Brexit: The Spectre of Reciprocity Evoked Before German Courts

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While negotiations for an agreement on the future partnership between the EU and the UK are pending, a spectre haunts Europe: reciprocity.

I. The Residual Role of the Requirement of Reciprocity

In some EU Member States, provisions of national-autonomous aliens law enshrine the requirement of reciprocity. Those provisions are largely superseded by exceptions established in international law, including international treaties (so-called "diplomatic reciprocity"). EU (primary and secondary) law establishes broad exceptions concerning EU citizens and legal persons based in the EU.

In the context of EU / UK relations, the Withdrawal Agreement relieves UK nationals and legal persons from the requirement of reciprocity in the EU Member States. However, the scope of the exception established by the Withdrawal Agreement is limited in (personal and temporal) scope. An agreement on the future partnership between the EU and the UK could establish "full reciprocity" (Cf. points 29 and 49 of the Political Declaration accompanying the Withdrawal Agreement). Instead, if new arrangements will not be made, at the end of the transition period, in cases not covered by the Withdrawal Agreement, the method of reciprocity might once more play a residual role in the context of the treatment of UK nationals and legal persons in some EU Member States.

II. German Case-Law on Reciprocity with the UK and Civil Procedure

The spectre of reciprocity, in relations with the UK, was evoked in three recent cases brought before the German courts. The three cases concern provisions of German-autonomous aliens law in the field of civil procedure, which enshrine the requirement of reciprocity.

1. § 110 ZPO (Security for Court Costs)

In particular, two of the mentioned cases concern § 110 ZPO. Pursuant to § 110(1)

ZPO claimants not (habitually) residing in the EU (or in the EEA) must provide security for court costs (if the defendant requests so). § 110(2) ZPO provides exceptions to that duty. The claimant is relieved from the duty to provide security if an international treaty so provides (See § 110(2) no 1 ZPO) or if a treaty ensures the enforcement of the decision on court costs (see § 110(2) no 2 ZPO; see also the other exceptions listed in § 110(2), nos 3–5 ZPO).

In 2018 – before the UK's withdrawal from the EU –, in a case brought before the Düsseldorf Regional Court, a German defendant sought a decision ordering the UK claimant to provide security under § 110 ZPO (Düsseldorf Regional Court, interim judgment of 27 Sept 2018 – 4c O 28/12). The Regional Court dismissed the defendant's application, since (at that time) the UK was still an EU Member State. The German court thus shun an investigation as to "whether other international treaties might relieve the claimant from the obligation of providing security for costs after the [UK's] withdrawal".

Subsequently, in 2019 – after the UK's withdrawal from the EU, during the transition period –, a German defendant sought from the Dortmund Regional Court a decision ordering the claimant seated in London to provide security under § 110 ZPO (Dortmund Regional Court, interim judgment of 15 July 2020 – 10 O 27/20). The Regional Court dismissed the defendant's application, noting that – in the light of the legal fiction created by the Withdrawal Agreement – the UK must be considered as an EU Member State until the end of 2020. The German court – like the Düsseldorf Regional Court – shun an investigation as to whether treaties other than the Withdrawal Agreement relieve UK claimants – not habitually residing in the EU (or in the EEA) – from the duty of providing security under § 110 ZPO.

It appears that, apart from the Withdrawal Agreement, a treaty establishing diplomatic reciprocity for the purposes of § 110(2) no 1 ZPO does not exist yet (cf. ECJ, judgment 20 Mar 1997 – C-323/95).

Addendum: As mentioned above, § 110 ZPO does not apply to claimants habitually residing in the EU or EEA. It is important to underline that this holds true even in the case of UK nationals (habitually) residing in Germany (or in any other EU Member State or in an EEA Member State). It is also important to underline that, if the German-British Convention of 20 Mar 1928 on the conduct of legal proceedings will "revive" in relations between Germany and the UK after the

transition period, Art. 14 of that Convention will establish diplomatic reciprocity for the purposes of § 110 ZPO with respect to UK nationals having their "Wohnsitz" (domicile) in Germany. On the latter point see the ECJ's judgment referred to above.

2. § 917(2) ZPO (Writ for Pre-Judgment Seizure)

The third case brought before the German courts concerns § 917(2) ZPO. Pursuant to the first sentence of § 917(2) ZPO, a writ for pre-judgment seizure can be issued if the prospective judgment will have to be enforced abroad and if "reciprocity is not granted" (*i.e.* if an international treaty does not grant that the judgment will be eligible for enforcement in the given foreign country).

In 2019 – before the UK's withdrawal from the EU –, in a case brought before the Frankfurt Higher Regional Court, a German claimant applied for a writ under § 917 ZPO against a UK defendant (Frankfurt Higher Regional Court, judgment of 3 May 2019 – 2 U 1/19). The Higher Regional Court noted that reciprocity under § 917(2) first period ZPO could have been lacking if, after the UK's withdrawal from the EU, the Brussels Ia Regulation would have not been replaced by new arrangements granting the enforcement of (German) judgments in the UK. This notwithstanding, the German court decided not to issue the writ under § 917(2) first period ZPO, since failure to conclude new agreements replacing the Brussels Ia Regulation was (at that time) unlikely. In fact, the court pointed to the then ongoing negotiations between the EU and UK, namely to Art. 67(II) of the draft Withdrawal Agreement (today's Art. 67(1)(a) Withdrawal Agreement), providing for the continued application of the Brussels Ia Regulation in the UK.

It appears that, apart from the Withdrawal Agreement, a treaty establishing diplomatic reciprocity with the UK, for the purposes of § 917(2) ZPO, does not exist yet (unless the 1960 Convention between the UK and Germany for reciprocal recognition and enforcement of judgments – or even the 1968 Brussels Convention – will "revive"). An (albeit limited) exception concerns cases covered by exclusive choice-of-court agreements in favour of German courts falling under the 2005 Hague Convention (in fact, on 28 Sept 2020, the UK has deposited its instrument of accession to the 2005 Hague Convention, which should grant continuity in the application of the same Convention in the UK after the transition period).

III. Conclusion

In conclusion, at the end of the transition period, in cases not covered by the Withdrawal Agreement, unless new arrangements are made, the requirement of reciprocity might play a residual role in the context of the treatment of UK nationals and legal persons in some EU Member States, such as Germany.

The Chinese villages win a lawsuit in China to repatriate a Mummified Buddha Statue hold by a Dutch Collector —What Role has Private International Law Played?

The Chinese villages win a lawsuit in China to repatriate a Mummified Buddha Statue hold by a Dutch Collector

—What Role has Private International Law Played?

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1. **Introduction**

On 4 December 2020, the Sanming Intermediate People's Court of China's southeastern Province of Fujian rendered a judgment ordering the Dutch defendants to return a stolen 1,000-year-old Buddhist mummy, known as the statue of Zhanggong-zushi, to its original owner: two village committees in the

Province within 30 days after the verdict comes into effect. [1]

This is the first time in history that a Chinese court seized jurisdiction over a case filed by Chinese plaintiffs to repatriate a stolen cultural property illicitly exported. Once published, the judgment has aroused immediate attention both at home and abroad. Given the enormous quantity of Chinese cultural property stolen and illegally exported overseas, the potential influence of the judgment can hardly be overstated. This note focuses on the major legal issues that the Chinese judgment dealt with and attempts to analyse the role of private international law that has played.

2. Summary of Facts

Oscar Van Overeem, a Dutch architect, purchased a Buddhist statue for 40,000 Dutch guilders (US $20,500) in 1996 from a collector in Amsterdam who had acquired it in Hong Kong. In 1996, Van Overeem contacted a restorer to repair some chips and cracks in the exterior. When the restorer opened the bottom of the statue, he found two small pillows, and resting on the pillows, the body of a mummified monk. Initial radiocarbon testing found that the body was approximately 900-1000 years old. The statue was taken to the Meander Medical Center in Amersfoort, where a full CT scan was performed and samples taken through endoscopy. The investigative team found scraps of paper on which Chinese characters were written, placed inside the body in the cavities normally containing organs. These identified the Buddhist mummy as the mummy of a monk known as “Zhanggong-zushi”.

In 2014, Van Overeem loaned the statue to the Drents Museum in Assen for an exhibition, “Mummy World,” which traveled to the Hungarian Natural History Museum in the spring of 2015. Press reporting on the Hungarian exhibition alerted the Chinese villagers. Based on photographs from Hungary and archival materials in China, the Chinese villagers believe the statue is the one that have held the mummy of the village’s patriarch, Zhanggong Zushi. The statue was enshrined in the Puzhao Temple, jointly owned by the two villages named “Yunchun” and “Dongpu”, and worshiped by the local residents, for over 1,000 years until it went missing in December 1995.

After an unsuccessful negotiation, the Committee of Yunchun Village and the Committee Dongpu Village sued Van Overeem to demand the statue's return both in Fujian Province of China and in Amsterdam of the Netherlands at the end of 2015,[2] fearing that a statute of limitation might bar their case. Three years later, the Amsterdam District Court made a decision on 12 December 12, 2018, [3] ending one chapter in the legal battle over the statue of Zhanggong-zushi, but failed to resolve a controversial situation or illuminate the path forward for the parties, as the Dutch court did not decide anything about the ownership of the parties.[4] It simply determined not to hear the case, based on its finding that the two village committees did not have standing to sue in the Dutch court.[5]

Against this background, the lawsuit before the Chinese court is more important in terms of legal analysis. According to the information released by the Sanming Intermediate People's Court (the Court), it formally filed the case on 11 December 2015, which then served the Dutch defendants by international judicial cooperation. The Court, thereafter, held the hearings on 26 July and 12 October of 2018 respectively, and publicly pronounced the judgement on 4 December 2020.[6] Lawyers of both sides were present both at the hearings and the pronouncement of the judgement. From the perspective of private international law, the following two issues, among others, are particularly worth of concern:

(1) Jurisdiction: The Court exercised the jurisdiction over the dispute because the Dutch defendants did not raise an objection to its jurisdiction who responded to the action timely.[7]

(2) Application of Law: Based on the interpretation of "the *lex rei sitae* at the time that the legal fact occurred" in Article 37 of the Private International Law Act, the Court held that Chinese law, rather than Dutch law, shall govern the ownership of the statue.[8]

3. The Jurisdiction of the Chinese Court: Prorogated Jurisdiction

Jurisdiction is the first issue that the Court had to consider when it dealt with the dispute. Under the Civil Procedure Law of China (CPL), the general rule of territorial jurisdiction is that a civil action shall be brought in the People's Court of the place in which the defendant is domiciled subject to various exceptions grouped together under the title of "special jurisdictions".[9] As the defendants in the present case are domiciled in the Netherlands,[10] the jurisdiction of the Court depended on "special jurisdictions" among which the jurisdiction on actions on contractual disputes or disputes over property rights is most relevant.

