

International Seminar at València on Sustainability, Solidarity and Tolerance from Private International Law



On 16 November 2023, on the “International Day of Tolerance”, Prof. Rosario Espinosa Calabuig, is organising a new International Seminar, this time under the title: SUSTAINABILITY, SOLIDARITY AND TOLERANCE FROM PRIVATE INTERNATIONAL LAW.

Program:

Verónica Ruiz Abu-Ngim CARTEL Seminario Sostenibilidad, solidaridad y tolerancia. 16 nov. 2023 (Edinburgh): “Solidarity and sustainability: a look at Private International Law from the 2030 Agenda”

Stéphanie Franq (Louvain): “From Sorority to Solidarity in Private International Law: a methodological approach”

Laura Carballo Piñeiro (Vigo): “Tolerance or Solidarity? A look at maritime migrations from the perspective of cinema”.

More info here.

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](#)).

New Proposed Rules on International Jurisdiction and Foreign Judgments in Morocco

Last Thursday, November 9, Draft No. 02.23 proposing the adoption of a new Code of Civil Procedure (*al-musattara al-madaniyya*) was submitted to the Moroccan House of Representatives. One of the main innovations of this draft is the introduction, for the first time in Moroccan history, of a catalogue of rules on international jurisdiction. It also amends the existing rules on the enforcement of foreign judgments.

Despite the importance of this legislative initiative for the development of private international law in Morocco, the proposed provisions are unfortunately disappointing in many respects.

First, with regard to the rules of international jurisdiction, it is surprising that the drafters of the 2023 proposed Code have relied heavily on the rules of the

Egyptian Code of Civil Procedure, which date back to the fifties of the last century. These rules are in many respects completely parochial and outdated. Other codifications from the MENA region (e.g., the Tunisian codification of PIL) or elsewhere (e.g., recent codifications of PIL in Europe and Asia) could have served as better models. Furthermore, the proposed rules seem to have overlooked developments at the regional or international level, in particular those in the European Union and the Hague Conference on Private International Law over the last two decades. The fact that the new proposed rules do not even take into account the solutions of the 1991 Ras Lanouf Convention, a double convention concluded between the Maghreb countries (but not yet ratified by Morocco), is difficult to explain.

Examples of questionable aspects of the new proposed rules include, among others:

- Adopting the nationality of the defendant as the basis for jurisdiction in all matters, including civil and commercial matters, even if the dispute has no other connection with Morocco.
- Failure to distinguish between concurrent and exclusive jurisdiction. This is problematic because the new proposed provision on the requirements for the enforcement of foreign judgments allows Moroccan courts to refuse enforcement if the judgments were rendered in matters within the exclusive jurisdiction of Moroccan courts, without providing a list of such matters.
- The adoption of questionable and outdated grounds of jurisdiction, such as the location of property without limitation and the place of the conclusion of the contract.
- Failure to introduce new rules that take into account the protection of weaker parties, especially employees and consumers.
- Failure to include a clear and coherent rule on choice of court agreements.
- Failure to include a rule on *lis pendens*.

Second, with regard to the enforcement of foreign judgments, the main surprise is the introduction of the reciprocity rule, which was not part of the law on foreign judgments in Morocco. Moreover, Moroccan courts have never invoked the

principle of reciprocity when dealing with the enforcement of foreign judgments, either as a possible requirement or as ground for refusing to give effect to foreign judgments. It is not clear why the drafters felt the need to introduce reciprocity when there does not seem to be any particular problem with the enforcement of Moroccan judgments abroad.

The following is a loose translation of the relevant provisions. The text in brackets has been added by the author.

Part II - The Jurisdiction of the Courts

Chapter IV - International Judicial Jurisdiction

Article 72 [(General) Jurisdiction over Moroccans]

The courts of the Kingdom shall have jurisdiction to hear actions brought against Moroccans even if they are not domiciled or resident in Morocco, except when the action concerns immovables located abroad.

Article 73 [(General) Jurisdiction over Foreigners Domiciled or Resident in Morocco]

The courts of the Kingdom shall have jurisdiction to hear actions brought against foreigners who are domiciled or resident in Morocco, except where the dispute concerns immovables located abroad.

Article 74 [(Special) Jurisdiction over Foreigners not domiciled or resident in Morocco]

[1] The courts of the Kingdom shall have jurisdiction to hear actions brought against foreigners who are not domiciled or resident in Morocco [in the following cases]:

1. **[Property and Obligations]** [if the action] concerns property located in Morocco, or an obligation formed, performed, or should have been performed in Morocco;
2. **[Tortious Liability]** [if the action] concerns tortious liability when the act giving rise to liability or the damage takes place in Morocco;
3. **[Intellectual Property]** [if the action] concerns the protection of intellectual property rights in Morocco;

4. **[Judicial Restructuring]** [if the action] concerns procedures for businesses in difficulty instituted in Morocco;

5. **[Joint Defendants]** [if the action] is brought against joint defendants, and one of them is domiciled in Morocco;

6. **[Maintenance]** [if the action] concerns a maintenance obligation and the maintenance creditor is resident in Morocco;

7. **[Filiation and Guardianship]** [if the action] concerns the filiation of a minor resident in Morocco or a matter of guardianship over a person or property;

8. **[Personal status]** [if the action] concerns other matters of personal status:

a) if the plaintiff is Moroccan;

b) if the plaintiff is a foreigner who has resident in Morocco and the defendant does not have a known domicile abroad,

9. **[Dissolution of marriage]** [if the action] concerns the dissolution of the marital bond:

a) if the marriage contract was concluded in Morocco;

b) if the action is brought by a husband or a wife of Moroccan citizenship;

c) if one of the spouses abandons the other spouse and fixes his/her domicile abroad or has been deported from Morocco

[2] **[Counterclaims and related claims]** The courts of the Kingdom that have jurisdiction over an original action shall also have jurisdiction to hear counterclaims and any related claims.

[3] **[Conservative and Provisional measures]** The courts of the Kingdom shall also have jurisdiction to take conservative and provisional measures to be executed in the Kingdom even if they do not have jurisdiction over the original action.

Article 75

[1. **Consent and Submission]** The courts of the Kingdom shall also have jurisdiction to hear actions even if they do not fall within the jurisdiction of the defendant explicitly or implicitly accepting their jurisdiction unless the action concerns an immovable located abroad.

[2. Declining jurisdiction] If the defendant in question does not appear, the court shall [in its motion] rule that it has no jurisdiction.

Part IX - Methods of Execution

Chapter III - General Provisions relating to Compulsory Execution of Judicial Judgments

Article 451 [Necessity of an Exequatur Declaration]

Foreign judgments rendered by foreign courts shall not be enforced unless they are declared enforceable following the conditions laid down in the present Act.

Article 452 [Procedure]

[1] The request for exequatur shall be submitted to the First President of the court of the second instance with subject-matter jurisdiction.

[2] Jurisdiction shall lie with the court of the place of execution, and the executor shall have the authority to pursue the execution wherever the property of the person against whom the execution was issued is found.

[3] The first president or the person replacing him/her shall summon the defendant when necessary.

