The Kenyan Supreme Court holds that Scottish Locus Inspection Orders must be Examined by the Kenyan Courts for Recognition and Enforcement in Kenya

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I. INTRODUCTION

Kenya is one of the countries that make up East Africa and is therefore part of the broader African region. As such, developments in Kenyan law are likely to have a profound impact on neighbouring countries and beyond, consequently warranting special attention.

In the recent case of *Ingang'a & 6 others v James Finlay (Kenya) Limited* (Petition 7 (E009) of 2021) [2023] KESC 22 (KLR), the Kenyan Supreme Court dismissed an appeal for the recognition and enforcement of a locus inspection order issued by a Scottish Court. The Kenyan Supreme Court held that 'decisions by foreign courts and tribunals are not automatically recognized or enforceable in Kenya. They must be examined by the courts in Kenya for them to gain recognition and to be enforced' [para 66]. In its final order, the Court recommended that in Kenya:

‘The Speakers of the National Assembly and the Senate, the Attorney-General, and the Kenya Law Reform Commission, attended with a signal of the utmost urgency, for any necessary amendments, formulation and enactment of statute law to give effect to this judgment and develop the legislation on judicial assistance in obtaining evidence for civil proceedings in foreign courts and tribunals.’

This Case is highly significant, because it extensively addresses the recognition and enforcement of foreign judgments in Kenya and the principles to be considered by the Kenyan Courts. It is therefore a Case that other African countries, common law jurisdictions, and further parts of the globe could find invaluable.

II. FACTS

The Case outlined below pertained to the enforcement of a foreign judgment/ruling in Kenya, specifically, a Scottish ruling. As a brief overview, the Appellants were individuals who claimed to work for the Respondent, the latter being a company incorporated in Scotland. However, their place of employment was Kenya, namely, Kericho. The nature of the claim consisted of work-related injuries, attributed to the Respondent’s negligence due to the Appellants’ poor working conditions at the tea estates in Kericho. The claim was filed before the courts in Scotland, where inspection orders were sought by the Appellants and granted by the Courts. The purpose of the locus inspection order was to collect evidence by sending experts to Kenya and submit a report which can be used by the Scottish court to determine the liability of the Respondent. However, the respondent fearing compliance with the Scottish locus inspection order, sought an order from Kenyan Court to prevent the execution of the locus inspection order in Kenya, leading to a petition being filed by the Appellants before the Employment and Labour Relations Court in Kenya.

Nevertheless, the trial court ruled against the Appellants and stated that the enforcement of foreign judgments in Kenya, especially interlocutory orders, required Kenyan judicial aid to ensure that the foreign judgments aligned with Kenya’s public policy. This was further affirmed by the Court of Appeal, which expressed the same views and reiterated the need for judicial assistance in

enforcing foreign judgments and rulings in Kenya. The Court of Appeal held that decisions issued by foreign courts and tribunals are not automatically recognised or enforceable in Kenya and must be examined by the Kenyan courts to gain recognition and be enforced.

The matter was then brought before the Supreme Court of Kenya.

III. SUMMARY OF THE JUDGMENT BEFORE THE SUPREME COURT OF KENYA

With regard to the enforcement of foreign judgments, the Supreme Court had to determine 'whether the locus inspection orders issued by the Scottish Court could be executed in Kenya without intervention by Kenyan authorities.'

However, the Appellants argued that the locus inspection orders were self-executing and did not require an execution process. Instead, inspection orders only required the parties' compliance. Conversely, the Respondents argued that any decision not delivered by a Kenyan court should be scrutinised by the Kenyan authorities before its execution.

In its decision, the Supreme Court relied on the principle of territoriality, which it referred to as a 'cornerstone of international law' [para 51], and further elaborated on the importance of sovereignty. Based on the principle of territoriality, while upholding the principle of sovereignty, the Supreme Court stated that the 'no judgment of a Court of one country can be executed *proprio vigore* in another country' [para 52]. The Supreme Court's view was that the universal recognition and enforcement of foreign decisions leads to the superiority of foreign nations over national courts. It likewise paves the way for the exposure of arbitrary measures, which are then imposed on the residents of a country against whom measures have been taken abroad. In its statements, the Supreme Court concreted the decision that foreign judgments in Kenya cannot be enforced automatically, but must gain recognition in Kenya through acts of authorisation by the Judiciary, in order to be enforced in Kenya.

The Supreme Court grounded the theoretical basis for enforcing foreign judgments in Kenyan common law as comity. It approved the US approach (*Hilton v Guyot*) to the effect that: 'The application of the doctrine of comity means that

the recognition of foreign decisions is not out of obligation, but rather out of convenience and utility' [para 59]. The Court justified comity as:

'prioritizing citizen protection while taking into account the legitimate interests of foreign claimants. This approach is consistent with the adaptability of international comity as a principle of informed prioritizing national interests rather than absolute obligation, as well as the practical differences between the international and national contexts.' [para 60]

The Kenyan Supreme Court further established the importance of reciprocity and asserted that the Foreign Judgements (Reciprocal Enforcement) Act 2018 was the primary Act governing foreign judgments. The Court recognised that as a constituent country of the United Kingdom, Scotland is a reciprocating country under the Foreign Judgments (Reciprocal Enforcement) Act. However, the orders sought did not fall under the above Act, as locus inspection orders are not on the list of decisions that are expressly mentioned in the Act. Moreover, locus inspection orders are not final orders. Thus, the Supreme Court's position was that the locus inspection orders could not fall within the ambit of the Foreign Judgments (Reciprocal Enforcement) Act, and the trial court and the Court of Appeal were incorrect in extending the application of the Act to these orders.

