Which Law Governs Subject Matter Arbitrability in International Commercial Disputes?

*Written by Kamakshi Puri**[1]***

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

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

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

"*which system of law governs the issue of determining subject matter arbitrability at the pre-award stage? Is it the law of the seat or the proper law of the*

arbitration agreement?"

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

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

Singapore General Court Decision on Pre-award Arbitrability

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

At the outset, the SGHC noted that the issue of arbitrability was relevant at both initial and terminal stages. While at the initial stage, non-arbitrable subject matter rendered arbitration agreements *inoperative* or *incapable of being performed*, at the terminal stage, non-arbitrability rendered the award liable to be set aside or refused enforcement. Since at the post-award stage, arbitrability

would be determined by the enforcing court applying their own public policy, the lacuna in the law was limited to the issue of subject matter arbitrability at the pre-award stage.

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

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

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

Accordingly, the SGHC held that oppression and mismanagement disputes were

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

Appeal before the Singapore Court of Appeal

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

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

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

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

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

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

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

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

Anti-Enforcement Injunction by the Bombay High Court

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

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

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

Concluding Thoughts

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

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

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

Written by Seung Chan Rhee and Alan Zheng

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

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

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

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

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

Background

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

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

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

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

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

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

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

First Instance

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

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

Carnival appealed.

Full Court

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

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

The passengers appealed to the High Court.

The Interaction between a Mandatory Law and an Exclusive Jurisdiction Clause

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

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

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

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

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

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

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

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

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

Nevertheless, as the appellants pointed out (relying on drafting history), 'when the unfair contract terms legislation was first introduced … s 5(1) was specifically amended to apply to those provisions' (See Appellant's Written Submissions, p. 6). It is therefore apparent how the statutist approach invites a certain level of textual skirmishing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Judgment is reserved in the High Court.

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Asian Private International Law Academy Conference 2023 on 9 and 10 December

The Asian Private International Law Academy (APILA) will be holding its second conference at Doshisha University, Kyoto, on 9 and 10 December 2023. The keynote addresses will be delivered by Professor Emerita Linda Silberman on 9 December and Professor Gerald Goldstein on 10 December. The first day of the conference will comprise presentation and discussion of works-in-progress. The conference will devote most of 10 December to discussion and finalisation of the Asian Principles on Private International Law (APPIL) on three topics: (1) recognition and enforcement of foreign judgments, (2) direct jurisdiction, and (3) general choice of law rules. Persons interested in attending or wishing further information should email ***reyes.anselmo@gmail.com*** to that effect. Please note that, while APILA can assist attendees by issuing letters of invitations in support of Japanese visa applications, APILA's available funding is limited. In the normal course of events, APILA regrets that it will not be able to provide funding for travel and accommodation expenses.

JIIART Online Seminar on Use of ADR in Insolvency: Saturday 21 October

The Japanese Institute for International Arbitration Research and Training (JIIART) will be holding an online seminar investigating use of alternative dispute resolution mechanisms in insolvency this Saturday 21 October 2023 at 14:00-16:00 Japan Standard Time. The event is free to attend but registration is required. You may register here. Details of the programme and speakers can be found in the event poster.

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Japan Institute for International Arbitration Research and Training
https://www.jiiart.com/

5th Online Seminar

Co-hosted and finacially supported by
the Institute of Comparative Law in Japan (Chuo University)
and its Research Fund

Saturday, Oct. 21, 2023, 14:00-16:00 (JST)
Webinar (Zoom)

Simultaneous translation from English to Japanese

Fee-free, Registration required
https://bit.ly/46cEKgz

Program:

14:00-14:40 Welcome and opening remarks
"Avenues for Putting ADR to Use in Bankruptcy"
JIIART Chairperson: Shin-Ichiro Abe

14:40-14:50 Coffee break

14:50-16:00 Session "Use of Mediation in insolvency"

Mediation is becoming a critical part of the insolvency process in some jurisdictions such as in the United States. Mediation can and should be used in insolvency related disputes to bypass the burdens of litigation either among creditors or among the debtor and its creditors.