Article 453 [Requirements]

The foreign judgment shall not be declared enforceable except after verifying that the following requirements are satisfied:

[a] The foreign court did not render a judgment that falls within the exclusive jurisdiction of Moroccan courts;

[b] There exists a substantial connection between the dispute and the court of the state where the judgment was rendered;

[c] There was no fraud in choosing the rendering court;

[d] The parties to the dispute were duly summoned and properly represented;

[e] The judgment became final and conclusive following the law of the rendering court;

[f] The judgment does not contradict with a judgment already rendered by Moroccan courts;

[g] The judgment does not violate Moroccan public policy.

Article 454 [Documents and Appeal]

[1] Except otherwise stipulated in the international conventions ratified by Morocco and published in the Official Gazette, the request [for declarations of

enforceability] shall be submitted by way of application accompanied by the following:

[a] an official copy of the judicial judgment

[b] a certificate of non-opposition, appeal, or cassation

[c] a full translation into Arabic of the documents referred to above and certified as authentic by a sworn translator.

[2] The judgment of granting exequatur can be subject to appeal before the Supreme Court.

[3] The Supreme Court shall decide on the appeal within one month.

[4] Judgments granting exequatur in cases relating to the dissolution of marriage shall not be subject to any appeal except by the public prosecutor.

Article 455 [Titles and Authentic Instruments]

Titles and authentic instruments established abroad before competent public officers and public servants can be enforced in Morocco after being declared enforceable, and that after showing that the title or the authentic instrument has the quality of an enforceable title and that it is enforceable following the law of the State where it was drawn up and does not violate the Moroccan public policy.

Article 456 [International Conventions and Reciprocity]

The rules laid down in the previous articles shall be applied, without prejudice to the provisions of the international conventions and treaties ratified by the Kingdom of Morocco and published in the Official Gazette. The rule of reciprocity shall also be considered.

The Jurisdiction Puzzle: Dyson, Supply Chain Liability and Forum Non Conveniens

Written by Dr Ekaterina Aristova, Leverhulme Early Career Fellow, Bonavero Institute of Human Rights, University of Oxford

On 19 October 2023, the English High Court declined to exercise jurisdiction in *Limbu v Dyson Technology Ltd*, a case concerning allegations of forced labour and dangerous conditions at Malaysian factories which manufactured Dyson-branded products. The lawsuit commenced by the migrant workers from Nepal and Bangladesh is an example of business and human rights litigation against British multinationals for the damage caused in their overseas operations. Individuals and local communities from foreign jurisdictions secured favourable outcomes and won jurisdictional battles in the English courts over the last years in several notable cases, including *Lungowe v Vedanta*, *Okpabi v Shell* and *Begum v Maran*.

The *Dyson* case is particularly interesting for at least two reasons. First, it advances a novel argument about negligence and unjust enrichment of the lead purchasing company in a supply chain relationship by analogy to the parent company liability for the acts of a subsidiary in a corporate group. Second, it is one of the few business and human rights cases filed after Brexit and the first to be dismissed on *forum non conveniens* grounds. Since the UK's EU referendum in 2016, the return of *forum non conveniens* in the jurisdictional inquiry has been seen as a real concern for victims of business-related human rights and environmental abuses seeking justice in the English courts. With the first case falling on jurisdictional grounds in the first instance, the corporate defendants started to collect a 'Brexit dividend', as cleverly put by Uglješa Grušić in his case comment.

Facts

The proceedings were commenced in May 2022. The claimants were subjected to forced labour and highly exploitative and abusive conditions while working at a factory in Malaysia run by a local company. The defendants are three companies in the Dyson corporate group, two domiciled in England and one in Malaysia. The factory where alleged abuses took place manufactured products and components for Dyson products. Claimants argued that Dyson defendants were liable for (i) negligence; (ii) joint liability with the primary tortfeasors (the Malaysian suppliers running the factory and local police) for the commission of the torts of false imprisonment, intimidation, assault and battery; and (iii) unjust enrichment. They further alleged that the Dyson group exercised a high degree of control over the manufacturing operations and working conditions at the factory facilities and

promulgated mandatory ethical and employment policies and standards in Dyson's supply chain, including in Malaysian factories.

The English courts are already familiar with the attempts to establish direct liability of the English-based parent companies for the subsidiaries' harms relying on negligence and the breach of duty of care owed to the claimants. In *Vedanta* and *Okpabi*, the UK Supreme Court made it clear that the parent company's involvement and management of the subsidiary's operations in different ways can give rise to a duty of care.

Broadening the scope of the parent company liability in a corporate group beyond strict control opened paths to supply chain liability. While lead purchasing companies, like Dyson, are not bound by shareholding with their suppliers, they often exercise a certain level of managerial control over independent contractors. Such involvement with particular aspects of a supplier's activities leads to the argument that a lead company could also be liable in negligence for a breach of the duty of care. The unjust enrichment claim that Dyson group has been enriched at the claimant's expense is a relatively novel legal basis, although it has already been raised in similar cases. To the best of my knowledge, in addition to the *Dyson* case, at least four legal actions focusing on supply chain liability are progressing in England: Malawian tobacco farmer claims against British American Tobacco and Imperial, Malawian tea farmer claims against PGI Group Ltd, Ghanaian children accusations against cocoa producer Olam and forced labour allegations by Burmese migrants against Tesco and Intertek.

Judgment

The court had to resolve the jurisdictional question of whether the case would proceed to trial in England or Malaysia. The English common law rules are founded on service of the claim form on the defendant and are based on the defendant's presence in the jurisdiction. In general terms, jurisdiction over English-domiciled parent companies is effected within the jurisdiction as of right. Following Brexit, proceedings against an English parent company may be stayed on *forum non conveniens* grounds. Foreign subsidiaries are served outside the jurisdiction with the court's permission, usually on the basis of the 'necessary or proper party' gateway. In the *Dyson* case, the English defendants asked the court to stay the proceedings based on *forum non conveniens*, and the Malaysian defendant challenged the service of the claim form, arguing that Malaysia is a

proper place to bring the claim.

The court agreed with the corporate defendants, having applied the two-stage test set out by the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd*. The first stage requires consideration of the connecting factors between the case and available jurisdictions to determine a natural forum to try the dispute. The court concluded that Malaysia was 'clearly and distinctly more appropriate' [122]. Some factors taken into account were regarded as neutral between the different fora (convenience for all of the parties and the witnesses [84], lack of a common language for each of the witnesses [96], location of the documents [105]). At least one factor was regarded as a significant one favouring England as the proper place to hear the claim (risk of a multiplicity of proceedings and or irreconcilable judgments [109]). However, several factors weighed heavily in favour of Malaysia (applicable law [97], place where the harm occurred [102]). As a result, Malaysia was considered to be the 'centre of gravity' in the case [122].

Under the second limb of the *Spiliada* principle, the English courts consider whether they should exercise jurisdiction in cases where the claimant would be denied substantial justice in the foreign forum. The claimants advanced several arguments to demonstrate that there is a real risk of them not obtaining substantial justice in Malaysia [125–168], including difficulties in obtaining justice for migrant workers, lack of experienced lawyers to handle the case, the risk of a split trial, the cost of the trial and financial risks for the claimants and their representatives, limited role of local NGOs to support the claimants. The court did not find cogent evidence that the claimants would not obtain substantial justice in Malaysia [169]. A stay of proceedings against English defendants was granted, and the service upon the Malaysian company was set aside [172]. Reaching this conclusion involved consideration of extensive evidence, including contradictory statements from Malaysian lawyers and civil society organisations. The Dyson defendants have given a number of undertakings to submit to the jurisdiction of the Malaysian courts and cover certain claimants' costs necessary to conduct the trial in Malaysia, which persuaded the court [16].

