XLK v XLJ: Comity Beyond the Child Abduction Convention

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From the perspective of state participation, the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (the "Child Abduction Convention") stands as one of the most successful instruments of the Hague Conference on Private International Law (HCCH), boasting 103 Contracting Parties to date. This widespread adherence is largely driven by the pervasive—and increasingly difficult-to-ignore—problem of international child abduction, which affects even non-Contracting States. China, a populous country deeply engaged in globalization, exemplifies this reality. A recent custody ruling in Singapore concerned a child who had been brought to the country by his father in breach of an order issued by a Chinese court—an incident underscoring how cross-border family disputes transcend the formal boundaries of the Convention.

I. The Brief of XLK v. XLJ

XLK (the Father) and XLJ (the Mother) are both Chinese nationals, with their habitual residence in China. In 2023, a Chinese court rendered a divorce judgment, which provided that the child "shall be raised and educated" by the Mother. After the Father's appeal was dismissed, he removed the child from China to Singapore and enrolled him in school there. As a consequence of these acts, the Father was subjected to detention for non-compliance with the prior judgments, prohibited from leaving China, and had his travel documents declared invalid. These measures, however, did not alter the fact that the child remained in Singapore and was not in the Mother's care, which led the Mother to turn to Singapore in seeking the child's return.

In 2025, a District Judge of the Singapore Family Court, following consolidation of proceedings, heard the Mother's application seeking an order for sole custody and care and control of the Child together with the Father's application for joint

custody and liberal access, and rendered a decision ([2025] SGFC 42). In light of the finding that "the facts show clearly that this is a case of outright child abduction" ([2025] SGHCF 50, para. 6), the District Judge identified two core concepts running throughout the case, namely the interests of the child and the comity of nations.

On the one hand, the District Judge emphasized that "[i]s it in interest of the child for him to be returned to the Applicant Mother" constituted "the crux of the matter." Accordingly, "[h]e explained in some detail his analysis of the welfare of the child with reference to" Singapore case law, ultimately concluding that "it was in the best interests of the Child for the Mother to be given care and control, and to enable the Mother to exercise this right, she should also be given sole custody for the purpose of having the Child returned to her in China" ([2025] SGHC(A) 22, para. 10). On the other hand, the District Judge took the view that, once the Child was returned to China, no Singapore court order would be necessary, as China constituted the proper forum for addressing the Father's application for access, particularly given that the Chinese courts had already rendered a judgment, and that "it would be 'against the comity of nations' for another jurisdiction to make further orders on the same matter" ([2025] SGHC(A) 22, para. 10). The District Judge therefore allowed the Mother's application and dismissed the Father's application.

The Father's subsequent appeal was dismissed by the Family Division of the High Court ([2025] SGHCF 50). The Family Division stated that it agreed entirely with the District Judge's reasoning on these two concepts, emphasizing that, whether on the basis of the interests of the child or comity, either consideration alone was sufficient to justify dismissing the appeal, as reflected in its statement that "[t]he doctrine of comity of nations has immense force on the facts of this case, and on that basis alone, the appeal ought to be dismissed … I am of the view that the crucial point is that it is in the best interests of the child to be with the mother" ([2025] SGHCF 50, para. 7).

This reasoning prompted the Father to raise objections and to file an application for permission to appeal. Specifically, the Father contended that the emphasis placed on comity, together with the use of the language of "child abduction," indicated that the judge had conflated the circumstances in which the Convention applies with the present case, which did not fall within its scope because China is not a Contracting Party ([2025] SGHC(A) 22, para. 18). On this basis, he alleged a

prima facie error of law, namely that "the Judge failed to apply [the welfare-of-the-child principle] by reasoning that 'comity overrides welfare'" ([2025] SGHC(A) 22, para. 22). Accordingly, the Father requested that the appellate court address "important questions of law regarding (a) the extent to which considerations of comity may override the welfare principle; and (b) the weight to be accorded to custody decisions of foreign courts" ([2025] SGHC(A) 22, para. 38).

