Brazilian Ruling Recognises US Name Change

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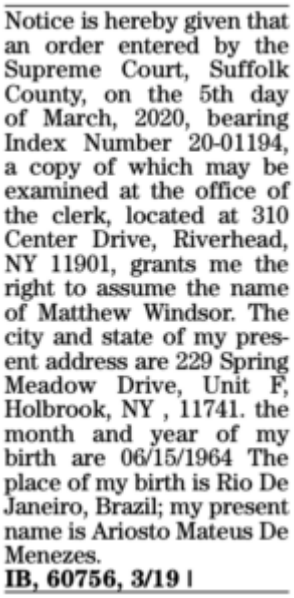
In April 2025, the highest chamber (*Corte Especial*) of the Brazilian Superior Court of Justice (STJ), under Justice Maria Isabel Gallotti as rapporteur, ruled on 'Recognition of a Foreign Judgment' (HDE) no. 7.091/EX. The case concerned the recognition of a United States ruling changing the last name of a Brazilian national who had acquired US nationality. The Plaintiff sought recognition of (i) his US naturalisation and (ii) a ruling of the Supreme Judicial Court of Suffolk County, Massachusetts, which changed his name from 'Ariosto Mateus de Menezes' to 'Matthew Windsor'.


Notice is hereby given that an order entered by the Supreme Court, Suffolk County, on the 5th day of March, 2020, bearing Index Number 20-01194, a copy of which may be examined at the office of the clerk, located at 310 Center Drive, Riverhead, NY 11901, grants me the right to assume the name of Matthew Windsor. The city and state of my present address are 229 Spring Meadow Drive, Unit F, Holbrook, NY , 11741. the month and year of my birth are 06/15/1964 The place of my birth is Rio De Janeiro, Brazil; my present name is Ariosto Mateus De Menezes.
IB, 60756, 3/19 |

The Court decided it had no competence to ratify the naturalisation. Granting US citizenship is a prerogative of the US Government. And loss of Brazilian nationality is ruled by a specific domestic administrative procedure, under the Brazilian Ministry of Justice. The Court concluded that, because of lack of competence, the documents presented did not satisfy the statutory requirements for recognition under the Brazilian Code of Civil Procedure and the Court's internal rules. By contrast, the Court granted recognition of the name-change judgment. It found that the formal requirements for recognition had been met: the decision was rendered by a competent authority, had become stable, and was properly documented and translated. The decisive issue, therefore, was whether recognition would violate Brazilian *ordre public*.

Justice Gallotti grounded her analysis in Article 7 of the Introductory Statute to the Norms of Brazilian Law (LINDB), a statute inspired by the German *Einführungsgesetz zum Bürgerlichen Gesetzbuche* (EGBGB). LINDB provides that the law of the person's domicile governs name and capacity. The applicant was domiciled in the United States. The name change was carried out under US law. The case did not fall within any area of exclusive Brazilian jurisdiction (Article 23 of the Brazilian Code of Civil Procedure).

The Attorney General's Office (*Ministério Público Federal*) argued that Brazilian law does not permit total suppression of family names. The foreign judgment therefore offended public policy. The Court rejected this view. It held that the mere fact that Brazilian legislation does not provide total suppression or change of surnames does not invalidate a foreign act. The prohibition is not a "nuclear" or foundational norm of the Brazilian legal order. There was no violation of *ordre public*, national sovereignty, or human dignity. Justice Gallotti stated: 'The "*ordre public* clause" is intended to prevent the recognition of rights that contradict the fundamental principles of our legal order. In general, private international law doctrine considers, for example, that Western countries tend not to recognise more than one spouse, even when the husband is domiciled in a country governed by Islamic law. Polygamy (the marriage of a man to multiple women) is understood to violate the basic and core rules of national family law and succession law.' Nothing of that nature was present in the case, said the Court. A foreign name change, even one involving the substitution of a surname, does not approach the level of structural incompatibility exemplified by polygamy.

The Court also placed the case in the context of recent domestic legal reform. Brazilian Law no. 14.382/2022 significantly facilitated changes of forenames in Brazil. A person may now change their first name extrajudicially (before a notary), without demonstrating a relevant reason. But such a change can only happen once in a lifetime and solely encompasses first names. Surname changes have also been made more flexible, but exclusively by allowing the recovery and inclusion of ancestral surnames. Brazilian law therefore no longer reflects a rigid immutability model, even if surnames remain harder to change than forenames. In HDE 7.091/EX, the Court considered it understandable and reasonable that the applicant adopted anglophone first and last names in the United States in order to avoid possible discrimination in the country of his new nationality. The change did not harm any relevant public or third-party interest.

From a comparative perspective, the decision sits at an interesting point. In Common Law jurisdictions, name change is generally available with considerable freedom, often through unilateral instruments such as a deed poll, subject to modest administrative formalities. In Germany and Austria, by contrast, name changes are treated as exceptional and typically require an 'important or relevant reason' under public-law procedures. Christian von Bar's comparative study *Gemeineuropäisches Privatrecht der natürlichen Person* (pp. 567–604) illustrates precisely the different models regarding name change. Some systems conceptualise the name primarily as an element of personal identity. Others see it as a structured institution embedded in family and public-order concerns. Brazil's domestic law still reflects elements of the latter approach. Yet in recognition proceedings, Brazil's highest Court with private law jurisdiction clearly opted for continuity of status formed at the domicile.

The decision is also consistent with a long Brazilian tradition of construing public policy narrowly in cross-border cases. As noted in a recent article, Brazilian law was frequently referenced in Ernst Rabel's writings. For instance, Rabel noted how Brazilian Courts would recognise foreign divorces at a time when divorce was not yet permissible in Brazil. HDE 7.091/EX fits that pattern: foreign status effects may be recognised even when domestic law would not have produced the same result internally.

Ultimately, HDE 7.091/EX is a restrained and technically precise decision. It does not liberalise Brazilian internal surname law. It does not dissolve the state's control over civil status. What it does is confirm that *ordre public* remains a high threshold in recognition proceedings of foreign rulings. In an era of increasing personal mobility and multi-layered identities, this approach reinforces a central intuition of private international law: the stability of personal status across borders is itself a value worthy of legal protection.

Anti-Arbitration Injunction in Foreign-Seated Arbitrations: The Delhi High Court's Controversial Intervention in Engineering Projects (India) Limited v. MSA Global LLC (Oman)

This post is posted on behalf of Arnav Sharma, Jindal Global Law School, Sonipat, India

Introduction

On 25th July 2025, a single judge bench of the Delhi High Court delivered a judgment in *Engineering Projects (India) Limited v. MSA Global LLC (Oman)* in *CS (OS) 243 of 2025****[1]*** that has stirred considerable discourse in international arbitration circles. The fundamental question at issue in the instant case was whether an Indian Court can grant an anti-arbitration injunction to stay proceedings in a foreign-seated arbitration on grounds of the proceedings turning oppressive and vexatious due to procedural impropriety, notwithstanding internationally well-settled principles of minimal judicial intervention, party autonomy, and *lex arbitri* that govern international commercial arbitration? The Delhi High Court answered in the affirmative, holding that Indian civil courts possess inherent power under Section 9 read with Section 151 of the Code of Civil Procedure, 1908 ("**CPC**") to intervene under exceptional circumstances where the arbitral process itself becomes a vehicle of abuse.

This ruling carries profound implications for India's aspirations to position itself as a global arbitration hub. By granting relief that undermines the exclusive jurisdiction of the Courts at the Seat (Singapore in the instant case), the ruling has invited scrutiny vis a vis its alignment with the territorial principle as

elaborated upon in ***Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*** ("**BALCO**")[2], and with internationally accepted 'best practices' which are well-settled considering that they promote predictability and finality in cross-border dispute resolution.