In international civil litigation, many cases involve a foreign defendant not domiciled or residing within China. Given the importance of some of such cases, the CPL empowers Chinese courts the jurisdiction over actions involving contract disputes or disputes over property rights against a non-resident defendant if certain conditions are satisfied. Article 265 of the CPL prescribes the following:[11]

In the case of an action concerning a contract dispute or other disputes over property rights and interests, brought against a defendant who has no domicile within the territory of the People's Republic of China, if the contract is signed or performed within the territory of the People's Republic of China, or if the object of the action is located within the territory of the People's Republic of China, or if the defendant has distrainable property within the territory of the People's Republic of China, or if the defendant has its representative office within the territory of the People's Republic of China, the People's Court of the place where the contract is signed or performed, or where the object of the action is, or where the defendant's distrainable property is located, or where the torts are committed, or where the defendant's representative office is located, shall have jurisdiction.

Therefore, for actions concerning a dispute over property rights brought against a defendant who has no domicile in China, a Chinese Court may exercise jurisdiction if one of the following conditions are satisfied: (1) the property is located in China; (2) the defendant has distrainable property in China; (3) the tort was committed in China; (4)the defendant has its representative office in China.

In the case at hand, one can hardly argue that the Court has the jurisdiction under Article 265 of the CPL, as the statue is not located in China when the action was filed, nor did the defendants steal it or purchase it in China, nor do they have distrainable property or representative office in China. However, the Court ruled that its jurisdiction over the case was established pursuant to the prorogated jurisdiction under the CPL regime.

Prorogated jurisdiction under the CPL refers to situations where a party institutes proceedings in a court, and the other party implicitly acquiesces to the jurisdiction of that court by responding to the action and not raising an objection to the jurisdiction. That is to say, the defendant's failure to object is understood as defendant's consent to the Chinese court's jurisdiction. Article 127 of the CPL provides as follows:[12]

Where a party raises any objection to jurisdiction after a case is accepted by a people's court, the party shall file the objection with the people's court during the period of submitting a written statement of defense. The people's court shall examine the objection. If the objection is supported, the people's court shall issue a ruling to transfer the case to the people's court having jurisdiction; or if the objection is not supported, the people's court shall issue a ruling to dismiss the objection. Where a party raises no objection to jurisdiction and responds to the action by submitting a written statement of defense, the people's court accepting the action shall be deemed to have jurisdiction, unless the provisions regarding tier jurisdiction and exclusive jurisdiction are violated.

Since the defendant's failure to object constitutes consent to jurisdiction, it is imperative that defendants, foreign defendants in particular, raise a timely jurisdictional objection. Under Article 127 of the CPL, if a party to a civil action objects to the jurisdiction of a People's Court, the objection must be raised within the time period prescribed for the filing of answers. According to Articles 125 and 268, defendant shall have fifteen days, or thirty days if residing outside the territory of China, to file his answer upon receipt of plaintiff's complaint. Thus, if a defendant wants to challenge the People's Court's jurisdiction, he must do so

within this statutory fifteen-day or thirty-day period.[13]

It should be noted that the Dutch defendants in the present case did not raise objection to the jurisdiction of the Court; instead, they had responded to the lawsuit by submitting a written statement of defense represented by two Chinese lawyers, to the surprise of many observers. Hence, jurisdiction of the Court over this case was established under the prorogated jurisdiction of the CPL in an unexpected manner.

4. Choice of Law Issue: *Lex Rei Sitae* = *Lex Furti*?

One of the most widely accepted and significant rules of private international law today is that, in determining property rights, a court applies *lex rei sitae*. This rule has been accepted by Chinese private international law, though party autonomy is placed before *lex rei sitae* by Article 37 of the Private International Law Act. Given that it is very rare that the parties reach agreement on the applicable law after the dispute over the property has occurred, the *lex rei sitae* plays a *de facto* decisive role.

However, the question of application of the *lex rei sitae* in specific cases remains open out of diverse possible interpretations of the rule. From the perspective of comparative law, it can be found that many jurisdictions, say England, prefer to apply the law of the place of last transaction,[14] while others, say France, apply the law of place where goods are located at the time of the litigation.[15] As far as China is concerned, its courts has never clarified the meaning of the *lex rei sitae* in Article 37 of the Private International Law Act; therefore, the outcome of the present action was entirely dependent on the interpretation of this article.

The Chinese plaintiffs commenced the action for recover of the stolen statue by arguing, among other things, that they are its owners because *bona fide* acquisition does not apply to stolen cultural property under the Property Law of China. The Dutch defendants took the stand, claiming to have purchased the

statue on good title under Dutch Civil Code. Thus, it had to be decided which of the two laws shall be used in the present case: whether Chinses law or Dutch law shall govern the ownership of the statue. The Court, by resorting to Article 37 of the Private International Law Act, held that title was to be determined by Chinese law.

However, the Court acknowledged that the statue was stolen and illicitly exported before the implementation of the Private International Law Act, therefore, it had to decide in the very beginning whether the Act is applicable to the present dispute. To determine the issue, the Court referred to Article 2 of the Judicial Interpretation on the the Private International Law Act issued by the Supreme People's Court,[16] which states that:

As to a civil relationship involving foreign elements which occurred before the implementation of the Private International Law Act, People's Court shall determine the governing law according to the choice-of-law rules effective at the time of the occurrence of such relationship. In case no choice-of-law rules existed at that time, the Private International Law Act may be resorted to in order to determine the applicable law.

Given the General Principles of Civil Law, the most significant and primary legislation on private international law in China before 2010, is silent on the law applicable to property right,[17] the Court decided it is proper to invoke the Private International Law Act to fill the lacunae pursuant to the above article. The Court then referred to Article 37 of the Private International Law Act of China which provides that "the parties may choose the law applicable to the real rights in movable property; in the absence of such choice, the *lex rei sitae* at the time when the legal fact occurred applies".[18] As the parties in the case failed to reach agreement on the applicable law, the Court decided that the ownership of the statue shall be governed by the *lex rei sitae* at the time when the legal fact occurred.

With regard to the meaning of "the time when the legal fact occurred", the Court

stated that it pointed to the time when the statue was stolen, rather than the time when Oscar Van Overeem purchased it in Amsterdam. Summarising the conclusion, the judge stressed that the statue is a cultural property of great historic and religious significance, instead of an ordinary property. As the illicit traffic of cultural property usually creates a number of legal facts which inevitably leads to the proliferation of the *lex rei sitae*, including the law of the location of a cultural property had been stolen (*lex furti*), the law of the place of first transaction, the law of the place of last transaction, the law of the place of exhibition, the law of the location of a cultural property at the time of litigation, *etc*., the judge emphasised the need to spell out the *lex rei sitae* at the time when the legal fact occurred for the cases of recovering cultural property.

The Court stressed that when interpreting the *lex rei sitae* in a cultural property repatriation case, the object and purpose of international conventions of cultural property should be taken into consideration. It went on to highlight two conventions to which China is a contracting party: Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("the 1970 Convention") and Convention on Stolen or Illegally Exported Cultural Objects ("the 1995 Convention"). As both those conventions are devoting to prohibiting the illicit trafficking of cultural property and facilitating the return of cultural property to its origin nations, the Court concluded that it should interpret the *lex rei sitae* at the time when the legal fact occurred in the light of their object and purpose.

Hence, the Court decided that the *lex rei sitae* at the time when the legal fact occurred should be understood as the *lex furti*, *i.e*., law of the location of a cultural property had been stolen, insofar as such interpretation favours the protection of cultural heritage and facilitates the return of cultural property illicitly trafficked, whereas the place of transaction not only favours the laundering of stolen cultural property but also adds considerable uncertainty to the question of title.

The Court then referred to the Property Law of China under which *bona fide*

acquisition does not apply to stolen cultural property. Consequently, the Court ruled that the Chinese village committees retain the title of the statue and demanded the defendants to return it to plaintiffs.

5. Concluding Remarks

Under the CPL, judicial proceedings in China occur in two instances, namely, trial and appeal. Therefore, the Dutch defendants are entitled to appeal to the Higher People's Court of Fujian Province within 30 days. If they do not appeal within the time limit, the judgment will become effective.

At the present stage, it is not clear whether the defendants will comply with the judgment or appeal, or simply ignore it. Though as a Chinese, I do hope that the Dutch defendants will return the statue as ordered by the Court; nevertheless, I am afraid that ignoring the Chinese judgment may be one of their reasonable options because of serious obstacles to recognize and enforce this Chinese judgment in the Netherlands.

In spite of the uncertainty ahead, one cannot overestimate the significance of this judgment. First of all, as noted in the very beginning, this is the first time that a Chinese court exercises the jurisdiction over case to recover a Chinese cultural property stolen and illicitly exported. Therefore, it is a historic judgment, no matter it will be enforced or not in the future.