Comment

The *Dyson* case marks a shift from the recent trend of allowing human rights and environmental cases involving British multinationals to proceed to trial in the UK courts. Three principal takeaways are worth highlighting. First, the claimants in

the business and human rights cases can no longer be certain about the outcome of the jurisdictional inquiry in the English courts. The EU blocked the UK's accession to the Lugano Convention despite calls from NGOs and legal experts. The risk of dismissal on *forum non conveniens* grounds is no longer just a theoretical concern.

Second, the *Dyson* case demonstrates the difficulties of finding the natural forum under the doctrine of *forum non conveniens* in civil liability claims involving multinationals. These complex disputes have a significant nexus with both England, where the parent or lead company is alleged to have breached the duty of care, and the foreign jurisdiction where claimants sustained their injuries. The underlying nature of the liability issue in the case is how the parent or lead company shaped from England human rights or environmental performance of its overseas subsidiaries and suppliers. In this context, I agree with Geert van Calster, who criticises the court's finding about Malaysia being the 'centre of gravity' in the case. I have argued previously that the *forum non conveniens* analysis should properly acknowledge how the claimants frame the argument about liability allocation between the parent company and other entities in the group or supply chain.

Finally, the *Dyson* case is not the first one to be intensely litigated on the *forum (non) conveniens* grounds. In *Lubbe v Cape*, *Connelly v RTZ* and *Vedanta*, the English courts accepted jurisdiction, acknowledging that the absence of a means of funding or experienced lawyers to handle the case in a host state will lead to a real risk of the non-availability of substantial justice. The court in *Dyson* reached a different conclusion, but its analysis of the availability of substantial justice for claimants in Malaysia is not particularly persuasive, especially considering the claimants' 'fear of persecution, detention in inhumane conditions and deportation should they return to Malaysia' [71].

One aspect of the judgment is notably concerning. Claimants referred to the conduct of the *Dyson* defendants as being 'aggressive' and 'heavy-handed' [71], [73]. In concluding remarks, the court accepted there were deficiencies in *Dyson's* responses to the claimants' requests for the documents [173]. Yet despite this acceptance, the court has on multiple occasions relied on the defendants' undertakings to cooperate with the claimants to ensure the trial can proceed in Malaysia [136], [147], [151], [152], [166], [169]. Undoubtedly, the ruling will be appealed, and it remains to be seen if the English courts will be willing to try

cases involving British multinationals in the post-Brexit landscape.

Navigating Global Jurisdiction: The Indian Courts' Approach to Online IP Infringement

Written by Akanksha Oak, Jindal Global Law School, India

Introduction

The modern commerce landscape faces a significant challenge: the widespread infringement of intellectual property ("IP") rights due to online interactions that enable instant global access. This issue is exacerbated by cross-border activities, necessitating the application of private international law ("PIL"). However, IP protection remains territorial, guided by the principle of "*lex loci protectionis*." This results in complexities when it intersects with PIL. Online IP infringement further convolutes matters due to the internet's omnipresence and accessibility, making the establishment of jurisdiction a complicated process for legal professionals. A pivotal development in this arena occurred in 2021 when the Delhi High Court rendered a judgement in the case of *HK Media Limited and Anr v. Brainlink International Inc.*,^[1] illuminating India's legal framework for determining jurisdiction in cases of online IP infringement within the context of cross-border disputes.

Facts

HT Media, the plaintiff in this case, was involved in the business of print media and online publications. They operated online editions of their newspapers through their websites, specifically www.hindustantimes.com, and held registered trademarks for "*Hindustan*" and "*Hindustan Times*". The defendants,

Brainlink Int. Inc., were a corporation based in New York and owned the domain name www.hindustan.com. Their website provided news content like HT Media, focusing on India-America interests and stock market reports from India.

Due to the striking similarity between the websites, the plaintiffs initiated legal proceedings seeking a permanent injunction against the defendants, restraining them from using the domain name. Simultaneously, the defendants filed a suit in the United States District Court, asserting non-infringement of the plaintiffs' rights.

In response, the plaintiffs argued that the Indian court should halt the proceedings in the foreign court through an anti-suit injunction. They contended that the defendants were subject to the personal jurisdiction of the Delhi High Court, making it appropriate for the Indian court to intervene in the case.

Enhanced and vital interpretation of “Carrying on Business”

The court's jurisdiction in the present case was established under Section 134 of the Trade Marks Act 1999, which permits a plaintiff to file a suit in the court's jurisdiction where it carries on business.

In cases of online infringement of IP, the test for carrying on business was outlined in *World Wrestling Entertainment Inc. v. Reshma Collection*.^[2] In the *World Wrestling* case, the plaintiffs were a company incorporated under the State of Delaware, USA laws. They filed for a trade mark infringement in a suit in the Delhi High Court. They contested that their website was accessible in Delhi, and thus, under Section 134 of the Trade Marks Act, they carried on business in Delhi. The court noted that “*the availability of transactions through a website at a particular place is virtually the same thing as a seller having shops in that place in the physical world.*” This means that if a website is accessible via the internet at a particular place, the courts of that place could claim jurisdiction over the dispute. Moreover, due to the pervasive and global access of the internet, this gives the parties an opportunity for forum shopping; the jurisdiction can be established at any place where the online site is accessible.

This principle was further affirmed in the case of *Millennium & Copthorne International Ltd. v. Aryans Plaza Services (P) Ltd.*^[3] In this instance, the plaintiff, “*Millennium & Copthorne*,” was a London-based company without a physical office in India. Nevertheless, the plaintiff extensively promoted its

services in India through its online presence, collaborating with notable companies such as “*MakeMyTrip*” and “*Hotel Travel Ltd.*” Applying this law, the plaintiff argued that despite lacking an office in Delhi, they were carrying out business in Delhi and thus qualified to file the suit in the Delhi High Court under Section 134 of the Trade Marks Act.

Unsurprisingly, this approach raises concerns about predictability. This is because parties could file suits in any court where their website is accessible. In the present case, however, this reasoning was not accepted, as the court emphasised the physical existence of the plaintiff’s registered office in Delhi to meet the criterion of “*carrying on business.*” Moreover, the court deemed the lawsuit filed in the Eastern District of New York vexatious and oppressive.

One of the grounds to establish that the jurisdiction of the US court was oppressive was that the plaintiff was not carrying on business in the US. This determination was made by diverging from the precedent set in the *World Wrestling case*, as illustrated above. In this case, the court analysed the target audience of the plaintiff’s business. This analysis demonstrated that the plaintiff was indeed conducting business in India, and most of its readers were residents of India despite the global accessibility of its website. Had the court followed the *World Wrestling case ratio*, the mere accessibility of the plaintiff’s website would have constituted carrying on business in the US. However, the court, in this instance, refrained from doing so. Hence, the court’s interpretation of “*carrying on business*” was twofold: it relied on the physical presence of the plaintiff’s registered office and evaluated its target audience to establish the “*carrying on of business.*” The court did not solely consider the accessibility of the plaintiff’s website, as was the practice in previous cases.