Consequently, the Supreme Court highlighted the correct instrument to be relied on for the above matter. It was the Supreme Court's position that although the Civil Procedure Act does not specifically establish a process for the judicial assistance of orders to undertake local investigations, the same process as for judicial assistance in the examination of witnesses could be imitated for local investigation orders. Thus, the Supreme Court stated that:

'The procedure of foreign courts seeking judicial assistance in Kenya for examination of witnesses was the same procedure to be followed for carrying out local investigations, examination or adjustment accounts; or to make a partition. That procedure was through the issuance of commission rogatoire or letter of request to the High Court in Kenya seeking assistance. That procedure was not immediately apparent. The High Court and Court of Appeal were wrong for extending the spirit of the beyond its application as that was not the appropriate statute that was applicable to the instant case.' [para 26]

The process is therefore as under the Sections 54 and 55 of the Civil Procedure

Act, Order 28 of the Civil Procedure Rules, as well as the Practice Directions to Standardize Practice and Procedures in the High Court made pursuant to Section 10 of the Judicature Act. It entails issuing a commission rogatoire or letter of request to the Registrar of the High Court in Kenya, seeking assistance. This would then trigger the High Court in Kenya to implement the Rules as contained in Order 28 of the Civil Procedure Rules, 2010 [92 – 99].

IV. COMMENTS

An interesting point of classification in this case might be whether this was simply one of judicial assistance for the Kenyan Courts to implement Scottish locus inspection orders in its jurisdiction. Seen from this light, it was not a typical case of recognising and enforcing foreign judgment. Nevertheless, the case presented before the Kenyan Courts, including the Kenyan Supreme Court was premised on recognition and enforcement of foreign judgments.

The Kenyan Supreme Court has settled the debate on the need for foreign judgments to be recognised in Kenya before they can be enforced. The Court also settled that owing to the principle of finality, interim orders could not fall within the Foreign Judgments (Reciprocal Enforcement) Act. It is owing to this principle of finality that the Supreme Court refused to extend the application of the Act to local investigation orders, but rather proceeded to tackle the latter in the same manner as under the Civil Procedure Act and Civil Procedure Rules.

The Supreme Court was correct in establishing that recognition is necessary before foreign judgments can be enforced in Kenya. The principles upon which the Supreme Court came to this conclusion were also correct since territoriality and sovereignty dictate the same. The Supreme Court set a precedent that the Civil Procedure Act and the Civil Procedure Rules are the correct instruments to be relied upon in issuing orders for local investigations, in contrast to the position of the Court of Appeal, which placed local investigations in the ambit of the Foreign Judgments (Reciprocal Enforcement) Act. The Supreme Court adopted its position based on section 52 of the Civil Procedure Act, which empowers courts to issue commission orders and lists local investigations under commission orders.

This decision is crucial, because not only did the Supreme Court lay to rest any confusion over what should constitute the applicable law for local investigations,

it also sets down the procedure for foreign courts seeking judicial assistance in Kenya with regard to all four commission orders, as under the Civil Procedure Act. The Civil Procedure Act is the primary Act governing civil litigation in Kenya, while the Civil Procedure Rules 2010 are the primary subsidiary regulations for the same. Commission orders under this Act are divided into four as highlighted above: examination of witnesses, carrying out local investigations, examination or adjustment accounts, or making a partition.

This decision thus did not only tackle orders of local investigation but concluded the process for all four commission orders as highlighted above. In doing so, it established a uniform process for all four of the commission orders, in accordance with the Primary Act and Rules governing civil litigation in Kenya. Although it may appear that the Supreme Court has stretched the application of the Civil Procedure Rules, 2010 in the same way that the Court of Appeal stretched the application of the Foreign Judgments (Reciprocal Enforcement) Act; the Civil Procedure Rules, 2010 are more relevant, given that the rules touch on these four commission orders and are tackled in turn, in the same category, under the Civil Procedure Rules, 2010. Moreover, while it is true that there is currently a gap in the law as the process for local investigations has not been outlined in the same way that it has been for examination of witnesses, by parity of reasoning the Supreme Court's reasoning fits, and the logic behind adopting the same process is laudable.

Another interesting aspect of the Supreme Court's decision is the endorsement of the US approach of comity as the basis of recognising and enforcing foreign judgments in Kenyan common law. This is indeed a radical departure from the common law approach of the theory of obligation, which prevails in other Commonwealth African Countries. In an earlier Case, the Kenyan Court of Appeal in Jayesh Hasmukh Shah vs Navin Haria & Anor [para 25 – 26] adopted the US principle of comity to recognise and enforce foreign judgments. The principle of comity also formed the sole basis of enforcing a US judgment in Uganda in Christopher Sales v Attorney General, where no reciprocal law exists between the state of origin and the state of recognition. Consequently, it is safe to say that some East African judges are aligning more with the US approach of comity in recognising and enforcing foreign judgments at common law, while many other common law African countries continue to adopt the theory of obligation.

An issue that was not explicitly directed to the Kenyan Supreme Court was that

this was a business and human rights case, and one involving the protection of weaker parties. This may have provoked policy reasons from the Court that would have been very useful in developing the law as it relates business and human rights issues, and protection of employees in cross-border matters.

On a final note, the robust reasoning of their Lordships must be commended in this recent Supreme Court decision, given that it adds significant value to the jurisprudence of recognising and enforcing foreign judgments in the Commonwealth as a whole, in East Africa overall, and particularly in Kenya. The comparative approach adopted in this judgment will also prove to be edifying to anyone with an interest in comparative aspects of the recognition and enforcement of foreign judgments globally.