If an avenue for mediation can be made available inside an insolvency procedure, this would significantly shorten the path towards rehabilitating the debtor company, and thereby increase the debtor company's chances of a successful turnaround. We shall also explore the possible ways to use mediation in an insolvency situation.

Moderator: Anselmo Reyes: International Judge of Singapore International Commercial Court, Former Judge of Hong Kong High Court, Arbitrator

Panelists:

Justice Chris Sontchi: International Judge of Singapore International Commercial Court, Former Chief Judge of the United States Bankruptcy Court for the District of Delaware

Takeo Kosugi: a Japanese lawyer and former judge with knowledge of mediation / arbitration in insolvency

Nina Mocheva: Senior Financial Sector Specialist (Dispute Resolution & Insolvency) at the World Bank Group

Sumant Batra: an insolvency lawyer and former president of INSOL. Among his many other distinguished achievements, Mr. Batra established the Insolvency Law Academy, the focus of which is mediation in relation to insolvency

German Federal Court of Justice: Article 26 Brussels Ia Regulation Applies to Non-EU Defendants

By Moses Wiepen, Legal Trainee at the Higher Regional Court of Hamm, Germany

In its decision of 21 July 2023 (V ZR 112/22), the German Federal Court of Justice confirmed that Art. 26 Brussels Ia Regulation applies regardless of the defendant's domicile. The case in question involved an art collector filing suit against a Canadian trust that manages the estate of a Jew who was persecuted by the German Nazi regime. The defendant published a wanted notice in an online Lost Art database for a painting that the plaintiff bought in 1999. The plaintiff considers this as a violation of his property right.

In general, following the procedural law principle of *actor sequitur forum rei*, the Canadian trust should be brought to court in Canadian courts. Special rules are required for jurisdictions that deviate from this principle. The lower German court confirmed its authority based on national rules on jurisdiction. Under sec. 32 German Civil Procedure Code, tort claims can be brought to the court where the harmful act happened regardless of the defendant's domicile. The German Federal Court of Justice established its jurisdiction on Art. 26 Brussels Ia Regulation as the *lex specialis*.

This may appear surprising as the scope of the Brussels Ia Regulations is generally limited to defendants domiciled in a member state of the EU, Artt. 4, 6 Brussels Ia Regulation. Exceptions to this rule are stated in Art. 6 Brussels Ia Regulation and – relying on its wording – limited to the Artt. 18 I, 21 II, 24 and 25 Brussels Ia Regulation. Nevertheless, due to the common element of party autonomy in Art. 25 and Art. 26 Brussels Ia Regulation, some parts of the literature – and now the German Federal Court of Justice – apply Art. 26 Brussels Ia Regulation to non-EU-domiciled defendants as well. The German Federal Court of Justice even considers this interpretation of Art. 26 Brussels Ia Regulation as

acte clair and thus, it sees no need for a preliminary ruling of the CJEU under Art. 267 TFEU.

However, the Court's argumentation is not completely persuasive. Firstly, the wording of Art. 26 Brussels Ia Regulation is open to other – even opposing – interpretations. Secondly, although it contains a party-autonomous element, Art. 26 Brussels Ia Regulation does not depend on the defendant's choice of court. In fact, courts are not required to verify defendant's awareness of jurisdictional risks in order to proceed in a court lacking jurisdiction. And unlike Art. 25 Brussels Ia Regulation, Art. 26 Brussels Ia Regulation can be part of a litigation strategy detrimental to the defendant

A detailed analysis on the court's ruling in German is available here.

Save the Date: German-French Symposium on the new German Sales Law (Heidelberg, 24 Nov 2023)

On 24 November 2023, the Institute for the History of Law at the University of Heidelberg (Institut für geschichtliche Rechtswissenschaft) is hosting a symposium on the new German Sales Law in cooperation with the Université de Lorraine. Further information can be found here (French version).