The ruling in the *WWE case* allowed parties to potentially misuse the right of forum shopping, enabling them to file suits in any country where their website was accessible. However, the approach adopted in the present case aligns more closely with the principles of PIL. It helps prevent the abuse of forum shopping by restricting the options available to parties when filing a suit under the ambit of “*carrying on business.*” This decision establishes a precedent, underscoring the significance of establishing jurisdiction based on various connecting factors, such as the registered office of the party’s business and its target audience. This approach emphasises the importance of a collective analysis by considering a range of factors rather than solely relying on the accessibility of a website in a

specific location.

The test of “Cause of Action”

In online IP infringement cases, another ground for establishing jurisdiction revolves around determining the place where the cause of action arose. The Delhi High Court has established precedents in this regard, notably in *Banyan Tree Holding (P) Ltd. v. A. Murali Krishna Reddy*,^[4] and further elucidated in *Impresario Entertainment v. S & D Hospitality*.^[5] In the *Banyan Tree* case, the plaintiff had a registered office in Singapore. It had an e-commerce website accessible in India, and thus, it instituted a suit in Delhi. It filed for trade mark infringement against the defendant, whose place of business was in Andhra Pradesh, India. The issue in this case was regarding the jurisdiction of the Delhi High Court, as neither of the parties resided in the territory of Delhi. Thus, the court established the “*tighter version of the effects test*” for deciding the place of cause of action in online infringement matters. The court ruled that to establish jurisdiction when the defendant does not reside or conduct business in the forum state but the website in question is universally accessible, and the plaintiff must demonstrate that the defendant specifically targeted the forum state with the intent to harm the plaintiff.

Building on this, in *Impresario Entertainment v. S & D Hospitality*, a Mumbai-based restaurant business (plaintiff) sued a Hyderabad-based restaurant (defendant) with a similar name in the Delhi High Court. The plaintiff claimed jurisdiction under the grounds of cause of action based on the reasoning that interactive website listings such as Zomato were accessible in Delhi, and thus, it was also one of the places where infringement took place, resulting in the cause of action. However, the court ruled in favour of the defendant, stating that mere website interactivity was insufficient for establishing jurisdiction under this ground. Thus, the *Impresario* case emphasised the concept of “*specifically targeting the forum state*,” requiring the plaintiff to prove that one of their customers was misled by the defendant, leading to the conclusion of a commercial transaction or a strong intention to finalise a transaction.

The tests for carrying on business and cause of action represented opposite ends of the spectrum: the former was relatively easy to establish, and the latter was challenging to prove, placing the burden on the plaintiff. In the present case, the court struck a balance between these tests. It established a criterion where the

connecting factors for identifying where the cause of action arose required a demonstration of the likelihood of damage without conclusively proving a commercial transaction. The court held that since the plaintiff was an Indian news channel catering to an Indian audience, their goodwill and reputation were primarily in India. Consequently, any damage inflicted would stem from the defendant's site being accessed from India, given that the plaintiff's primary target audience resided there. The burden of proof was not on the plaintiff to prove that he had "*actually*" faced financial damage but to show that there was a "*likelihood*" of facing such financial damage to invoke the grounds for cause of action, unlike in the cases of *Banyan Tree* and *Impresario*. Furthermore, as the IP rights were safeguarded in India, any infringement would constitute a cause of action where these rights were granted.

Implications of the case

In the European Union (EU), the court's jurisdiction is established under Art 7(2) of the Brussels I Recast Regulation. The connecting factors in this article are the places where the damage occurred or may occur. Thus, jurisdiction is established based on the location of the harm caused by online infringement, which the likelihood of financial loss to the plaintiff would prove. The plaintiff must prove that damage was caused due to the accessibility of the defendant's site in that country. The court's reasoning in the present case aligns with the reasoning of the EU to establish jurisdiction in such cases, as even in the present case, the court established jurisdiction based on connecting factors such as the place of "*damage*" by analysing the plaintiff's target audience and how damage to its goodwill in India would lead to financial loss for the party. Thus, with the ruling in *HK Media Limited and Anr v. Brainlink International Inc.*, India has also adopted an Article 7(2) Brussels approach. This ruling sets an encouraging precedent, fostering consistency and harmonising private international law rules across nations for cross-border online IP infringement. It furthers the goals of establishing predictability and certainty in determining jurisdiction in cross-border disputes.

[1] 2020 SCC Online Del 1703.

[2] 2014 SCC Online Del 2031.

[3] 2018 SCC Online Del 8260.

[4] 2009 SCC Online Del 3780.

[5] 2018 SCC OnLine Del 6392.

The 2019 Hague Judgments Convention Applied by Analogy in the Dutch Supreme Court

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

On 1 September 2023, the 2019 Hague Judgments Convention (HJC) entered into force. Currently, this Convention only applies in the relationship between EU-Member States and Ukraine. Uruguay has also ratified the HJC on 1 September 2023 (see status table). The value of the HJC has been criticised by Haimo Schack inter alia, for its limited scope of application. However, the HJC can be valuable even beyond its scope as this blog will illustrate by the ruling of the Dutch Supreme Court on 29 September 2023, ECLI:NL:HR:2023:1265.

Facts

In 2019, a couple with Moroccan and Dutch nationality living in the Netherlands separated. They have two children over whom they have joint custody. On 5 June 2020, the wife filed for divorce and ancillary relief, inter alia division of the matrimonial property, with the Dutch court. On 29 December 2020, the husband requested this court to also determine the contribution for child maintenance to be paid by the wife. However, the wife raised the objection of *lis pendens* with reference to Article 12 Dutch Civil Code of Procedure (DCCP), arguing that the Dutch court does not have jurisdiction regarding child maintenance, since she filed a similar application with the Moroccan court on 9 December 2020, and the judgment to be rendered by the latter court could be recognised in the

Netherlands.

Lis pendens

On 26 March 2021, the Dutch district court pronounced the divorce and ruled that the wife must pay child maintenance. This court rejected the objection of *lis pendens* because the Moroccan and Dutch proceedings did not concern the same subject matter as in Morocco a husband cannot request child support to be paid by the wife. Furthermore, there has been no Convention to enforce the Moroccan judgment in the Netherlands, as required by Article 12 DCCP. However, the Court of Appeal held that the district court should have declined jurisdiction regarding child maintenance, because both proceedings concerned the same subject matter, i.e. the determination of child maintenance. Subsequently, the Court of Appeal declined jurisdiction over this matter by pointing out that the Moroccan judgment, which in the meantime had been rendered, could – in the absence of a Convention – be recognised in accordance with the Dutch requirements for recognition of non-EU judgments, the *Gazprombank*-requirements (see Hoge Raad 26 September 2014, ECLI:NL:HR:2014:2838, 3.6.4).

The case brought before the Supreme Court initially concerned the interpretation of *lis pendens* under Article 12 DCCP. In accordance with this provision, the Supreme Court states that the civil action should be brought to a foreign court first, and subsequently the Dutch court to consider the same cause of action between the same parties. If it is expected that the foreign proceedings will result in a judgement that can be recognised, and if necessary enforced, in the Netherlands either on the basis of a Convention or *Gazprombank*-requirements (see Hoge Raad 29 September 2023, ECLI:NL:HR:2023:1266, 3.2.3), the Dutch court may stay its proceedings but is not obliged to do so. The court may, for example, decide not to stay the case because it is expected to take too long for the foreign court to render the final judgment (3.3.5). However, the court must declare itself incompetent if the foreign judgment has become final and this judgment could be recognised and, if necessary enforced, in the Netherlands. To define the concept of finality of the foreign judgement, the Supreme Court drew inspiration from the HJC and the Explanatory Report by Garcimartín and Saumier (paras. 127–132) by applying the definition in Article 4(4) HJC by analogy; i.e the judgment is not the subject to review in the State of origin and the time limit for seeking ordinary review has been expired. According to the Supreme Court, this prevents that the dispute cannot be settled anywhere in court (3.3.6).