Postgraduate Law Conference of the Centre for Private International Law, 6 May 2024

The Second Postgraduate Law Conference of the Centre for Private International Law will be taking place on 6 May 2024, 09:00 – 17:00 GMT.
This is a virtual event bringing together early career scholars working in the private international law field or fields with an intersection to private international law such as EU Law, Human Rights Law and AI Law.
See the Programme and Register to attend one of the panels on international family law, artificial intelligence, civil and commercial law or human rights.

The European Parliament's last plenary session & Private International Law

This post was written by Begüm Kilimcio?lu (PhD researcher), Thalia Kruger (Professor) and Tine Van Hof (Guest professor and postdoctoral researcher), all of the University of Antwerp.

During the last plenary meeting of the current composition of the European Parliament (before the elections of June 2024), which took place from Monday 22 until Thursday 24 April, **several proposals relevant to private international law** were put to a vote (see the full agenda of votes and debates). All of the regulations discussed here still have to be formally approved by the Council of the European Union before they become binding law, in accordance with the ordinary legislative procedure.

It is interesting to note that, while many pieces of new legislation have a clear cross-border impact in civil matters, not all of them explicitly address private international law. While readers of this blog are probably used to the discrepancies this has led to in various fields of the law, it is still worth our consideration.

First, the European Parliament voted on and adopted the proposal for a **Directive on Corporate Sustainability Due Diligence** (CSDDD) with 374 votes in favour, 235 against and 19 abstentions (see also the European Parliament's Press Release). The text adopted is the result of fierce battles between the Commission, Parliament and the Council and also other stakeholders such as civil society, academics and practitioners. This necessitated compromise and resulted in a watered-down version of the Commission's initial proposal of 23 February 2022 and does not go as far as envisaged in the European Parliament's Resolution of 10 March 2021 (see also earlier blog pieces by Jan von Hein, Chris Tomale, Giesela Rühl, Eduardo Álvarez-Armas and Geert van Calster).

The Directive is one of the few instruments worldwide that put legally-binding obligations on multinational enterprises. It lays down obligations for companies regarding their adverse actual and potential human rights and environmental

impacts, with respect to their own operation, the operations of their subsidiaries, and the operations carried out by their business partners in the chains of activities. The Directive further stipulates specific measures that companies have to take to prevent, mitigate or bring an end to their actual or potential adverse human rights impacts. Besides national supervisory authorities for the oversight of the implementation of the obligations, the Directive enacts civil liability for victims of corporate harm.

The adopted Directive is more or less **silent on private international law.** The closest it gets to addressing our field of the law is Article 29(7), placing the duty on Member States to ensure the mandatory nature of civil remedies:

Member States shall ensure that the provisions of national law transposing this Article are of overriding mandatory application in cases where the law applicable to claims to that effect is not the national law of a Member State.

and Recital 90, which is more general:

In order to ensure that victims of human rights and environmental harm can bring an action for damages and claim compensation for damage caused when the company intentionally or negligently failed to comply with the due diligence obligations stemming from this Directive, this Directive should require Member States to ensure that the provisions of national law transposing the civil liability regime provided for in this Directive are of overriding mandatory application in cases where the law applicable to such claims is not the national law of a Member State, as could for instance be the case in accordance with international private law rules when the damage occurs in a third country. This means that the Member States should also ensure that the requirements in respect of which natural or legal persons can bring the claim, the statute of limitations and the disclosure of evidence are of overriding mandatory application. When transposing the civil liability regime provided for in this Directive and choosing the methods to achieve such results, Member States should also be able to take into account all related national rules to the extent they are necessary to ensure the protection of victims and crucial for safeguarding the Member States' public interests, such as its political, social or economic organisation.

While the text contains references to numerous existing Regulations, Brussels I and Rome I are not among them; not even a precursory or confusing reference as

in Recital 147 of the GDRP.

Second, the European Parliament voted on two other proposals that build on and implement the objectives of the European Green Deal and the EU Circular Economy Action Plan. The first is a proposal for a **Regulation establishing a framework for setting eco-design requirements for sustainable products** with 455 votes in favour, 99 against and 54 abstentions (see also the European Parliament's Press Release). The Regulation aims to reduce the negative life cycle environmental impacts of products by improving the products' durability, reusability, upgradability, reparability etc. It sets design requirements for products that will be placed on the market, and establishes a digital product certificate to inform consumers.

This Regulation does not contain a private-international-law type connecting factor for contracts or products. Neither does it expressly elevate its provisions to overriding rules of mandatory law (to at least give us some private international law clue). Its scope is determined by the EU's internal market. All products that enter the European market have to be in conformity with the requirements of both regulations, also those that are produced in third countries and subsequently imported on the European market (Art. 3(1)). "Products that enter the market" is the connecting factor, or the basis for applying the Regulation as overriding mandatory law. The Regulation is silent on products that exit the market. Hopefully the result will not be that products that were still in the production cycle at the time of entry into force will simply be exported out of the EU.

The third adopted proposal is the **Regulation on packaging and packaging waste** with 476 votes in favour, 129 against and 24 abstentions (see also the European Parliament's Press Release). This Regulation aims to reduce the amount of packaging placed on the Union market, ensuring the environmental sustainability of the packaging that is placed on the market, preventing the generation of packaging waste, and the collection and treatment of packaging waste that has been generated. To reach these aims, the regulation's key measures include phasing out certain single-use plastics by 2030, minimizing so called "forever chemicals" chemicals in food packaging, promoting reuse and refill options, and implementing separate collection and recycling systems for beverage containers by 2029.

Like the Eco-design Regulation, no word on Private International Law, no

references. The Regulation refers to packaging “placed on the market” in various provisions (most notably Art. 4(1)) and recitals (e.g. Recitals 10 and 14).