On November 5, the Appellate Division of the High Court rendered its decision ([2025] SGHC(A) 22), dismissing the Father's application. The Appellate Division's central rationale was that "the Father's submission fails to recognise that the Judge did not dismiss the appeal on the sole basis of comity" ([2025] SGHC(A) 22, para. 23), such that no prima facie error of law arose. In other words, the Appellate Division took the view that, in the present case, taking comity into consideration did not entail overriding the interests of the child, as both the District Judge and the Family Division had treated the interests of the child as "the crux" or "the crucial point." On that basis, the District Judge had correctly applied Singapore law, by testing in detail, with reference to relevant case law, the factors advanced by the Father, an approach which the Family Division expressly endorsed (see [2025] SGHC(A) 22, paras. 21–30).

At the same time, however, the Appellate Division held that the Family Division's statement that "on [the doctrine of comity of nations] alone, the appeal ought to be dismissed" was incorrect. In other words, in the Appellate Division's view, although both courts' application of the law, centering on the interests of the child, was entirely correct and sufficient to justify dismissing the Father's appeal, consideration of comity was unnecessary. Accordingly, "[a]ny error … on the relevance of comity therefore has no impact on the ultimate outcome of the case" ([2025] SGHC(A) 22, para. 37). Proceeding from this position, the Appellate Division concluded that the "important questions of law" advanced by the Father, which in fact presupposed the applicability of comity in the present case, could not be regarded as being of "general importance which would justify granting permission to appeal in the present application" ([2025] SGHC(A) 22, para. 40).

II. The Comity in XLK v. XLJ

The divergence in judicial positions in *XLK v. XLJ* raises a question: was consideration of comity in this case, as the Appellate Division opined, unnecessary, or, more broadly, should comity be disregarded altogether in cases

falling outside the scope of the Child Abduction Convention?

Admittedly, in convention cases, consideration of comity is principled in nature, with comity in this context having been elevated to an obligation under international law. Even though the Convention is "[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody," its practical operation nonetheless rests on comity, which, when the Convention is applied by domestic courts, may occasionally generate tension between comity and the interests of the child. This, however, does not mean that such tension arises from an inherent contradiction between the two concepts. On the contrary, no necessary conflict exists between them. The actual and original foundation of comity lies in serving the interests of sovereign states (Ernest G. Lorenzen, *Story's Commentaries on the Conflict of Laws—One Hundred Years After*, 48 Harv. L. Rev. 15, 35 (1934)), and, for that very reason, it should not be deployed to challenge the best interests of the child as a human right (Art. 3 of the Convention on the Rights of the Child).

More specifically, according to the Preamble of the Convention, comity may be regarded as being justified by, and oriented toward, the better realization of the interests of the child; pursuant to Articles 13 and 20 of the Convention, comity is suspended in defined exceptional circumstances to secure the interests of the child. Viewed as a whole, comity constitutes an obligation introduced by this interests-of-the-child–oriented international convention by virtue of its nature as an instrument binding states, such that inter-state comity in this context unambiguously serves the realization of the individual interests of the child. This understanding is in fact facilitated by the breadth of the concept of the best interests of the child, as illustrated by Lord McDermott's explanation in the English case *J v. C*, in which consideration of the child's interests was described as "a process whereby, when all relevant facts and relationships, claims and wishes of parents, risks and choices and other circumstances are taken into account and weighed" ([1970] AC 710 (HL)).

However, this results in the realization of the interests of the child under the Convention being less direct than its realization under domestic law, as reflected in the authority cited by the Appellate Division in *XLK v. XLJ*, which observed that "the understanding of the child's welfare under the Convention is not the substantive understanding (as under the domestic law of guardianship and custody) but rather the more limited understanding, that where she has been

unlawfully removed from her habitual residence, her welfare is best served by swiftly returning her to her habitual residence" ([2025] SGHC(A) 22, para. 32).

Against this background, it is not difficult to understand why, although *XLK v. XLJ* was a non-convention case, the Appellate Division nonetheless acknowledged that "it might be useful to contrast the present application with applications for the return of a child under the [Convention]" ([2025] SGHC(A) 22, para. 32). Within this Convention-referential reasoning, the child's swift and immediate return appears to be a typical outcome of considering comity under the Convention, yet its essence remains a decision reached after assessing the interests of the child. In other words, while the fact that the Chinese courts had issued subsisting orders on custody was "connected to the notion of comity of nations," it was, in substance, merely one of the "non-comity-related factors relevant in the assessment of the Child's welfare" ([2025] SGHC(A) 22, para. 36).