In the case at hand, the Dutch district court did thus not have to decline jurisdiction as the Moroccan judgment had not been final yet. The Supreme Court has also specified the conditions under which the court at first instance's decision on the application of Article 12 DCCP can be challenged on appeal (3.4.2-3.4.6), which is outside the scope of this blog.

Finality of the foreign judgment in the context of recognition

Moreover, the Supreme Court clarifies that in proceedings involving *lis pendens*, an action may be brought for recognition of the foreign decision, including a claim to rule in accordance with the condemnation in the foreign decision (on the basis of Article 431(2) DCCP) (3.5.1). After reiterating the known *Gazprombank*-requirements for recognition, the Supreme Court addresses for the first time the issue whether the foreign judgment should be final (which has frequently been debated by scholars). According to the Supreme Court, the court may, postpone or refuse the recognition on the basis of the *Gazprombank*-requirements if the foreign judgement is not final, i.e. the judgment is the subject of review in the State of origin or the time limit for seeking ordinary review has not expired (3.6.2). The Supreme Court therefore copies Article 4(4) HJC, and refers to the Explanatory Report by Garcimartín and Saumier (paras. 127-132). Similar to the latter provision, a refusal on this ground does not prevent a renewed application for recognition of the judgment. Furthermore, the court may, on application or of its own motion, impose the condition that the party seeking recognition of a non-final foreign judgment provides security for damages for which she could be ordered to pay in case the judgement is eventually annulled or amended. The Supreme Court therefore follows the suggestion in the Explanatory Report by Garcimartín and Saumier (para. 133).

Comment

The application by analogy of the autonomous definition of finality in Article 4(4) HJC yields legal certainty in the Netherlands regarding both the *lis pendens*-conditions under Article 12 DCCP, and the recognition of non-EU judgments in civil matters to which no Convention applies. Because of the generally uncoded nature of Dutch law for recognition of latter judgements, legal certainty has been advocated. In this regard, the Dutch Government Committee on Private International Law submitted its advice in February 2023 to revise Article 431 DCCP which inter alia includes the application by analogy of the jurisdictional

filters in Article 5(1) HJC (see advice, p. 6). Thus, despite its limited scope of application, the HJC has value because of its possible application by analogy by courts and legislators (see also B. van Houtert, ‘Het 2019 Haags Vonnissenverdrag: een *gamechanger* in Nederland? Een rechtsvergelijkende analyse tussen het verdrag en het Nederlandse commune IPR’, forthcoming *Nederlands Internationaal Privaatrecht* 4, 2023). Furthermore, the Dutch Supreme Court’s application by analogy of Article 4(4) HJC contributes to the Hague Conference on Private International Law’s aim to unify Private International Law.

AMEDIP’s Annual Seminar: The program is available (in Spanish)

The *Mexican Academy of Private International and Comparative Law* (AMEDIP) will hold its annual XLVI Seminar entitled “Private International Law and the National Code of Civil Procedure. A critical analysis” (*el Derecho Internacional Privado y el Código Nacional de Procedimientos Civiles. Un análisis crítico*) from 8 to 10 November 2023. See our previous post [here](#).

The program is available [here](#).

Today there will be a book presentation entitled:

“Comentarios a la Normatividad Procesal en el Código Nacional de Procedimientos Civiles y Familiares” by Nuria González Martín and Jorge Alberto Silva.

Commenting: Magistrado Oscar Gregorio Cervera and Ligia Claudia González Lozano.

There is a fee for participation both in person and online.

Which Law Governs Subject Matter Arbitrability in International Commercial Disputes?

Written by Kamakshi Puri[1]

Arbitrability is a manifestation of public policy of a state. Each state under its national laws is empowered to restrict or limit the matters that can be referred to and resolved by arbitration. There is no international consensus on the matters that are arbitrable. Arbitrability is therefore one of the issues where contractual and jurisdictional natures of international commercial arbitration meet head on.

When contracting parties choose arbitration as their dispute resolution mechanism, they freely choose several different laws that would apply in case of disputes arising under the contract. This includes (i) the law that is applicable to the merits of the dispute, (ii) the institutional rules that govern the conduct of the arbitration, (iii) law that governs the arbitration agreement, including its interpretation, generally referred to as the 'proper law of the arbitration agreement'. Similarly, contracting parties are free to choose the court that would exercise supervisory jurisdiction over such arbitration, such forum being the 'seat' of arbitration.

Since there is no global consensus on the matters that are arbitrable, and laws of multiple states simultaneously apply to an arbitration, in recent years, interesting questions surrounding arbitrability have presented themselves before courts adjudicating cross-border disputes. One such issue came up before the Singapore High Court in the *Westbridge Ventures II v Anupam Mittal*, succinctly articulated by the General Court as follows:

“which system of law governs the issue of determining subject matter arbitrability at the pre-award stage? Is it the law of the seat or the proper law of the arbitration agreement?”

In this piece, I will analyze the varied views taken by the General Court at Singapore (“**SGHC**”), Singapore Court of Appeal (“**SGCA**”) and the Bombay High Court (“**BHC**”) on the issue of the law(s) that would govern the arbitrability of the disputes in international commercial disputes.

The Westbridge Ventures-Anupam Mittal dispute began in 2021 when Mittal approached the National Company Law Tribunal in Mumbai (“**NCLT Mumbai**”) alleging acts of minority oppression and mismanagement of the company, People Interactive (India) Private Limited, by the majority shareholder, Westbridge Ventures. In response to the NCLT proceedings, Westbridge Ventures approached the Singapore High Court for grant of permanent anti-suit injunction against Mittal, relying on the arbitration agreement forming part of the Shareholders’ Agreement between the suit parties. Since 2021, the parties have successfully proceeded against one another before various courts in Singapore and India for grant of extraordinary remedies available to international commercial litigants *viz* anti-suit injunctions, anti-enforcement injunctions and anti-arbitration injunctions.

Singapore General Court Decision on Pre-award Arbitrability

Oppression and mismanagement claims are arbitrable under Singapore law but expressly beyond the scope of arbitration under Indian law. To determine whether proceedings before the NCLT were in teeth of the arbitration agreement, the court had to determine if the disputes raised in the NCLT proceedings were arbitrable under the *applicable* law. Thus, the question arose as to the law which the court ought to apply to determine arbitrability.

At the outset, the SGHC noted that the issue of arbitrability was relevant at both initial and terminal stages. While at the initial stage, non-arbitrable subject matter rendered arbitration agreements *inoperative* or *incapable of being*

performed, at the terminal stage, non-arbitrability rendered the award liable to be set aside or refused enforcement. Since at the post-award stage, arbitrability would be determined by the enforcing court applying their own public policy, the lacuna in the law was limited to the issue of subject matter arbitrability at the pre-award stage.