Lastly, the European Parliament approved the proposal for a **regulation on prohibiting products made with forced labour** on the Union market with an overwhelming majority of 555 votes in favour, 6 against and 45 abstentions (see also the European Parliament’s Press Release). The purpose of this Regulation is to improve the functioning of the internal market while also contributing to the fight against forced labour (including forced child labour). Economic operators are to eliminate forced labour from their operations through the pre-existing due diligence obligations under Union law. It introduces responsible authorities and a database of forced labour risk areas or products.

Just as is the case for the other Regulations, this Regulation does not contain references to private international law instruments, and no explicit reference to instruments in this field, even though the implementation of the Regulation requires vigilance throughout the value chain. It would be correct to assume that this provides overriding mandatory law, as the ban on forced labour is generally accepted to be *jus cogens* even though the extent of this ban is contentious (see Franklin).

Other proposals that are more clearly in the domain of private international law have not (yet?) reached the finish line. First, in the procedure on the dual proposals in the field of the protection of adults of 31 May 2023, the European Parliament could either adopt them or introduce amendments at first reading. However, these proposals have not reached the plenary level before the end of term and it will thus be for the Conference of Presidents to decide at the beginning of the new parliamentary term whether the consideration of this ‘unfinished business’ can be resumed or continued (Art. 240 Rules of Procedure of the European Parliament).

In the second file, the proposal for a **Regulation in matters of parenthood and on the creation of a European Certificate of Parenthood** of 7 December 2022 the European Parliament was already consulted and submitted its opinion in a Resolution of 14 December 2023. It is now up to the Council of the European Union to decide unanimously (according to the procedure in Art. 81(3) of the Treaty on the Functioning of the European Union). It can either adopt the amended proposal or amend the proposal once again. In the latter case the

Council has to notify or consult (in case of substantial amendments) the European Parliament again.

Pax Moot Court and Half day conference on Dispute Resolution in Private International Law

On Tuesday 23 April the Pax Moot Court Competition will kick off in Ljubljana. The oral rounds between 29 teams from all over Europe and beyond (including Asia and Australia) will start on Wednesday 24th. Teams will be litigating against each other for two days in front of private international law experts from academia and practice. The semi-finals and finals are scheduled for Friday 26th.

Also on Friday 26 April, there will be a hybrid conference on Dispute Resolution in Private International Law, co-organised by the Pax team and the University of Aberdeen's Centre for Private International Law. This will include of three panels: Commercial Arbitration, Business and Human Rights, and Decolonial Perspectives on private international law. All welcome to join!

Please see the programme and register.

Choice of Law in the American Courts in 2023

The thirty-seventh annual survey on choice of law in the American courts is now available on SSRN. The survey covers significant cases decided in 2023 on choice

of law, party autonomy, extraterritoriality, international human rights, foreign sovereign immunity, adjudicative jurisdiction, and the recognition and enforcement of foreign judgments. So, on this leap day, we thought we would leap into the new month by looking back at the old year.

Choice of Law

The Eighth Circuit applied Mexican law to a suit against General Motors over a car crash in Mexico, while an Ohio state court applied South African law to invalidate a marriage. A Washington state court interpreted an Irish forum selection clause to require dismissal of statutory claims against Microsoft despite the facts that Microsoft was not party to the agreement and the clause arguably did not cover statutory claims. Meanwhile the Fifth Circuit enforced a forum selection clause in an insurance contract choosing British Virgin Island courts despite evidence that the claims stood little chance in those courts.

Extraterritoriality

The Supreme Court decided two important extraterritoriality cases. In *Yegiazaryan v. Smagin*, the Court interpreted civil RICO's "domestic injury" requirement to apply to a domestic judgment confirming a foreign arbitral award, a decision that brings another tool to bear to help enforce foreign awards and judgments. In *Abitron Austria GmbH v. Hetronic International, Inc.*, the Court held that the Lanham Act applies only to domestic conduct infringing U.S. trademarks and, in so doing, provided important guidance about how to apply the federal presumption against extraterritoriality.

Meanwhile, lower courts struggled with how to fit the Supreme Court's 1922 decision in *United States v. Bowman*, which addresses the scope of federal criminal statutes, into its current extraterritoriality framework. The Eleventh Circuit held that *Bowman* provides an alternative framework that courts may apply instead of the current presumption to determine the reach of criminal statutes, whereas the Ninth Circuit held that *Bowman*could be considered part of the relevant "context" at step one of the Court's present two-step framework. As Bill has explained, both solutions seem doubtful, and the issue may be headed to the Supreme Court.

International Human Rights

In an important decision, the Ninth Circuit held that Chinese practitioners of Falun Gong could sue Cisco Systems and some of its executives for aiding and abetting their torture by designing and building a surveillance system for the Chinese government. The court held that plaintiffs had alleged sufficient conduct in the United States to support their Alien Tort Statute (ATS) claim and that the Tort Victim Protection Act (TVPA) permitted aiding and abetting claims against the corporate executives. Meanwhile, the Supreme Court interpreted the aiding and abetting provision of the Anti-Terrorism Act (ATA) in *Twitter, Inc. v. Taamneh* to require conscious and culpable participation, thereby shielding social media platforms from liability based on the use of their platforms by terrorist groups.

Foreign Sovereign Immunities Act

In *Tu?rkiye Halk Bankasi, A.S. v. United States*, the Supreme Court held that the Foreign Sovereign Immunities Act (FSIA) does not apply to criminal prosecutions. The Court remanded for further consideration of Halkbank's claim of immunity under federal common law.

In *Bartlett v. Baasiri*, the Second Circuit held that a foreign company can acquire immunity under the FSIA if it becomes majority-owned by a foreign government *after* a lawsuit is filed. That decision is in some tension with the Supreme Court's decision in *Dole Food Co. v. Patrickson* (2003) holding that status as an agency or instrumentality of a foreign state is determined at the time of filing.