Accordingly, the question posed above may be framed more concretely as whether, beyond the Convention, comity should be considered directly and explicitly, or whether courts should instead adopt a Convention-referential logic while avoiding the application of the Convention itself, thereby subsuming comity within the interests of the child and avoiding its direct consideration. In *XLK v. XLJ*, the positions taken by the District Judge and the Family Division clearly reflected the former approach, albeit in a more aggressive form, whereas the Appellate Division adopted the latter. Admittedly, the District Judge and the Family Division should not have treated comity and the interests of the child as parallel and equivalent lines of reasoning, given that, even within the scope of the Convention, the interests of the child remains the paramount consideration, and *a fortiori*, beyond the Convention, comity is not even framed as an obligation. In this sense, the Appellate Division's criticism of the two courts was justified. It nevertheless appears to have moved to the opposite extreme by effectively excluding any consideration of comity. Although the Appellate Division did not expressly state that comity should not be considered, it treated the interests of the child as the sole operative concept in the present case, through its interpretive logic that "comity-connected factors are included in welfare."

III. Considering Comity beyond the Convention

Before diving into this question, a preliminary point should first be clarified, that the interests of the child is not an exclusive or monopolistic consideration. Under

the Convention, comity operates as an independent consideration serving the interests of the child, which is described as being "of paramount importance," and functions at jurisdiction allocation, which explains why, in certain circumstances, it may come into tension with the interests of the child. Outside the scope of the Convention, however, whether expressed as "a primary consideration" in the Convention on the Rights of the Child or as a "paramount consideration" in the Guardianship of Infants Act 1934 of Singapore as applied in the present case, such formulations merely emphasize the preeminent weight of the interests of the child in a comparative sense, rather than conferring upon it an exclusive character. Accordingly, the question is not whether comity can be considered, but whether comity should be considered.

In essence, the Convention elevates comity to a binding obligation, manifested in the relinquishment of jurisdiction; beyond the Convention, by contrast, comity only "persuades; but it does not command" (*Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485 (1900)). Accordingly, the state where the abducted child is located is entirely free, if it so chooses, to disregard comity. From a technical perspective, the nature of a child custody order itself also furnishes the state with a basis for not considering comity, in that such an order is typically not final and may be modified in light of changed circumstances or the interests of the child (Robert A. Leflar, *American Conflicts Law* 490–493 (1977)).

This, however, does not mean that, beyond the Convention, there is no reason at all to take comity into consideration. In other words, outside the scope of the Convention, and while fully respecting the preeminence of the interests of the child, there are both policy and technical reasons for taking account of the role of states.

From a policy perspective, considering comity can extend the Convention's influence even indirectly, which was apparent in Singapore prior to its accession to the Convention, as *AB v. AC* ([2004] SGDC 6) being a paradigmatic example, in which scholars have observed that the court effectively recognised a foreign custody order on the basis that it had been made by the court of the child's habitual residence, thereby reflecting the Convention's spirit, a course of action described as legally questionable but policy-wise correct (See Joel Lee, *Private International Law in the Singapore Courts*, 9 Sing. Y.B. Int'l L. 243, 244 (2005)). It is therefore unsurprising that, now that Singapore has acceded to the Convention, courts may still take the Convention into consideration even in cases

where it is inapplicable ([2025] SGHC(A) 22, para. 32). In the recent case, however, the Singapore courts abandoned this policy-driven, indirect application of the Convention, which, while wholly avoiding the risk of applying the Convention to non-Convention cases, to some extent, diminished the Convention's appeal to non-Contracting States by leaving its foundational logic unarticulated.

Even for states that have not acceded to the Convention, comity remains a principle worthy of consideration. For the state of the child's habitual residence, the relevant interests lie not only in the child's being returned to its jurisdiction but also in the jurisdictional interest in adjudicating the substantive custody disputes, both of which amount to the state's expectation of fulfilling its child-protection obligations. If the state where the abducted child is located wholly disregards comity, it thereby fails to show respect for the jurisdictional interest of the state of the child's habitual residence. That consequence means that, where origin and destination are reversed, culturally divergent interpretations of the interests of the child may dominate judicial discretion, producing a situation in which the child's return is less chance to be a uniform outcome of considering the interests of the child and where such an outcome cannot be influenced by comity to vindicate that interests. Moreover, the absence of comity can render potential bilateral or multilateral cooperation beyond the Convention awkward for lack of reciprocal foundations (see *Blondin v. Dubois*, 189 F.3d 240, 248 (2d Cir. 1999)), thereby inhibiting the emergence of regional alternatives to the Convention.