Upon detailed consideration, the SGHC concluded that it was the *law of the seat* that would determine the issue of subject matter arbitrability at the pre-award. The court reasoned its decision broadly on the following grounds:

- Contracts are a manifestation of the party autonomy principle. States being asked to give effect to a contract ought to respect party autonomy but for very limited grounds, such as public policy considerations. Power of the seat court to limit the arbitral tribunal's jurisdiction, and consequently affect party autonomy, ought to be limited to necessary constraints posed by such seat State's public policy;
- Since seat courts their own law at the post-award stage (in setting-aside and enforcement proceedings), it would be a legal anomaly for the same court to rely on different systems of law to determine subject-matter arbitrability at pre and post-award stages. This could also result in a situation where a subject matter, being arbitrable under the law of the arbitration agreement despite being non-arbitrable under the law of the seat, is first referred to arbitration however later the resulting award is set aside;
- Courts should, as a general position, apply their own law unless specifically directed by law to another legal system. Public interest and state policy favoured the promotion of International Commercial Arbitration. It was neither necessary nor desirable for a court to give effect to a foreign non-arbitrability rule to limit an otherwise valid arbitration agreement. Arbitrability was therefore a matter to be governed by national courts by applying domestic law.

Interestingly, despite noting that arbitrability was an issue of jurisdiction and that non-arbitrability made an agreement *incapable of being performed*, the SGHC distinguished the scenarios where a party's challenge was based on arbitrability and where parties challenged the formation, existence, and validity of an agreement. The court held that for the former, the law of seat would apply, however, for the latter, the proper law of arbitration agreement could apply.

Accordingly, the SGHC held that oppression and mismanagement disputes were arbitrable under the law of the seat, *i.e.*, in Singapore law, the arbitral tribunal had exclusive jurisdiction to try the disputes raised by the parties. An anti-suit injunction was granted against the NCLT proceedings relying on the arbitration agreement between the parties.

Appeal before the Singapore Court of Appeal

Mittal appealed the SGHC judgment before the Singapore Court of Appeal. The first question of law before the SGCA was whether the SGHC was correct in their holding that to determine subject matter arbitrability, *lex fori* (*i.e.*, the law of the court hearing the matter) would apply over the proper law of the arbitration agreement. Considering the significance of the issue, Professor Darius Chan was appointed as *amicus curie* to assist the court.

Professor Chan retained the view that *lex fori* ought to be the law applicable to the question of arbitrability. This was for reasons of *predictability* and *certainty*, which weighed on the minds of the drafters of the UNCITRAL Model Law. Although the Model Law was silent on the question of pre-award arbitrability since it was clear on the law to be applied post-award, a harmonious reading of the law was preferable. The courts ought to generally apply *lex fori* at both, pre and post-award stages.

The SGCA disagreed. It held that the *essence* of the principle of arbitrability was public policy. In discussing issues of *predictability*, *certainty*, and congruence between law to be applied at pre and post-arbitral stages, the parties had lost sight of the core issue of public policy in considering the question of arbitrability. Public policy of which state? – it unequivocally held that it was public policy derived from the law governing the arbitration agreement. Where a dispute could not proceed to arbitration under the foreign law that governed the arbitration agreement for being contrary to the foreign public policy, the seat court ought to give effect to such non-arbitrability.

The SGCA relied on the same concepts as the General Court albeit to come to the opposite conclusion:

- Arbitration agreements are the manifestation of party consensus. When parties expressly adopt a system of law to govern their arbitration agreement, public policy enshrined under such law ought to be given effect. Further, if arbitrability is a question of jurisdiction, then it necessarily follows that the law of the agreement from which jurisdiction of the tribunal is derived be considered first.
- As regards the potential anomaly with the seat court applying different laws pre and post-award, SGCA held that non-arbitrability under the law of the seat would be an *additional* obstacle to the enforcement of the arbitration agreement. This could, however, not go to say that the law of the seat would be the *only* law to govern arbitrability. Accordingly, the SGCA upheld a *composite approach*:

“55. Accordingly, it is our view that the arbitrability of a dispute is, in the first instance, determined by the law that governs the arbitration agreement. ... where a dispute may be arbitrable under the law of the arbitration agreement but Singapore law as the law of the seat considers that dispute to be non-arbitrable, the arbitration would not be able to proceed. In both cases, it would be contrary to public policy to permit such an arbitration to take place. Prof Chan refers to this as the “composite” approach.”

- On the state policy to encourage International Commercial Arbitration, the court noted that principles of comity, requiring the court to respect public policy under foreign undoubtedly outweighed the policy to encourage arbitration. This was despite Prof. Chan’s concerns that expanding the grounds for refusal of reference of arbitration was *“unnecessarily restrictive and not in line with the general tendency to favor arbitration”*.

On facts, however, the court noted that the law of the arbitration agreement was in fact Singapore law itself, and Indian law was but the law of the substantive contract. Accordingly, arbitrability had to be determined under Singapore law and the appeal was dismissed.

Anti-Enforcement Injunction by the Bombay High Court

Mittal approached the Bombay High Court seeking an anti-enforcement injunction against the SGHC decision, and for a declaration that NCLT Mumbai was the only forum competent to hear oppression and mismanagement claims raised by him.

The BHC did not directly consider the issue of the law governing arbitrability, however, the indirect effect of the anti-enforcement injunction was the court determining the same. The BHC's decision reasoned as follows – the NCLT had the exclusive jurisdiction to try oppression and mismanagement disputes in India, such disputes were thus non-arbitrable under Indian law. The enforcement of any ensuing arbitral award would be subject to the Indian Arbitration Act. An award on oppression and mismanagement disputes would be contrary to the public policy of India. Enforcement of an arbitral award in India on such issues would be an impossibility – *“What good was an award that could never be enforced?”*. The court noted that allowing arbitration in a case where the resulting award would be a nullity would leave the plaintiff remediless, and deny him access to justice. An anti-enforcement injunction was granted.

The BHC's decision can be read in two ways. The decision has either added subject matter arbitrability under a third law for determining jurisdiction of the tribunal, *i.e.*, the law of the court where the award would inevitably have to be enforced or the decision is an isolated, fact-specific order, not so much a comment on the law governing subject matter arbitrability but based on specific wording of the arbitration clause which required the arbitral award to be enforceable in India, although clearly the intent for the clause was to ensure that neither parties resist enforcement of the award in India and not to import India law at the pre-award stage.

Concluding Thoughts

The SGHC is guided by principles of party autonomy and Singapore policy to encourage International Commercial Arbitration, on the other hand, the Court of Appeal was driven by comity considerations and the role of courts applying foreign law to be bound by foreign public policy. Finally, the Indian court was

occupied with ensuring “access to justice” to the litigant before it, which according to the court overrode both party autonomy and comity considerations. Whether we consider the BHC decision in its broader or limited form, the grounds for refusing reference to arbitration stand invariably widened. Courts prioritizing different concerns as the most significant could potentially open doors for forum shopping.

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Choice of law rules and statutory interpretation in the Ruby Princess Case in Australia

Written by Seung Chan Rhee and Alan Zheng

Suppose a company sells tickets for cruises to/from Australia. The passengers hail from Australia, and other countries. The contracts contain an exclusive foreign jurisdiction clause nominating a non-Australian jurisdiction. The company is incorporated in Bermuda. Cruises are only temporarily in Australian territorial waters.

A cruise goes wrong. Passengers, Australian and non-Australian, want relief under the *Australian Consumer Law (ACL)*. They commence representative proceedings alleging breaches of consumer law, and negligence in the Federal Court of Australia. The Australian court must first resolve the conflict of laws

problems posed – problems as sustained as they have been complex in the history of private international law.