Adjudicative Jurisdiction

In *Fuld v. Palestine Liberation Organization*, the Second Circuit held that the Promoting Security and Justice for Victims of Terrorism Act is unconstitutional because it permits the assertion of personal jurisdiction based on an activity—making payments to terrorists and their families—that cannot be understood as consent to jurisdiction. The court applied the Supreme Court's newest personal jurisdiction decision, *Mallory v. Norfolk Southern Railway Co.* (2023), which is also discussed in the survey. Congress could not, the court held, simply take an activity and label it consent to jurisdiction without providing something in return.

In *Lewis v. Mutond*, the D.C. Circuit dismissed a U.S. citizen's torture claim against officials of the Democratic Republic of Congo, rejecting an argument that the vitality of the TVPA as a statutory scheme should factor into the court's personal jurisdiction analysis. The court also reiterated the D.C. Circuit's position that the limits imposed on federal courts by the Fifth Amendment are the same as those imposed on state courts by the Fourteenth, with Judge Rao suggesting in a concurring opinion that the court should reconsider that position en banc.

Interpreting the doctrine of forum non conveniens, the Tenth Circuit held that a foreign forum is not available if only the moving party, but not the other defendants, has consented to jurisdiction there. In another case, the Fourth Circuit held that a foreign forum was not adequate because it could not address the plaintiff's American trademark claims.

Recognition and Enforcement of Foreign Judgments

Virginia has adopted the Uniform Foreign-Country Money Judgments Recognition Act, but because that act applies only to money judgments, the Fourth Circuit had to apply Virginia common law to decide whether to recognize a Ghanaian divorce decree. The court held that Virginia's common law requirements were met, even though Virginia might not have granted a divorce under the same circumstances. Meanwhile, a Texas state court held that a Canadian judgment did not violate Texas public policy even though it awarded speculative damages.

Finally, the Tenth Circuit (applying Colorado law) joined the growing number of courts that have held that a court may order a debtor or third-party garnishee to bring assets held abroad into the United States if the court has personal jurisdiction over the debtor or third-party.

Conclusion

The annual survey on choice of law was admirably maintained by Symeon Symeonides for three decades. The present authors are pleased to have extended this tradition for the last three years.

John Coyle (University of North Carolina School of Law)

William Dodge (University of California, Davis School of Law)
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[*This post is cross-posted at Transnational Litigation Blog*]

The Japanese Yearbook of International Law (Vol. 66, 2023)

The latest volume (Vol. 66, 2023) of the *Japanese Yearbook of International Law* (formerly Annual Yearbook of Private International Law) – published by the International Law Association of Japan – has recently been released. It contains the following articles, case notes, and English translations of some court decisions relating to or relevant to private international law.

MOBILITY AND BELONGING IN A GLOBALIZED WORLD

Yuko Nishitani

Introductory Note (p. 169)

Nami Thea Ohnishi

1. **Private International Law**

The full table of contents can be viewed here under the “Current Issue” tab.

More information about the Yearbook and the content of its previous volumes can be found here under the “Past Issues” tab.

The full contents of Vols. 1~64 (1957-2021) are available on **HeinOnline**.

Call For Papers: Second Postgraduate Law Conference of the Centre for Private International Law

The Centre for Private International Law (CPIL) of the University of Aberdeen is announcing its 2nd Postgraduate Law Conference of the Centre for Private International Law, which will take place online on 6 May 2024. Researchers are invited to submit abstracts by 29 February.

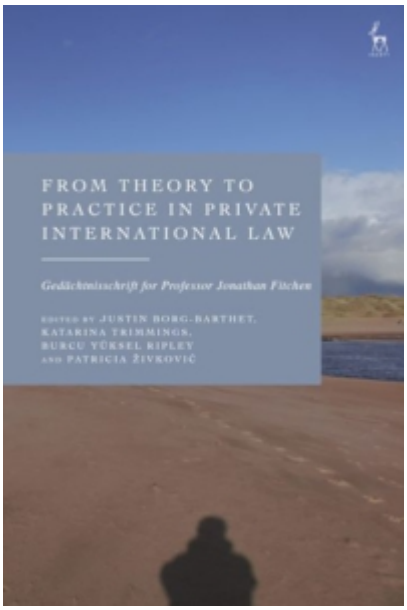
The Conference aims to provide young scholars with the opportunity to present their research before panels with relevant expertise and receive valuable feedback for further development of their work.

It has four panels, respectively on international family law, civil and commercial law, artificial intelligence and human rights linked to private international law.

For more information, please see the Centre’s website.

From Theory to Practice in Private International Law: Gedächtnisschrift for Professor Jonathan Fitchen

Written by Justin Borg-Barthet, Katarina Trimmings, Burcu Yüksel Ripley and Patricia Živkovic



Note: This post is also available via the blog of the European Association of Private International Law.

When our colleague and friend Prof Jonathan Fitchen passed away on 22nd January 2021, we were comforted in our grief by an outpouring of messages of condolence from private international lawyers around the world. We had known, of course, of the impact and importance of Jonathan's work to the world of private international law scholarship. His monograph on authentic instruments, for example, will remain an essential reference on that subject for many years to come. Jonathan's impact on the world of private international law scholars was, to a degree, less obvious. He was an unassuming man. He did not seek to command the attention of every gathering he attended, and he might have been surprised to realise how often he did just that. He was tremendously well-liked and well-respected for his wit, his self-deprecating sense of humour, and his empathy.

This book seeks to capture in it some of the immense esteem in which Jonathan was held. That much will of course be of interest to the many scholars and practitioners who had the privilege of Jonathan's acquaintance. The intellectual generosity of the contributing authors will ensure, however, that this volume will also be of great value to those who encounter Jonathan for the first time in these pages. Taken together, the chapters in this book address the major conceptual and practical challenges of our time: from stubborn definitional dilemmas, such as the deployment of key terms in international child abduction cases, to contemporary concerns about disruptive technologies like cryptocurrencies, to

core conceptual challenges regarding the unintended consequences of our discipline's professed neutrality.