Second, the Court in the judgement clarified for the first time that "*lex rei sitae* at the time when the legal fact occurred" in Article 37 of the Private International Law should be interpreted in the light of the object and purpose of the 1970 Convention and the 1995 Convention, so that the *lex furti*, i.e., Chinese law, shall govern the ownership of cultural property lost overseas. Given the huge number of Chinese cultural property stolen and illicitly exported abroad, the author believes the impact of the judgment is tremendous.

[1] The Committee of Yunchun Village and the Committee Dongpu Village v. Oscar Van Overeem, Design & Consultancy B.V. and Design Consultancy Oscar van Overeem B.V., the Sanming Intermediate People's Court (2015) Sanmin Chuzi No. 626, Date of judgment: 4 December 2020.

[2] China villagers launch Dutch court bid to retrieve mummy, https://www.bbc.co.uk/news/world-europe-40606593, last visited on 8 December 2020.

[3] C/13/609408 / HA ZA 16-558, Court of Amsterdam, 12 December 2018, available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:8919, last visited on 8 December 2020.

[4] Chinese villagers disappointed about Dutch rejection of mummy Buddha repatriation case, http://www.xinhuanet.com/english/2018-12/14/c_137672368.htm, last visited on 8 December 2020.

[5] Uncertain Future for Golden Statue Holding Buddhist Mummy, https://culturalpropertynews.org/uncertain-future-for-golden-statue-holding-buddhist-mummy/, last visited on 8 December 2020.

[6] http://fjfy.chinacourt.gov.cn/article/detail/2020/12/id/5647265.shtml, last visited on 8 December 2020.

[7] The Committee of Yunchun Village and the Committee Dongpu Village v. Oscar Van Overeem, Design & Consultancy B.V. and Design Consultancy Oscar van Overeem B.V., the Sanming Intermediate People's Court (2015) Sanmin Chuzi No. 626, Date of judgment: 4 December 2020, p.21.

[8] *Id*,. at pp. 24-35.

[9] Zhengxin Huo, Private International Law (2017), pp.148-151.

[10] The defendants are Oscar Van Overeem, Design & Consultancy B.V. and Design Consultancy Oscar van Overeem B.V.

[11] Zhonghua Renmin Gongheguo Minshi Susongfa [Civil Procedure Law] art. 265 (1991, revised in 2017) (PRC).

[12] Zhonghua Renmin Gongheguo Minshi Susongfa [Civil Procedure Law] art. 127 (1991, revised in 2017)(PRC).

[13] Zhengxin Huo, Private International Law (2017), p.157.

[14] E.g., Winkworth v. Christie's Ltd.[1980] 1 Ch. 496.

[15] Stroganoff-Scerbatoff v. Bensimon, 56 Rev. crit. De dr. int. privé(1967).

[16] See Zhengxin Huo, 'Two Steps Forward, One Step Back: A Commentary on the Judicial Interpretation on the Private International Law Act of China' (2013) 43 HKLJ 685, 710.

[17] The General Principles of Civil Law was adopted at the Fourth Session of the Sixth National People's Congress on April 12, 1986, coming into force on January 1, 1987. It was abolished on January 1, 2021 when the Civil Code of the PRC took effect. For a quite a long period, the GPCL was the most important source of Chinese private international law. Structurally, the GPCL has devoted an entire chapter to regulating the conflict of laws (i.e., Chapter Eight, Application of Laws to Civil Matters Involving Foreign Elements), where nine conflict rules can be found.

[18] Zhonghua Renmin Gongheguo Shewai Minshi Falvguanxi Shiyongfa [Act on the Application of Laws over Foreign-related Civil Relationships] art. 37 (2010) (PRC).

The Second Wave of the COVID-19 Pandemic and Force Majeure

Guest post by Franz Kaps, Attorney at law at DLA Piper, Frankfurt am Main

The resurgence of COVID-19 (Coronavirus) cases has been observed in countries around the world after COVID-19 outbreaks were successfully curbed earlier this year. To flatten the curve of the second wave of the pandemic governments again closed “non-essential businesses”, restricted travel and imposed “lockdowns” and “stay-at-home orders”. Beyond the health and human tragedy of the pandemic, it caused the most serious economic crisis since World War II, which also affected commercial contracts. In cases where the COVID-19 virus or government measures have affected commercial contracts, it is necessary to carefully analyse the state of affairs to determine the appropriate remedy.

The ICC Force Majeure Clause

Whether a force majeure clause is applicable in a particular case, and what its consequences would be, depends primarily on the wording of the clause. Courts have held that force majeure clauses are to be interpreted in a narrow sense and that performance under a contract is ordinarily excused only if the event preventing performance is explicitly mentioned in the force majeure clause. However, the state-of-the-art ICC Force Majeure Clause (Long Form) 2020 in Paragraph 3 (e) only presumes an epidemic to be a force majeure event but does not cover pandemics such as COVID-19. The difference between an epidemic and a pandemic is that an epidemic is a disease happening in a particular community. A pandemic, in contrast, is a disease that spreads over a whole country or the whole world. Due to its global spread, COVID-19 is classified as a pandemic.

In order to invoke the force majeure defence Paragraph 1 ICC Force Majeure Clause additionally requires that the party affected by the impediment proves that the following three conditions are met:

1. the impediment is beyond its reasonable control; and

2. the impediment could not reasonably have been foreseen at the time of the conclusion of the contract; and
3. the effects of the impediment could not reasonably have been avoided or overcome by the affected party.

The events enumerated in Paragraph 3 ICC Force Majeure Clause which are presumed to fulfil conditions a) and b) under Paragraph 1 ICC Force Majeure Clause do not explicitly cover pandemics. Consequently, a party claiming a force majeure defence as a result of the COVID-19 pandemic must prove all three conditions.

Whether the impact and governmental measures triggered by COVID-19 are beyond the reasonable control of the parties depends on the specifics of each case. In many cases of mandatory governmental measures it will be relatively straight-forward for a party to argue this successfully.

With regard to the second condition – the reasonable foreseeability of the COVID-19 pandemic according to Paragraph 1 (b) ICC Force Majeure Clause – the point in time when the parties have concluded their contract is crucial. In October 2019, the effects of COVID-19 were less foreseeable than in December 2019, and in any case, as of March 2020, it was at least foreseeable that the COVID-19 virus would in some way interfere with the performance of contractual obligations.

In 2020, countries adopted differentiated approaches to combat the COVID-19 pandemic. These approaches included stay-at-home orders, travel restrictions, closure of non-essential businesses and lockdowns. It is also not yet possible to foresee which government measures will be taken to ensure a flatter curve for the second COVID-19 wave in winter of 2020 and beyond. This is particularly true as countries previously known for their laid-back COVID-19 policies are currently considering changing their policies and are willing to adopt stricter measures in response to the second wave of the COVID-19 virus. Sweden, for example, which was known for its special path without restrictions, mandatory requirements to wear masks, or lockdowns, has now introduced COVID-19 restrictions to contain the spread of COVID-19 and does not rule out local lockdowns. In the US, too, it is very probable that tougher COVID-19 measures will be implemented by the government at the latest when President-elect Biden takes office in January 2021.

Besides government COVID-19 measures, it is difficult for the parties to foresee

specific effects of the COVID-19 virus on global supply chains and the performance of their obligations.

With regard to the second wave or further waves of the COVID-19 pandemic, it is therefore difficult for a party to foresee the exact impact of the Covid-19 virus in the individual countries and the various measures taken by the respective governments.

The third requirement under Paragraph 1 ICC Force Majeure Clause, that the effects of the impediment could not reasonably have been avoided or overcome by the affected party, again lacks legal certainty and is subject to the specificities of the case at hand – particularly regarding the reasonable remedies available to the party to eliminate and overcome the consequences of the COVID-19 pandemic.

Only if the conditions set out above are fulfilled can a party successfully invoke the force majeure defence pursuant to Paragraph 5 ICC Force Majeure Clause and be relieved from its duty to perform its contractual obligations and from any liability in damages or from any other contractual remedy for breach of contract.

State-of-the-Art Force Majeure Clause

This legal uncertainty regarding the impact of COVID-19 under the modern ICC Force Majeure Clause as well as under other force majeure clauses requires parties to first clarify whether their clause generally covers pandemics. Secondly, in light of the second wave of COVID-19, parties should consider amending their force majeure clauses to include or exclude the novel COVID-19 pandemic as a force majeure event in order to provide legal certainty as to whether a contract must be performed and whether a damage claim for non-performance of contractual obligations exists.

When pandemics are included in a force majeure clause as a force majeure event, an affected party under Paragraph 3 ICC Force Majeure Clause needs only to prove that the effects of the impediment could not reasonably have been avoided or overcome. Parties should therefore consider reviewing and updating their clauses and contemplate including pandemics as a force majeure event. In our globalised world, the next pandemic will spread sooner or later – therefore a *lege artis* force majeure clause must cover pandemics as a force majeure event. Where a pandemic is included in a force majeure clause, parties should refer to an objective criterion such as a pandemic declared by the World Health Organization

to define when pandemics trigger the force majeure consequences. By linking a pandemic to such an objective criterion, disputes as to whether a pandemic in the sense of the force majeure clause exists can be avoided.

Besides updating their force majeure clause parties should consider temporarily modifying their clauses in light of the current second wave of the COVID-19 virus. Parties, when amending their force majeure clause, may decide either to introduce a clause ensuring that effects and governmental measures due to the ongoing COVID-19 pandemic are not covered by their clause, or opt for a clause encompassing the current COVID-19 pandemic. Which option a party should select is a policy question and depends on the characteristics of the case. A party affected by the COVID-19 pandemic in the performance of its contractual obligations – because, for example, it depends heavily on international supply chains easily disrupted by the effects of the COVID-19 pandemic – should, on the one hand, ensure that the parties incorporate a force majeure clause encompassing the COVID-19 pandemic as a force majeure event. On the other hand, if the risk of non-performance of contractual obligations as a result of the COVID-19 virus is primarily in the risk sphere of the other party, a party may contemplate excluding the COVID-19 pandemic from the scope of the force majeure clause. In any case, a good starting point for future "tailor-made" force majeure clauses – which take into account the parties' specific needs – is the balanced ICC Force Majeure Clause.