Facts

Engineering Projects (India) Limited ("**EPIL**"), a public sector enterprise, entered into a sub-contract agreement with MSA Global LLC (Oman) ("**MSA**") for the design, supply, installation, integration, and commissioning of a border security system at the Yemen-Oman border. The agreement contained an arbitration clause stipulating that any disputes would be resolved by way of arbitration under the rules of the International Chamber of Commerce ("**ICC**") with Oman's law being the governing law, while conferring exclusive jurisdiction upon the courts at New Delhi, India. For the sake of clarity, Article 19 of the agreement between the parties containing the aforementioned arbitration clause, is extracted in its entirety as under:

"ARTICLE 19

LAW AND ARBITRATION

19.1 *Disputes if any, arising out of or related to or any way connected with this agreement shall be resolved amicably in the First instance or otherwise through arbitration in accordance with Rules of Arbitration of the International Chamber of Commerce. The jurisdiction of the Contract Agreement shall lie with the Courts at New Delhi, India.*

19.2 *This Agreement shall be governed by, construed and take effect in all respects according to the Laws and Regulations of the Sultanate of Oman.*

19.3 *Any dispute or difference of opinion between the parties hereto arising out*

of this Agreement or as to its interpretation or construction shall be referred to arbitration. The Arbitration Panel shall consist of three Arbitrators, one Arbitrator to be appointed by each party and the third Arbitrator being appointed by the two Arbitrators already appointed, or in event that the two Arbitrators cannot agree upon the third Arbitrator, third Arbitrator shall be appointed by the International Chamber of Commerce. The place of the Arbitration shall be mutually discussed and agreed.

19.4 *The decision of the Arbitration Panel shall be final and binding upon the parties."*

In the course of performance of the contract, disputes arose between the parties concerning alleged delays in contractual performance. Consequently, MSA invoked the arbitration agreement in 2023 nominating Mr. Andre Yeap SC ("**Mr. Yeap**") as a co-arbitrator. Thereafter, on 20.04.2024, Mr. Yeap submitted his statement of acceptance, availability, impartiality and independence to the ICC, expressly declaring that he had "nothing to disclose" with respect to any facts or circumstances that could give rise to justifiable doubts as to his impartiality or independence. EPIL nominated Hon'ble Justice Mr. Arjan Kumar Sikri (Retd.) as its co-arbitrator. The Tribunal was duly constituted on 05.09.2023 with Mr. Jonathan Acton Davis KC being appointed as the presiding arbitrator by the co-arbitrators.

In June 2024, the tribunal rendered a first partial award on MSA's application for interim measures. EPIL challenged this award before the Singapore High Court. In December 2024, in preparation of the evidentiary hearings, EPIL, through a Gujarat High Court Judgment dated 05.07.2024 titled ***Neeraj Kumarpal Shah v. Manbhupinder Singh Atwal***, discovered the Mr. Yeap had been previously appointed as an arbitrator in separate proceedings involving Mr. Manbhupinder Singh Atwal who happens to be MSA's Managing Director, Chairman, and Promoter. This prior involvement had not been disclosed when Mr. Yeap accepted his appointment. As such, on 19.01.2025, EPIL filed a challenge application before the ICC Court under Article 14(1) of the ICC Rules alleging non-disclosure

and raising doubts about Mr. Yeap's independence and impartiality. The ICC Court in its decision acknowledged the non-disclosure as "regrettable" but rejected EPIL's challenge on merits, finding that the circumstances did not establish justifiable doubts regarding Mr. Yeap's impartiality or independence. Subsequently, EPIL filed an application before the Singapore High Court under Article 13(3) of the UNCITRAL Model Law seeking determination on the validity of Mr. Yeap's continued participation, and also simultaneously approached the Delhi High Court by filing the instant suit seeking a declaration and permanent injunction restraining MSA from continuing the ICC arbitration with the present tribunal composition. Further complicating the matter, MSA filed an enforcement petition before the Delhi High Court for the recognition and enforcement of the First Partial Award while also obtaining an anti-suit injunction from the Singapore High Court restraining EPIL from continuing its proceedings before the Delhi High Court.

The Dispute

The crux of the legal controversy in this case was around three inter-related questions.

1. Whether an Indian Civil Court has the jurisdiction to entertain a suit seeking an anti-arbitration injunction against a foreign-seated arbitration, particularly in light of the fact that the parties had agreed to arbitrate under ICC Rules with Singapore being designated as the seat. In this respect, MSA relied upon the judgment in ***Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd.*** ("**Indus Mobile**")[3] to contend that once parties agree to a specific seat of arbitration, it is solely the Courts at that seat that retain supervisory jurisdiction over the arbitral process to the exclusion of all other Courts. MSA further argued that the suit was barred by Section 5 and Section 45 of the Arbitration and Conciliation Act of 1996 which are the statutory embodiment of the principle of minimal judicial intervention and the territoriality doctrine affirmed in BALCO.

11. Whether the non-disclosure by Mr. Yeap rendered the arbitration proceedings vexatious, oppressive, and violative of Indian Public Policy. In this regard, EPIL argued that Mr. Yeap's failure to disclose this material information constituted a manifest violation of Article 11 of the ICC Rules, which mandates arbitrators to disclose any facts or circumstances likely to give rise to justifiable doubts as to their impartiality or independence. EPIL contended that such non-disclosure strikes at the root of party consent and procedural fairness thereby rendering the entirety of the arbitral process illegitimate. On the other hand, MSA relied upon Article 11.2 of the ICC Rules read with Clause 3.1.3 of the IBA Guidelines which mandate disclosure only if an arbitrator has been appointed on two or more occasions in the past three years by a party or one of its affiliates; MSA contends this requirement had not been satisfied in the instant case.

III. Whether EPIL was entitled to interim injunctive relief restraining the continuation of arbitral proceedings pending final disposal of the suit.

As such, this dispute was centred around reconciling party autonomy and minimal judicial intervention on one hand, with the Court's duty to prevent abuse of process and ensure procedural fairness on the other [4].

The Decision

On Maintainability

At the very outset, the Delhi High Court affirmed the strong presumption in favour of the civil court's jurisdiction as under Section 9 of the CPC, which confers authority to adjudicate all suits that are of a civil nature unless the same is expressly or through implication barred by statutory law. The Court relied on the case of ***Dhulabhai v. State of Madhya Pradesh[5]*** and held that the exclusion of civil court jurisdiction cannot be readily inferred and must be clearly provided by law. Further, the Court distinguished the rulings in Indus Mobile and

BALCO, noting that while these judgments do affirm the seat principle and the territoriality doctrine, they did not create an absolute bar on civil courts' power to grant an anti-arbitration injunction in exceptional circumstances. The Court found guidance in the ***Union of India v. Dabhol Power Company[6]*** and ***ONGC v. Western Company of North America [7],*** wherein it was held that Indian Courts do have the power to grant injunctions against foreign proceedings whenever the circumstances make the proceedings oppressive, or where such an injunction is necessary or expedient, or when the ends of justice so require; with the former specifically referring to Sections 5 and 45 of the Arbitration and Conciliation Act of 1996 and stating that neither of them oust, entirely, the jurisdiction of the Indian Courts. Additionally, the Court emphasised the distinction between anti-suit injunctions and anti-arbitration injunctions, noting that the latter require a higher threshold of oppression or vexatiousness to be met, citing examples along the lines of doubts as to the consent of the parties, allegations of forgery, or fundamental procedural impropriety which can meet the aforementioned threshold. Crucially, the Court held that the principle of minimal judicial intervention does not and must not translate into negligible interference[8], and said this crucial difference has been preserved to ensure that private dispute resolution mechanisms such as arbitration do not turn oppressive or operate in an unruly manner, which can be deemed contrary to the foundational principles of judicial propriety.

On Vexatiousness and Oppressiveness of the Proceedings

The Court began the discussion in this regard by defining "vexatious" as proceedings instituted in the absence of sufficient legal basis and primarily intended to annoy, harass, and/or burden the opposing party, and "oppressive" as conduct that unjustly imposes harsh burdens or unfair disadvantages upon a party to the proceedings. Thereafter, in reference to the ICC Rules, the Court noted that Article 11 therein casts a categorical obligation upon arbitrators to make full and frank disclosure of any circumstance that might give rise to justifiable doubts regarding their impartiality or independence. It was emphasised that this obligation must be assessed from the perspective of the parties as is clear from the language of the provision insofar as it says "in the eyes of the parties", rather than from an arbitrator's subjective perception of bias. Further, it was noted that the arbitrator cannot withhold disclosure on the ground that the fact appears

benign or remote in lieu of the fact that the obligation arises when there exists even a possibility that the information, if known to the parties, might give rise to an apprehension of bias in the parties' minds.

