contracted to travel on the cruise in different parts of the world, and according to Princess, were subject to different terms and conditions subject to different systems of law. The cruise itself departed and returned to Sydney but included time outside of

Australia, including in New Zealand.

It is unsurprising then that Princess sought to defend the proceedings at a preliminary stage through litigation over where to litigate.

Princess brought an interlocutory application to stay the proceedings as they related to a Canadian passenger, Mr Patrick Ho, who entered the contract with Princess when he was not in Australia. Princess argued that Mr Ho's contract was subject to different terms and conditions to those that governed the contracts of other Aussie passengers. These 'US Terms and Conditions' included a class action waiver clause, a choice of law clause selecting US maritime law, and an exclusive jurisdiction clause selecting US courts. Mr Ho was identified by Ms Karpik as a sub-group representative of those members of the class action that Princess argued were subject to the US Terms and Conditions.

In contesting the stay application, Ms Karpik relied on section 23 of the ACL, which provides among other things that a term of a consumer contract is void if the term is unfair and the contract is a standard form contract. Princess argued that s 23 did not apply to Mr Ho's contract, given it was made outside Australia.

The primary judge refused the stay application, which was then reversed by the Full Court of the Federal Court of Australia.

On further appeal, the High Court held that ACL s 23 does apply to Mr Ho's contract, with the result that the class action waiver clause was void: *Karpik v Carnival plc* [2023] HCA 39. The Court held that there were strong reasons not to give effect to the exclusive foreign jurisdiction clause. Ms Karpik succeeded, meaning that the case may now continue in Australia, even as regards those members of the class action who are not Australian and contracted overseas.

The decision is significant not just for the litigants. It will be commercially significant for foreign businesses that contract with consumers in respect of services that have connections to Australia. For example, it may have serious implications for travel operators, including those who run cruises that stop in Australia. The decision is significant too for private international law nerds like myself, contemplating how to resolve choice of law questions in our age of statutes.

Procedural history

Princess applied to stay the proceedings relying on terms of Mr Ho’s contract with Princess. A Calgary resident, he booked his ticked on the *Ruby Princess* via a Canadian travel agent in September 2018. By the time the matter came to the High Court, it was not disputed that when he did so, he became a party to a contract subject to the US Terms and Conditions, which contained three clauses of particular relevance.

First, it included a choice of law clause (cl 1):

> *‘[A]ny and all disputes between Carrier and any Guest shall be governed exclusively and in every respect by the general maritime law of the United States without regard to its choice of law principles … To the extent such maritime law is not applicable, the laws of the State of California (U.S.A.) shall govern the contract, as well as any other claims or disputes arising out of that relationship. You agree this choice of law provision replaces, supersedes and preempts any provision of law of any state or nation to the contrary.’*

Second, it included an exclusive foreign jurisdiction clause (cl 15B(i)):

> ‘Claims for Injury, Illness or Death*: All claims or disputes involving Emotional Harm, bodily injury, illness to or death of any Guest whatsoever, including without limitation those arising out of or relating to this Passage Contract or Your Cruise, shall be litigated in and before the United States District Courts for the Central District of California in Los Angeles … to the exclusion of the courts of any other country, state, city, municipality, county or locale. You consent to jurisdiction and waive any objection that may be available to any such action being brought in such courts.’*

Third, it included a class action waiver clause (cl 15C):

> *‘WAIVER OF CLASS ACTION: THIS PASSAGE CONTRACT PROVIDES FOR THE EXCLUSIVE RESOLUTION OF DISPUTES THROUGH INDIVIDUAL LEGAL ACTION ON YOUR OWN BEHALF INSTEAD OF THROUGH ANY CLASS OR REPRESENTATIVE ACTION. EVEN IF THE APPLICABLE LAW PROVIDES OTHERWISE, YOU AGREE THAT ANY ARBITRATION OR LAWSUIT AGAINST*

> *CARRIER WHATSOEVER SHALL BE LITIGATED BY YOU INDIVIDUALLY AND NOT AS A MEMBER OF ANY CLASS OR AS PART OF A CLASS OR REPRESENTATIVE ACTION, AND YOU EXPRESSLY AGREE TO WAIVE ANY LAW ENTITLING YOU TO PARTICIPATE IN A CLASS ACTION …'*

By its interlocutory application, Princess sought an order that certain questions be heard and determined separately. The questions included whether Mr Ho was bound by the exclusive foreign jurisdiction clause.

At first instance, Ms Karpik argued that Mr Ho was not subject to the US Terms and Conditions, and so denied that the foreign exclusive jurisdiction clause and the class action waiver clause were incorporated into his contract. It was argued in the alternative that those clauses if incorporated were void or otherwise unenforceable.

In July 2021, Stewart J refused the application for a stay as regards Mr Ho on the basis that the US Terms and Conditions were not incorporated into his contract, and held further that if they were incorporated, the class action waiver was void and unenforceable under ACL s 23. Stewart J held there would be strong reasons for not enforcing the exclusive foreign jurisdiction clause even if it were incorporated and enforceable: *Karpik v Carnival plc (The Ruby Princess) (Stay Application)* [2021] FCA 1082; (2021) 157 ACSR 1, [331].

In September 2022, by majority, the Full Court of the Federal Court allowed the Princess appeal. The Full Court was comprised of judges who are, with respect, well known for their private international law and maritime law expertise: Allsop CJ, Rares J and Derrington J. All three agreed that the primary judge erred in holding that the exclusive foreign jurisdiction clause and the class action waiver clause were not terms of Mr Ho's contract. Allsop CJ and Derrington J agreed that the clauses were enforceable and not contrary to the policy of Part IVA of the *Federal Court of Australia Act 1976* (Cth) which regulates representative proceedings in the Federal Court. Rares J dissented in holding that it was contrary to public policy to permit contracting out of that class actions regime. The majority did not decide on the extraterritorial application of ACL s 23 but enforced the exclusive foreign jurisdiction clause by staying the proceeding as regards Mr Ho's claim: *Carnival plc v Karpik (The Ruby Princess)* [2022] FCAFC 149; (2022) 294 FCR 524.

Mrs Karpik obtained special leave. The Attorney-General of the Commonwealth and the Australian Competition and Consumer Commission intervened. The appeal was heard in August 2023.

The High Court was comprised of Gageler CJ, Gordon, Edelman, Gleeson and Jagot JJ. The Court unanimously allowed Ms Karpik's appeal and re-exercised the primary court's discretion by refusing to stay the proceedings. The decision may be distilled into three key propositions.

1. Section 23 of the ACL had extraterritorial application and applied to the contract between Mr Ho and Princess.
2. The class action waiver clause was void under ACL s 23 because it was unfair.
3. Although the exclusive foreign jurisdiction clause formed part of the contract, there were strong reasons for not enforcing the clause.

The territorial scope of ACL s 23

The first proposition turned on resolution of difficult issues of private international law, or the conflict of laws.

Princess argued that the application of the ACL in a matter with a foreign element depended first on determining that the law of the forum (*lex fori*) was the applicable law (*lex causae*) in accordance with the forum's choice of law rules.

Where a contract selects a system of foreign law as the applicable law, as this contract did in cl 1, the relevant choice of law rule is that generally, the selected system of law supplies the proper law of the contract, which is the applicable law: see *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 188 CLR 418.

The High Court held that 'Princess' submissions incorrectly invert the inquiry': [22]. Rather, the application of ACL s 23 to Mr Ho's contract, a contract made outside Australia, was described as 'a question of statutory construction': [18]. So the Court construed the ACL as part of the CCA by holding as follows at [26], [34]ff:

- The ACL applies to the extent provided by CCA pt XI: ACL s 1.
- CCA s 131(1), within CCA pt XI, provides that the ACL applies to the conduct of corporations and in relation to contraventions of certain

chapters of the ACL by corporations.

- CCA s 5 extends the application of relevant parts of the ACL to conduct engaged in outside Australia, where the conduct outside Australia was by a corporation carrying on business within Australia.
- ACL s 23, as part of ACL pt 2-3, prescribes a norm of conduct. Section 23 in particular addresses adhesion contracts—that is, contracts in which one of the parties enters into a contract on a take-it-or-leave it basis. ACL s 23 protects consumer contracts and small business contracts but not others.

There was no dispute before the High Court that Princess was carrying on business in Australia. (On the role of that jurisdictional hook in Australian legislation, see Douglas, 'Long-Arm Jurisdiction over Foreign Tech Companies "Carrying on Business" Online: Facebook Inc v Australian Information Commissioner' (2023) 45(1) *Sydney Law Review* 109).

The High Court clarified that ACL s 23 should not be considered a generally worded statutory provision: [43]–[44]. Rather, the statute expressly provided for the territorial scope of the ACL via CCA s 5. The Court held that there was no justification to only apply s 23 to situations where the proper law of the contract is Australian law. The Court considered the CCA's policy objective of consumer protection (CCA s 2) as supporting a construction which would extend protection to Australian consumers with companies even where the contract was for services wholly or predominantly performed overseas: [47], [49].

The class action waiver clause was an unfair term

The US Terms and Conditions were therefore subject to s 23 of the ACL. Was the class action waiver clause 'unfair' for the purposes of s 23(1)(a)? The Court applied the definition in ACL s 24(1), which provides:

> *'(1) A term of a consumer contract or small business contract is unfair if:*
>
> *(a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and*
>
> *(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and*

> *(c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.'*

The Court considered that the clause had the effect of preventing or discouraging passengers from vindicating their legal rights where the cost to do so individually and not as part of a class action would be economical. The clause therefore caused a significant imbalance in the parties' rights and obligations: [54]. The Court held that Princess had not proved that the clause was reasonably necessary in order to protect their interests: [55]–[56]. Further, being denied access to the representative proceedings regime was considered a sufficient detriment: [58].