The Gordian knot is cut – CJEU rules that the Posting of Workers Directive is applicable to road transport

Written by Fieke van Overbeeke[1]

On 1 December 2020 the Grand Chamber of the CJEU ruled in the FNV/Van Den Bosch case that the Posting of Workers Directive(PWD) is applicable to the highly mobile labour activities in the road transport sector (C-815/18). This judgment is in line with recently developed EU legislation (Directive 2020/1057), the conclusion of AG Bobek and more generally the '*communis opinio*'. This question however was far from an 'acte clair' or 'acte éclairé' and the Court's decision provides an important piece of the puzzle in this difficult matter.

The FNV/Van Den Bosch case dates back all the way to the beginning of 2014, when the Dutch trade union FNV decided to sue the Dutch transport company Van den Bosch for not applying Dutch minimum wages to their Hungarian lorry drivers that were (temporarily) working in and from its premises in the Netherlands. One of the legal questions behind this was whether the Posting of Workers Directive is applicable to the road transport sector, for indeed if it is, the minimum wages of the Netherlands should be guaranteed if they are more favourable than the Hungarian minimum wages (and they are).

At the Court of first instance, the FNV won the case with flying colours. The Court unambiguously considered that the PWD is applicable to road transport. Textual and teleological argumentation methods tied the knot here. The most important one being the fact that Article 1(2) PWD explicitly excludes the maritime transport sector from its scope and remains completely silent regarding the other transport sectors. Therefore the PWD in itself could apply to the road transport sector and thus applies to the case at hand.

Transport company Van Den Bosch appealed and won. The Court of Appeal diametrically opposed its colleague of first instance, favouring merely the principles of the internal market. The Court of Appeal ruled that it would not be in line with the purpose of the PWD to be applied to the case at hand.

The FNV then took the case to the Supreme Court (Hoge Raad), at which both parties stressed the importance of asking preliminary question to the CJEU in this matter. The Supreme Court agreed and asked i.a. whether the PWD applies to road transport and if so, under which specific circumstances.

The CJEU now cuts this Gordian knot in favour of the application of the PWD to the road transport sector. Just as the Court in first instance in the Netherlands, the CJEU employs textual and teleological argumentation methods and highlights

the explicit exception of Article 1(2) PWD, meaning that the PWD in itself could apply to road transport.

As regards to the specific circumstances to which the PWD applies, the CJEU sees merit in the principle of the 'sufficient connection' (compare CJEU 19 December 2018, C-16/18 Dobersberger, paragraph 31) and rules:

'A worker cannot, in the light of PWD, be considered to be posted to the territory of a Member State unless the performance of his or her work has a sufficient connection with that territory, which presupposes that an overall assessment of all the factors that characterise the activity of the worker concerned is carried out.'

So in order to apply the PWD to a specific case, there has to be a sufficient connection between worker and temporary working country. In order to carry out this assessment, the CJEU identifies several 'relevant factors', such as the characteristics of the provision of services, the nature of the working activities, the degree of connection between working activities of a lorry driver and the territory of each member state and the proportion of the activities compared to the entire service provision in question. Regarding the latter factor, operations involving loading or unloading goods, maintenance or cleaning of the lorries are relevant (provided that they are actually carried out by the driver concerned, not by third parties).

The CJEU also clarifies that the mere fact that a lorry driver, who is posted to work temporarily in and from a Member State, receives their instructions there and starts and finishes the job there is 'not sufficient in itself to consider that that driver is "posted" to that territory, provided that the performance of that driver's work does not have a sufficient connection with that territory on the basis of other factors.'

Finally, it is important to note that the Court provides a helping hand regarding three of the four main types of transport operations, namely transit operations, bilateral operations and cabotage operations. A *transit operation* is defined by the Court as a situation in which 'a driver who, in the course of goods transport by road, merely transits through the territory of a Member State'. To give an example: a Polish truck driver crosses Germany to deliver goods in the Netherlands. The activities in Germany are regarded as a 'transit operation'. A

bilateral operation is defined as a situation in which 'a driver carrying out only cross-border transport operations from the Member State where the transport undertaking is established to the territory of another Member State or vice versa'. To give another example, a Polish truck driver delivers goods in Germany and vice versa. The drivers in those operations cannot be regarded as 'posted' in the sense of the PWD, given the lack of a sufficient connection.

By referring to Article 2(3) and (6) of Regulation No 1072/2009, a *cabotage operation* is defined by the CJEU as 'as national carriage for hire or reward carried out on a temporary basis in a host Member State, in conformity with that regulation, a host Member State being the Member State in which a haulier operates other than the haulier's Member State of establishment'. For example, a Polish lorry driver carries out transport between two venues within Germany. According to the CJEU, these operations do constitute a sufficient connection and thus will the PWD in principle apply to these operations.

In short, the CJEU gives a green light for transit- and bilateral operations and a red light for cabotage operations. The CJEU however remains silent regarding the fourth important road transport operation: cross-trade operations. A *cross-trade operation*s is a situation in which a lorry driver from country A, provides transport between countries B and C. The sufficient connection within these operations should therefore be assessed only on a case-by-case basis.

At large, the judgment of the CJEU is in line with the road transport legislation that has been adopted recently (Directive 2020/1057). This legislation takes the applicability of the PWD to road transport as a starting point and then provides specific conflict rules to which transport operations the PWD does and does not apply. Just like the judgement of the CJEU, this legislation determines that the PWD is not applicable to transit- and bilateral operations, whereas the PWD is applicable to cabotage operations. Cross-trade operations did not get a specific conflicts rule and therefore the application of the PWD has to be assessed on a case-by-case basis, to which the various identified factors by the Court could help.

All in all, the Gordian knot is cut, yet the assessment of the applicability of the PWD to a specific case will raise considerable difficulties, given de wide margin that has been left open and the rather vague relevant factors that the CJEU has identified. Hard and fast rules however seem to be impossible to impose to the highly mobile and volatile labour activities in the sector, and in that regard the

CJEU's choice of a case by case analysis of a sufficient connection seems to be the lesser of two evils.

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Enforcing Consent-to-Jurisdiction Clauses in U.S. Courts

Guest Post by John Coyle, the Reef C. Ivey II Distinguished Professor of Law at the University of North Carolina School of Law

One tried-and-true way of obtaining personal jurisdiction over a foreign person that otherwise lacks minimum contacts with a particular U.S. state is to require the person to agree *ex ante* to a forum selection clause. This strategy only works, however, if the forum selection clause will be enforced by the courts in the chosen state. To date, scholars have written extensively about the enforceability of "outbound" forum selection clauses that redirect litigation from one court to another. They have devoted comparatively less attention to the enforceability of "inbound" forum selection clauses that purport to provide a basis for the chosen court's assertion of personal jurisdiction over a foreign defendant.

In a recent paper, Katherine Richardson and I seek to remedy this deficit. We reviewed 371 published and unpublished cases from the United States where a

state court was asked to assert personal jurisdiction over an out-of-state defendant on the basis of an "inbound" consent-to-jurisdiction clause. In conducting this review, we documented the existence of several different enforcement frameworks across states. The state courts in New York, for example, take a very different approach to determining whether such a clause is enforceable than the state courts in Florida, which in turn take a very different approach to this question than the state courts in Utah.

These differences in enforcement frameworks notwithstanding, we found that consent-to-jurisdiction clauses are routinely given effect. Indeed, our data suggest that such clauses are enforced by state courts approximately 85% of the time. When the courts refuse to enforce these clauses, moreover, they tend to cite just a handful of predictable reasons. First, the courts may refuse to enforce when the clause fails to provide proper *notice* to the defendant of the chosen forum. Second, the courts may conclude that the clause should not be given effect because the parties *lack a connection* to the chosen forum or that litigating in that forum would be *seriously inconvenient*. Third, a clause may go unenforced because it is contrary to the *public policy* of a state with a close connection to the parties and the dispute.

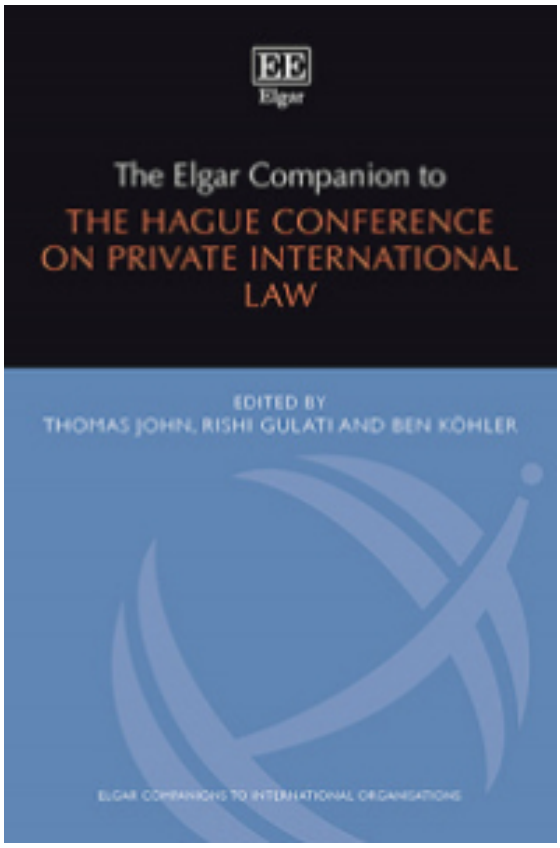
After mapping the relevant terrain, we then proceed to make several proposals for reform. We argue that the courts should generally decline to enforce consent-to-jurisdiction clauses when they are written into contracts of adhesion and deployed against unsophisticated counterparties. We further argue that the courts should decline to enforce such clauses in cases where the defendant was never given notice as to where, exactly, he was consenting to jurisdiction. Finally, we argue that the courts should retain the flexibility to decide whether to dismiss on the basis of *forum non conveniens* even when a forum selection clause specifically names the jurisdiction where the litigation is brought. Each of these reforms would, in our view, produce fairer and more equitable results across a wide range of cases.