Conference Sustaining Access to Justice – registration closing soon

On 19-20 October 2023 the Conference **Sustaining Access to Justice in Europe: New Avenues for Costs and Funding** will take place live at Erasmus University Rotterdam. Renowned speakers from academia, policy, business and consumer associations from Europe, the US and Asia will discuss developments in funding, including third-party litigation funding and crowdfunding, collective actions, public interest litigation, ADR and ODR and entrepreneurial lawyering. Keynotes by Rachael Mulheron (Queen Mary University of London) and Andreas Stein (European Commission, DG Justice & Consumers)

You can register till Sunday 15 October! The program is available here and further information and registration is available here.

Description

Access to civil justice is of paramount importance for enforcing citizens' rights. At the heart access to civil justice lies litigation funding and cost management. Yet, over the past decades, access to justice has been increasingly put under pressure due to retrenching governments, high costs of procedure, and inefficiency of courts and justice systems. Within this context, the funding of litigation in Europe seems to be shifting from public to private sources. Private actors and innovative business models have emerged to provide new solutions to the old problem of financial barriers to access to justice.

With the participation of academics, policymakers, practitioners, academics and representatives of civil society from all over Europe and beyond, the conference seeks to delve deeper into the financial implications of access to justice and the different ways to achieve sustainable civil justice systems in Europe. The topics addressed in this international academic conference include different methods of financing dispute resolution and regulating costs, such as third-party funding, crowdfunding, blockchain technologies, public interest litigation, developments in ADR/ODR to enhance access to justice, new business models of legal professionals as well as law and economics perspectives on litigation funding.

This conference is organised by Erasmus School of Law in the context of the NWO

Vici Project: 'Affordable Access to Justice', funded by the Dutch Research Council.

This week begins the Special Commission on the 1980 Child Abduction Convention and the 1996 Child Protection Convention

Written by Mayela Celis

The eighth meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention will be held from 10 to 17 October 2023 in The Hague, the Netherlands. For more information, click here.

One of the key documents prepared for the meeting is the Global Report – Statistical study of applications made in 2021 under the 1980 Child Abduction Convention, where crucial information has been gathered about the application of this Convention during the year 2021. However, these figures were perhaps affected by the Covid-19 pandemic as indicated in the Addendum of the document (see paragraphs 157-167, pp. 33-34). Because it refers to a time period in the midst of lockdowns and travel restrictions, it is not unrealistic to say that the figures of the year 2021 should be taken with a grain of salt. For example, the overall return rate was the lowest ever recorded at 39% (it was 45% in 2015). The percentage of the combined sole and multiple reasons for judicial refusals in 2021 was 46% as regards the grave risk exception (it was 25% in 2015). The overall average time taken to reach a final outcome from the receipt of the application by the Central Authority in 2021 was 207 days (it was 164 days in 2015). While statistics are always useful to understand a social phenomenon, one may only wonder why a statistical study was conducted with regard to applications during such an unusual year – apart from the fact that a Special Commission meeting is taking place and needs recent statistics -, as it will unlikely reflect realistic trends

(but it can certainly satisfy a curious mind).

Other documents that are also worth noting are the following (both Preliminary Documents and Information Documents):

Child abduction and asylum claims

- Prel. Doc. No 16 of August 2023 – Discussion paper on international child abduction return applications where the taking parent lodged a parallel asylum claim. This document submits the following for discussion and includes a useful annex with decisions rendered in the UK, Canada and USA about this issue (SC stands for Special Commission):

43. The SC may wish to discuss how the issue of delays in processing the asylum claims could be addressed when a return application is presented, and what the solutions could be to avoid such delays ultimately pre-empting a return application under the 1980 Child Abduction Convention, in particular:

a. Bearing in mind the confidentiality rules that apply to asylum proceedings, consideration can be given to whether general information can be shared, where possible and appropriate, (between authorities of the requested State/country of asylum only) for example, regarding timeframes and average duration periods, steps or stages of such proceedings.

b. Where possible and appropriate, consideration can be given to whether asylum claims can be treated and assessed on a priority basis when a return application is presented under the 1980 Child Abduction Convention.

c. Consideration can be given to whether stays of return proceedings can be avoided in order to prevent that allegations are made concerning the settlement of the child in the new environment, and whether an eventual stay can only be considered regarding the implementation and enforcement of the return order.