The collection is divided into three main parts. Following a preface in which Prof Xandra Kramer paints a vivid picture of Jonathan's humanity, humour and wit, and an introduction by ourselves as the editors, Part I includes four chapters which address conceptual matters relating to the nature and scope of private international law. Part II is made up of seven chapters concerning civil and commercial matters in private international law. Part III includes two chapters on family matters in private international law.

Part I: The Evolving Nature and Scope of Private International Law

The first substantive chapter is a tour de force by Alex Mills in which he explores the unsettled relationship between private international law and legal pluralism. Mills observes that private international law is both a product and producer of pluralism, in addition to being internally pluralist in its self-conception. Mills' analysis will be of great interest to readers seeking to discern private international law's place in the taxonomy of the study of law, whether they are observing that taxonomy from the perspective of a comparatist, a conflicts scholar, or a public international lawyer.

The following chapter also engages with the problem of pluralism in private international law. Thalia Kruger focuses specifically on mediated settlements with a view to illuminating their meaning for the purposes of transnational law. Kruger does a wonderful job of building on Jonathan Fitchen's work by providing technical and normative analysis of the public faith to be accorded to private agreements. Ultimately, she welcomes a movement towards the upholding of settlement agreements but cautions against potential abuse of vulnerable parties.

The problem of vulnerability is the central focus of the next chapter, by Lorna Gillies. Gillies provides robust, systematic analysis of the theory and practice of our discipline's treatment of vulnerable parties. This is, of course, one of the central problems in a discipline whose professed neutrality is capable of furthering and entrenching inequalities. Gillies argues persuasively that the application of Fredman's four pillars of asymmetrical substantive equality would equip private international law better to address inherent risks of vulnerability.

Asymmetries of private power remain the focus of discussion in the following chapter on the under-explored relationship between our discipline and feminist scholarship, authored by two of the editors. Justin Borg-Barthet and Katarina Trimmings set out to contribute to a nascent discussion about sex-based vulnerability and how this is (un)seen by much of the literature and law. It is argued, ultimately, that private international law requires more sustained engagement with feminist scholarship if it is to avoid acting as an instrument for the entrenchment of substantive inequalities.

Part II: Civil and Commercial Matters in Private International Law

Unsurprisingly, given the focus of much of Jonathan Fitchen's written work, Part II on civil and commercial matters makes up around half of the volume. It begins with Andrew Dickinson's meticulous analysis of the meaning of "damage" in EU private international law. Dickinson notes that, despite the central importance of the term to the operation of much of EU private international law, there is little clarity as to its meaning. His chapter sets out to remedy this shortcoming through the articulation of a hitherto undeveloped taxonomy of "damage" which promises to become an essential tool in the arsenal of students, teachers, practitioners, and adjudicators of private international law.

Another editor, Burcu Yüksel Ripley, authored the next chapter, which addresses cryptocurrencies. Our discipline's continued preoccupation with definitional clarity remains very much in evidence in this discussion of challenges posed by disruptive technologies. Yüksel Ripley notes that attempts to characterise cryptocurrencies as a thing/property are unsatisfactory in principle, and that they therefore lead to conceptually unsound outcomes. She proposes instead that analogies with electronic fund transfers provide more promise for the determination of the applicable law.

In the next chapter, by Laura Carballo Piñeiro, the volume returns to another major theme of Jonathan Fitchen's scholarly output, namely the effectiveness of collective redress mechanisms. Carballo Piñeiro observes that access to justice remains restricted in most jurisdictions, and that a common EU approach remains lacking. Although the courts have provided some routes to collective redress, Carballo Piñeiro argues that a robust legislative response is paramount if

corporate accountability for environmental harm is to be realised in Europe.

Private international law's ability to engage with concerns regarding environmental sustainability remains a key focus of analysis in Carmen Otero García-Castrillón's chapter concerning the discipline's place in international trade agreements. The chapter advocates the bridging of an artificial systemic separation between the private and the public in the international system. It is argued that the extent of private power in the international system merits attention in trade agreements if sustainable development goals are to be attained.

Giesela Rühl also addresses concerns regarding private international law's ability to be deployed in matters which are traditionally reserved to public and public international law. Her chapter considers innovations introduced through the German Supply Chain Due Diligence Act (Lieferkettensorg-faltspflichtengesetz – LkSG) which establishes mandatory human rights due diligence obligations in German companies' international supply chains. Rühl laments the lack of attention paid to private international law in German law. She makes an especially compelling case for any future EU interventions to recognise the need to engage with private international law if legislation is to be effective.

The uneasy public-private divide in transnational law remains in evidence in Patricia Živkovi?'s chapter concerning what she describes as "creeping substantive review" in international arbitration. Živkovi? decries a lack of conceptual clarity in courts' treatment of arbitral determinations, particularly insofar as public policy is deployed as an instrument of substantive review of private adjudication. She argues that international legislative intervention is needed if prevailing inconsistencies of treatment are to be resolved.

Fittingly, Part II is rounded off with a discussion of that part of private international law to which Jonathan Fitchen made his most enduring scholarly contribution, namely authentic instruments. Zheng Tang and Xu Huang discuss authentic instruments in Chinese private international law. Like Jonathan's work, this chapter provides readers of English language scholarship with a rare example of in-depth analysis of concepts which are unfamiliar in the Anglo-American tradition. The chapter's compelling arguments for legal refinements will also be of use, however, to readers who wish to identify possible improvements to Chinese law.