Globalization has strengthened comity's reciprocal character, such that a state's showing trust in foreign courts' custody determinations is both necessary and not fundamentally at odds with the interests of the child. On the contrary, comity can assist non-Contracting States in obtaining reciprocal comity in custody disputes, thereby giving Contracting Parties greater opportunities to realize their child-protection objectives. The Convention highlights this value of comity in custody matters, yet by hard-wiring comity into a binding obligation, a feature some states find difficult to accept. Outside the scope of the Convention, however, comity is merely persuasive, and for states hesitating to join the Convention, this softer form of comity should be more palatable and may serve as a practicable intermediate step toward accession.

As for the technical benefits of comity, they have, in fact, long been reflected in non-Convention cases, which may be observed through the referential use of the Convention in such cases. According to a Singapore scholar's synthesis, drawing

on the practice of the English courts, courts generally adopt four approaches in dealing with non-Convention cases (Chan Wing Cheong, *The Law in Singapore on Child Abduction*, 2004 Sing. J. Legal Stud. 444 (2004)). Two of these take the Convention as a reference. One involves indirectly adopting the Convention's understanding of the interests of the child by presuming that returning the abducted child accords with the child's welfare, an approach reflected in *XLK v. XLJ*. The other involves directly adopting the Convention's policy, under which return is refused only where the foreign court is in principle unacceptable or where one of the Convention's specified exceptions applies. The close linkage of these two approaches to the Convention allows them to be regarded as applications of comity beyond the Convention. The remaining two approaches, although not involving a direct reference to the Convention, share the same foundation as the Convention, namely, comity. One is the application of *forum non conveniens*, and the other is the treatment of comity as a consideration equal to the best interests of the child. As noted above, the latter should not be accepted, while *forum non conveniens* is likewise closely associated with comity.

The most immediate technical benefit brought about by comity is certainty. This certainty manifests itself, on the one hand, at jurisdiction, thereby to some extent preventing parents from forum shopping through abduction. On the other hand, it manifests itself in the application of laws, as comity can, beyond the Convention, to some degree mitigate divergences in the interpretations of the interests of the child across different legal cultures, thereby contributing to a measure of predictability. Put differently, comity can provide a unifying, inter-state relational context for an issue that would otherwise be subject to divergent interpretations across fragmented legal systems.

In addition, another technical benefit of considering comity beyond the Convention lies in providing a jurisprudential foundation for the development of related legal mechanisms. Beyond the application of *forum non conveniens* noted above, a prominent example is the mirror order. Although, on its face, a mirror order may appear to run counter to comity (see *Danaipour v. Mclarey*, 286 F.3d 1, 22–25 (1st Cir. 2002)), it nonetheless fully reflects the highest regard for the interests of the child, and its "practice… may actually be seen as enhancing comity" (Rhona Schuz, *The Doctrine of Comity in the Age of Globalization: Between International Child Abduction and Cross-Border Insolvency*, 40 Brook. J. Int'l L. 31, 82–83 (2014)).

IV. Concluding Remarks

In *XLK v. XLJ*, the Appellate Division did not dispute that the application of comity in the present case would not have undermined the correctness of the outcome. Indeed, the two guiding considerations, comity and the interests of the child, did not lead to conflicting results. Rather, they served distinct yet complementary purposes: the former addressed state interests while the latter safeguarded private interests. Even assuming that tension were to arise between them in a non-Convention context, comity would not necessarily impede the interests of the child. A court may duly consider comity while still arriving at a decision fully aligned with the child's interests—thereby simultaneously honoring international reciprocity and fulfilling its protective duty toward the child.

In sum, comity can serve a significant function in cases falling outside the scope of the Child Abduction Convention. From a policy perspective, it can, to some extent, encourage non-Contracting States to align more closely with the Convention or allow them to benefit from the Convention's advantages without formal accession to the Convention. From a technical perspective, it can, to some degree, alleviate the inherent uncertainty in the interpretation of the interests of the child and provide a jurisprudential foundation for the development of related legal mechanisms. Accordingly, for states that have not yet formed a clear intention to accede to the Convention, comity remains a consideration worthy of serious attention, offering an intermediate approach that approximates the Convention while preserving a measure of sovereign caution.