44. The SC may wish to discuss to what extent it is possible to have some level of coordination or basic exchange of information between the different spheres of the government and competent authorities that process the different proceedings, when/if allowed by the relevant domestic laws and procedures and respectful of confidentiality and judicial independence principles. Where

possible and appropriate, such coordination could:

a. Encompass, for example, that the competent authority responsible for the return application informs the competent authority responsible for the asylum claim of the return application.

b. Include establishing procedures, guidelines or protocols to ensure that both proceedings are dealt with expeditiously.

This is a sensitive topic that deserves attention, as disclosing that a child is present in a specific State can have a great impact on the safety of the person seeking asylum (usually, the parent).

Transfer of jurisdiction under 1996 Child Protection Convention

- Prel. Doc. No 17 of August 2023 – Transfer of jurisdiction under the 1996 Child Protection Convention (Arts 8 and 9). It is submitted the following:

55. The SC may wish to consider adopting the following Conclusions and Recommendations:

a. The SC invited Contracting States, which have not done so already, to consider designating, in accordance with the Emerging Guidance regarding the Development of the IHNJ, one or more members of the judiciary for the purpose of direct judicial communications within the context of the IHNJ.

b. Recalling Article 44 of the 1996 Convention, the SC encouraged Contracting States to designate the authorities to which requests under Articles 8 and 9 are to be addressed, as such a designation could greatly assist in improving the processing times of requests for a transfer of jurisdiction. Depending on domestic policies and requirements relating to the judiciary, Contracting States may choose to designate a member of the IHNJ (if applicable) and / or the Central Authority to receive requests for transfers of jurisdiction.

c. The SC encouraged authorities requesting a transfer of jurisdiction to, in the first place, informally consult their counterparts in the requested State, to ensure that their requests are as complete as possible and that all necessary information and documentation is furnished from outset to meet the requirements of the requested State.

d. Recalling Principle 9 of the Emerging Guidance regarding the Development of the IHNJ,139 the SC encouraged Central Authorities that are involved in a transfer of jurisdiction request and judges engaging in direct judicial communications pertaining to a request for a transfer of jurisdiction to keep one another informed regarding the progress and outcome of such a request. Doing so could further assist in addressing delays and enhance the efficiency of processing requests under Article 8 or 9 of the 1996 Convention.

e. The SC invited the PB to circulate the questionnaire annexed to Prel. Doc. No 17 of August 2023 to all Contracting States to the 1996 Convention, with a view collecting information from judges and Central Authorities regarding requests under Article 8 or 9. The SC further invited the PB to review Prel. Doc. No 17, in the light of the responses from Contracting States, and to submit the revised version of Prel. Doc. No 17 to the Council on General Affairs and Policy (CGAP). The SC noted that it will be for CGAP to determine the next steps in this area (e.g., whether there is a need to form a Working Group consisting of judges and representatives from Central Authorities to identify good practices pertaining to requests for a transfer of jurisdiction under the 1996 Convention).

The transfer of jurisdiction (as foreseen in those articles) is sometimes little known in some civil law States (in particular, Latin America) so these suggestions are very much welcome.

Placement or provision of care of a child (incl. kafala) under the 1996 Child Protection Convention

- Prel. Doc. No 20 of September 2023 – Placement or provision of care of the child in another Contracting State under the 1996 Child Protection Convention (Art. 33). Interestingly, this document includes as annex Working Document No 10 Proposal from the delegation of Morocco about "The Kafala procedure as established by the law of 10 September 1993 on abandoned children" of 30 September 1996. This Prel. Doc. suggests the following:

64. The SC may want to discuss what clearly falls within the scope of application of Article 33 of the 1996 Convention and what clearly falls out of the scope of application of Article 33.

65. The SC may want to consider discussing the use of the term "approved" in C&R No 42 of the 2017 SC as it does not appear in Article 33 of the 1996 Convention.