The Court recognised that courts in the United States have held differently, but considered that the class action waiver clause was unfair, and therefore void under ACL s 23: [60].

The Court further opined in *obiter* that the class action waiver clause would not be inconsistent with the Federal Court's representative proceedings regime: [61]–[64].

Strong reasons not to enforce the exclusive foreign jurisdiction clause

Australian courts give effect to the norm of party autonomy by enforcing exclusive foreign jurisdiction clauses in the absence of strong reasons to not enforce such clauses. The primary judge held that there were strong reasons in this case to not enforce the party's exclusive choice of foreign fora. The High Court agreed.

The Court held that the following 'strong' reasons justified denying the application for the stay, as a matter of discretion: first, the class action waiver clause was an unfair term, which corresponded to Mr Ho's juridical advantage in litigating in Australia in circumstances where he could be denied participation in a class action in the US; and second, the enforcement of the exclusive jurisdiction clause would fracture the litigation: [67]–[69].

Conclusion

The High Court's decision is significant for its consideration of the territorial scope of ACL s 23. It means that many companies outside of Australia that operate in a way that touches on Australia will have difficulty in contracting out of Australia's consumer protection regime as regards standard contracts with consumers and small businesses. The decision will be a big deal for businesses like Princess, who operate travel services that involve Australia.

Theoretically, the Australian consumer protection regime could apply to regulate contracts between persons who are not Australian, with limited connection to Australia, and in respect of transactions with subject matter with a closer connection to places other than Australia. But as the High Court recognised at [50], the practical significance of this possibility should not be overstated. *Forum non conveniens* should operate to limit the prosecution of those kinds of claims.

On the other hand, Australia's parochial approach to that doctrine via the 'clearly inappropriate forum' test could mean that in some cases, it is worth it for foreigners to have a crack in an Australian forum over subject matter with a tenuous connection to Australia. Strong consumer protection may provide the 'legitimate juridical advantage' by reference to which a court may decline a stay application in a matter with a foreign element: see generally Garnett, 'Stay of Proceedings in Australia: A "Clearly Inappropriate" Test?' (1999) 23(1) *Melbourne University Law Review* 30.

The case is similarly significant for its treatment of class action waivers within the framework of the ACL. Contracts with consumers are the kind in which such clauses have the most work to do: these are contracting parties who may not sue at all unless they are part of representative proceedings. Australia's plaintiff-focused class action lawyers should be licking their lips.

For me, the case is most significant for its approach to choice of law. The High Court has now expressly endorsed an approach that has been applied in a number of cases and described by some as 'statutist'. I've previously argued that the statute-first approach to choice of law should be orthodox in the Australian legal system: Douglas, 'Does Choice of Law Matter?' (2021) 28 *Australian International Law Journal* 1; an approach which now appears right, if I do say so myself. Australian private international law may seem incoherent when viewed within the theoretical framework of multilateralism espoused by the likes of Savigny. But it makes sense when you approach matters with foreign elements with regard to our usual constitutional principles.

In Australian courts, all Australian statutes are 'mandatory', even in matters with a foreign element—there is no such thing as 'mandatory law'. In every case where a forum statute is involved, the question is whether the statute applies. Statutory interpretation is the primary tool to resolve such questions.

The jurisdictional hurdles of s 26 of the Trans-Tasman Proceedings Act 2010 (Cth), in the context of interim anti-enforcement relief in aid of New Zealand proceedings

The New Zealand High Court recently granted a permanent anti-enforcement injunction in relation to a default judgment from Kentucky in *Kea Investments Ltd v Wikeley Family Trustee Limited* [2023] NZHC 3260. The plaintiff, a British Virgin Islands company, claimed that the defendants had committed a tortious conspiracy against it because the Kentucky default judgment was based on fabricated claims intended to defraud it. The defendants were a New Zealand company, Wikeley Family Trustee Ltd (WFTL), and persons associated with the company.

In an undefended judgment, the High Court granted the injunction, awarded damages for the costs incurred in the foreign proceedings (referring to cases such as *Union Discount Co Ltd v Zoller* [2001] EWCA Civ 1755, [2002] 1 WLR 1517 by analogy), and issued a declaration that the Kentucky judgment would not be recognised or enforceable in New Zealand. As noted previously on this blog (see here), the case is an interesting example of "the fraud exception to the principles of comity" (*Kea Investments Ltd v Wikeley (No 2)* [2023] QSC 215 at [192]).

In this post, I want to focus on the trans-Tasman element of the case – and, in particular, the interpretation of s 26(1)(b) of the Australian Trans-Tasman Proceedings Act 2010. One of the defendants was Mr Wikeley, a Queensland resident, who apparently sought to evade or contravene the New Zealand Court's interim orders by purporting to assign the Kentucky judgment from WTFL to a new (Kentucky) company. The New Zealand Court responded by placing WFTL under the control of a provisional liquidator. However, because Mr Wikeley was located in Queensland, the Court had limited powers to make its restraining orders effective against him.

Kea therefore applied to the Supreme Court of Queensland under s 25 of the Trans-Tasman Proceedings Act 2010. Under this section, a party to a New Zealand proceeding may apply to the Australian courts for interim relief in support of the New Zealand proceeding. More specifically, the Australian court may give interim relief if "the court considers it appropriate" to do so (s 26(1)(a)). The court must be satisfied that, "if a proceeding similar to the New Zealand proceeding had been commenced in the court", it would have had power to give – and would have given – the interim relief in that similar proceeding (s 26(1)(b)(i) and (ii)). The equivalent provisions in the New Zealand Act are ss 31 and 32.

Following an ex parte hearing, the Queensland Court granted the application and made an order restraining Mr Wikeley from leaving Australia (*Kea Investments Ltd v Wikeley* [2023] QSC 79). The Court accepted that the assistance sought was "consistent with the beneficial nature of the Act" (at [32]). It was also satisfied that it would have had power to grant the relief if Kea had commenced a similar proceeding in Queensland, and that it would have granted the relief, satisfying s 26(1)(b)(i) and (ii) (at [39]-[60]). This decision was largely confirmed in *Kea Investments Ltd v Wikeley (No 2)* [2023] QSC 215.

The case provides a good example of the value of ss 25 and 26 (and its New Zealand equivalents): the power to provide prompt and effective support of the other country's proceedings, in circumstances where the court asked to grant the support will not – and should not – be taking jurisdiction over the merits. However, the jurisdictional requirements for granting interim relief under these provisions appear to be causing some confusion.

- In its first decision, the Queensland Court noted that it had "reservations" about "transposing relevant facts, including the respondents' connections with the jurisdiction to a Queensland setting" when determining whether it would have given relief in the hypothetical similar proceeding (at [43]-[44]). The Court's preference seemed to be to assess the question of jurisdiction on the basis of the facts as they were. Either way, it was clear that the Court would have had jurisdiction (at [44]). The Court "plainly" had jurisdiction over Mr Wikeley, due to his presence in Queensland. Moreover, Mr Wikeley's conduct to avoid or contravene the New Zealand orders took place in Queensland, with the result that Queensland would have been "an appropriate forum if a similar proceeding had been brought in this court" (at [45]).

- In its second decision, the Court considered that it also had to be satisfied that the Australian court would have been the clearly appropriate forum for the hypothetical similar proceeding (at [85]). It rejected a submission from Kea that the question of appropriate forum did not arise in the context of ss 25 and 26 (at [84]). The Court was satisfied that it had personal jurisdiction over Mr Wikeley, that it had subject-matter jurisdiction over the issues raised by Kea's proceeding by virtue of the steps taken by Mr Wikeley in Australia to obtain or enforce the Kentucky judgment, and that it was not – or would not have been – a clearly inappropriate forum.

It is not clear why the supporting court should ask itself whether it could – and would – have exercised jurisdiction over the substantive proceeding, especially where this question is determined without transposing the relevant geographical facts. The whole point of the power to provide interim relief in support of the foreign proceeding is that the supporting forum may not be the right place to determine the proceeding, albeit that it is a place where (interim) orders can be made effective.

This does not necessarily mean that the relevant geographical connections ought to be transposed. When followed strictly, this approach could render ss 25 and 26 unavailable in circumstances where they would be most useful because the original court does not have the jurisdiction to make the necessary orders. Here, the New Zealand Court did not have enforcement jurisdiction over Mr Wikeley, in the sense that it could not make an order preventing him from leaving Australia or an order for his arrest.

In most cases, a straightforward interpretation of s 26(1)(b) is that it is concerned with the court's jurisdiction in a hypothetical domestic case (see Reid Mortensen

"A trans-Tasman judicial area: civil jurisdiction and judgments in the single economic market" (2010) 16 Canterbury Law Review 61 at 71). In other words, the question of jurisdiction (in an international sense) is determined mainly on the basis whether the court considers "it appropriate to give the interim relief in support of the [substantive] proceeding" (s 26(1)(a)). But in the context of anti-suit or anti-enforcement injunctions, it is impossible to shoehorn the cross-border implications of the relief into a hypothetical proceeding that is purely domestic. The case is inherently international. This may explain the Queensland Court's decision to play it safe by asking, effectively, whether Kea could have brought the proceeding in Queensland. Ultimately, the Court thought that it would have been inappropriate for the Australian court "to simply replicate injunctive orders granted by a New Zealand court in order to secure compliance with the New Zealand orders" (at [260]).