Part III: Family Matters in Private International Law

The final part of the book turns to family law, an area in which Jonathan provided ample instruction to students, but which was not especially in evidence in his written work. In keeping with the previous parts of the book, our discipline's need for definitional clarity and consistency are very much apparent in the chapters in this part, as is the somewhat existential concern regarding the proper delineation of the public and the private. As the authors in this part observe, each of these matters has far-reaching effects on the apportioning of rights and obligations in circumstances which are deeply meaningful to the lives of litigants.

Aude Fiorini's chapter considers flawed reasoning in the US Court of Appeals judgment in *Pope v Lunday.* Fiorini illustrates the substantive flaws in the Court's treatment of the habitual residence of neonates, but also highlights a broader concern regarding the potential for unconscious bias in judicial decision-making. Through the judgment in *Pope*, Fiorini raises alarms regarding inconsistent judicial treatment of similar situations which turn on appreciation of circumstances establishing the habitual residence of a child. She argues, particularly compellingly in our view, that the interests of justice require greater conceptual clarity and consistency.

In the final chapter, by Anatol Dutta, the interactions of the public and the private return to the fore. Taking his cue from Jonathan Fitchen's work on authentic instruments, Dutta explores the concept of private divorce under the Brussels IIter Regulation. Concerns regarding decisional autonomy are very much in evidence in this chapter, which considers the meaning of private divorces and the extent to which they enjoy recognition in the EU private international law system. Ultimately, Dutta welcomes measures which restrict private divorce tourism in the EU.

Conclusions

This book was born of a collective wish to remember and honour a much-loved scholar of private international law. In that, we trust that it has already fulfilled its purpose. However, each chapter individually and the book taken as a whole

also capture the state of the art of private international law. Ours remains a discipline in search of systemic normative clarity and in episodic need of technical refinement. This collection provides tantalising glimpses of possible answers to both the essential question of the treatment of the private in the attainment of public goods, and in relation to longstanding vexing technical questions.

To preserve and further Jonathan Fitchen's legacy as an educator of private international lawyers, editorial royalties from the sale of the book will be donated to the Jonathan Fitchen Fund of the Development Trust at the University of Aberdeen. Direct individual donations to the fund are also welcome and appreciated.

EAPIL Wroclaw Conference 2024: Private International Law and Global Crises

We are please to announce that registration for the next bi-annual conference of the European Association of Private International Law (EAPIL) is now open!

The conference will take place in Wroclaw (Poland) from 6 to 8 June 2024 and will be devoted to "Private International Law and Global Crises". Topics to be discussed will include the interplay of private international law and 1) war and armed conflicts, 2) the rule of law, 3) climate change and 4) global supply chains. Speakers will be:

- Raffaele Sabato (European Court of Human Rights)

- Vincent Kronenberger (Court of Justice of the European Union)
- Andreas Stein (European Commission)
- Patrick Kinsch (University of Luxembourg)
- Veronica Ruiz Abou-Nigm (University of Edinburgh)
- Iryna Dikovska (Taras Shevchenko National University Kyiv)
- Tamasz Szabados (ELTE Eötvös Loránd University)
- Alex Mills (University College London)
- Matthias Weller (University of Bonn)
- Eduardo Alvarez Armas (Universidad Pontificia Comillas)
- Olivera Boskovic (Université Paris Cité)
- Rui Dias (University of Coimbra)
- Klaas Eller (University of Amsterdam)
- Laura Carpaneto (University of Genova)

To register for the conference please click here.

For questions, please get in touch with the local organizer, Agnieszka-Frackowiak-Adamska, at *2024.EAPIL.Wroclaw@uwr.edu.pl*.

French Supreme Court ruling in the Lafarge case: the private international law side of transnational criminal litigations

Written by Hadrien Pauchard (assistant researcher at Sciences Po Law School)
In the *Lafarge* case (Cass. Crim., 16 janvier 2024, n°22-83.681, available here), the French Cour de cassation (chambre criminelle) recently rendered a ruling on some criminal charges against the French major cement manufacturer for its activities in Syria during the civil war. The decision addresses several key aspects of private international law in transnational criminal lawsuits and labour law.

From 2012 to September 2014, through a local subsidiary it indirectly controlled, the French company kept a cement plant operating in a Syrian territory exposed to the civil war. During the operation, the local employees were at risk of extortion and kidnapping by armed groups, notably the Islamic State. On these facts, in 2016, two French NGOs and 11 former Syrian employees of *Lafarge*'s Syrian subsidiary pressed criminal charges in French courts against the French mother company. Charges contend financing a terrorist group, complicity in war crimes and crimes against humanity, abusive exploitation of the labour of others as well as endangering the lives of others.

After lengthy procedural contortions, the *chambre d'instruction* of the Cour d'appel de Paris (the investigating judge) confirmed the indictments in a ruling dated May 18th, 2022. Here, the part of the decision of most direct relevance to private international law concerns the last incrimination of endangering the lives of others. The charge, set out in Article 223-1 of the French Criminal Code, implicates the act of directly exposing another person to an immediate risk of death or injury likely to result in permanent mutilation or infirmity through the manifestly deliberate violation of a particular obligation of prudence or safety imposed by law or regulation. The *chambre d'instruction* found that the relationship between *Lafarge* and the Syrian workers was subject to French law, which integrates the obligations of establishing a single risk assessment report for workers' health and safety (Articles R4121-1 and R4121-2 of the French Labour Code) and a mandatory safety training related to working conditions (Article R4141-13 of the French Labour Code). On this basis, it upheld the mother company's indictment for violating the aforementioned prudence and safety obligations of the French Labour Code. Following this ruling, the Defendants petitioned to the French Supreme Court to have the charges annulled, arguing that French law did not apply to the litigious employment relationship.