The Court found that Mr Yeap's non-disclosure was deliberate and calculated. Even though Mr. Yeap admitted in his response to the initial challenge application that he had made enquiries and was aware of the potential need for disclosure, he chose not to do the same based on his subjective assessment that four years had passed since the prior appointment in the matter concerning MSA's Chairman. Moreover, Mr. Yeap had acknowledged in the initial proceedings that "had I made the disclosure, the possibility of the Respondent seeking to challenge my impartiality could not be discounted". The Court viewed this statement as evidence of the fact that the non-disclosure was intentional and aimed at avoiding objection. Further, the Court held that the ICC Court's decision on the challenge, while acknowledging the non-disclosure as "regrettable", erroneously misplaced the burden on EPIL to demonstrate actual bias rather than focusing on the breach of the mandatory disclosure requirement, thereby noting that the decision was a classic case of *operation successful, but patient dead*. The logic behind this was that, while the ICC Court's decision may seem sound on the surface and in compliance with the formal procedure, it did not address the substantive loss of confidence in the arbitral process's neutrality.

On Interim Injunction

As such, applying the triple test of (i) prima facie case, (ii) balance of convenience, and (iii) irreparable harm for interim injunction as under Order XXXIX Rules 1 and 2 of the CPC, the Court found that all three conditions were satisfied and accordingly stayed the ICC arbitral proceedings until final disposition of the suit and restrained both parties from participating in the arbitration with the tribunal's present composition.

Concluding Remarks

While the judgment articulates laudable concerns about procedural fairness and impartiality, the approach that has been adopted raises serious questions about jurisdictional overreach, inconsistency with India's pro-arbitration legislative intent, potential damage to India's credibility as an arbitration-friendly jurisdiction.

Firstly, the most fundamental flaw in the judgment lies in its erosion of the seat principle which is unarguably a cornerstone of international arbitration law[9]. The UNCITRAL Model Law, which forms the very basis of India's Arbitration and Conciliation Act, is predicated on the seat principle, which has also been unequivocally affirmed by the Indian Supreme Court in cases such as BALCO. By granting an anti-arbitration injunction in this matter, the Delhi High Court effectively usurped the supervisory jurisdiction of the Singapore courts. The Singapore Court had already considered and rejected EPIL's challenge to Mr. Yeap's appointment, yet the Delhi High Court substituted its own judgment on the same issue. This created an untenable situation of conflicting judicial orders: the Singapore High Court granted an anti-suit injunction restraining the Delhi proceedings on 23 May 2025, while the Delhi High Court proceeded to grant an anti-arbitration injunction on 25 July 2025. Judicial conflicts of such nature undermine the predictability and finality that parties seek when choosing arbitration, not to mention the violation of principles of comity between courts. Additionally, it's not as if EPIL was rendered remedy-less before the seat courts at Singapore. There were multiple appeals available to Singapore High Court's decision on the challenge to Mr. Yeap's impartiality. The Delhi High Court's position could still have been appreciated had EPIL had no remedy left at the seat courts except to continue with vexatious and oppressive arbitral proceedings, but this was not the case. Further, the judgment's reliance on ***Dabhol Power Company*** and ***ONGC v. Western Company*** were misplaced considering that those cases involved enforcement of foreign awards or bank guarantees, and not the question of intervening in ongoing foreign-seated arbitrations with active supervisory courts. Not to mention that the judgment's characterisation of MSA's conduct as vexatious appears rather selective and outrightly ignores EPIL's own forum shopping tendencies, i.e., filing parallel challenges before ICC, Singapore Courts, and Delhi Courts simultaneously.

Secondly, while the Court correctly emphasised the importance of arbitrator disclosure, the underlying principles were applied in a problematic manner. The Court failed to consider that four years had passed since Mr. Yeap's prior appointment, and neither the ICC Rules nor the IBA Guidelines mandate disclosure of appointments separated by such a temporal gap unless it can be demonstrated that the same constitutes a pattern of repeated appointments; this standard is akin to Entry 20 of the Vth Schedule to India's 1996 Act. The ICC Court's decision carefully considered these standards and concluded that while disclosure would have been prudent, a failure to do the same did not give rise to justifiable doubts about Mr. Yeap's impartiality or independence. The Delhi High Court's characterization of this reasoned decision as *operation successful, but patient dead* is rather dismissive, fails to engage with the substantive reasoning, and fails to also take into account the fact that international arbitration institutions like the ICC possess expertise in assessing arbitrator conflicts; it is a clear case of 'due process paranoia' [10]. Domestic courts ought to be cautious about second-guessing such determinations, especially when institutional rules provide clear mechanisms and standards for such challenges. Further, the judgment entirely conflates two distinct issues: whether disclosure was required, and whether non-disclosure renders the arbitrator actually biased.

Lastly, the present judgment runs counter to India's objective to become an arbitration-friendly jurisdiction, as expressed in the Law Commission's 264th Report. By allowing a non-seat court to stay a foreign-seated arbitration based on alleged procedural impropriety, the decision sends a troubling signal to international parties i.e., choosing India as a contracting party, even with a foreign seat, exposes you to unnecessary intervention by Indian Courts; this is precisely what the BALCO regime sought to eliminate[11]. The judgment also creates a dangerous precedent for other jurisdictions. If Indian courts can intervene in Singapore-seated arbitrations, what is to stop Chinese courts from intervening in London-seated arbitrations, or vice versa? The result would be a race to obtain competing injunctions, undermining the entirety of the international arbitration framework.? Beyond doctrinal concerns, this is also a clear case of practical ineffectiveness. The ICC tribunal and Singapore courts are not bound by the Delhi High Court's judgment and have continued to recognise the arbitration's validity. Singapore subsequently issued a permanent anti-suit

injunction against EPIL on 18.09.2025, and initiated contempt proceedings when EPIL obtained yet another ex parte injunction from the Delhi courts restraining MSA from participating in the Singapore contempt proceedings. This cycle of competing injunctions serves neither party's interests and brings both judicial systems into disrepute, which is a massive concern, especially when this ordeal was wholly avoidable considering that under the New York Convention, any award rendered in this arbitration would have ultimately been enforceable in India only through the procedures in Part II of the 1996 Act, at which point EPIL could have raised objections under Section 48, including alleged violation of public policy. The availability of this post-award remedy also undermines the necessity for pre-emptive intervention.

A better approach would have been for the Court to (i) recognise that the seat court in Singapore has exclusive supervisory jurisdiction, (ii) acknowledge that EPIL has adequate remedies through the ICC challenge process and challenges before Singapore courts under Article 13 of the UNCITRAL Model Law, along with post-award resistance to enforcement, and (iii) decline jurisdiction on *forum non conveniens* grounds while allowing EPIL to pursue its remedies before the aforementioned appropriate fora.

[1] 2025 SCC OnLine Del 5072.

[2] (2012) 9 SCC 552.

[3] (2017) 7 SCC 678.

[4] See https://www.scconline.com/blog/post/2022/10/20/party-autonomy-or-the-choice-of-seat-the-essence-of-arbitration/ for a discussion.

[5] 1968 SCC OnLine SC 40.

[6] 2004 SCC OnLine Del 1298.

[7] (1987) 1 SCC 496.

[8] See https://disputeresolution.cyrilamarchandblogs.com/2025/08/delhi-high-court-clarifies-scope-of-anti-arbitration-injunctions-in-foreign-seated-proceedings/ for a discussion.

[9] See https://indiacorplaw.in/2025/09/08/jurisdictional-overreach-and-the-illusion-of-equity-a-critique-of-the-delhi-high-courts-intervention-in-epi-v-msa-global/ for a discussion.

[10] See https://forum.nls.ac.in/nlsir-online-blog/arbitrator-non-disclosure-before-the-delhi-high-court/ for a discussion.

[11] See https://legalblogs.wolterskluwer.com/arbitration-blog/a-shield-of-justice-or-a-sword-through-the-seat-the-delhi-high-courts-contentious-anti-arbitration-injunction/ for a discussion.