It is likely that future courts will continue to grapple with this issue. The legislative history of s 26 suggests that the section was not intended to be weighed down by jurisdictional considerations, and that Cooper J's approach may have been unduly restrictive. The original version of the section provided, in subs (2), that an Australian court may refuse to give the interim relief if it considered that it had no jurisdiction, apart from s 26, in relation to the subject matter of the New Zealand proceeding and for that reason it would be inexpedient to give the interim relief (see [84]). The Explanatory Memorandum to the Trans-Tasman Proceedings Amendment and Other Measures Bill 2011 (Cth), which repealed subs (2), noted that "[a]n unintended consequence of subsection 26(2) may be to give greater significance to issues of jurisdiction and expediency than is necessary, resulting in applicants for interim relief facing an unintended additional hurdle" (at [21]). The proper place to consider "issues of jurisdiction and expediency" was when assessing whether it was appropriate to grant relief under s 26(1)(a). Section 26(2) was borrowed from s 25(2) of the Civil Jurisdiction and Judgments Act 1982 (UK), which apparently responded "to the jurisdictional conditions of the Brussels I Regulation" (see Mortensen, cited above, at 71).

In the context of freezing injunctions, an explicit rationale for granting interim relief in aid of foreign proceedings has been that the relief preserves the assisting court's ability to enforce the foreign court's final judgment (see *Broad Idea International Ltd v Convoy Collateral Ltd* [2021] UKPC 24, [2023] AC 389). This is consistent with the function of freezing injunctions more generally, which are designed to facilitate the enforcement of a judgment for the payment of a sum of money by preventing the dissipation of assets against which the judgment could potentially be enforced. Interim anti-suit injunctions are not, of course, the same as freezing injunctions. But there may be value here, too, in looking ahead to the enforcement stage. Under the TPPA, any final judgment from the New Zealand court was likely to be registrable in Australia, including a judgment for a final injunction. In a way, it might be ironic, therefore, if the jurisdictional requirements of s 26 somehow prevented the Australian court from preserving its ability to give meaningful relief at the enforcement stage.

Second Act in Dutch TikTok class action on privacy violation: court assesses Third Party Funding Agreements

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Introduction

Third Party Litigation Funding (TPLF) has been one of the key topics of discussion in European civil litigation over the past years, and has been the topic of earlier posts on this forum. Especially in the international practice of collective actions, TPLF has gained popularity for its ability to provide the financial means needed for these typically complex and very costly procedures. The Netherlands is a jurisdiction generally considered one of the frontrunners in having a well-developed framework for collective actions and settlements, particularly since the

Mass Damage Settlement in Collective Actions Act (WAMCA) became applicable on 1 January 2020 (see also our earlier blogpost). A recent report commissioned by the Dutch Ministry of Justice and Security found that most collective actions seeking damages brought under the (WAMCA) have an international dimension, and that all of these claims for damages are brought with the help of TPLF.

This blogpost provides an update of the latest developments in the Dutch collective action field focusing on a recent interim judgment by the Amsterdam District Court in a collective action against *TikTok c.s* in which the Dutch court assessed the admissibility of the claimant organisations based, among other criteria, on their funding agreements. This is the second interim judgment in this case, following the first one year ago which dealt with the question of international jurisdiction (see here). After a brief recap of the case and an overview of the WAMCA rules on TPLF, we will discuss how the court assessed the question of compatibility of the TPLF agreements with such rules. Also in view of the EU Representative Action Directive for consumers, which became applicable on 25 June 2023, and ongoing discussions on TPLF in Europe, developments in one of the Member States in this area are of interest.

Recap

In the summer of 2021, three Dutch representative foundations – the Foundation for Market Information Research (*Stichting Onderzoek Marktinformatie*, SOMI), the Foundation Take Back Your Privacy (TBYP) and the Foundation on Mass Damage and Consumers (*Stichting Massaschade en Consument*, SMC) – initiated a collective action against, in total, seven TikTok entities, including parent company Bytedance Ltd. The claims concern the alleged infringement of privacy rights of children (all foundations) and adults and children (Foundation on Mass Damage and Consumers). The claims include, *inter alia,* the compensation of (im)material damages, the destruction of unlawfully obtained personal data, and the claimants request the court to order that an effective system is implemented for age registration, parental permission and control, and measures to ensure that TikTok complies with the Code of Conduct of the Dutch Media Act and the GDPR.

In a its second interim judgment in this case, rendered on 25 October 2023, the District Court of Amsterdam assessed the admissibility of the three representative organisations (DC Amsterdam, 25 October 2023, ECLI:NL:RBAMS:2023:6694; in

Dutch), and deemed SOMI admissible and conditioned the admissibility of TBYP and SMC on amendments to their TPLF agreements. This judgment follows the District Court's acceptance of international jurisdiction in this collective action in its first interim judgment, which we discussed on this blog in an earlier blogpost.

TPLF under the WAMCA

The idea of TPLF refers essentially to the practice of financing litigation in which the funder has no direct involvement with the underlying claim, as explained by Adrian Cordina in an earlier post on this blog. The basic TPLF contract entails the funder agreeing to bear the costs of litigation on a non-recourse basis in exchange for a share of the proceeds of the claim. Collective actions tend to attract this type of funding for two reasons. Firstly, these claims are expensive for several reasons such as the need for specialised legal expertise and complex evidence gathering, thereby creating a need for external financing through TPLF. Secondly, considering that these proceedings seek damages for mass harm, the potential return on investment for a funder can be substantial. This makes it an appealing prospect for funders who may be interested in investing with the possibility of sharing in these proceeds.

The WAMCA has put in place some rules on the practice of TPLF in the context of collective actions. These rules are inserted in the revised Article 3:305a Dutch Civil Code (DCC), which concerns the admissibility requirements for representative organisations to file such actions. Among other requirements, these rules stipulate that claimant organisations must provide evidence of their financial capacity to pursue the action while maintaining adequate control over the proceedings. This provision aims to ensure the enforceability of potential adverse cost orders and to prevent conflicts of interest between the funding entity and the claimant organisation (Tzankova and Kramer, 2021). This requirement can be waived if the collective action pursues an "idealistic" public interest and does not seek damages or only a very low amount, commonly referred to as the "light" WAMCA regime (Article 305a, paragraph 6, DCC). However, foll0wing the implementation of the Representative Actions Directive (Directive (EU) 2020/1828, or RAD) in the Netherlands, the stipulations related to financial capacity and procedural control persist when the collective action derives its legal basis from any of the EU legislative instruments enumerated in Annex I of the RAD, irrespectively of whether or not the collective action pursues an "idealistic" public interest.

Additionally, within the framework of the Dutch implementation of the RAD, it is stipulated that the financing for the collective action cannot come from a funder who is in competition with the defendant against whom the action is being pursued (Article 3:305a, paragraph 2, paragraph f, DCC).

Additional rules on TPLF can also be found in the Dutch Claim Code, a soft-law instrument governing the work of *ad hoc* foundations in collective proceedings. The latest version of the Claim Code (2019) mandates organisations to scrutinise both the capitalisation and reputation of the litigation funder. The Claim Code also stipulates that TPLF agreements should adopt Dutch contract law as the governing law and designate the Netherlands as the forum for resolving potential disputes. Most importantly, it emphasises that the control of the litigation should remain exclusively with the claimant organisation. Moreover, it prohibits the funder from withdrawing funding prior to the issuance of a first instance judgment. This Claim Code is non-binding, but plays an important role in Dutch practice.

The District Court's assessment of the TPLF agreements

In the most recent interim judgment, the District Court of Amsterdam assessed the admissibility requirements concerning financial capacity and control over the proceedings for each of the organisations separately. In its first interim judgment the court had determined that, with a view to assessing the admissibility of each of the claimants and also with a view to the appointment of an exclusive representative, the financing agreement the claimants had reached with their respective funders should be submitted to the court.

After the review of these agreements all three organisations were deemed to have sufficient resources and expertise to conduct the proceedings since they are all backed by TPLF agreements (SMC and TBYP) and donation endowments (SOMI). However, the court ordered amendments to the TPLF agreements of both SMC and TBYP due to concerns related to control over the proceedings. The District Court also acknowledged concerns about potential excessiveness in compensation, particularly if calculated as a fixed percentage irrespective of awarded amounts and the number of eligible class members. Notably, the court considered the proportionality of compensation to the invested amount and emphasised the need to align it with the potential risks faced by litigation funders.

In this sense, the court indicated that the acceptable percentage of compensation for litigation funders should be contingent on the awarded amount and the expected number of class members. While a maximum of 25% accepted in case law (for example, in the *Vattenfall* case, DC Amsterdam 25 October 2023) could play a role, the court indicates it will use a five-times-investment maximum as a more practical approach. The court stressed the importance of adjusting compensation rates based on damages to be assessed, ensuring appropriate remuneration for funders without exceeding the established maximum.

In light of these considerations, the District Court also outlined preconditions for future approval of settlement agreements, limiting the amount deducted from the compensation of the class members to a percentage that will be established by the court and capping litigation funder fees.

Assessment of each organisation's control over the proceedings

The three claimant organisations have entered into different financial agreements to pursue this collective action. SOMI is financed by donations from another organisation, which does not require repayment of the amount invested. The District Court assessed the independence of SOMI's decision-making, given that the sole shareholder of the donating organisation is also the director of SOMI. The court concluded that appropriate safeguards are in place, as the donation agreement contains clauses stipulating that this person should refrain from taking any decisions in case of a conflict of interest. It was also stressed that the donating organisation declared to be independent from SOMI's directors and lawyers, as well as from TikTok.