Although our research focused primarily on state courts, our reform proposals are

relevant to federal practice as well. Federal courts sitting in diversity are required by Federal Rule of Civil Procedure 4(k)(1)(a) to follow the law of the state in which they sit when they are called upon to determine whether to enforce a consent-to-jurisdiction clause. If a given state were to revise or reform its rules on this topic along the lines set forth above, the federal courts sitting in that state would be obliged to follow suit.

Introduction to the Elgar Companion to the Hague Conference on Private International Law (HCCH) — Part I

The following entry is the first of two parts that provide an introduction to the Elgar Companion to the Hague Conference on Private International Law (HCCH). Together, the parts will offer readers an overview of the structure of the Companion (Part I) as well as of the core themes as they emerged from the 35 Chapters (Part II). Both parts are based on, and draw from, the Editors' Introduction to the Elgar Companion to the HCCH, which Elgar kindly permitted.



Introduction

The Elgar Companion to the HCCH will be launched on 15 December 2020 as part of a 1 h long virtual seminar. The Companion, edited by Thomas John, Dr Rishi Gulati and Dr Ben Koehler, is a unique, unprecedented and comprehensive insight into the HCCH, compiling in one source accessible and thought-provoking contributions on the Organisation's work. Written by some of the world's leading private international lawyers, all of whom have directly or indirectly worked closely with the HCCH, the result is a collection of innovative and reflective contributions, which will inform shaping the future of this important global institution.

The Companion is timely: for more than 125 years, the HCCH has been the premier international organisation mandated to help achieve global consensus on the private international law rules regulating cross-border personal and commercial relationships. The organisation helps to develop dedicated multilateral legal instruments pertaining to personal, family and commercial legal situations that cross national borders and has been, and continues to be, a shining example of the tangible benefits effective and successful multilateralism can yield

for people and businesses globally.

Approach to private international law

The Companion approaches private international law classically, that is, by understanding the subject matter with reference to its three dimensions: jurisdiction, applicable law, and the recognition and enforcement of foreign judgments. But, as the contributions in this work show, since its inception, and in particular since the 1980s, the HCCH has helped to reach international consensus concerning a further, a "fourth" dimension of private international law: cross-border legal cooperation.

In line with this development, and with the firm belief that such cooperation is crucial to the private international law of the 21st century, the Companion has adopted a strong focus on cross-border legal cooperation, including by an increased use of technology. This deliberate choice was fortuitous: the global pandemic is testing the domestic and international justice sector like never before, bringing into sharp focus the often non-existing or still arcane methods prevalent especially in the area of cross-border legal cooperation.

Structure of the Companion

The Companion comprises 35 Chapters that are organised into three Parts.

Part I of the Companion: Institutional perspectives

Part I consists of three Sections. Section 1 considers the HCCH as an international organisation and the contributions trace the development of the Organisation from its inception in 1893 until the present day, including its trajectory towards a truly global organisation. The initial Chapters specifically concern the history of the HCCH; its institutional setting, especially in terms of

the HCCH's privileges and immunities; as well as a contribution on the relationship between the HCCH, and the other two international organisations dealing with international private law issues, i.e., UNCITRAL and UNIDROIT, often also referred to as the HCCH's 'Sister Organisations'.

The following Section is dedicated to the HCCH as an organisation with global reach. The Chapters demonstrate how the HCCH is evolving from an organisation whose membership was historically European-based into an increasingly global institution. The HCCH currently has 86 Members (as of December 2020), comprising 85 States and the EU. Perhaps other Regional Economic Integration Organisations (REIO) may also become members one day, and this should be encouraged. Remarkably, since the turn of the century, the HCCH has added 39 New Members (or 45% of its current membership), including six South American States, two States from North America, one in Oceania, fourteen in Asia, eleven in Europe and five in Africa.[1] Since 3 December, the HCCH has a further Candidate State: Mongolia, which has applied for membership and for which the six-month voting period is now running. Importantly, this Section considers the HCCH's expanded reach, including thoughtful contributions on the organisation's work in Latin America and the Caribbean; Africa; and in the Asia Pacific. The Chapters also reflect on the work of the HCCH's Regional Offices, namely, the Regional Office for Asia and the Pacific (ROAP), which is based in Hong Kong and commenced its work in 2012; as well as the Regional Office for Latin America and the Caribbean (ROLAC), operating out of Buenos Aires since 2005.

Part I's final Section looks at the HCCH as a driver of private international law. The Chapters contain stimulating contributions concerning some of the contemporary philosophical dimensions of private international law as shaped by globalisation, and the ways in which the HCCH can be understood in this context; the role the Organisation can play in shaping private international law into the future; considering whether the 2015 Choice of Law Principles establish a good framework for regulatory competition in contract law; what role the HCCH can play in further strengthening legal cooperation across borders; and the concept of *public order*, including its relationship with mandatory law.

Part II of the Companion: Current

instruments

Part II of the Companion concerns contributions on existing HCCH instruments. It traces the evolution, implementation, and effectiveness of each of those instruments, and looks forward in terms of how improvements may be achieved. The contributors not only provide a record of the organisation's successes and achievements, but also provide a critical analysis of the HCCH's current work. They canvassed the traditional tripartite of private international law, including forum selection, choice of law and the recognition and enforcement of judgments. In addition, they also provided their thoughts on the fourth dimension of private international law, i.e. cross-border legal cooperation, tracing the pioneering, as well as championing, role of the HCCH in this regard, resulting in cooperation being a quintessential feature, in particular of more modern conventions, developed and adopted by the HCCH.

Part II is organised following the three pillars of the HCCH: (1) family law; (2) international civil procedure, cross-border litigation and legal cooperation; and (3) commercial and financial law.

The first Section of Part II addresses HCCH instruments in the family law sphere. Contributions include an analysis of the HCCH and its instruments relating to marriage; the 1980 Child Abduction Convention; the 1993 Intercountry Adoption Convention; a Chapter on the challenges posed by the 1996 Child Protection Convention in South America; the 2000 Adult Protection Convention; a contribution on HCCH instruments in the area of maintenance Obligations; the work of the HCCH in the field of mediation in international children's cases; and a contribution overviewing the interaction between various HCCH instruments concerning child protection.

The second Section concerns HCCH instruments that are some of its major successes. But as the Chapters show, more work needs to be done given the ever-increasing cross-border movement of goods, services and people, and the need to better incorporate the use of technology in cross border legal cooperation. Contributions concern the 1961 Apostille Convention; the 1965 Service and 1970 Evidence Conventions; the 2005 Choice of Court Convention; and finally, the 2019 Judgments Convention which was decades in the making.

The final Section in Part II consists of contributions on HCCH commercial and

finance instruments. Contributions specifically focus on the 1985 Trusts Convention; the 2006 Securities Convention; and the 2015 Choice of Law Principles, which constitute a soft law instrument demonstrating versatility in the kind of instruments HCCH has helped negotiate.

Part III – Current and possible future priorities

Part III of the Companion consists of Chapters that discuss the substantive development of private international law focusing on current and possible future priorities for the HCCH. In that regard, this Companion seeks to bridge the HCCH's past and its future.

The first Section focuses on current priorities. It consists of contributions on a highly difficult and sensitive area of international family law, i.e. parentage and international surrogacy and how the HCCH may assist with its consensual solutions; how the HCCH may play a global governance role in the area of the protection of international tourists; and how the exercise of civil jurisdiction can be regulated. Specifically, this Chapter shows how the doctrine of *forum non conveniens* is increasingly being influenced by access to justice considerations, a matter borne out by comparative analysis.

The second Section of Part III, and of the Companion, contemplates possible future priorities for the HCCH. Contributions concern how private international law rules ought to be developed in the context of FinTech; what role the HCCH may play in setting out the private international law rules in the sphere of international commercial arbitration; how the digitisation of legal cooperation ought to reshape the fourth dimension of private international law; the potential development of special private international law rules in the context of complex contractual relationships; how the HCCH can engage with and embrace modern information technology in terms of the development of private international law; and finally, what role there is for the HCCH in developing a regulatory regime for highly mobile international employees. It is hoped that in addition to providing ideas on how progress may be made on its current priorities, the contributions in Part III can also provide a basis for the HCCH's future work.

Concluding remarks and outlook

The editors, who collaboratively prepared this entry, chose this structure for the Companion to provide the reader with an easy access to a complex organisation that does complex work. The structure also makes accessible the span of time the Companion bridges, chronicling the HCCH's history, reaching back to 1893, while looking forward into its future.

The second entry on Conflict-of-Laws.net will outline the editor's reflections on the 35 Chapters, drawing out some of the key themes that emerged from the Companion, including the HCCH's contribution to access to justice and multilateralism.

[1] HCCH, 'Members & Parties' <https://www.hcch.net/en/states> accessed 6 December 2020. The latest Member State is Nicaragua for which the Statute of the HCCH entered into force on 21 October 2020.

Report on the ERA conference of 29-30 October 2020 on 'Recent Developments in the European Law of Civil Procedure'

This report has been prepared by Carlos Santaló Goris, a researcher at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, and Ph.D. candidate at the University of Luxembourg.

On 29-30 October 2020, ERA – the Academy of European Law – organized a conference on "Recent Developments in the European Law of Civil Procedure", offering a comprehensive overview of civil procedural matters at the European and global level. The program proved very successful in conveying the status quo

of, but also a prospective outlook on, the topics that currently characterise the debates on cross-border civil procedure, including the Brussels I-bis Regulation and 2019 HCCH Judgments Convention, the digitalisation of access to justice, the recent developments on cross-border service of documents and taking of evidence, and judicial cooperation in civil and commercial matters in the aftermath of Brexit.