Cross-Border Personal Data Transfers: The Remaining Issues Following the Indonesian Constitutional Court Decision

Written by Dr Priskila Pratita Penasthika, Assistant Professor, Faculty of Law, Universitas Indonesia

INTRODUCTION

The Indonesian Personal Data Protection Law, Law Number 27 of 2022 (Indonesian PDP Law), came into effect on 17 October 2022. Before its enactment, data protection rules in Indonesia were fragmented across different

sector-specific laws and regulations. The Indonesian PDP Law aims to unify these laws and regulations, providing greater clarity and ensuring consistent personal data protection across all sectors in the country. The Indonesian PDP Law sets out normative provisions on personal data protection; however, detailed, practical rules have yet to be specified in the implementing regulations. As of now, the drafting of these implementing regulations is still underway.

Many of the fundamental elements of the Indonesian PDP Law, including definitions of covered data and entities, lawful grounds, processing obligations, accountability measures, and relationships between data controllers and processors, are modelled after the European Union's General Data Protection Regulation (GDPR). Nonetheless, several key provisions are tailored specifically to the Indonesian context. For instance, the Indonesian PDP Law has broad extraterritorial reach, which shall apply to entities insofar as their personal data processing activities have legal implications within Indonesia or pertain to an Indonesian national data subject outside Indonesian jurisdiction.

To date, there have been five decisions by the Constitutional Court of the Republic of Indonesia (*Mahkamah Konstitusi Republik Indonesia*) concerning the Indonesian Personal Data Protection Law. Briefly, the Indonesian Constitutional Court functions as one of Indonesia's apex judicial authorities, alongside the Supreme Court. Its primary jurisdiction involves the constitutional review of enacted laws (*undang-undang*) in Indonesia to assess their conformity with the 1945 Indonesian Constitution (as lastly amended in 2002), thereby safeguarding the constitutional rights therein. Its decisions are final, legally binding, and possess immediate legal effect upon issuance, with no provisions for appeal or annulment by any other institutional body.

This piece will focus on the most recent ruling by the Constitutional Court issued on 19 January 2026 regarding the Indonesian PDP Law, namely Case Number 137/PUU-XXIII/2025, as it pertains to matters within private international law.

FACTS

The Petitioner mainly requests a constitutional review of Article 56 of the Indonesian PDP Law, which specifies the requirements for cross-border personal data transfers. Article 56 delineates a tiered set of prerequisites for such transfers. A personal data controller responsible for transmitting personal data

abroad (data exporter) must verify that the recipient country offers an adequate or higher level of personal data protection than that provided by the Indonesian PDP Law. If this requirement is not met, the data exporter must ensure that sufficient and binding data protections are in place in the recipient country. If neither condition is satisfied, the data exporter is obliged to obtain consent from the data subject prior to transferring personal data abroad. Furthermore, the forthcoming implementing regulations are expected to provide further details on the specific requirements for cross-border data transfers.

The petition was initiated with the briefing announcement issued by the White House on 22 July 2025 concerning the Framework for Negotiating a Reciprocal Trade Agreement between Indonesia and the United States of America (Indonesia-USA Reciprocal Trade Agreement Negotiation Framework). As part of this framework, Indonesia has committed to establishing legal certainty regarding the ability to transfer personal data outside its borders to the United States.

The Petitioner argued that the Indonesia-USA Reciprocal Trade Agreement Negotiation Framework has led to a key interpretation of Article 56 of the Indonesian PDP Law concerning the transfer of citizens' personal data beyond Indonesian borders. The Petitioner maintained that, under a strict interpretive approach, the PDP Law allows data controllers to assess the adequacy requirement independently, without parliamentary oversight. This could potentially weaken democratic accountability and expose personal data vulnerable to misuse. Additionally, the Petitioner emphasised that such commitments should require approval from the House of Representatives, as they directly impact national sovereignty and the protection of citizens.

The foundation of the Petitioner's petition is based on Article 28G, paragraph (1) of the 1945 Indonesian Constitution, which protects citizens' rights to their dignity, family, honour, and property, as well as the right to be free from threats to their fundamental rights. Additionally, the Petitioner referred to Article 11 of the 1945 Indonesian Constitution, which confers authority on the House of Representatives and the President to conclude international agreements.

Therefore, the Petitioner requests that the Constitutional Court interpret the provisions of Article 56 of the Indonesian PDP Law to mean that transferring personal data to jurisdictions such as the United States should occur only if there is an international agreement approved by the Indonesian House of

Representatives. Moreover, transfers to countries considered to lack adequate personal data protection standards should take place only with the consent of the data subjects, after informing them of the risks involved in the cross-border transfers of their personal data.

CONSTITUTIONAL COURT DECISION

The Constitutional Court rejected all of the Petitioner's petition and arguments. According to the Court, the cross-border transfer of personal data constitutes part of the administrative and technical measures carried out by the executive branch, rather than an agreement between nations that creates rights and obligations in the domains of politics, defence, or sovereignty. Based on this reasoning, the Court affirmed that there is no constitutional obligation to involve the Indonesian House of Representatives in any cross-border data transfer process, including in determining the adequacy decision regarding such a personal data transfer.

Regarding the adequacy decision, the Court held that the personal data controller (data exporter) shall undertake technical verification procedures to ascertain whether the recipient country of the personal data transfer maintains data protection standards that are adequate or even higher than those provided in the Indonesian PDP Law. Furthermore, the Court pointed out that cross-border personal data transfers do not rely solely on the personal data controller to ensure adequacy or higher protection standards in the recipient country. Instead, it also necessitates the existence and active involvement of the Personal Data Protection Authority (PDPA), as prescribed in Articles 58-61 of the Indonesian PDP Law. The PDPA is tasked with overseeing, evaluating, and implementing technical policy measures to ensure compliance with requirements for cross-border personal data transfers. Nevertheless, it is important to note that such authority has yet to be established.

REMARKS

Despite the Constitutional Court's rejection of the petition, Case Number 137/PUU-XXIII/2025 brings to light persistent concerns regarding the Indonesian PDP Law, particularly its provisions on cross-border personal data transfers. These issues call for further discussion and highlight the pressing need to pass the implementing regulations and establish the PDPA.

First, clarification is required regarding the party responsible for conducting

cross-border transfers of personal data. Article 56 of the Indonesian PDP Law exclusively employs the term 'personal data controller' (*pengendali data pribadi*) in the context of cross-border data transfers, which seems to imply that only personal data controllers are authorised to carry out such transfers.

Second, it is necessary to delineate which countries are recognised as having adequate or higher levels of personal data protection. In this context, Article 60(f) of the Indonesian PDP Law provides that the PDPA is empowered to assess whether the requirements for cross-border personal data transfers are satisfied. The significant role of the PDPA in cross-border personal data transfer is also emphasised by the Constitutional Court Judges in Case Number 137/PUU-XXIII/2025. Since the PDPA has not yet been established or designated to date, this situation underscores the urgent need to set up or appoint such an authority.

Third, the forthcoming implementing regulations of the Indonesian PDP Law are expected to clarify issues surrounding cross-border personal data transfers, including the incorporation of whitelists and blacklists of specific jurisdictions, standardised contractual language, and specific data processing activities such as pseudonymisation and encryption. It is also presumed that the personal data controller and the forthcoming PDPA will be required to report to the Indonesian Ministry of Communication and Digital regarding cross-border transfers of personal data.

Fourth, as set out at the outset of this piece, the Indonesian PDP Law has an extensive extraterritorial scope. In the event of a personal data breach involving cross-border transfer of personal data, any individuals, corporations, public entities, and international organisations—irrespective of their origin or residence—whether functioning as personal data controllers or processors, may be considered potential defendants for violations that affect the rights of an Indonesian data subject. Referring to Article 2 of the Indonesian PDP Law, this applicability is contingent upon the occurrence of their misconduct (1) within the jurisdiction of Indonesia or (2) outside of Indonesia, provided that such misconduct results in legal consequences (a) within the Indonesian jurisdiction or (b) impacting an Indonesian personal data subject outside of Indonesian territory.

The subsequent issue concerns the court's jurisdiction. As no cross-border data protection litigation has occurred in Indonesia to date, the court's position in this matter remains indeterminate. Nevertheless, Indonesian courts are notorious for

their indifference and insularity when addressing foreign-related issues. Furthermore, Indonesian civil procedural law does not specify provisions regarding parallel litigation. Consequently, in case of parallel proceedings concerning a cross-border data transfer dispute, it is likely that the Indonesian court would exercise jurisdiction and proceed with the legal proceeding in Indonesia, notwithstanding the existence of an ongoing legal proceeding involving the same dispute and parties in a foreign court.