On the other hand, TBYP and SMC have entered into TPLF agreements. The District Court highlighted some provisions of TPLF agreement of TBYF that were deemed dubious under the WAMCA. One clause required that no actions could be taken that could potentially harm the funder's interests, with an exception made if such actions were legally necessary to protect the interests of the class members. The court decided that this clause compromised TBYP's independence in controlling the claim. Another clause stipulated that TBYP could not make, accept, or reject an offer of partial or full settlement in the proceedings without first receiving advice from the lawyers that such a step was reasonable. The court viewed this clause as further compromising TBYP's control over the proceedings.

Similarly, the District Court had reservations about some clauses in the TPLF agreement SMC had entered into. One clause stipulated that if the lawyers were dismissed, the funder could inform SMC of the replacing lawyers they would like to appoint, subject to SMC's approval. Also, if the funder wanted to dismiss the lawyers and SMC disagreed, the dispute should be resolved by arbitration. The court decided that this gave power to the funder to disproportionately influence the proceedings. Another clause stipulated that if the chance of winning significantly decreased, the parties would need to discuss whether to continue or terminate the agreement. The court rejected this clause, stressing that terminating the TPLF agreement prematurely is unacceptable. Finally, the agreement contained a clause allowing the funder to transfer its rights, benefits, and obligations under the agreement, even without SMC's consent. The court also rejected this clause, emphasising that SMC should not be involuntarily associated with another funder.

In view of all these considerations the District Court decided that these provisions in the TPLF agreements could compromise the independence of TBYP and SMC from their respective litigation funders. In principle, the presence of these contractual provisions should lead to TBYP and SMC being deemed inadmissible. However, considering the overall intent of the TPLF agreements and the novelty of such agreements being reviewed, the court has given TBYP and SMC the opportunity to amend their TPLF agreements to remove the contentious clauses.

Outlook

In its decision, the District Court repeatedly stressed that it was 'entering new territory' with this detailed assessment of the funding agreements. This is also reflected in the careful consideration the court has for the various, potentially problematic, aspects of TPLF in collective actions and the fact that it chooses to formulate a number of preconditions that it intends to apply when determining what will count as reasonable compensation in the event of future approval of a settlement agreement. It thereby forms the second act in this *TikTok* case, but also the firsts steps in clarifying some uncertainties in the practical implementation of the WAMCA.

The challenges collective actions and TPLF face are not unique to The Netherlands, as for instance also the *PACCAR* judgment by the UK Supreme Court 0f earlier this year showed (see also this recent blogpost by Demarco and

Olivares-Caminal on OBLB). In this ruling, the Supreme Court considered whether Litigation Funding Agreements (LFAs) should be regarded as Damages-Based Agreements (DBAs) within the context of ‘claims management services’. The court concluded that the natural meaning of ‘claims management services’ in the Compensation Act 2006 (CA 2006) encompassed LFAs. The court dismissed arguments suggesting a narrower interpretation of ‘claims management services’, stating it would be contrary to the CA 2006’s purpose. As a result of this ruling, these agreements could potentially be deemed unenforceable if they fail to adhere to the regulations applicable to DBAs.

This second interim judgment in the *TikTok* case is a novelty in the Dutch practice of collective actions in terms of the detailed review of funding agreements. While generally being a collective action-friendly jurisdiction, this judgment and other (interim) judgments under the WAMCA so far, show that bringing international collective actions for damages is a long road, or what some may consider to be an uphill battle. The rather stringent requirements of the WAMCA are subject to rigorous judicial review, which has also resulted in the inadmissibility of claimant organisations and their funding agreements in other cases (notably, in the *Airbus* case, DC The Hague 20 September 2023, ECLI:NL:RBDHA:2023:14036). Almost four years after the WAMCA became applicable no final judgment rewarding damage claims has been rendered yet. But in the *TikTok* case the claimant organisations got a second chance. This open trial-and-error approach is perhaps the only way to further shape the collective action practice both in The Neterlands and other European countries.

To be continued.

Is this a Conflicts Case?

In *Sharp v Autorité des marchés financiers*, 2023 SCC 29 (available here) the Supreme Court of Canada has held that a Quebec administrative tribunal, the Financial Markets Administrative Tribunal, can hear a proceeding brought by the administrative agency that regulates Quebec's financial sector, the Autorité des marchés financiers, against four defendants who reside in British Columbia. The AMF alleged in the proceedings that the defendants had contravened the Quebec *Securities Act*.

The courts below, including a majority of the Quebec Court of Appeal, focused the analysis on s. 93 of the *Act respecting the Autorité des marchés financiers*, CQLR, c. A-33.2, which grants the FMAT jurisdiction to make determinations under the *Securities Act*. They interpreted and applied this provision in light of *Unifund Assurance Co. v Insurance Corp. of British Columbia*, 2003 SCC 40, a leading decision on the scope of application of provincial law, which held that a provincial regulatory scheme constitutionally applies to an out-of-province defendant when there is a "real and substantial connection", also described as a "sufficient connection", between the province and the defendant. This test was met on the facts [see para 22] and so the FMAT had jurisdiction. This analysis is not generally understood as being within the field of conflict of laws. Indeed, the majority of the Court of Appeal "saw no conflict of jurisdiction or any conflict of laws that would require the application of private international law rules to this case" [see para 29].

In separate concurring reasons at the Court of Appeal, Mainville JA found that the FMAT's jurisdiction was to be found in Title Three of Book Ten of the *Civil Code of Quebec*, which establishes rules for the "International Jurisdiction of Québec Authorities". These are Quebec's private international law rules for taking jurisdiction and so squarely this is a conflict of laws approach.

The majority of the Supreme Court of Canada observed [para 7] that "the character of the proceedings and the conclusions sought before the FMAT could suggest, at first blush, a regulatory matter that does not concern the C.C.Q. The dispute involves a public regulator seeking prohibitions and administrative penalties under a legislative scheme designed to protect the public interest in the securities markets. One might indeed expect jurisdiction over this regulatory scheme to stand outside the scope of Quebec's law of general application established by the C.C.Q." Roll credits! In fairness, that was the view of the courts below and it seems a very straightforward way of resolving the issue. Surprisingly, then, it does not end up being adopted by the court.

The court concludes that because securities regulation has a "hybrid character" [para 7] the starting point for analysis has to be the general approach to taking jurisdiction under the conflict of laws, looking to the provisions in the CCQ. Because they are laws of general application, the "provisions of Title Three of Book Ten of the C.C.Q. can, in principle, apply to an administrative tribunal like the FMAT, even if no private right is in issue and even if no conflict of jurisdiction arises" [para 41; see also para 63]. However, the court then concludes, contrary to the decision of Mainville JA, that the FMAT does not have jurisdiction under the CCQ [para 73]. But a majority of the court goes on to hold that s. 93 provides the FMAT with jurisdiction over the defendants in accordance with *Unifund* (Cote J dissents from this view). Section 93 is a special jurisdictional rule, beyond the CCQ, which gives the FMAT jurisdiction [paras 93-94]. In the end, the detour/digression into conflict of laws and the CCQ is not a significant factor in arriving at the ultimate result. The majority explains that "[t]o evaluate whether these statutes may be applied in such circumstances, the Quebec securities scheme must be interpreted to determine its territorial reach. That issue involves consideration of this Court's decision in *Unifund*, which holds that the permissible territorial application of provincial legislation is determined by assessing the sufficiency of the connection among the enacting jurisdiction, the subject matter of the legislation, and the individual or entity sought to be regulated" [para 102]. This aligns very closely with the position of the majority of the Court of Appeal below.

Particularly with respect to the law of Quebec, the decision is important for what it says about the relationship between the conflicts rules in the CCQ and the jurisdiction of any administrative tribunal. It also offers, in setting out its conclusions that none of the general CCQ rules apply, some observations on the scope of those provisions, which could be helpful for future disputes. Both the majority decision and the dissent contribute to these issues. In addition, the majority opinion offers several observations about the *Unifund* test regarding the extraterritorial application of provincial law [paras 111-23]. One of these is that the "real and substantial connection" test used in *Unifund* is different from other "real and substantial connection" tests used elsewhere in the law, such as for purposes of assumed jurisdiction under *Club Resorts Ltd. v Van Breda*, 2012 SCC 17. The majority describes this as a "family" of tests [para 118], noting that "the same formula of words … involves different considerations in each of the varying contexts in which the formula is employed". This has been reasonably well understood prior to this decision but it is interesting to see it explained as such by the court.

Justice Cote dissents. She agrees with the primacy of the CCQ provisions in the analysis and that none of them apply to give the FMAT jurisdiction. She disagrees with the majority on the basis that, in her view, none of the statutory provisions beyond the CCQ give the FMAT jurisdiction over the British Columbia resident defendants [para 156ff]. In her view, *Unifund* does not apply to this issue because the concern is the territorial jurisdiction of the FMAT and not the application of the *Securities Act* [paras 174-75].

In the Canadian context, it will be interesting to think about what the decision might herald for subsequent analysis of the jurisdiction of an administrative tribunal in a common law province. Will the starting point in those situations be the private international law rules on jurisdiction in that province, whether found in a court jurisdiction statute or in the jurisprudence?

How to Criticize U.S. Extraterritorial Jurisdiction (Part II)

Written by Bill Dodge, the John D. Ayer Chair in Business Law and Martin Luther King Jr. Professor of Law at UC Davis School of Law.

There are better and worse ways to criticize U.S. extraterritorial jurisdiction. In Part I of this post, I discussed some shortcomings of a February 2023 report by China's Ministry of Foreign Affairs, "The U.S. Willful Practice of Long-arm Jurisdiction and its Perils." I pointed out that the report's use of the phrase "long-arm jurisdiction" confuses extraterritorial jurisdiction with personal jurisdiction. I noted that China applies its own laws extraterritorially on the same bases that it criticizes the United States for using. I argued that the report ignores significant constraints that U.S. courts impose on the extraterritorial application of U.S. laws. And I suggested that China had chosen to emphasize weak examples of U.S.

extraterritoriality, such as the bribery prosecution of Frédéric Pierucci, which was not even extraterritorial.