66. The SC may want to consider whether additional information should be provided in the Country Profile for the 1996 Convention in addition to what appears under Sections 16 to 19 and 36 of the draft Country Profile to assist with the implementation of Article 33.

67. The SC may want to consider developing a Guide, illustrated by examples, to assist Contracting States with the implementation and operation of Article 33. In addition to covering issues relating to the scope of application of Article 33, the Guide could cover the different issues of procedure relating to Article 33 as presented in this Prel. Doc. Such a Guide would raise awareness as to the mandatory nature of Article 33. The SC may wish to recommend that such a Guide be developed by a Working Group.

68. The SC may want to consider the need to develop a model recommended form for the purpose of requests under Article 33.

The conclusions suggested in this document are very much needed, in particular given that the operation of Article 33 of the 1996 Convention in the Contracting States is far from ideal (the FAMIMOVE project is studying this Article in the context of kafala).

The Guide to Good Practice on the grave risk exception (art. 13(1)(b)) under the Child Abduction Convention – pointing to a mistake in the Guide

- Info. Doc. No 6 of October 2023 – "A mistake waiting to happen: the failure to correct the Guide to Good Practice on Article 13(1)(b)" – Article by Professor Rhona Schuz and Professor Merle Weiner. I fully endorse the position adopted by Professors Schuz and Weiner and have included my views on this issue in a previous post see here and have discussed this at length in my recent book on international child abduction.

The Note of the International Social Service (ISS) where it highlights (perhaps rightfully), among other things, that the Malta Process and the

Central Contact Points are underutilized

- Info. Doc. No 1 of February 2023 – ISS – General information & Response to Prel. Doc. No 2 of October 2022

The Note of the International Association of Child Law Researchers showcases the new publication *Research Handbook on International Child Abduction: The 1980 Hague Convention* (Cheltenham: Edward Elgar Publishing, 2023) – We will be preparing a book review, which will be posted on CoL – stay tuned!

- Info. Doc. No 4 of September 2023 – International Association of Child Law Researchers (IACLaR) – Observer Note

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Workshop on 'The Commission Proposal for a EU Regulation on Parenthood and the Creation of a European Certificate of Parenthood. Czech-German Perspectives'

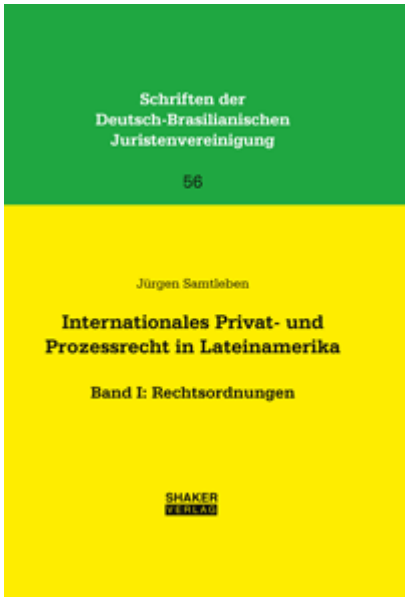
Magdalena Pfeiffer (Charles University Prague) and Anatol Dutta (Ludwig-Maximilians-Universität München) will be hosting a workshop on the Proposal for a EU Regulation on Parenthood and the Creation of a European Certificate of Parenthood (discussed here) on 24 November 2023 in Prague.

Further information can be found on the flyer.

Out Now: Internationales Privat- und Prozessrecht in Lateinamerika by Jürgen Samtleben

Jürgen Samtleben just published a collection of his work on the PIL of Latin America; he kindly shared the following announcement with us:

> *Jürgen Samtleben has authored numerous articles over the years on private international law and international civil procedure in Latin America. These contributions have now been updated and systematically organized into a single volume, thereby offering a unique overview of the conflict of laws in Latin American countries. The collection of articles in German, Spanish and English is supplemented by a comprehensive volume containing the relevant statutory materials in their original language as well as in German translation.*



The indices of volume I (‘Rechtsordnungen’) and volume II (‘Gesetzestexte’) can be found here and here. More information is available here.