If proceedings are conducted in a foreign court, the complexities of the issues may increase. Indonesia maintains a stringent stance that a foreign judgment is not enforceable unless it pertains to damages arising from marine salvage. Any foreign, other than those on damages resulting from marine salvage, must undergo re-examination by an Indonesian court. In light of this stance, it is apparent that Indonesian courts would not recognise or enforce foreign judgments concerning cross-border personal data transfer disputes and would require such disputes to be relitigated before an Indonesian court.

Practical challenges also include the complexities of seizing assets or digital evidence located in foreign jurisdictions, given that Indonesia has not yet acceded to the HCCH 1970 Evidence Convention.

Further details concerning the Indonesian PDP Law and its private international law aspects are available in Priskila Pratita Penasthika, “Chapter 12 – Indonesia” in Adrian Mak, Ching Him Ho, and Anselmo Reyes (eds.), Privacy and Personal Data Protection Law in Asia (Hart Publishing, 12 December 2024).

HUK-COBURG II: A Case on Mandatory Overriding Law or Jurisdiction?

By Ross Pey, Western University, Canada

1. Introduction

In Case C-86/23 *E.N.I. and Y.K.I. v HUK-COBURG-Allgemeine Versicherung AG II* (‘*HUK-COBURG II*’), the principal issue that arose was whether a Bulgarian compensation provision may be interpreted as having mandatory effect. In suggesting that it does not, the Court required the facts to have sufficiently close links with the forum. (Hereinafter the ‘sufficient connexion test’) Ostensibly, a freestanding sufficient connexion test could be viewed as a disguised jurisdictional control of the forum rather than part of a mandatory law analysis. In doing so, parallels to *renvoi* and *forum non conveniens* are drawn.

2. Facts

The daughter of the Bulgarian claimants died in a road traffic accident in Germany. The person responsible was insured by the defendant. The claimants commenced a claim in Bulgaria against the defendant for non-material damages suffered for the loss of their daughter. (*HUK-COBURG II* at [16]–[17])

The case was dismissed on appeal. As German law governed the claim under the Rome II Regulation, the claimants 'had not established that the mental pain and suffering sustained had caused pathological harm' required under German law. (*HUK-COBURG II* at [20], [24], [51])

Crucially, the Court also said that Bulgarian law, in particular Article 52 Zakon za zadalzheniyata i dogovorite ('ZZD'), did not apply to the case as a mandatory overriding rule under Article 16 Rome II Regulation. This issue as to whether the ZZD applied as a mandatory overriding rule was appealed to the Varhoven kasatsionen sad (Supreme Court of Cassation), which then referred the question to the ECJ.

3. The CJEU's Reasoning

In essence, the ECJ said that although it is for the member state court to assess whether Article 52 ZZD was a mandatory overriding rule, it strongly suggested that it did not. (*HUK-COBURG II* at [47]-[54]). In the operative part, the Court said that that the Rome II Regulation must be interpreted as meaning that a forum law 'cannot be regarded as an 'overriding mandatory provision', within the meaning of that article, unless, where the legal situation in question has sufficiently close links with the Member State of the forum, the court before which the case has been brought finds, on the basis of a detailed analysis of the wording, general scheme, objectives and the context in which that national provision was adopted [.]' (Emphasis mine)

4. Issues with Linking Sufficient Connexion and Mandatory Law

When faced with an allegedly mandatory provision, *HUK-COBURG II* requires a three-step analysis: (1) identify whether the law has a mandatory effect, (2) identify whether the facts have a sufficiently close connexion with the forum, and (3) determine whether the facts fall under the statute. One reading of the sufficient connexion test in this context is that it is intrinsic to the concept of mandatory law and is read in by the ECJ into the requirements of Article 16 Rome II Regulation. [1] However, there are two issues with this view.

Firstly, it may be that a sufficient territorial connexion forms part of the reason why a forum statute is a mandatory statute and is relevant to determining whether a mandatory rule applies to the facts.[2] But linking territorial connexion

and mandatory effect is problematic as they are analytically distinct. In *Soldiers, Sailors, Airmen and Families Association v Allgemeines Krankenhaus Viersen GmbH* [2022] UKSC 29, Lord Llyod-Jones warned that there is a risk of 'confusion' if both territoriality and mandatory effect are conflated. The former relates to the intrusion into the territorial affairs of another state, while the latter relates to 'whether the public policy of the forum displaces the more modest presumption that statutes only apply if they form part of the applicable law.'[3]

Secondly, one might argue that sufficient territorial connexion is *required* for a forum rule to be deemed a mandatory rule. But the difficulty here is why a territorial connexion with the forum matters at all. The point of mandatory overriding rules is that such rules are so important to the forum that they justify the departure from the law chosen by default choice of law rules. Viewed this way, it is difficult to see why the facts must be sufficiently connected with the forum for a mandatory law to apply. Forum mandatory overriding rules operate precisely because they are reflections of fundamental values of the forum. Requiring a territorial connexion could dilute this.

This is not to say that the Bulgarian law ought to be viewed as mandatory law. Rather, from an interpretative standpoint, grounding a rejection simply because the Bulgarian law fails to satisfy a sufficient connexion test is at least open to question.

5. A Disguised Jurisdiction Analysis?

From the above discussion, there exist questions regarding the role of a freestanding connexion test with the concept of overriding mandatory law. It is, however, plausible to read the judgment differently, where the sufficient connexion test is a jurisdictional analysis of forum choice disguised as a choice of law analysis.

Firstly, this interpretation is not precluded by the judgment itself. In the operative part, the ECJ stated that the 'legal situation in question has sufficiently close links with the Member State of the forum' before the forum court seised conducts a mandatory law analysis. Further, in the Court's own analysis of what constitutes mandatory law from paragraphs 37 to 54, the Court did not place reliance on the lack of a sufficient territorial connexion. It was a factor in its own right (paragraphs 32 to 36) but does not seem necessary to the mandatory law analysis

and the suggestion that Art 52 ZZD does not have a mandatory effect.

Secondly, both the ECJ judgment and the Advocate General's opinion suggest this. The Court observed at paragraph 36 that although the claim was brought by the parents, who are domiciled in Bulgaria, the accident took place in Germany and was insured by a German insurer. The daughter who died and the person who caused the accident were Bulgarians, but are now residents in Germany. To a common lawyer, this discussion bears a striking resemblance to Step 1 of the *forum non conveniens* analysis in *Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada)* [1987] AC 460, where the court asks which jurisdiction has the most real and substantial connexion with the dispute (ie. the 'natural forum'). The jurisdictional impetus is fortified by the Advocate General's opinion, which at paragraph 53 explicitly states that 'the requirement of a close link helps to prevent forum shopping.'

This jurisprudential instinct to discuss the sufficiency of connexion is not unwarranted. Under the Brussels I bis Regulation, jurisdiction is allocated by a series of brightline rules, normally based on the domicile of the defendant (Article 4), and at times the claimant (for instance, under Article 11). Crucially, in Case C-281/02 *Andrew Owusu v N. B. Jackson*, the ECJ erred on the side of certainty in rejecting the doctrine of *forum non conveniens*. But in doing so, it deprived the courts of a flexible tool to control jurisdiction, making an indirect control via choice of law rules understandable.[4]

In fact, controlling jurisdiction via choice of law is not new. Briggs observes in 1998 that the doctrine of *renvoi* has, in part, served such a function in English law historically.[5] In this vein, the doctrine of *forum non conveniens* was part of the 'tailor-made rules against forum shopping which went straight to the heart of the problem, and did not seek to operate by remote control.'[6]

If so, *HUK-COBURG II* is another example of the interrelatedness of the conflict of laws. When jurisdictional rules are understood rigidly, the pressure points move to other areas, including the choice of law.

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[1] Eg. Dominika Moravcová, 'Navigating the nexus: The Doctrinal Significance of

close connection in the Enforcement of (not only) overriding mandatory norms' (2025)

[2] Eg. Hague-Visby Rules scheduled to the Carriage of Goods by Sea Act 1971.

[3] *Soldiers, Sailors, Airmen and Families Association v Allgemeines Krankenhaus Viersen GmbH* [2022] UKSC 29 [36].