In this post, I suggest some better ways of criticizing U.S. extraterritorial jurisdiction. Specifically, I discuss three cases in which the extraterritorial application of U.S. law appears to violate customary international law rules on jurisdiction to prescribe: (1) the indictment of Huawei executive Wanzhou Meng; (2) the application of U.S. sanctions based solely on clearing dollar transactions through U.S. banks; and (3) the application of U.S. export controls to foreign companies abroad based on "Foreign Direct Product" Rules. The Ministry of Foreign Affairs report complains a lot about U.S. sanctions, but not about the kind of sanctions that most clearly violates international law. The report says much less about export controls and nothing about Meng's indictment, which is odd given the tensions that both have caused between China and the United States.

Wanzhou Meng

In 2018, federal prosecutors in New York indicted Huawei executive Wanzhou Meng for bank and wire fraud. They then sought her extradition from Canada, where she had been arrested at the request of U.S. authorities. The indictment was based on a meeting in Hong Kong between Meng and HSBC, a British bank, to convince it to continue doing business with Huawei despite concerns that the Chinese company might be violating U.S. sanctions on Iran. The prosecution's theory appears to have been that Meng's representations at this meeting ultimately caused HSBC's U.S. subsidiary to clear foreign transactions denominated in dollars through the United States in violation of Iran sanctions.

During the extradition proceeding, I filed an affidavit with the Canadian court explaining why the U.S. prosecution violated international law. Customary international law allows states to exercise prescriptive jurisdiction only when there is a "genuine connection" between the subject of the regulation and the regulating state. There are six traditional bases for jurisdiction to prescribe: territory, effects, active personality, passive personality, the protective principle, and universal jurisdiction.

Clearly the United States did not have prescriptive jurisdiction based on territory or nationality because the conduct occurred in Hong Kong and Meng is not a U.S. national. Passive personality, which recognizes jurisdiction to prescribe based on the nationality of the victim, also could not justify the application of U.S. law in this situation because the alleged misrepresentations were made to a non-U.S. bank. And bank and wire fraud do not fall within the categories of offenses that are subject to the protective principle or universal jurisdiction.

The only possible way of justifying the application of U.S. law would be effects jurisdiction, reasoning that Meng's meeting with a British bank in Hong Kong caused its U.S. subsidiary to continue clearing dollar transactions through New York. But, in this case, it was not clear that the alleged misrepresentations actually caused such effects in the United States. And even if they did, it is difficult to say that such effects were substantial, which is a requirement for effects jurisdiction under customary international law.

Apart from customary international law, it is also doubtful that Meng's conduct in Hong Kong fell within the scope of the federal bank and wire fraud statutes. Applying the presumption against extraterritoriality (a limit on U.S. extraterritorial jurisdiction discussed in yesterday's post), the Second Circuit has interpreted those statutes to require conduct in the United States that constitutes a "core component" of the scheme to defraud. Although U.S. courts are currently divided on how much U.S. conduct is required under the federal bank and wire fraud statutes, Meng engaged in no U.S. conduct at all.

After nearly three years of house arrest in Canada, Meng agreed to a deferred prosecution agreement with the United States, in which she admitted that her statements to HSBC were false (though not that they violated U.S. law), and she returned to China. The agreement resolved a "damaging diplomatic row" between China and the United States. Because the indictment provides a clear example of U.S. extraterritorial jurisdiction in violation of international law, it is odd to find no mention of this case in the Ministry of Foreign Affairs report.

Correspondent Account Jurisdiction

A second example of U.S. extraterritorial jurisdiction that violates international law involves U.S. secondary sanctions. In contrast to Meng's indictment, the report discusses U.S. sanctions at length, but it does not focus on the kind of sanctions that most clearly violate international law. This is what Susan Emmenegger has called "correspondent account jurisdiction": sanctions imposed on foreign persons engaged in foreign transactions when the only connection to the United States is clearing dollar payments through banks in the United States.

The report calls the United States a "sanctions superpower" and specifically mentions U.S. sanctions against Cuba, Iran, Iraq, Libya, and Syria, as well as human rights sanctions under the Global Magnitsky Human Rights Accountability Act. "Sanctions strain relations between countries and undermine the international order," the report says. They can also cause "humanitarian disasters."

One can certainly criticize some U.S. sanctions as a matter of policy. As a matter of international law, however, most of these programs have strong support. U.S. sanctions typically take the form of access restrictions, limiting the ability of foreign parties to do business in the United States or with U.S. nationals. Under international law, these programs are based on the territoriality and nationality principles. In their comprehensive legal analysis of U.S. secondary sanctions, Tom Ruys and Cedric Ryngaert note that "most of these measures—denial of access to the US financial system, access to US markets, or access to the US for individual persons—merely amount to the denial of privileges" and "international law does not entitle foreign persons to financial, economic, or physical access to the US."

But correspondent account jurisdiction is different. The United States is currently prosecuting a state-owned bank in Turkey, Halkbank, for violating U.S. sanctions on Iran. According to the indictment, Halkbank ran a scheme to help Iran repatriate more than $20 billion in proceeds from oil and gas sales to Turkey's national oil company by using the proceeds to buy gold for Iran and creating fraudulent transactions in food and medicine that would fit within humanitarian exceptions to U.S. sanctions. The only connection to the United States was the clearing of dollar payments through banks in the United States.

As discussed above, customary international law requires a "genuine connection" with the United States. None of the traditional bases for jurisdiction to prescribe would seem to supply that connection. Halkbank is not a U.S. national, and it is being prosecuted for conduct outside the United States. Passive personality does not provide jurisdiction under international law because the only potential harm to U.S. persons from Halkbank's conduct is the risk of punishment for Halkbank's correspondent banks for violating U.S. sanctions, harm the United States is well placed to avoid. And clearing dollar transactions is not the sort of conduct that either the protective principle or universal jurisdiction covers.

That leaves the effects principle—that by arranging transactions with Iran in dollars outside the United States, Halkbank caused the clearing of those transactions in the United States. As in Meng's case discussed above, the problem with this argument is that the effects must be substantial to satisfy customary international law. It is difficult to see how merely clearing a transaction between foreign nationals that begins and ends outside the United States rises to the level of a substantial effect, since it does not in any way disrupt the U.S. financial system.

Correspondent account jurisdiction is not just a violation of international law; it is also a violation of U.S. domestic law. U.S. sanctions against Iran are issued under a statute called the International Emergency Economic Powers Act (IEEPA). IEEPA authorizes the President to prohibit financial transactions only "by any person, or with respect to any property, subject to the jurisdiction of the United States." As I explain in greater detail here, if the United States does not have jurisdiction under international law, the sanctions are invalid as a matter of domestic law under IEEPA.

The Ministry of Foreign Affairs report wants to claim that U.S. extraterritorial jurisdiction "violates international law." But on sanctions, it spends most of its energy discussing programs that are consistent with international law. The report mentions correspondent account jurisdiction only briefly, accusing the United States of exercising jurisdiction based on "the flimsiest connection with the United States, such as … using U.S. dollar[s] for clearing or other financial services." With this example, I agree. I simply wonder why the report did not focus on it to a greater extent.

Foreign Direct Product Rules

A third example of U.S. extraterritorial jurisdiction that the report could have emphasized involves U.S. export controls. On October 7, 2022, in a "seismic shift" of policy, the United States adopted new rules to limit China's ability to develop advanced computing power, including artificial intelligence. (The rules were updated last month.) Most of these rules are consistent with international law, but the Foreign Direct Product Rules arguably are not.

First, the regulations limit the export from the United States of computer chips with advanced characteristics, other products that contain such chips, and equipment used to manufacture such chips. These restrictions are consistent with international law because they are based on U.S. territorial jurisdiction.

Second, the regulations add several Chinese companies, universities, and other entities to the U.S. Entity List and Unverified List, which prohibit those entities from receiving exports from the United States. Again, these restrictions are consistent with international law because they are based on U.S. territorial jurisdiction.

Third, the regulations prohibit U.S. engineers and scientists from helping China with semiconductor manufacturing even if those individuals are working on things that are not subject to export controls. These restrictions are consistent with international law because they are based on U.S. nationality jurisdiction.

Fourth, the regulations extend U.S. export controls extraterritorially to non-U.S. companies outside the United States. These rules are known as Foreign Direct Product Rules (FDP rules) because they prohibit foreign companies from exporting goods to China that are the direct products of technology that originated in the United States. Currently, the most advanced computer chips are made in Taiwan, South Korea, and Japan. The machines to make these chips are manufactured in the Netherlands. But U.S.-origin technology is used in virtually all chip manufacturing. So, the effect of these FDP rules is to extend U.S. export controls to chips made in Taiwan, Japan, and South Korea even if those chips themselves contain no components that were originally made in the United States.

There is a serious question whether FDP rules violate international law. None of the traditional bases for jurisdiction to prescribe exists. These U.S. rules are not based on territory, effects, nationality, passive personality, the protective principle, or universal jurisdiction. The origin of technology is not a traditional basis for jurisdiction to prescribe. Of course, the traditional bases are not exclusive. They are simply well accepted examples of a more general requirement that the regulating state must have a “genuine connection” to whatever it wishes to regulate. But it is not clear that the origin of technology qualifies as a genuine connection.