By its decision of January 16, 2024, the French Cour de cassation (chambre

criminelle) ruled partly in favour of the petitioner. By applying Article 8 of the Rome I regulation, it decided that the employment relationship between *Lafarge* and the Syrian workers was governed by Syrian law, so that, French law not being applicable, the conditions for application of Article 223-1 of the French Criminal Code were not met. Thus, the *Cour de cassation* quashed *Lafarge*'s indictment for endangering the lives of others, while upholding the remaining charges of complicity in war crimes and crimes against humanity.

The *Lafarge* case highlights the stakes of transnational criminal law and its interplay with private international law.

Interactions between criminal jurisdiction and conflict of laws.

Because of the solidarity between criminal jurisdiction and legislative competence, the field is in principle exclusive of conflict of laws. However, this clear-cut frontier is often blurred.

In *Lafarge*, a conflict appeared incidentally via the specific incrimination of endangering the lives of others. In a transnational context, the key legal issue concerns the scope of the legal and regulatory obligations covered by the incrimination. A flexible interpretation including foreign law would lead to a (too) broad extension of French courts' criminal jurisdiction. In the present decision, the *Cour de cassation* logically ruled, notably on the basis of the principle of strict interpretation of criminal law, that an obligation of prudence or safety within the meaning of Article 223-1 "necessarily refers to provisions of French law".

Far from exhausting issues of private international law, this conclusion opens the door wide to conflict of laws. Indeed, the court then had to determine whether such French prudence or safety provisions applied to the case.

Under Article 8§2 of the Rome I regulation, absent a choice of law in an employment contract, the law applicable to the employment relationship between *Lafarge* and the Syrian workers should be the law of the country in which the employees habitually carry out their work –*i.e.* Syrian law. However, French law could be applicable in two situations: either if it appears that the employment relationships have a closer connection with France (article 8§4 Rome I), or because French law imposes overriding mandatory provisions (article 9 Rome I).

On the one hand, the *Cour de cassation* dismissed the argument that the employment relationship had a closer connection with France. Previously, the *chambre d'instruction* considered that the parent company's permanent interference ("*immixtion*") in the management of its Syrian subsidiary (based on a body of corroborating evidence, in particular, the subsidiary's financial and operational dependence on the parent company, from which it was deduced that the latter was responsible for the plant's safety) resulted in a closer connection between France and the employment contracts of the Syrian employees. Referring to the ECJ case law, which requires such connection to be assessed on the basis of the circumstances "as a whole", the Supreme Court conversely held that considerations relating solely to the relationship between the parent company and its subsidiary were not sufficient to rule out the application of Syrian law. Ultimately, the *Cour de cassation* found that none of the alleged facts was such as to characterize closer links with France than with Syria.

On the other hand, the *Cour de cassation* rejected the characterization of Articles R4121-1, R4121-2 and R4141-13 of the French Labour Code as overriding mandatory provisions ("*lois de police*"). Here, the Criminal division of the *Cour* is adopting the solution set out by the Labour disputes division (chambre sociale) in an opinion issued on the present Lafarge case. In its opinion, the Social division noted that, while the above-mentioned provisions do indeed pursue a public interest objective of protecting the health and safety of workers, the conflict of laws rules set out in Article 8 Rome I are sufficient to ensure that the protection guaranteed by these provisions applies to workers whose contracts have enough connection with France -a questionable utterance in the light of the reasoning of the Cour de cassation in the decision under comment and its strict interpretation of the escape clause.

As a result, the employment relationship between *Lafarge* and the Syrian workers was governed by Syrian law, with French law not imposing any obligation of prudence or safety to the case. The Supreme court thereby concluded that the conditions for application of Article 223-1 of the French Criminal Code were not met.

Implications.

The *Lafarge* decision will have broad implications for transnational litigations.

Firstly, the *Cour de cassation* confirms the strict interpretation of the escape clause in Article 8§4 of the Rome I regulation. Making extensive reference to the ECJ case law, the Court recalled that when applying Article 8§4, courts must take account of all the elements which define the employment relationship and single out one or more as being, in its view, the most significant (among them: the country in which the employee pays taxes on the income from his activity; the country in which he is covered by a social security scheme and pension, sickness insurance and invalidity schemes; as well as the parameters relating to salary determination and other working conditions).

More importantly, the French Supreme Court limits the consequences of parent companies' interference (*immixtion*) in international labour relations and value chain governance. The criterion of interference is commonly used to try to lift the corporate veil for imputing obligations and liability directly to a parent company. By establishing that the parent company's interference was insufficient to characterize the existence of a closer connection with France, the *Cour de cassation* circumscribes the spatial scope of French labour law and maintains the territorial compartmentalization of global value chains. It is regrettable, in that respect, that the Supreme court did not precisely discuss the nature of the relationship between *Lafarge* and the Syrian workers. This solution is nevertheless consistent with the similarly restrictive approach to co-employment adopted by the French courts, which requires a "permanent interference" by the parent company leading to a "total loss of autonomy of action" on the part of the subsidiary. Coincidentally, in the absence of overriding mandatory provisions, the ruling empties of all effectiveness similar transnational criminal actions based on Article 223-1 of the French Criminal Code.

While the *Cour de cassation* closed the door of criminal courts, French law on corporate duty of care (*Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*) offers an effective alternative in the field of civil liability. The aim of this text is precisely to impose on lead companies a series of obligations purported to identify risks and prevent serious violations of human rights and fundamental freedoms, human health and safety, and the environment, throughout the value chain. The facts of the *Lafarge* case are prior to the enactment of this law. Nevertheless, future litigations will likely prosper on this ground, all the more so with the forthcoming adoption of a European directive on mandatory corporate sustainability due

diligence.