For those who did not have the opportunity to attend this fruitful conference, this report offers a succinct overview of the topics and ideas exchanged over this two-day event.

Day 1: The Brussels I (Recast) and Beyond

The Brussels regime, its core notions and the recent contributions by the CJEU via its jurisprudence were the focus of the first panel. In this framework, Cristina M. Mariottini (Max Planck Institute Luxembourg) tackled the core notion of civil and commercial matters (Art. 1(1)) under the Brussels I-bis Regulation. Relying, in particular, on recent CJEU judgments, among which C-551/15, *Pula Parking*; C-308/17, *Kuhn*; C-186/19, *Supreme Site Services*, she reconstructed the functional test elaborated by the CJEU in this area of the law, shedding the light on the impact of recent developments in the jurisprudence of the Court, i.a., with respect to immunity claims raised by international organizations.

Marta Pertegás Sender (Maastricht University and University of Antwerp) proceeded then with a comprehensive overview of the choice-of-court agreement regimes under the Brussels I-bis Regulation and the 2005 Hague Convention on choice of court agreements. Relying, inter alia, on the CJEU case law on Article 25 of the Brussels I-bis Regulation (C-352/13, *CDC Hydrogen*; C-595/17, *Apple Sales*; C-803/18, *Balta*; C-500/18, *AU v. Reliantco*; C-59/19, *Wikingerhof* (pending)), she highlighted the theoretical and practical benefits of party autonomy in the field of civil and commercial matters.

The interface between the Brussels I-bis Regulation and arbitration, and the boundaries of the arbitration exclusion in the Regulation, were the focus of Patrick Thieffry (International Arbitrator; Member of the Paris and New York Bars) in his presentation. In doing so he analysed several seminal cases in that subject area (C-190/89, *Marc Rich*; C-391/95, *Van Uden*; C-185/07, *West Tankers*; C?536/13, *Gazprom*), exploring whether possible changes were brought about by

the Brussels I-bis Regulation.

The evolution of the CJEU's jurisprudence vis-à-vis the notions of contractual and non-contractual obligations were at the heart of the presentation delivered by Alexander Layton (Barrister, Twenty Essex; Visiting Professor at King's College, London). As Mr Layton effectively illustrated, the CJEU's jurisprudence in this field is characterized by two periods marking different interpretative patterns: while, until 2017, the CJEU tended to interpret the concept of contractual matters restrictively, holding that "all actions which seek to establish the liability of a defendant and which are not related to a contract" fall within the concept of tort (C-189/87, *Kalfelis*), the Court interpretation subsequently steered towards an increased flexibility in the concept of "matters relating to a contract" (C-249/16, *Kareda*; C-200/19, *INA*).

The principle of mutual trust of the European Area of Freedom, Security and Justice vis-à-vis the recent Polish judicial reform (and its consequential backlash on the rule of law) was the object of the presentation delivered by Agnieszka Fr?ckowiak-Adamska (University of Wroc?aw). Shedding the light on the complex status quo, which is characterized by several infringement actions initiated by the European Commission (C?192/18, *Commission v Poland*; C?619/18, *Commission v Poland*; C?791/19 R, Commission v Poland (provisional measures)) as well as CJEU case law (e.g. C?216/18 PPU, *Minister for Justice and Equality v LM*), Ms Fr?ckowiak-Adamska also expounded on the decentralised remedies that may be pursued by national courts in accordance with the EU civil procedural instruments, among which public policy, where available, and refusal by national courts to qualify Polish judgments as "judgments" pursuant to those instruments.

The second half of the first day was dedicated to the 2019 HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. In this context, it is of note that the EU, among others, has opened a Public Consultation into a possible accession to the Convention (see, esp., Thomas John's posting announcing the EU's public consultation). While Ning Zhao (Senior Legal Officer, HCCH) gave an overview of the *travaux preparatoires* of the 2019 HCCH Convention and of the main features of this instrument, Matthias Weller (University of Bonn) delved into the system for the global circulation of judgments implemented with the Convention, highlighting its traditional but also innovative

features and its potential contributions, in particular to cross-border dealings.

The roundtable that followed offered the opportunity to further expound on the 2019 HCCH Judgments Convention. Namely, Norel Rosner (Legal and Policy Officer, Civil Justice, DG for Justice and Consumers, European Commission) explained that the EU has a positive position towards the Convention, notably because it facilitates the recognition and enforcement of EU judgments in third countries and because it will help create a more coherent system of recognition and enforcement in the EU Member States of judgments rendered in other (of course, non-EU) Contracting States. The roundtable also examined the features and objectives of Article 29, which puts forth an "opt-out" mechanism that allows Contracting States to mutually exclude treaty obligations with those Contracting States with which they are reluctant to entertain the relations that would otherwise arise from the Convention. As Ms Mariottini observed, this provision – which combines established and unique characters compared to the systems put forth under the previous HCCH Conventions – contributes to defining the "territorial geometry" of the Convention: it enshrines a mechanism that counterbalances the unrestricted openness that would otherwise stem from the universality of the Convention, and is a valuable means to increase the likelihood of adherence to the Convention. Matthias Weller proceeded then to explore the consequences of limiting a Contracting State's objection window to 12 months from adherence to the Convention by the other Contracting State and raised the case of a Contracting State whose circumstances change so dramatically, beyond the 12-month window, that it is no longer possible to assure judicial independence of its judiciary. In his view, solutions as the ones proposed by Ms Fr?ckowiak-Adamska for the EU civil procedural instruments may also apply in such circumstances.

Day 2: European Civil Procedure 4.0.

Georg Haibach (Legal and Policy Officer, Civil Justice, DG for Justice and Consumers, European Commission), opened the second day of the conference with a detailed presentation on the ongoing recast of the Service Regulation (Regulation (EC) No 1393/2007). Emphasizing that the main objective of this

reform focuses on digitalization – including the fact that the proposed recast prioritises the electronic transmission of documents – Mr Haibach also shed the light on other notable innovations, such as the possibility of investigating the defendant's address.

The Evidence Regulation (Council Regulation No. 1206/2001), which is also in the process of being reformed, was at the core of the presentation delivered by Pavel Simon (Judge at the Supreme Court of the Czech Republic, Brno) who focuses not only on the status quo of the Regulation as interpreted by the CJEU (C-283/09, Wery?ski; C-332/11, ProRail; C-170/11, Lippens), but also tackled the current proposals for a reform: while such proposals do not appear to bring major substantive changes to the Regulation, they do suggest technological improvements, for instance favouring the use of videoconference.

In her presentation, Xandra Kramer (University of Rotterdam and Utrecht University) analysed thoroughly two of the CJEU judgments on "satellite" instruments of the Brussels I-bis Regulation: the EAPO Regulation (Regulation No. 655/2014); and the EPO Regulation (Regulation No. 1896/2006). C-555/18, was the very first judgment that the CJEU rendered on the EAPO Regulation. Xandra Kramer remarked the underuse of this instrument. In the second part of her lecture, she identified two trends in the judgments on the EPO Regulation (C?21/17, Caitlin Europe; Joined Cases C?119/13 and C?120/13, ecosmetics; Joined Cases C?453/18 and C?494/18, Bondora), observing that the CJEU tries, on the one hand, to preserve the efficiency of the EPO Regulation, while at the same time seeking to assure an adequate protection of the debtor's position.

In the last presentation of the second day, Helena Raulus (Head of Brussels Office, UK Law Societies) explored the future judicial cooperation in civil matters between the EU and the United Kingdom in the post-Brexit scenario. Ms Raulus foresaw two potential long-term solutions for the relationship: namely, relying either on the 2019 Hague Convention, or on the Lugano Convention. In her view, the 2019 Hague Convention would not fully answer the future challenges of potential cross-border claims between EU Member States and the UK: it only covers recognition and enforcement, while several critical subject areas are excluded (e.g. IP-rights claims); and above all, from a more practical perspective, it is still an untested instrument. Ms Raulus affirmed that the UK's possible adherence to the Lugano Convention is the most welcomed solution among English practitioners. Whereas this solution has already received the green light

from the non-EU Contracting States to the Lugano Convention (Iceland, Norway, and Switzerland), she remarked that to date the EU has not adopted a position in this regard.

The conference closed with a second roundtable, which resumed the discussions on the future relations between the EU and the UK on judicial cooperation in civil law matters. Christophe Bernasconi (Secretary General, HCCH) offered an exhaustive review on the impact of the UK withdrawal from the EU on all the existing HCCH Conventions. From his side, Alexander Layton wondered if it might be possible to apply the pre-existing bilateral treaties between some EU Member States and the UK: in his view, those treaties still have a vestigial existence in those matters non-covered by the Brussels I-bis Regulation, and thus they were not fully succeeded. In Helena Raulus's view, such treaties would raise competence issues, since the negotiating of such treaties falls exclusively with the EU (as the CJEU found in its Opinion 1/03). As Ms Raulus observed, eventually attempts to re-establish bilateral treaties between the Member States and the UK might trigger infringement proceedings by the Commission against those Member States. The discussion concluded by addressing the 2005 Hague Convention and it is applicability to the UK after the end of the transition period.

Overall, this two-day event was characterized by a thematic and systematic approach to the major issues that characterize the current debate in the area of judicial cooperation in civil and commercial matters, both at the EU and global level. By providing the opportunity to hear, from renowned experts, on both the theoretical and practical questions that arise in this context, it offered its audience direct access to highly qualified insight and knowledge.

Online Symposium on Private International Law in Nigeria

The editors of Afronomicslaw.org have invited Dr. Chukwuma Okoli and Professor Richard Frimpong Oppong to organise a symposium on Private International Law

in Nigeria. The purpose of the symposium is to discuss important issues on the subject of private international law in Nigeria with principal reference to Chukwuma and Richard's recent pioneer work on the subject that was published under the *Hart Studies in Private International Law.* Drawing on over five hundred Nigerian cases, relevant statutes, and academic commentaries, the book examines the rules, principles, and doctrines in Nigerian law for resolving cases involving cross-border issues. It is the first book-length treatise devoted to the full spectrum of private international law issues in Nigeria.