One thing that makes this analysis more complicated is the reaction of other states. Customary international law is based on state practice, so one must pay close attention to whether other states consider the origin of technology to be a legitimate basis for export controls. China, of course, has protested the U.S. export controls. But Taiwan, Japan, South Korea, and the Netherlands have not. This is different from what happened 40 years ago when the United States imposed export controls on foreign companies to prohibit the sale of certain goods to the USSR to try to stop the building of pipelines from Russia to Europe. In that case, the United States' allies in Europe strongly protested the export controls as a violation of international law, and in the end the United States withdrew those controls. This time, U.S. allies are supporting the export controls on sales of advanced computer chips to China.

The Ministry of Foreign Affairs report makes no mention of FDP rules. It does claim that "[u]nder the pretext of safeguarding national security," the United States "has adopted a package of measures including the Entity List and economic sanctions to restrict foreign enterprises from obtaining raw materials, items and technologies vital to their survival and development." The report's specific mention of the Entity List, which essentially blacklists certain Chinese companies, is consistent with the emphasis on this list in other Chinese protests of U.S. export controls. But, as explained above, the U.S. Entity List does not violate international law, whereas the FDP rules arguably do.

Conclusion

The United States frequently exercises extraterritorial jurisdiction. As I discussed in Part I of this post, so does China. Countries are within their rights to apply their laws extraterritorially so long as doing so is consistent with international law.

In these posts, I have used the Ministry of Foreign Affairs report as a foil because it has shortcomings. As I described yesterday, it uses confusing terminology, criticizes the U.S. for regulating on the same bases that China does, ignores constraints on U.S. extraterritoriality, and illustrates its points with weak examples (like the case of Frédéric Pierucci, which was not even extraterritorial). But I do not mean to suggest that the United States is beyond criticism. The United States does sometimes apply its laws extraterritorially in ways that violate international law, and, in this post, I have pointed to three examples.

It seems to me that China's criticism of U.S. extraterritorial jurisdiction would be more effective if it would focus on examples that violate international law rather than on examples that do not. China should be talking less about Frédéric Pierucci and more about Wanzhou Meng.

[This post also appears at Transnational Litigation Blog (TLB)]

How to Criticize U.S. Extraterritorial Jurisdiction (Part I)

Written by Bill Dodge, the John D. Ayer Chair in Business Law and Martin Luther King Jr. Professor of Law at UC Davis School of Law.

China has been critical of U.S. extraterritorial jurisdiction. In February, China's Ministry of Foreign Affairs issued a report entitled "The U.S. Willful Practice of Long-arm Jurisdiction and its Perils." In the report, the Ministry complained about U.S. secondary sanctions, the discovery of evidence abroad, the Helms-Burton Act, the Foreign Corrupt Practices Act, the Global Magnitsky Human Rights Accountability Act, and the use of extraterritorial jurisdiction in criminal cases. The report claimed that U.S. extraterritorial jurisdiction has caused "severe harm … to the international political and economic order and the international rule of law."

There are better and worse ways to criticize U.S. extraterritorial jurisdiction. The Ministry of Foreign Affairs report pursues some of the worse ways and neglects some better ones. In this post, I discuss a few of the report's shortcoming. In a second post, I discuss stronger arguments that one could make against U.S. extraterritorial jurisdiction.

Confusing Extraterritorial Jurisdiction with

Personal Jurisdiction

One problem with the report is terminology. The report repeatedly uses the phrase “long-arm jurisdiction” to refer to the extraterritorial application of U.S. law. The United States, the report says, has “expand[ed] the scope of its long-arm jurisdiction to exert disproportionate and unwarranted jurisdiction over extraterritorial persons or entities, enforcing U.S. domestic laws on extraterritorial non-US persons or entities, and wantonly penalizing or threatening foreign companies by exploiting their reliance on dollar-denominated businesses, the U.S. market or U.S. technologies.”

In the United States, however, “long-arm jurisdiction” refers to the exercise of personal jurisdiction over non-resident defendants based on contacts with the forum state. The report seems to recognize this, referring in its second paragraph to the U.S. Supreme Court’s decision in *International Shoe Co. v. Washington* (1945) and the requirement of “minimum contacts.” But the report goes on use “long-arm jurisdiction” to refer the extraterritorial application of U.S. law. This is more than an academic quibble. Jurisdiction to prescribe (the authority to make law) and jurisdiction to adjudicate (the authority to apply law) are very different things and are governed by different rules of domestic and international law.

The report’s confusion on this score runs deeper than terminology. The Ministry of Foreign Affairs seems to think that the United States uses the concept of “minimum contacts” to expand the extraterritorial application of U.S. law. The United States “exercises long-arm jurisdiction on the basis of the ‘minimum contacts’ rule, constantly lowering the threshold for application,” the report states. “Even the flimsiest connection with the United States, such as having a branch in the United States, using [the] U.S. dollar for clearing or other financial services, or using the U.S. mail system, constitutes ‘minimum contacts.’”

In fact, the requirement of “minimum contacts” for personal jurisdiction is quite stringent. Moreover, as I have recently noted, this requirement serves to *limit* the extraterritorial application of U.S. law rather than expand it. When foreign defendants lack minimum contacts with the United States, U.S. courts cannot exercise personal jurisdiction and thus cannot apply U.S. laws extraterritorially even when Congress wants them to. The Helms-Burton Act (one of the laws about which China’s Ministry of Foreign Affairs complains) is an example of this. Congress clearly intended its cause of action for trafficking in confiscated property to discourage non-U.S. companies from investing in Cuba. But U.S. courts have been unable to apply the law to foreign companies because they have concluded that those companies lack “minimum contacts” with the United States.

China’s complaint is not against U.S. rules of personal jurisdiction or the requirement of “minimum contacts.” It is rather with the extraterritorial application of U.S. law. Using the phrase “long-arm jurisdiction” confuses the two issues.

Criticizing Extraterritorial Jurisdiction that China Exercises Too

The report also criticizes the United States for applying its law extraterritorially based on effects: “the United States has further developed the ‘effects doctrine,’ meaning that jurisdiction may be exercised whenever an act occurring abroad produces ‘effects’ in the United States, regardless of whether the actor has U.S. citizenship or residency, and regardless of whether the act complies with the law of the place where it occurred.” This is true. For example, the U.S. Supreme Court has held that U.S. antitrust law “applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”

But China also applies its law extraterritorially based on effects. China’s Anti-Monopoly Law provides in Article 2 that it applies not only to monopolistic practices in the mainland territory of the People’s Republic of China but also “to monopolistic practices outside the mainland territory of the People’s Republic of China that eliminate or restrict competition in China’s domestic market.” In 2014, China blocked an alliance of three European shipping company because of possible effects on Chinese markets.

China regulates extraterritorially on other bases too. Although the Ministry of Foreign Affairs characterizes the extraterritorial application of U.S. criminal law as “an extreme abuse,” China applies its criminal law extraterritorially on all the bases that the United States employs. The Criminal Law of the People’s Republic of China asserts jurisdiction based not just on territory (Article 6), but also on effects (Article 6), nationality (Article 7), passive personality (Article 8), the protective principle (Article 8), and universal jurisdiction (Article 9). Each of these bases for jurisdiction to prescribe is consistent with customary international law, and China has the right to extend its criminal law extraterritorially like this. But so does the United States.

In their excellent article *Extraterritoriality of Chinese Law: Myths, Realities and the Future*, Zhengxin Huo and Man Yip provide a detailed discussion of the extraterritorial application of Chinese law. "China's messaging to the international community is," they note, "somewhat confusing: it opposes the US practice of 'long-arm jurisdiction,' yet it has decided to build its own legal system of extraterritoriality." By criticizing the United States for exercising jurisdiction on the same bases that China itself uses, China opens itself to charges of hypocrisy.

Ignoring Constraints on U.S. Extraterritoriality

The Ministry of Foreign Affairs report also ignores important constraints on the extraterritorial application of U.S. law. It says the United States has "developed a massive, mutually reinforcing and interlocking legal system for long-arm jurisdiction" and has "put in place a whole-of-government system to practice long-arm jurisdiction."

In fact, U.S. courts limit the extraterritorial application of U.S. law in significant ways. First, as noted above, U.S. rules on personal jurisdiction (including "minimum contacts") limit the practical ability of the United States to apply its laws abroad. As I have written before, "Congress cannot effectively extend its laws extraterritorially if courts lack personal jurisdiction to apply those laws."

Second, U.S. courts apply a presumption against extraterritoriality to limit the reach of federal statutes. Most recently, in *Abitron Austria GmbH v. Hectronic International, Inc.* (2023), the Supreme Court held that federal statutes should be presumed to apply only to conduct in the United States unless those statutes clearly indicate that they apply extraterritorially. At issue in *Abitron* was the federal trademark statute, which prohibits use of a U.S. trademark that is likely to cause confusion in the United States. The defendants put U.S. trademarks on products in Europe, some of which were ultimately sold to the United States. The dissent argued that the statute should apply to foreign conduct as long as the focus of Congress's concern—consumer confusion—occurred in the United States. But the majority disagreed, holding that there must also be conduct in the United States. As I have noted previously, this version of the presumption has the potential to frustrate congressional intent when Congress focuses on something other than conduct.

Third, some lower courts in the United States impose additional limits on the extraterritorial application of U.S. law when foreign conduct is compelled by foreign law. In 2005, U.S. buyers sued Chinese sellers of vitamin C for fixing the prices of vitamins sold to the United States. The U.S. court found the Chinese sellers liable for violating U.S. antitrust law and awarded $147 million in damages. Although the anticompetitive conduct occurred in China, it had effects in the United States because vitamins were sold at higher than market prices in the United States.