These are the facts at the heart of the Ruby Princess cruise, and her 2,600 passengers. The story was reported widely. A COVID-19 outbreak prematurely terminated the cruise. Many passengers contracted COVID-19; some died. Unsurprisingly, the cruise then spawned an inquiry and a class action against Carnival plc (Carnival) as charterer and operator of the Ruby Princess, and Princess Cruise Lines Ltd, the Bermuda-registered subsidiary and vessel owner.

Statute has left little of the common law untouched. This short note analyses the interaction between a mandatory law and an exclusive jurisdiction clause in the context of the case. The note observes the tension between the selection of the statist approach or conventional choice of law rules as an analytical starting point, in difficult consumer protection cases.

Background

The Ruby Princess' passengers contracted on different sets of terms and conditions (US, UK and AU). The US and UK terms and conditions contained exclusive foreign jurisdiction clauses favouring the US and English courts respectively (PJ, [26], [29]). US customers also waived their rights to litigate in representative proceedings against Carnival (the 'class action waiver') (PJ, [27]). In aid of these clauses, Carnival sought a stay of the proceedings vis-à-vis the UK and US passenger subgroups.

Whether a stay is granted under Australian law turns on whether the Australian court is 'a clearly inappropriate forum' (See *Oceanic Sun Line Special Shipping Co Inc v Fay* at 247–8) (***Oceanic Sun Line***). In *Regie Nationale des Usines Renault SA v Zhang* (***Renault v Zhang***), the High Court (at [78]) described the test as requiring the applicant to show the Australian proceeding:

would be productive of injustice, because it would be oppressive in the sense of seriously and unfairly burdensome, prejudicial or damaging, or vexatious ...

In *Voth v Manildra Flour Mills Pty Ltd* (***Voth***), a majority observed (at 566):

the extent to which the law of the forum is applicable in resolving the rights and liabilities of the parties is a material consideration ... the selected forum should

not be seen as an inappropriate forum if it is fairly arguable that the substantive law of the forum is applicable in the determination of the rights and liabilities of the parties.

Through these cases the High Court elected not to follow the English approach (see *Spiliada Maritime Corporation v Cansulex Ltd*) which requires that another forum is clearly or distinctly *more* appropriate. The Australian test, after *Voth* poses a negative test and a more difficult bar.

First Instance

Stewart J found the Federal Court was not a clearly inappropriate forum and declined to stay the proceedings. A critical plank of this conclusion was the finding that the exclusive foreign jurisdiction and class action waiver clauses were not incorporated into the contracts (PJ, [74]). Even if the clauses were incorporated, Stewart J reasoned in obiter that the class action waiver was void as an unfair contract term under s 23 of the *ACL* (PJ, [145]) and the Federal Court was not a clearly inappropriate forum.

As noted in *Voth* and *Oceanic Sun Line*, simply because the contract selected the US or UK as the particular *lex causae* did not end the analysis (PJ, [207]) — the US and UK subgroups were not guaranteed to take the benefit of the *ACL* in the US and English courts, notwithstanding Carnival's undertaking that it would not oppose the passengers' application to rely on the *ACL* in overseas forums (PJ, [297], [363]). Ultimately, there remained a real juridical advantage for the passengers to pursue representative proceedings *together* in Australia.

Carnival appealed.

Full Court

The majority (Derrington J, Allsop CJ agreeing) allowed Carnival's appeal, staying the US subgroup's proceedings. Unlike the primary judge, the majority reasoned the clauses were incorporated into the US subgroup contracts. Further, a stay should be refused because the US and English courts had similar legislative analogues to the *ACL* (FCAFC, [383]-[387]). Although the US passengers would lose the benefit of the class action, that was a mere procedural advantage and the question of forum is informed by questions of substantive rights (FCAFC, [388]).

Rares J dissented, upholding the primary judge's refusal of a stay (FCAFC, [96]).

The passengers appealed to the High Court.

The Interaction between a Mandatory Law and an Exclusive Jurisdiction Clause

Statutes generally fall into one of three categories (see Maria Hook, 'The "Statutist Trap" and Subject-Matter Jurisdiction' (2017) 13(2) *Journal of Private International Law* 435). The categories move in degrees of deference towards choice of law rules. First, a statute may impose a choice of law rule directing the application of the *lex fori* where a connecting factor is established. Second, a statute may contain, on its proper construction, a 'self-limiting' provision triggered if the applicable law is the *lex fori*. Third, a statute may override a specified *lex causae* as a mandatory law of the forum. An oft-repeated refrain is that all local Australian statutes are mandatory in nature ([2023] HCATrans 99).

In the High Court, Carnival contended that if contracting parties select a *lex causae* other than the forum law, the forum statute will not apply unless Parliament has expressly overridden the *lex causae*.

The passengers (supported by the Commonwealth Attorney-General and ACCC, as interveners) took a different starting point — the threshold question is whether the forum law, *as a matter of interpretation*, applies to the contract irrespective of the parties' usage of an exclusive jurisdiction clause. In this case, several factors supported the *ACL's* application including s 5(1)(g) of the CCA, and the need to preserve the *ACL's* consumer protection purpose by preventing evasion through the insertion of choice of law clauses.

The parties adopted unsurprising positions. The passengers' case was conventionally fortified by the statutist approach, prioritising interpretation in determining the forum statute's scope of application. Carnival relied on the orthodox approach, prioritising choice of law rules in controlling when and to what extent forum statutes will apply, and more aligned with comity norms and party autonomy the selection of the governing law of private agreements. The orthodox approach was exemplified in Carnival's submission that '[i]t was not the legislature's purpose to appoint Australian courts as the global arbiter ... of class actions concerning consumer contracts across the world' (See Respondent's Outline of Oral Argument, p. 3).

Against that view, it was said that party autonomy should be de-emphasised where contracts are not fully negotiated, involve unequal bargaining power and standard terms (contracts of 'adhesion' as here provide a good example): see [2023] HCATrans 99 and the exchange between Gordon J and J Gleeson SC.

As scholars have noted, differences between the two approaches can be almost imperceptible. Characterisation is a 'species of interpretation' (Michael Douglas, 'Does Choice of Law Matter?' (2021) 28 *Australian International Law Journal* 1). However, the approach taken can lead to different outcomes in hard cases.

The key obstacle to the statist approach is uncertainty. If interpretation of a statute's extraterritorial scope controls the choice of law, then how do contracting parties ensure their selection of law prevails and that they are complying?

Interpretation (*both* in the choice of law sense and statutory interpretation) invites reasonable arguments that cut in both directions requiring judicial adjudication. Take, for example, Carnival's response to the passengers' argument that the ACL's consumer protection policy weighs against the use of choice of law clauses to evade liability. Carnival contended any evasion can be controlled by a two-step approach: firstly, applying the ACL's unfair contract provisions to the choice of law clause itself and, if it the clause is void, *only then* secondly applying the provisions to the contract as a whole. However, this only shifts the application of statutory interpretation to an anterior stage, namely how and when a given choice of law clause, on its face, might be considered unfair. To the extent any determination of unfairness could be made, this turns on the consequences of the clause *per se* than any particular manner of wording. Such an outcome equally produces unpredictability as to the anticipated effect and application of the forum law.