Four papers have now been selected for the symposium, which will first be published in Afronomicslaw.org sometime in December this year, and later in conflictoflaws.net, where Chukwuma is an editor. The names of the persons presenting are Dr. Abubakri Yekini (Lecturer in Law at Lagos State University, Nigeria), Orji Uka (Senior Associate at African Law Practice, Nigeria), Anthony Kennedy (Associate Member of Serle Court, England), and Richard Mlambe (Lecturer in Law at University of Malawi – Polytechnic).

Cross Border Dispute Resolution under AfCFTA: A Call for the Establishment of a Pan-African Harmonised Private International Legal Regime to Actualise Agenda 2063*

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Introduction

Over three score and ten years ago, Professor G. C. Cheshire, then Vinerian Professor of Law at the University of Oxford, issued a clarion call for the wider study of private international law in general and the renaissance of English private international law in particular.[1] As explored below, it is pertinent for African States to respond to that call today, especially within the context of the need to actualise the Agenda 2063 of the African Union, which aims for the establishment of a continental market with the free movement of persons, goods and services which are crucial for deepening economic integration and promoting economic development in Africa.

The Agreement establishing African Continental Free Trade Area

In January 2012, the 18th Ordinary Session of the Assembly of Heads of State and Government of the African Union, which held in Addis Ababa – Ethiopia, adopted a decision to establish an Africa wide Continental Free Trade Area. On 30th May 2019, the Agreement establishing the African Continental Free Trade Area ("AfCFTA"), entered into force.[2] With an expected participation of 55 countries, a combined population in excess of 1.3 billion people and a combined Gross Domestic Product (GDP) of over $2.5 trillion, the AfCFTA will be the largest trade area since the formation of the World Trade Organisation (WTO) in 1995.

Despite the benefits that the AfCFTA is widely expected to bring, Nigeria curiously delayed at first in signing the Agreement. Thankfully, reason ultimately prevailed and Nigerian signed the agreement at the 12th Extraordinary Session of the African Union (AU) Heads of State and Government held in Niamey, Niger. Very recently, the Federal Executive Council of Nigeria has also taken the decision to ratify the AfCFTA. What is now left is for the Nigerian National Assembly to domesticate the Agreement as required by the Nigerian Constitution.

It is pertinent to note that although the AfCFTA has justifiably received – and continues to receive – wide publicity, what is seldom talked about is that the Agreement is only a part of a larger long term plan, christened Agenda 2063, to ultimately establish an African Economic Community with a single Custom Union and a single common market to "accelerate the political and socio-economic integration of the continent" in accordance with Article 3 of the AU's Constitutive Act.[3]

The case for Harmonisation

The economic integration and the concomitant growth in international relationships that are sure to result from these integration efforts will undoubtedly lead to a rise in cross border disputes, which call for resolution using the instrumentality of private international law. When, not if, these disputes arise, questions such as what courts have jurisdiction, what law(s) should apply, and whether a judgment of the courts of one member State will be recognised and enforced by the courts of the other member States, are just some of the key questions that will arise.[4]In the words of Professor Richard Frimpong Oppong, a well-developed and harmonised private international law regime is an indispensable element in any economic community.[5]Curiously however, the role of private international law in facilitating and sustaining the on-going African economic integration efforts is conspicuously missing.[6]

It is against this backdrop that this writer joins others in calling for the establishment of a pan-African harmonised private international legal regime as an instrument of economic development in general and as part of the modalities for the actualisation of Agenda 2063 in particular. Incidentally, one of the first of such calls predates the adoption of the decision to establish the AfCFTA. As far back as 2006, Professor Oppong had argued that given the significant divergence in the approaches to the subject of private international law in Africa, if the idea of a common market is to materialise, African countries must embark on a comprehensive look at, and reform of, the regime of private international law.[7]He specifically stressed the need for harmonised private international law rules to govern the operation of the divergent national substantive rules.[8]Very recently, Lise Theunissen has stated, and rightly too, that the non-harmonised state of private international law in Africa forms an important obstacle to

international trade and to cross-border economic transactions and that for this reason, it is crucial for the African economic integration to strive for a harmonisation of private international law.[9]Beyond these, harmonisation has other benefits.

It has been argued that harmonisation helps promote equal treatment and protection of citizens of an economic community as well as other economic actors transacting or litigating in the internal market by subjecting them to a uniform and certain legal regime.[10]As the learned authors of *Dicey, Morris and Collins, The Conflict of Laws* observed, part of the rationale behind the EU Judgments Regulation and its predecessor Convention is, "to avoid as far as possible the multiplication of the bases of jurisdiction in relation to the same legal relationship and to reinforce legal protection by allowing the plaintiff easily to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued".[11]Accordingly, it has been said that harmonisation boosts certainty in the law, thus reducing transaction and litigation costs for economic actors within the Community.[12]Africa is in dire need of this certainty.

Potential Challenges to Harmonisation

This writer is not unmindful of the challenges that such a project will pose especially having regard to the diverse legal traditions in Africa; the underdeveloped nature of the subject of private international law in Africa;[13]and the diversity of approach to the question.[14]These challenges are however not insurmountable. Thankfully, there are precedents and successful examples that the relevant actors can point to, for inspiration. And the first that readily comes to mind is the well-established harmonised private international law system applicable within the European Union. There are also other examples like the Organisation of American States with its Inter-American Conference on Private International Law. Similarly, within the Common Market of the Southern Cone (MECOSUR) [comprising Argentina, Brazil, Uruguay, and Paraguay] Article 1 of the Asuncion Treaty 1991 expressly recognises the 'harmonization of legislation in relevant areas' as cardinal to the strengthening of their stated integration process.

Recommendation on the Modalities for Harmonisation

In considering the above examples, however, the question must be asked whether it is desirable to import, for instance, the tried and tested European Union private international law model into Africa or whether it is necessary to develop an autochthonous private international law system that responds to the socio-economic, cultural, and political interests of countries in Africa. In my view, the answer is in the question. It is pertinent to state at this juncture that what this writer advocates at this stage is the harmonisation of the private international law rules of the various member states in the African Union as opposed to the unification of the substantive laws which is the subject of other efforts, a case in point being the Organisation for the Harmonization of Commercial Law in Africa (OHADA).

Lise Theunissen[15]has very helpfully recommended a four-pronged approach to tackling the issue of the underdeveloped and non-harmonised state of private international law in the African Union as follows – (i) sensitization of national courts and the enlargement of regional economic community courts to ensure a harmonised and authoritative interpretation to relevant private international law legislation; (ii) a methodical continent wide engagement effort including the establishment of a private international law orientated body under the African Economic Community; (iii) the ratification of international conventions by African Union member states for instance the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters; and (iv) the exploration of a potential collaboration with non-State actors for instance the Research Centre for Private International Law in Emerging Countries at the University of Johannesburg. At the very least, these suggestions deserve to be accorded close consideration.

Before now, Oppong had equally suggested the establishment of a specialised body with the specific mandate to deal with private international law regime. He also advocated for the establishment of a court empowered to provide authoritative and final interpretation of the unified rules of private international

law and the entrenchment of the principle of mutual trust and respect by all African Union member states of each other's national judicial competence.[16]Above all, urgent steps must be taken to elicit the requisite political will and obtain the institutional support necessary to actualise the harmonised rules of private international law in Africa. As a starting point, however, this paper calls for the immediate convocation of an Inter-African Conference on Private International Law.

Conclusion

Despite the enormous challenges that is sure to militate against the harmonisation of the private international law rules in a divergent community like Africa, the general belief is that the African Union and the people of Africa stand a better chance to actualise the aims of establishing a common market, deepening economic integration and promoting economic development in Africa with a harmonised private international legal regime. Since Professor Cheshire issued his clarion call in 1947, European courts, lawyers and academics have largely heeded the call, but the same cannot be said of their African counterparts. The best time to have heeded the call was in 1947, the next best time is now.

*This Paper was first published in Law Digest Journal Spring 2020

[1]G. C. Cheshire 'Plea for a Wider Study of Private International Law' (1947) Intl L Q 14.

[2]African Union, Agreement establishing the African Continental Free Trade Area, available at https://au.int/en/treaties/agreement–establishing–african–continental–free–trade–arealast accessed on 14 February 2020.

[3]African Union, Constitutive Act of the African Union, available at https://au.int/en/treaties/constitutive–act–african–unionlast accessed on 14 February 2020.

[4]Chukwuma Okoli, 'Private International Law in Africa: Comparative Lessons' available at http://conflictoflaws.net/2019/private–international–law–in–africa–comparative–lessons/last accessed on 15 February 2020.

[5]Richard Frimpong Oppong, 'Private International Law and the African Economic Community: A Plea for Greater Attention' The International and Comparative Law Quarterly, Vol. 55, No. 4 (Oct., 2006), Cambridge University Press pp.911-928 available at https://www.jstor.org/stable/4092623

[6]Richard Frimpong Oppong, (n 5 above).

[7] Richard Frimpong Oppong, (n 5 above).

[8]Richard Frimpong Oppong, (n 5 above).

[9]Lise Theunissen, 'Harmonisation of Private International Law in the African Union' available at https://www.afronomicslaw.org/2020/02/08/harmonisation–of–private–international–law–in–theafrican–union/accessed on 15 February 2020.

[10]Richard Frimpong Oppong, (n 5 above). See also A. Dickinson, "Legal Certainty and the Brussels Convention Too Much of a Good Thing?" in Pascal de Vareilles-Sommieres (ed), *Forum Shopping in the European Judicial Area* (Oxford, Hart Publishing, 2007), ch 6.