[4] The irony here is that the ECJ has now *read in* a sufficient connexion test into both Rome I and II Regulations, a move which it declined to do in the Brussels I bis Regulation.

[5] Adrian Briggs, 'In Praise and Defence of Renvoi' (1998) 47(4) The International and Comparative Law Quarterly 877.

[6] Adrian Briggs, 'In Praise and Defence of Renvoi' (1998) 47(4) The International and Comparative Law Quarterly 877, 879.

Book Review: L. d'Avout's La Cohérence Mondiale Du Droit (Brill)

The general course in private international law delivered at the Hague Academy of International Law by Louis d'Avout during the 2022 Summer Session was published in the Academy's Pocket Books Series (1 032 pages). Louis d'Avout is Professor at Université Paris Panthéon-Assas. In addition to his numerous scholarly works, readers of this blog may recall that his special course on "L'entreprise et les conflits internationaux de lois" was also published in the Academy's Pocket Books Series in 2019. The general course is title « La cohérence mondiale du droit » (*"The Global Coherence of Law"*). The publication of a general course in private international law—particularly in the Academy's Pocket Books Series—deserves the attention of the readers of this blog. The aim of this review is, modestly, to offer a glimpse into this important work so readers who are sufficiently francophone may be encouraged to read it directly, while those who are not are offered a brief overview of the author's approach.

Two caveats. First, translations, and inevitable related inaccuracies, are mine. Second, it should be stated at the outset that a work of such scope is not easily summarized: the demonstration, subtle and original, is based on detailed and nuanced analyses and is supported by an impressive bibliographical apparatus, of remarkable diversity. One may note in that respect the author's relentless effort to draw on a very large number of courses delivered at the Academy of International Law, both in private and in public international law. It is unfortunately impossible to reflect such wealth in the present review other than in a very selective manner.

The course's program

The program of the course as encapsulated in the title is ambitious. The idea of "coherence" in law, and especially in private international law (PIL), is particularly evocative. On the one hand, it evokes the often recalled need to preserve the coherence of the forum's legal order in the face of the disturbance that foreign norms may generate. On the other hand, it also conveys the

traditional objective pursued by conflict of laws: the international harmony of solutions. The use of the term "global" (*mondiale*) gives this search for coherence a particular breadth: it does not concern merely the legal treatment of international or transnational private relationships—the traditional object of private international law—but rather the articulation of legal regimes (State and non-State, domestic and international, public and private) whose still largely disordered coexistence is one of the defining features of our time. As will be seen, the perspective adopted in the course is normative, oriented toward the pursuit of global legal coherence. This search must be understood in a double sense: to uncover coherence where it exists, and to restore it where it does not. At a first level, coherence refers to the rationality and predictability of legal regimes, as well as to their effectiveness. Such coherence (or at least the aspiration to it) is regarded by the author as consubstantial with law itself.

The context in which this search for coherence unfolds is marked by a triple dynamic. On the one hand, increased individual mobility and technological change have diminished the relevance of geographical distance, and even of the crossing of borders. On the other hand, and correlatively, new forms of inter-State cooperation or coordination have emerged. Added to this is the development of non-State and/or transnational legal regimes. These factors give rise to collisions between legal regimes, confronting individuals and enterprises alike. The author proposes to draw on the technical and conceptual wealth of private international law in order to bring coherence to this normative disorder. After all, PIL has a (multi-)millennial experience in resolving conflicts of norms.

Two points are central to the author's approach. First, the search for coherence must be conducted at the supra-State level. The State level is still relevant for reasoning about conflicts of norms and their resolution, but with a view to a "framework extended to global society" (p. 29). Second, although the search for coherence benefits individuals, it does not necessarily entail a subjective right of individuals to the transnational coherence of law, that is, a right to enjoy a single legal status notwithstanding the crossing of borders and the diversity of legal systems (p. 41).

Starting point and definitions

An introductory chapter, strikingly entitled *"Confronting Global Legal Anarchy"* ("Face à l'anarchie juridique mondiale"), provides the starting point of the demonstration and key definitional elements. Legal coherence does not mean "the uniformity of applicable rules and the absolute centralization of dispute resolution mechanisms, supplemented by a transnational enforcement police force," but rather "the state of a system in which coordination between partial legal systems is generalized and whose effects are guaranteed, for the benefit of the predictability and legal certainty expected by each subject or user of the law" (p. 54). The expression "partial legal systems" refers, it seems, to the incompleteness of any legal system in the perspective of a transnational relation (here at least, comp. p. 117). The definition of coherence introduces the idea of a spontaneous coordination, which plays an important role in the demonstration, as will become clear. The author also revisits the traditional definitions of private international law. Rather than a conceptual definition centered on the notion of internationality (internationality of sources or subject-matter internationality), he prefers a functional definition (p. 75), structured around two objectives: respect for the legitimate expectations of the parties despite their exposure to diverse legal regimes, and the international harmony of solutions, which implies an "aptitude for universality" (p. 75) and the exportability of the solution adopted. Again this definition will prove instrumental in the demonstration (particularly to show that the singularity of PIL rules should not be overstated, compared to other norms).

After a brief historical overview presented in six evocative tableaux, the author examines the merits of three intellectual representations of the discipline, all of which share a connection with general international law: State-centrism, inter-Statism, and the allocation of jurisdiction. The author's approach is structured by this concern with the relationship between private and public international law. In so doing, he deliberately continues a doctrinal current that has become rather minority in contemporary PIL scholarship (at least in France). In any event, private international law brings together mechanisms for opening State legal orders and articulating them with one another (p. 111).

The author then turns to defining "inter-State and transnational coherence of law" (p. 112). He devotes particularly dense pages to this issue, pages which are

difficult to summarize but are decisive for the originality of his perspective. He emphasizes institutional and procedural coherence—that is, the institutions, procedures, mechanisms and actors whose work produces coherence. This *procedural* coherence is fundamental and constitutes a *sine qua non* condition of a legal system, whereas *normative* coherence (the consistency and logical character of the solutions produced) is both secondary—since it flows from institutional and procedural work—and closer to an ideal, often imperfectly achieved.

Equally decisive is the author's conviction as to the necessity of coherence. The "praise of incoherence" (p. 127) is dismissed as stemming from a confusion between normative coherence and institutional coherence: the former, being ideal, may fail to convince, whereas the latter is genuinely necessary for the jurist. In short, coherence and incoherence are opposing poles of a complex reality; the existence of incoherences is not sufficient to discredit the need for coherence. As a result, coherence is both necessary and achievable.

Basically, incoherence arises from the tendency of legal systems—particularly the most sophisticated and robust among them, namely States—to reason in autarchy and to impose their own viewpoint (often in the name of their internal coherence) at the expense of the "global rationality of the law applied". What makes coherence possible is the openness of legal systems to one another (and thus openness to otherness) and their willingness to cooperate. The international (public) legal order itself is marked by a corresponding tension between unilateralism (each sovereign acting alone) and concertation (sovereigns acting together). Coherence in the international order may follow a horizontal (inter-State) or a vertical (supra-State) model. The vertical, supra-State and overarching (tending toward monism) model allows for a form of universality (a *jus commune*). By contrast, the horizontal model is characterized by pluralism. The author associates each model with a method of private international law: verticality and monism allow for bilateralism, whereas horizontality (and pluralism) implies unilateralism (p. 169).

The book's outline and summary

The horizontal/vertical distinction structures the book. The first part is devoted to

the study of horizontal interactions: independent “legal spheres” interact with one another, coherence is not guaranteed but may be produced through mutual consideration and interaction. The second part focuses on institutional verticalization, a partial and complementary dynamic (limited to certain sectors or regions of the world), based on the creation and intervention of supra-State bodies capable of producing coherence for the benefit of individuals.

Horizontal interactions between legal systems

The first part of the course is therefore devoted to what the author terms “horizontal” interactions between “independent legal spheres”. In this context, he examines the mechanisms of classical private international law: conflicts of laws and conflicts of jurisdictions or authorities. Here, the “conjunction” of viewpoints (that is, of legal orders) with respect to an international private relationship is, in a sense, voluntary rather than mandatory. It operates through two main sets of mechanisms: first, the attachment of situations to a particular law, court, or authority; and second, cross-border cooperation between authorities (for example, the taking of evidence, the delegation of formalities, or the enforcement of judgments).