There is another example on point. Section 5(1)(g) extends the ACL to the 'engaging in conduct outside Australia' by bodies corporate carrying on business in Australia. Carnival's *expressio unius*-style argument that s 5(1)(g) does not support the passengers' case because the unfair contracts prohibition is not predicated on 'engaging in' any conduct, whereas ACL prohibitions apply to 'conduct'. Accordingly, taking up a point made by the Full Court majority (FCAFC, [301]), Carnival contended a limitation should be read into s 5(1)(g) else it capriciously apply to companies like Carnival whose business were entirely engaged outside of Australia's territorial limits.

Nevertheless, as the appellants pointed out (relying on drafting history), ‘when the unfair contract terms legislation was first introduced ... s 5(1) was specifically amended to apply to those provisions’ (See Appellant’s Written Submissions, p. 6).

It is therefore apparent how the statist approach invites a certain level of textual skirmishing.

Choices are available to judges under both the statist approach and in the application of choice of law rules (see Michael Douglas, ‘Choice of Law in the Age of Statutes’ in Michael Douglas, Vivienne Bath, Mary Keyes and Andrew Dickinson, *Commercial Issues in Private International Law: A Common Law Perspective* (Hart Publishing, 2019) ch 9). However, it does not follow that there are comparable levels of certainty in the two approaches. Characterisation of a case as contract or tort (to take a very general example) invites a narrower range of choices than the entire arsenal of statutory interpretation techniques deployable analysing words in a statutory provision. That is so because characterisation is controlled by matters external to submissions, namely pleadings and the facts as objectively found (e.g. where was the defective product manufactured, or where was the injury sustained). Interpretation, particularly through the modern focus on text, context and purpose, is not disciplined by facts or pleadings. Instead, it is shaped by submissions and argumentation actuated by the connotative ambiguity found in statute.

That has led the High Court to observe that choice of law rules uphold certainty. In *Renault v Zhang*, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ stated ([66]-[67]):

The selection of the lex loci delicti as the source of substantive law meets one of the objectives of any choice of law rule, the promotion of certainty in the law. Uncertainty as to the choice of the lex causae engenders doubt as to liability and impedes settlement.

Against the aim of certainty (and deference to choice of law clauses) are the countervailing considerations arising from legislative policy and the higher-order status of statute over choice of law rules sourced from the common law (see Douglas, ‘Choice of law in the Age of Statutes’). The interveners put it as an ‘unattractive prospect’ if the ‘beneficial’ aspects of the ACL regime could be defeated by expedient foreign jurisdiction clauses.

Insofar as the legislature evinces an intent to confer the benefit of legislation beyond Australia's territorial bounds, courts bound by an interpretive obligation to give effect to that legislative intention will not be able to defer to choice of law rules. In the case of the *CCA* and the *ACL*, s 15AA of the *Acts Interpretation Act 1901* (Cth) enjoins courts to prefer the interpretation 'that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act)'. Douglas and Loadsman (see 'The Impact of the Hague Principles on Choice of Law in International Commercial Contracts' (2018) 19(1) *Melbourne Journal of International Law* 1) observe that:

It is consistent with this purposive approach to statutory interpretation that Australian courts take a broad approach to the geographical scope of Australian statutes. In an environment where Australian lives and businesses increasingly cross borders on a regular basis, it would defeat the purposes of many pieces of Australian legislation if courts were to take a territorially-limited approach to statutes' scope of operation.

No doubt there is some truth to Carnival's submission that Parliament did not intend to render Australian courts the global arbiters of consumer contracts. However, subject to a pronouncement to the contrary from the High Court, the judgments to date in *Karpik v Carnival plc* suggest a statist analysis, however uncertain, difficult or comity-abating, will be a necessary precondition to determining the weight given to the wording of a choice of law clause. This is ultimately a consequence of the premium placed on a purposive construction to mandatory laws arising out of the home forum. For better or worse (and a strong case has been made for worse – see Maria Hook, 'The "Statutist Trap" and Subject-Matter Jurisdiction' (2017) 13(2) *Journal of Private International Law* 435), '[i]f the purposive approach to statutory interpretation gives rise to forum shopping in favour of Australian courts, so be it' (see Douglas and Loadsman, 20).

Notwithstanding this, another difficulty with Carnival's submissions in favour of the choice of law approach is that it functionally revives the common law *presumption* of non-extraterritorial application of laws and elevates the rebuttability threshold of that presumption to something made 'manifest' by parliament (which has been keenly disputed in the High Court: see Respondent's Submissions, [10]).

It is important to recall that the presumption was always couched in the language

of construction. In *Wanganui-Rangitiei Electric Power Board v Australian Mutual Provident Society*, Dixon J stated (at 601):

The rule is one of construction only, and it may have little or no place where some other restriction is supplied by context or subject matter.

Rebuttability does not arise at all if the context or subject matter of the forum statute, as a matter of interpretation, supplies a relevant territorial connection. If it so supplies, that territorial connection operates as a restriction.

Dixon J also went on to state (at 601):

But, in the absence of any countervailing consideration, the principle is that general words should not be understood as extending to cases which, according to the rules of private international law administered in our courts, are governed by foreign law.

Most recently in *BHP Group Ltd v Impiombato*, Kiefel CJ and Gageler J (at [23]) considered the common law presumption resembled a ‘presumption *in favour of* international comity’ rather than one *against* extraterritorial operation – although it is worth noting that three other judges recognised (at [71]) the common law presumption was ultimately a statutory construction rule which did not always require reference to comity. Nevertheless, an important factor for Kiefel CJ and Gageler J in finding the class action provisions of Part IVA of the *Federal Court of Australia Act 1976* (Cth) were not restricted to Australian residents by the presumption was the fact no principle of international law or comity would be infringed by a non-consenting and non-resident group member being bound by a judgment of the Federal Court in relation to a matter over which that court had jurisdiction.

Conversely, as Derrington J noted on appeal (FCAFC, [300]), the extension of s 23 to the transactions of companies operating in overseas markets as a result of their ancillary dealings in Australia would have been an ‘anomalous result’. Such a result would not have promoted comity between Australia and other national bodies politic, where the ACL would have had the result of potentially subjecting foreign companies to obligations additional to those imposed by the laws of their home country. As Carnival put it in the High Court:

if a company happens to carry on business in Australia, all of its contracts with

consumers (as defined) all over the world are then subject to Part 2-3 of the ACL. It would mean, for example, that contractual terms between a foreign corporation and consumers in Romania under standard form contracts can be deemed void under s 23 (Respondent's Submissions, [36]).

Without an expressed intention to the contrary, it was unlikely that Parliament had intended to 'legislate beyond the bounds of international comity' - into an area that would ordinarily be expected to be governed by foreign law.

To some extent, the judgments to date, despite their differing conclusions, suggest in common that an entirely non-statutist outcome (insofar as the CCA and ACL is concerned) is something of a will-o'-the-wisp. If it is accepted that matters of high forum public policy can supervene the contractual arrangements of the parties, expressed in no uncertain terms, then a court must always evaluate legislation in a statutist manner to determine how contractual arrangements interact with that policy. This is so even if, as in Derrington J's view in *Carnival plc v Karpik*, the conclusion would be that the policy would not be advanced by applying the mandatory law.

The High Court's decision will not only clarify the ambit of the CCA regime; it will materially bear upon the desirability of Australian courts as a forum for future transnational consumer law class actions. Coextensively, companies with Australian operations liable to be on the respondent end of such class actions will be watching the developments closely before drafting further exclusive foreign jurisdiction clauses.

Judgment is reserved in the High Court.

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