[11]L Collins (gen ed), *Dicey, Morris and Collins, The Conflict of Laws* (London, Sweet and Maxwell, 14th edn, 2006), observed at para 11-062.

[12]Richard Frimpong Oppong, (n 5 above).

[13]Chukwuma Okoli on his part believes that there has been significant progress and that is a growing interest in the study of private international law in Africa. See Chukwuma Okoli, 'Private International Law in Africa: Comparative Lessons' available at http://conflictoflaws.net/2019/private–internationallaw–in–africa–comparative–lessons/accessed on 15 February 2020. While this is true, he must however acknowledge that there is still a lot of room for improvement.

[14]In this regard, Lise Theunissen, (n 8 above) has lamented the lack of any

efforts to establish a private international law orientated body under the African Economic Community, despite the necessity and urgent need for same.

[15]Lise Theunissen, (n 8 above).

[16]Richard Frimpong Oppong, (n 5 above).

How Chinese Courts Tackle Parallel Proceeding Issues When Offshore Arbitration Proceeding Is Involved?

(The following case comment is written by Chen Zhi, a PhD candidate at the University of Macau?

The parallel proceeding is a long-debated issue in International Private Law, by which parties to one dispute file two or more separate dispute resolution proceedings regarding the same or similar problems. Such parallel proceedings will increase the cost and burdensome of dispute resolution, and probably result in the risk of conflicting judgements, undermining the certainty and integrity of it. In the field of international civil and commercial litigation, parallel proceeding issue is always subject to domestic civil procedure rules or principles like lis pendens, res judicata and forum non-convenience, while the problem may be complicated when arbitration proceeding is involved. According to the New York

Convention, state court which seizes the dispute has an obligation to refer the case to arbitration at the party's request, except in case the arbitration agreement is void, inoperable or unable to be performed. Nonetheless, the New York Convention does not address the standards for the validity of arbitration agreement nor the scope of judicial review on such agreement. In particular, it is silent on the scenario where the validity of the same arbitration agreement is filed before the judges and arbitrators simultaneously. This problem can be exacerbated when the court seizure of the issue concerning validity of arbitration agreement is not the court in the place of the seat of arbitration, which in principle does not have the power to put final words on this issue.i

Some jurisdictions are inclined to employ an arbitration-friendly approach called prima facies review, by which the court will constrain from conducting a full review on the substantive facts and legal matters of the case before the tribunal decide on the jurisdictional issues, and grant a stay of litigation proceeding accordingly. This approach derives from a widely accepted principle across the world called "competence-competence" which endows the tribunal with the power to decide on its jurisdiction.ii Admittedly, prima facies review is not a corollary of the competence-competence principle. Still, it was instead thought to maximize the utility of competence-competence and enhance the efficiency of arbitration by minimizing the judicial intervention beforehand.

However, some jurisdictions like Mainland China do not employ a prima facies review, and they are reluctant to acknowledge tribunal's priority in deciding jurisdiction issue, irrespective of the fact that the seat is outside their territories. This article aims to give a brief introduction on the most recent case decided by the Supreme People's Court (hereinafter as SPC), and discuss how Chinese courts would like to tackle parallel proceeding.

Case Information

Keep Bright Limited?Appellant?v. SuperAuto Investments Limited and others 2013 Min Zhong Zi No. 3 (hereinafter as Keep Bright Case), decided on 20 December 2018.

Facts and background

The dispute regards four parties, among which two major ones are companies both incorporated in the British Virgin Islands: Keep Bright Limited and SuperAuto Investments Limited (hereinafter as K and S respectively). All parties signed a Letter of Intent (LOI) on 12 April 2006 regarding a complicated transaction which involved two main parts; the first part is the transfer all share of S's Hong Kong based 100% subsidiary to K, the second part is the transfer of

title of a real estate located in Zhuhai, Guangdong Province. The LOI stipulated that it shall be governed by and construed according to the Hong Kong law, while the dispute resolution clause provided that any dispute arises from the LOI can be referred to either arbitration in Hong Kong or litigation in the location of the asset.

Following the conclusion of the contract, both K and S were dissatisfied with the performance of the LOI and commenced separate dispute resolution proceedings. K initiated an arbitration before the Hong Kong International Arbitration Center (HKIAC) in March of 2010, while S filed a lawsuit against H and other parties before the Guangdong Provincial Court in April of the same year. Following two partial awards in 2011 and 2012, the HKIAC tribunal concluded the proceeding through rendering a final award in 2014, and K subsequently sought for enforcement of the awards which was granted by the Hong Kong Court of First Instance in 2015.

The litigation proceeding in Guangdong Court, instead, was still ongoing during the arbitration in Hong Kong, and for this reason, in 2011 K applied for a stay of litigation proceeding due to ongoing arbitration concerning the same matter in Hong Kong before the court, but the latter dismissed such request. The Guangdong Court issued its judgment on August 2012 which was contradictory with the awards given by the HKIAC, by using laws of Mainland China as the governing law by reason of failure to identify relating Hong Kong laws under the choice-of-law clause of LOI. The case was then appealed to the SPC, leaving two main issues to be decided: first, whether the Guangdong Court's rejection to the stay of proceeding constituted a procedural error, and second, whether the Guangdong Court has wrongfully applied the law of Mainland China instead of the Hong Kong law.

The decision of the SPC

As for the first issue, SPC decided that parallel proceeding phenomenon shall not prejudice the jurisdiction of courts in Mainland China, except in case the arbitration awards rendered offshore has been recognized in China already. Therefore, it is proper for the Guangdong Court to continue litigation proceeding irrespective of the ongoing arbitration in Hong Kong. The SPC also noted in its final decision that H did not raise an objection to jurisdiction before the court based on the arbitration agreement.

As for the second issue, the SPC found that Guangdong Court was in error in the application of law and overturned the substantive part of the Guangdong Court's decision, making the judgment in line with awards in Hong Kong.

Comment

By the above decision of the SPC, it's clear that courts are in no position to decide on the stay of proceeding despite a pending arbitration outside the territory of Mainland China, with one exception that is the case of arbitration proceeding concluded, recognized and ready to be or already under enforced by Chinese courts. This approach is in line with the stipulation of the SPC's Judicial Interpretation on Civil Procedural Law in 2015 which tackle parallel proceedings where parties have filed other litigation proceeding before courts other than Mainland China regarding the same or identical dispute. iii Though the Judicial Interpretation does not cover parallel proceeding involving arbitration, the Keep Bright Case reveals that it makes no difference. There is no comity obligation for arbitration.

Moreover, though no objection to jurisdiction was raised in Keep Bright, it is safe to conclude that Chinese courts would likely grant arbitration tribunals the priority to decide on the jurisdiction issue, even when they are not the court in the place as the seat of arbitration, which, per the New York Convention, should have no power to put the final word on the effectiveness of arbitral agreement or award. As per another case ruled in 2019, a court in Hubei Province refused to recognize and enforce a Hong Kong seated arbitral award based on the reason that court in Mainland China had decided otherwise on the jurisdictional issue, by which the recognition of such an award would constitute a breach of public policy.iv

In a nutshell, Chinese courts' approach to coping with parallel proceeding is far from pro-arbitration, contrary to other arbitration-friendly jurisdictions like England, Singapore, France and Hong Kong SAR. Admittedly, effective negative approach is not a standard fits for all circumstances, and it may cause prejudice to the parties when the enforcement of arbitration agreement is burdensome (in particular, boiler-plate arbitration clauses in consumer agreement which are intendedly designed by the party with more substantial bargain power for circumvention of judicial proceeding). Nonetheless, in the circumstances like the Keep Bright, proceeding with two parallel processes at the same time could be oppressive to the parties' rights. It could likely create uncertainty through conflicting results (which occurred in Keep Bright itself). With this respect, the negative effective approach seems to be the best approach to keep dispute resolutions cost and time-efficient.

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i, As per Article 5.1(a) of New York Convention, which stipulates that validity of arbitration agreement shall be subject to the law chosen by parties, failing which shall be subject to the law of the country where the award was made (arbitration seat), see also Article 6 of New York Convention which said that the enforcing court may stay the enforcement proceeding if the setting aside application is seized by competent court.

ii, For instance, English Court of Appeal stated in landmark Fiona Turst that: "[…]that it is contemplated by the Act that it will, in general, be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute". Fiona Trust & Holding Corp v Privalov [2007] EWCA Civ 20, at 34. See also judicial opinions by court of Singapore in Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals [2015] SGCA 57 , court of Hong Kong PCCW Global Ltd v Interactive Communications Service Ltd [2007] 1 HKLRD 309, and France court in Société Coprodag et autre c Dame Bohin, Cour de Cassation, 10 May 1995 (1995?

iii, See the controversial Article 533 of SPC's Interpretation on Application of Civil Procedure Law(adopted in 2015) ,which stipulates that: "Where both the courts of the People's Republic of China and the courts of a foreign country have jurisdiction, the People's Court may accept a case in which one party files a lawsuit in a foreign court and the other party files a lawsuit in a court of the People's Republic of China. After the judgment has been rendered, no application by a foreign court or request by a party to the case to the People's Court for recognition and enforcement of the judgment or ruling made by a foreign court in the case shall be granted, unless otherwise provided in an international treaty to which both parties are parties or to which they are parties. If the judgment or ruling of a foreign court has been recognized by the people's court, the people's court shall not accept the case if the parties concerned have filed a lawsuit with the people's court in respect of the same dispute."

iv, See the decision of Yichang Intermediate Court on Automotive Gate FZCO's application for recognition and enforcement of arbitral award in Hong Kong SAR, 2015 E Yi Zhong Min Ren No. 00002, in which the court rejected to enforce a HKIAC award on the basis that the award rendered in 2013 is contradictory with Shijiazhuang Intermediate Court's ruling on the invalidity of arbitration agreement, which amounted to a breach of public policy in Mainland China, though the ruling was made five year later than the disputed award.