The spirit of Relativism

In the first chapter, the author sets out the rudimentary elements of the discipline. These rudiments appear clearly in historical perspective. He explores the tools spontaneously used by courts in order to take account of the foreignness of a person or a situation vis-à-vis the forum. This perspective is original, in particular because it does not merely recount a historical evolution but demonstrates the persistence of these instruments in contemporary PIL. The earliest manifestations of the openness of State legal orders were guided by a concern to achieve equity “formulated from the standpoint of the *lex fori*”, through recognition of the foreign elements of the situation to be regulated, combined with interpretative techniques applied to the law of the forum to reach a fair outcome. The author emphasizes that these instruments, rudimentary though they may be, are not devoid of subtlety. At their root lies a form of judicial spontaneity oriented toward the pursuit of equity in cross-border relationships.

This pursuit is guided by a spirit of legal relativity: the transnational private relationship is exposed to a diversity "of laws, customs or values" (p. 187), and this diversity must be considered. The author thus shows how foreignness and relativity constitute the foundational elements of what he terms "international civil law". The foreigner receives particular treatment when the *lex fori* is applied, and the international or foreign situation calls either for a reception mechanism (and, correlatively, for limits to relativism, notably an international public policy exception subject to modulation), or for a form of spatial limitation of the *lex fori* (as exemplified by the presumption against extraterritoriality in U.S. law). The author further demonstrates how these instruments continue to be used in contemporary law to manage situations of legal otherness within the domestic legal order itself. States are prompted to limit the undifferentiated and uniform application of their own laws through compromise solutions, often entrusted to the judiciary (see, from this perspective, the discussion of the Molla Sali judgment of the European Court of Human Rights, p. 218). The identity of individuals may likewise warrant specific accommodations from the inward pull of communities. The author reflects on the relationship between this spirit of relativism (both international and internal) and a form of liberal individualism, particularly as expressed through the growing judicial consideration of fundamental rights. From this perspective, the application of the principle of proportionality in private law may be seen as a manifestation of this spirit of relativity.

The author then explores the tactics developed by judges—and still employed today—to loosen, where necessary, the constraints of the *lex fori*, which remains the unavoidable starting point for the forum judge when confronted with an international situation. These tactics include the self-limitation of the law of the forum (see, for example, the analysis of the Gonzalez-Gomez decision of the French Conseil d'État, p. 266), creative interpretation of the *lex fori*, *prise en consideration* of foreign law, and judge-made international substantive rules. Judicial creativity, however, has its limits: true conflicts are difficult to overcome (see the analysis of unilateral techniques, p. 290 et seq.). The spontaneous modulation of the *lex fori*, while significant, reveals certain weaknesses and highlights the need for a selective method that appears to "allocate competences among the various legal spheres or among the different poles of law production" (p. 217).

Connecting factors and conflicts rules

The following chapter is devoted to connecting factors, whether from the standpoint of jurisdictional competence or of the applicability of laws. One of the drawbacks of the spontaneous judicial method of adapting the *lex fori* described in the preceding chapter lies in its casuistic nature, which proves ill-suited to the massification of international private relationships. The author defines the technique of connecting factors in general terms as establishing a rational link between a transnational situation and either a specific legal regime, whether domestic or conventional, or a collective entity (a State or an international organization) (p. 319). He devotes particularly thorough and insightful developments to connecting factors, highlighting their richness, diversity and complexity (see the synthesis at p. 344 et seq.).

Among other points, the author rejects an overly rigid opposition between unilateralism and bilateralism, noting that "the connecting operation may function in both directions" (p. 323): the connecting factor may operate either on the side of the legal consequence or on that of the presupposition of the rule. He usefully distinguishes between the policy of the connecting factor—that is, the intention guiding its author—and the justice of the connecting factor, which results from it and may be assessed independently. The respective connecting roles of bilateral conflict-of-laws rules, unilateral applicability rules, and jurisdictional rules are thus clarified. In another original move, the author also draws a link between the recognition of a foreign judgment and the operation of connecting factors, particularly from the perspective of reviewing the origin of the judgment (indirect jurisdiction).

Following these general observations, the author successively examines jurisdictional connecting factors (judicial or administrative) and substantive connecting factors. With regard to the former, one may summarize (see p. 398) the rich analyses developed as follows. Jurisdictional (or administrative) connecting factors are distinct from substantive connecting factors. They are unilateral (save under conventional regimes) and generally plural and alternative (with some exceptions), giving rise to a situation of "concurrent international availability" of authorities belonging to several legal orders. These connecting factors are not purely localizing: they always have a purpose grounded in considerations of appropriateness, sometimes linked to substantive aspects of the

dispute. In any event, the connecting factor is not purely procedural. It affects the substance of the dispute (the forum applies its own procedural law and its own private international law), and it expresses a (legal) policy, understood as a balancing of the interests at stake. As regards administrative authorities, the connecting factors adopted are generally dictated by the applicability of the administrative law concerned, which the authority is tasked with enforcing (according to the model of the *lex auctoris*). The unilateral and diverse nature of jurisdictional rules creates risks for the coherence of the legal treatment of situations, thus calling for conciliatory mechanisms, namely the forum's consideration of foreign judicial activity.

With respect to "substantive connecting factors" (conflict of laws rules, then), L. d'Avout claims from the outset a "substantive impregnation of the rules, imbued with objectives and revealing legal policies forged by their authors" (p. 402). These considerations are sometimes specific to the international context and sometimes derive from the orientations of domestic substantive law (often a combination of both). Faithful to his commitment to methodological flexibility, the author develops the idea of a progressive crystallization of synthetic bilateral rules, starting from an intuitive unilateralism (see pp. 412–416). Here he draws on the German doctrine of *Bündelung* (with reference to Schurig). This approach is convincing with regard to the formation of connecting categories. It is complemented by a sophisticated functional approach (with reference to the work of Professor Brilmayer in the United States). The choice of a connecting factor is above all a matter of appropriateness, taking into account both the divergent interests of the individuals directly concerned and, through consideration of externalities, the collective interests affected by the situation (p. 435).

These balances are struck by the author of the rule and are therefore liable to vary from one State to another, or where the rule has been adopted at a supranational level (for example, at the European level). The author thus distances himself from an apolitical, universalist, but also singularist vision of the discipline: the conflict-of-laws rule is a rule like any other, a deliberate rule. On this basis, the author addresses the classical difficulties of the conflict-of-laws method: characterization and *dépeçage* (pp. 439 et seq.), conflicts of systems (p. 443), and the authority of the conflict-of-laws rule (p. 447). In each case, the analyses are guided by the previously articulated teleological precepts, without any particular search for originality for its own sake (as the author himself

acknowledges), but rather by a concern for… coherence.

The pragmatism advocated by the author is not exclusive of visceral attachment to the conflict-of-laws rule *as a rule*. Targeted adjustments that depart from this abstract mode of regulation (such as the escape clause or the recognition method) have their place, but they must remain subsidiary and be used with caution. Concluding on this point, the author offers a nuanced diagnosis of the connecting rule. As an international extension of domestic legislation, it is indeed an instrument of coherence (or at least of cohesion). Being anchored in the legal order that adopts it, it is however not capable—at least not systematically—of ensuring "the harmonious junction of legal spheres" (p. 473). Mechanical application must therefore be avoided, and the rule must be accompanied by a cooperative attitude, thus offering a transition to the following chapter.

Transnational cooperation

The final chapter of the first part is accordingly devoted to "transnational cooperation" and "communications between authorities". The author adopts a broad conception of transnational judicial cooperation, ranging from ancillary technical cooperation (such as the taking of evidence or service of documents) to what he terms cooperation-communication, and even co-determination of solutions (p. 477). These mechanisms are important because they offer some remedy to the shortcomings identified earlier (competing jurisdictions and divergence in substantive connecting rules).

The prominence given to these instruments and the analyses developed in this chapter constitute arguably one of the course's most strikingly original contributions. To be sure, significant scholarly work has already been devoted to international judicial cooperation (see the references cited in the chapter's introduction). The analyses presented here stand out nonetheless both for their ambition to offer a comprehensive reflection on mechanisms that had previously often been addressed piecemeal, and, above all, for their full integration into a private international law framework, on an equal footing, so to speak, with the conflict-of-laws rule. This innovation is made possible by the course's overarching perspective, since transnational judicial cooperation is fully part of the search for the global coherence of law.