The Chinese companies appealed, arguing that they were required by Chinese law to agree on export prices. The case went all the way to the U.S. Supreme Court on the question of how much deference to give the Chinese government's interpretation of its own law. Ultimately, in 2021, the Second Circuit Court of Appeals held that Chinese law did indeed require the anticompetitive conduct and that the case should therefore be dismissed on grounds of international comity because China had a stronger interest in applying its law than the United States did. This is a remarkable decision. Although Congress clearly intended U.S. antitrust law to apply to foreign conduct that causes anticompetitive effects in the United States, and although applying U.S. law based on effects would not violate international law, the U.S. court held that the case should be dismissed in deference to Chinese law.

To be clear, I disagree with these constraints on the extraterritorial application of U.S. laws. I think Congress should have more authority to define rules of personal jurisdiction, particularly when it wants its laws to apply outside the United States. I disagree with *Abitron*'s conduct-based version of the presumption against extraterritoriality. And I filed two separate amicus briefs (with Paul Stephan) urging the Supreme Court to take up the international comity question and make clear that lower courts have no authority to dismiss claims like those in Vitamin C that fall within the scope of U.S. antitrust law. But whether these constraints are wise or not, ignoring them provides a distorted picture of U.S. extraterritorial jurisdiction.

Weak Examples

The Ministry of Foreign Affairs also weakens its case by relying on examples that do not support its arguments. The report singles out the indictment of French executive Frédéric Pierucci for violating the U.S. Foreign Corrupt Practices Act (FCPA), a story he recounts in his 2019 book *The American Trap.* Here is how the report describes what happened:

> *In 2013, in order to beat Alstom in their business competition, the United States applied the Foreign Corrupt Practices Act to arrest and detain Frédéric Pierucci on charges of bribing foreign officials. He was further induced to sign a plea deal and provide more evidence and information against his company, leaving Alstom no choice but to accept General Electric's acquisition, vanishing ever since from the Fortune 500 list. The U.S. long-arm jurisdiction has become a tool for its public power to suppress competitors and meddle in normal international business activities, announcing the United States' complete departure from its long-standing self-proclaimed champion of liberal market economy.*

I have read Pierucci's book, and his story is harrowing. But the book does not show what the report claims.

First, and perhaps most significantly, application of the FCPA in this case was not extraterritorial. Pierucci was indicted for approving bribes paid to Indonesian officials to secure a contract for Alstrom from his office in Windsor, Connecticut (p. 65). He seems to acknowledge that the bribes violated the FCPA but counters that the statute was "very poorly enforced" at the time (p. 67) and that he "received no personal gain whatsoever" (p. 71). These are not valid defenses under U.S. law.

Second, Pierucci was not arrested to facilitate GE's acquisition of Alstom. The U.S. Department of Justice (DOJ) began investigating Alstom's payment of bribes in late 2009 (p. 54), and Pierucci was arrested in April 2013 (p. 1). Alstom's takeover discussions with GE began during the summer of 2013 (p. 162), and the deal was made public in April 2014 (p. 155). Pierucci plausibly claims that GE took advantage of Alstom's weakened position, noting that "Alstom is the fifth company to be swallowed up by GE after being accused of corruption by the DOJ" (p. 164). But I saw no claim in the book that DOJ's investigation of Alstom was intended to bring about its acquisition by a U.S. competitor.

Finally, it is hard to credit the report's assertion that prosecuting bribery constitutes "meddl[ing] in normal international business activities." China has joined the U.N. Convention Against Corruption. In 2014, China fined British company GlaxoSmithKline 3 billion yuan (U.S.$489 million) for bribing Chinese doctors. Earlier this year, China launched an unprecedented campaign against corruption in its health care industry. And, of course, fighting corruption remains a top priority of President Xi Jinping.

Conclusion

Perhaps it seems unfair to criticize a report from a foreign ministry for making mistakes about law. Perhaps the report should be seen merely as a political document. But the report itself discusses legal matters in detail and charges the United States with "violat[ing] international law." Whether the report is a political document or not, the shortcomings that I have discussed here weaken its credibility and undermine its arguments.

There are better ways to criticize U.S. extraterritorial jurisdiction. In Part II of this post, I will offer some examples.

[This post also appears at Transnational Litigation Blog (TLB)]

International child abduction: navigating between private international law and children's

rights law

In the summer of 2023 **Tine Van Hof** defended her PhD on this topic at the University of Antwerp. The thesis will be published by Hart Publishing in the Studies in Private International Law series (expected in 2025). She has provided this short summary of her research.

When a child is abducted by one of their parents, the courts dealing with a return application must consider several legal instruments. First, they must take into account private international law instruments, specifically, the Hague Child Abduction Convention (1980) and the Brussels IIb Regulation (2019/1111). Second, they have to take into account children's rights law instruments, including mainly the UN Convention on the Rights of the Child.

Because these instruments have different approaches regarding the concept of the best interests of the child, they can lead to conflicting outcomes. Strict adherence to private international law instruments by the return court could mean sending a child back to the country where they lived before the abduction. Indeed, the Hague Child Abduction Convention and Brussels IIb presume that it is generally best for children to return to the State of habitual residence and therefore require ¾ in principle ¾ a speedy return. The children's rights law instruments, on the other hand, require that the best interests of the individual child be taken into account as a primary consideration. If the court follows these instruments strictly, it could for example rule in a particular case that it is better for a child with medical problems to stay in country of refuge because of better health care.

The question thus arises how to address these conflicts between private international law and children's rights law in international child abduction cases. To answer this question, public international law can give some inspiration, as it offers a number of techniques for addressing conflicts between fields of law. In particular, the techniques of formal dialogue and systemic treaty interpretation can provide relief.

Formal dialogue, in which the actors of one field of law visibly engage with the instruments or case law of the other field of law, can be used by the Hague Conference, the EU and the Court of Justice of the European Union (CJEU) as private international law actors, and the Committee on the Rights of the Child and the European Court of Human Rights (ECtHR) as children's rights law actors. By paying attention to the substantive, institutional and methodological characteristics of the other field of law, these actors can promote reconciliation between the two fields and prevent the emergence of actual conflict. However, a prerequisite for this is that the actors are aware of the relevance of the other field of law and are willing to engage in such a dialogue. This awareness and willingness can be generated through informal dialogue. The CJEU and the ECtHR, for example, conduct such informal dialogue in the form of their biennial bilateral meeting.

In addition, supranational, international and domestic courts can apply the technique of systemic treaty interpretation by interpreting a particular instrument (e.g., the Hague Child Abduction Convention) in light of other relevant rules applicable in the relationship between the parties (e.g., the UN Convention on the Rights of the Child). This allows actual conflicts between the two fields of law to be avoided. This technique was used, for example, by the ECtHR in *X v. Latvia*. To apply this technique, it is also important that courts are aware of the applicability of the other field of law and are willing to take into account its relevant rules. Again, courts have established initiatives that promote this awareness and willingness, such as the International Hague Network of Judges.

The expectation is that by applying these techniques, the potential conflict between private international law and children's rights law in the context of international child abduction will no longer manifest itself as an actual conflict. Further, applying these techniques will make it possible for national courts to adequately apply all instruments and make a balanced decision on the return of children. In addition to these two techniques, other techniques, such as coordination *ex ante*, are considered appropriate to better align private international law and children's rights law when dealing with other issues, such as for example international surrogacy.

Choice of law in commercial contracts and regulatory competition: new steps to be made by the EU?

The recently published study titled 'European Commercial Contract Law', authored by Andrea Bertolini, addresses the theme of regulatory competition. It offers new policy recommendations to improve EU legal systems' chances of being chosen as the law governing commercial contracts.

The Study's main question

The European Parliament's Committee on Legal Affairs has published a new study authored by Andrea Bertolini, titled 'European Commercial Contract Law' (the 'Study'). The Study formulates the main question as follows: 'why the law chosen in commercial contracts is largely non-European and non-member state law'. The expression 'non-European and non-member state' law is specified as denoting the legal systems of England and Wales, the United States, and Singapore, and more generally, common law legal systems. The Study states:

It is easily observed how most often international contracts are governed by non-European law. The reasons why this occurs are up to debate and could be quite varied both in nature and relevance. Indeed, a recent study by Singapore Academy of Law (SAL) found that 43 per cent of commercial practitioners and in-house counsel preferred English law as the governing law of the contracts.

Although the SAL's findings are immediately relativised, the Study is underpinned by the assumption (derived from the SAL's findings) that commercial parties frequently opt for common law. The trend of choosing non-European and non-member state law, the Study submits, is the main reason for enquiring into measures that can be taken to improve the chances of EU Member States' legal systems being chosen as the law governing commercial contracts:

While the validity of such a study may be questioned, the prevalence of common law in international business transactions, emerging also from other reports and studies (see for a detailed discussion §§2.2 ff.), is one of the very reasons that led to need of performing the current analysis, and should be taken into account, so as to identify those elements that may be improved in the European and MS's regulatory framework for commercial contracts entered into by sophisticated parties.

The endeavour to identify the points of improvement in the EU and Member States' regulatory frameworks for international contracts merits appreciation and is relevant to businesses and policymakers. Meanwhile, this endeavour implies a complex task. This task can be approached from different perspectives.

The parties' perspective

The question of what drives private parties to choose one legal system over another as the law governing their contract is an empirical question. It implies the need to conduct an empirical study, including surveys, interviews, or to use another quantitative or qualitative social science method. This method has been used in several empirical studies, which have provided various insights into the parties' attitudes to the choice of law in commercial contracts. To name a few important studies, these include the research by Stefan **Vogenauer** on regulatory competition through the choice of contract law in Europe, the research by Gilles **Cuniberti** on international market for contracts and the most attractive contract laws, and an empirical study of parties' preferences in international sales contracts conducted by Luiz Gustavo **Meira Moser**. Vogenauer's research focused on Europe (which included the United Kingdom at that time), while the studies by Cuniberti and Meira Moser had a broader ambit.

Despite the possibly empirical nature of the Study's main question, the Study neither uses empirical methods nor focuses on the parties' perspectives. Instead, it takes the policymakers' perspective.

The policymakers' perspective

The Study aims to 'identify possible policies to be implemented to overcome' the trend that 'the law chosen in commercial contracts is largely non-European and non-member state'. The findings are formulated as recommendations for policymakers who attempt to make their own legal systems attractive to parties involved in international transactions. The recommendations address both substantive contract law and civil procedure (see inter alia point 2.1 on page 42). Within civil procedure, the Study leaves outside the scope conflict-of-law questions of the extent to which the courts upheld choice-of-law agreements or how various legal systems applicable to contract interpretation deal with the application of foreign law. By contrast, specific attention is paid to the efficiency of the national judiciaries.

Along with the discussion of substantive law, civil procedure and national judiciaries' efficiency, the Study looks for the reasons for (what it assumes to be) the low success rate of EU Member States' contract law in the pitfalls of the projects to harmonise contract law that have been undertaken over the last decades. The Study states from the outset:

*Indeed, **absent an autonomous European contract law**, business parties often elect other, non-European jurisdictions (often common law ones), to govern their contractual agreements.*

It goes on to identify 'the fate' of various attempts to harmonise contract law, such as soft law instruments (including the Principles of European Contract Law (PECL), the UNIDROIT Principles of International Commercial Contracts (UPICC), the Acquis Principles, the Draft Common Frame of Reference (DCFR), and the Common European Sales Law project. These are addressed in the first part of the Study, after which the contract laws of various legal systems are compared and coupled with a comparison of the functioning of the court systems. The method on which the Study bases its conclusions and recommendations is outlined as follows:

To do so, it first provides an overview of the relevant academic and policy efforts underwent to formulate a European contract law (Chapter 1). Then it moves on to touch upon a broad spectrum of matters emerging both from international reports on the adjudication and the functioning of the courts systems, as well as from academic literature on matters that span from contract qualification, interpretation, integration, and some fundamental aspects of remedies (Chapter 2). It then provides a series of policy options (Chapter 3), European institutions could consider when attempting to alter this trend and ensure EU regulation a global role in commercial contracts too.

Regulatory competition, soft law, or de facto harmonisation?

Placing harmonisation of contract law at the core of the discussion of regulatory competition is a fresh look at the (soft law) instruments harmonising contract law. However, it is a somewhat unexpected take on these instruments, because participation in regulatory competition, whereby a EU instrument would compete with third states' laws, does not appear to be the goal of any contract law harmonisation project. For instance, the UNIDROIT principles have harmonised commercial contract law worldwide. The instrument contains a number of rules rooted in the legal system of the United States (Uniform Commercial Code and States' case law) and has been endorsed by the UNCITRAL. The PECL and DCFR limit their scope to the EU, but at the time of these instruments' drafting, the United Kingdom was an EU Member State. Furthermore, PECL and DCFR are not confined to commercial contract law; they address contract law more broadly.

In contrast to these harmonisation projects, the Study appears to promote (without explicitly stating this) the de facto harmonisation by contract clauses and the need to foster party autonomy in the interpretation of contracts. If this is correct, this would be a very welcome recommendation, albeit not entirely novel. The Study states:

*Overall, the analysis is then used to lay out some **policy recommendations** that may only be broad in scope and point at one direction more than providing detailed solutions.*

*All efforts should aim at pursuing the **efficiency of the judiciary** on the one hand, and the **creation of a set of minimalist and – possibly – self-sufficient norms dedicated to the regulation of business contracts that prioritize legal certainty, foreseeability of the outcome, preservation of the parties will**.*

This and other recommendations are summarised on page 9 and provided on pages 76 ff, and are certainly worth reading.

Financial Hardship and Forum Selection Clauses

The U.S. Supreme Court has long held that a forum selection clause should not be enforced when “trial in the contractual forum will be so gravely difficult and inconvenient” that the plaintiff “will for all practical purposes be deprived of his day in court.” The financial status of the plaintiff is obviously a factor that should be considered as part of this inquiry. Large corporations can usually afford to litigate cases in distant courts. Individual plaintiffs frequently lack the resources to do so. Nevertheless, the lower federal courts in the United States have repeatedly held that financial hardship on the part of the plaintiff is not enough to make an otherwise valid forum selection clause unenforceable.

In a new article, *Financial Hardship and Forum Selection Clauses,* I argue that this practice is both doctrinally incorrect and deeply unfair. U.S. courts can and should consider the plaintiff’s financial circumstances when deciding whether to enforce foreign forum selection clauses. To illustrate the perversity of current practice, one need look no further than *Sharani v. Salviati & Santori, Inc*.

Jay Sharani, his wife Catherine, and their two young children were moving from the United Arab Emirates to San Francisco, California. They paid $3600 to IAL Logistics Emirates, LLC (IAL), a shipping company, to transport seventy pieces of household goods to the Bay Area. Although the goods were successfully delivered to a warehouse in Oakland, IAL never communicated this fact to the Sharanis. The Sharanis repeatedly sought to contact IAL over the course of two months. They received no response. When the company finally responded, the Sharanis discovered that many of their goods were in the process of being sold at auction. When the remaining goods were finally delivered, most of them were damaged and unusable.

The Sharanis filed a lawsuit, *pro se*, against IAL’s delivery agent in federal district court in California alleging breach of contract and negligence under the Carriage of Goods by Sea Act. The defendant moved to dismiss the case based on a forum selection clause in the shipping agreement. That clause required all lawsuits to be brought in London, England. The Sharanis argued that the clause should not be enforced because it would deprive them of their day in court. Specifically, they alleged that (1) they could not afford to hire counsel in the United Kingdom, and (2) they could not afford to take extended time away from their jobs and family responsibilities to represent themselves abroad. The court rejected these arguments. It held that the Sharanis had failed to show that litigating in England would be so expensive as to deprive them of their day in court. It also held that that the Sharanis had not explained "why one parent could not stay with the children while the other parent pursues the claim, or why their income is insufficient to pay for childcare." The case was dismissed. So far as I can determine, it was never refiled in England.

In my article, I demonstrate that the outcome in *Sharani* is no outlier. In case after case, decided decade after decade, U.S. courts have enforced foreign forum selection clauses knowing full well that the practical effect of enforcement would almost certainly deprive plaintiffs of their day in court because they lack the financial resources to bring their cases abroad. The end result is a long trail of abandoned lawsuits where plaintiffs holding legal claims were denied access to a forum in which to assert those claims.

[This post is cross posted at Transnational Litigation Blog.]

Revised Canadian Statute on Judgment Enforcement

Two years ago, the Uniform Law Conference of Canada (ULCC) released a revised version of the Court Jurisdiction and Proceedings Transfer Act (CJPTA), model legislation putting the taking of jurisdiction and staying of proceedings on a statutory footing. The statute is available here.

The ULCC has now released a revised version of another model statute, the Enforcement of Canadian Judgments Act (ECJA). The original version of this statute was prepared in 1998 and had been amended four times. It has now been consolidated and substantially revised. It is available here and background information is available here and here.

Disclosure: I was the lead researcher and a member of the Working Group for the revised ECJA.

The ECJA is based on the general rule that a party seeking to enforce a Canadian judgment in a province or territory that has enacted the ECJA should face no additional substantive or procedural barriers beyond those that govern the enforcement of judgments of the local courts.

The core features of the ECJA are unchanged. The statute allows for the registration of a Canadian judgment (a defined term: s 1). This is an alternative from the common law process of suing on the judgment. Registration is a simple administrative process (s 4) and makes the judgment enforceable as if it were a judgment of the province or territory in which it is registered (s 5). The aim is to make the enforcement of Canadian judgments easier.

Another core feature is also unchanged. The defendant cannot, at the registration stage, object to the jurisdiction of the court that rendered the judgment (s 7(4)(a)). Any challenge to the jurisdiction of that court must be made in the province or territory in which the plaintiff has chosen to sue.

What has changed? First, the commentaries to the statutory provisions have been extensively revised. In part this reflects the many developments that have occurred over the past thirty years. Second, a new provision (s 1(3)(f)) makes it clear that the scheme does not apply to a judgment that itself recognizes or enforces a judgment of another province, territory or foreign jurisdiction. This precludes registering so-called "ricochet" judgments. There had been some debate in the jurisprudence about whether the scheme applies to such judgments. Third, a clearer process has been established (s 7(1)) for setting aside a registration (for example, if the judgment does not in fact meet the requirements for registration). Fourth, there are some smaller changes to provisions dealing with the calculation of post-judgment interest (s 8) and costs of the registration process (s 9).

In addition, an optional defence to registration has been added (s 7(2)(a)(ii)). The defence protects individual defendants who are resident in the place of registration against certain judgments in consumer and employment litigation. Such a defence is not, in general, available under the current statutory schemes or at common law: these treat consumer and employment litigation similar to all other civil litigation rather than as a special case. The defence is optional in that it is left to an enacting province or territory to decide whether to implement it.

It will now fall to the provinces and territories that have enacted the ECJA to determine how to respond to these changes. A version of the statute is in force in several provinces and territories including British Columbia, Manitoba, Nova Scotia and Saskatchewan. It will also be interesting to see if the revised and updated version generates any interest in the provinces and territories that did not enact the earlier version (which include Alberta, Ontario and Quebec).

The expectation is that the ULCC will now turn its attention to revising its third model statute in this area, the Enforcement of Foreign Judgments Act (available here).