L. d'Avout proposes a useful typology: administrative or judicial assistance or

mutual legal assistance (acts auxiliary to the main proceedings); cooperation at the periphery of the main proceedings (a category that includes the recognition of judgments and public acts—see the justification at p. 499 et seq.); and more innovative hypotheses of co-determination of legal solutions, whether within a conventional framework (the example given is the 1993 Hague Convention on the Protection of Children, p. 507) or through spontaneous coordination. It is in respect of this last category that the developments are the most interesting and innovative (see the examples given at p. 519 et seq.).

On this basis, the author constructs a genuine theory of the concerted resolution of international disputes (illustrated by a traffic-light metaphor, p. 530). Without being able to go into the details of this theory here, its starting point lies in the ideal unity of the proceedings on the merits, possibly supplemented abroad by collaborative ancillary measures and by a subsequent review of acceptability (namely, recognition of the judgment on the merits). Because this ideal is not always achievable—nor even always desirable—additional instruments exist to ensure reciprocal consideration of judicial activity: stays of proceedings (potentially conditional upon a prognosis as to the regularity of the forthcoming judgment), or even the forum's consideration of the likely outcome of the foreign proceedings. Instruments for managing procedural conflicts also occupy a prominent place (p. 536 et seq.).

The search for coherence does not, however, imply an idealized view of international litigation: frictions do exist, and they cannot always be avoided. What matters is to identify their causes and consequences clearly, rather than proceeding in isolation and disregarding their effects (whether for the parties, or one of them, or for the objectives pursued within a given branch of law). After examining several areas particularly conducive to transnational judicial concertation (family litigation, insolvency, and collective proceedings), the author proposes both existing and potential tools, advancing several stimulating proposals: the transnational procedural agreement and the transnational preliminary reference (*question préjudicielle transnationale*), to name a few. Should one then recognize an autonomous duty of cooperation incumbent upon judges or authorities in international cases? Characteristically, the author's answer is cautious: cooperation is not the primary mission of the judge or of an administrative authority; it remains secondary (p. 575).

Having thus explored the avenues of horizontal cooperation between legal

systems—demonstrating both their potential and their limits—and following a rich intermediate conclusion, the author turns to the phenomenon of partial verticalization, which represents their transcendence.

Verticalization

The second part, entitled “Verticalization – Institutional Responses to the Interpenetration of Legal Spheres”, may come as something of a surprise to readers. Indeed, as it goes beyond the horizontality examined thus far, it tends to move away from the classical perspective of private international law. For the author, however, this movement is a natural one, as only a supranational construction is capable of overcoming the residual oppositions between States’ viewpoints. The approach unfolds in two successive stages. The first form of verticality examined is that of federative organizations, such as the European Union, whose role in coordinating legal regimes is undeniable. The second (and more exploratory) form of verticality concerns international law itself: are there international institutions that can be leveraged in the service of the global coherence of law?

The role of federative organizations

The first chapter of this second part examines “the coherence of law through federative organizations”, that is to say, new modes of articulating legal regimes and of reducing the accumulation and conflict of international rules. The demonstration begins with European regimes of coordination in public law insofar as they affect individuals and companies. European measures facilitating administrative procedures have made it possible to remedy the overlap of national legislation or administrative procedures that necessarily results from individual mobility. European integration has also established articulations of State competences to the same end. Likewise, European Union law has fostered the polymorphous mobility of companies by organizing the normative and administrative interventions of the Member States. The chapter offers further, equally convincing examples: federative organizations effectively articulate sovereignties. The author further proposes a distinction between two aspects : the intensification of horizontal cooperation and institutional federalism.

The first aspect provides an opportunity to examine mutual recognition as a form

of articulation of competences, as well as its limits (p. 664 et seq.). While acknowledging the major achievements of European integration, the author rightly insists on the need to avoid imposing automatic recognition where the underlying control whose outcome is being recognized has not been fully harmonized. The second aspect developed concerns the action of supranational administrative bodies.

The author then turns to the "vertical discipline of conflicts of laws in the interest of private persons". The issue here is to assess the impact of federative organization on the configuration and resolution of conflicts of laws. Following a preliminary discussion addressing the matter from an institutional perspective (in the form of an illuminating EU–US comparison), the author devotes profound developments to the renewal of conflict-of-laws reasoning brought about by institutional verticality. At the heart of this reflection lies the figure of the supranational judge, an external third party to conflicts of laws between Member States, and a point of "triangulation" of these opposing viewpoints.

Without being able to reproduce the entirety of the argument here, it may be noted that it leads the author to issue the following warning: "an analysis of current law does not support the emergence, within regional spaces, of an unconditional right of individuals to the transnational coherence of law and to a resolution of conflicts of laws favorable to them" (p. 725). Supranational courts that were to lose sight of this would expose themselves to the risk of "judge-made legislation". The author nevertheless identifies "an intensified duty to take account of discordant viewpoints and, at times, to articulate them in novel ways, in application of the organization's law and in the absence of harmonization by it of the applicable law". Particular attention should be drawn to the author's precise reassessment of the figure of so-called "diagonal conflicts", based on a fruitful distinction between horizontal conflicts resolved along the vertical axis through fundamental rights, and frictions between a supranational regime and a State regime (see pp. 761 et seq.).

Verticality in public international law

The final chapter is both the natural culmination of the overall demonstration and one that will likely most surprise PIL scholars. Having examined the effects of the verticality of federative organizations of States on conflicts between legal regimes, the author considers it natural to search directly within international law

for instruments capable of coordinating legal regimes applicable to private persons. The surprise may stem from the fact that contemporary private international law doctrine—at least in France—has largely ceased to look to general international law as a remedy for deficits in legal coordination.

The author's perspective here is once again innovative. While there is no substantive subjective right of individuals or companies exposed to discordant legal treatment, the possibility of a procedural subjective right may be envisaged "insofar as such a faculty allows, either immediately or following unsuccessful recourse before State bodies, access to an impartial judge capable of stating the law or of reviewing the manner in which it has previously been applied" (p. 795). The author thus embarks on a quest for this emerging procedural right in its various modalities (individual claims against the State; claims mediated through another State or an international organization). This leads him to explore avenues as diverse as investment arbitration, the fascinating experience of binational courts (and their spontaneous production of private international law solutions, p. 819 et seq.), as well as the International Court of Justice, whose case law is scrutinized to detect the tentative emergence of substantive rights of individuals. The author perceives here a potential for a de-specialization of the Law of Nations through the expansion of its addressees (p. 874).

The author then turns to international institutional fragmentation, that is, the fragmentation of the various regimes (territorial State regimes, special international regimes). He concludes that techniques of horizontal interaction between these legal spheres should be developed, and possibly even hierarchical principles (p. 901). A solution might lie in seizing an authority capable of arbitrating conflicts of competences exercised by independent international bodies, by expanding the advisory procedure before the International Court of Justice, or even by entrusting it with a mission of resolving these conflicts of competence.

Finally, the author seeks to determine whether, in order to transcend the multiplicity of clashing legal regimes, it might be possible to invent and construct a new "*jus commune*" (*droit commun*). He advances three series of proposals or concluding observations in this regard. The first concerns the contemporary role of States and State sovereignty: the author calls for the consolidation of an "interface State between local communities and distant communities" (p. 920). In his view, "the durable persistence of State organization requires a minimum level

of inter-State cooperation". The second series of observations concern the possibility of the emergence of this universal *jus commune* and its defining qualities. The author focuses on points of convergence (principles, values, standards) that make it possible to discern a phenomenon of conjunction between norms of diverse origins. Finally, the author returns once more to the legal discordances affecting international relations to emphasize that, beyond disciplinary, conceptual, and terminological distinctions, a single problem emerges: the lack of coordination between autonomous legal spheres. Given contemporary developments in human societies, spatial mechanisms for resolving certain of these discordances may appear less relevant. What is therefore required is a genuinely substantive coordination, resting on the production of concerted solutions (in the various forms discussed above). For the most difficult cases, the subsidiary intervention of a supranational court could be envisaged.

Highlights

Within the limited space of this review, it is unfortunately not possible to engage in a detailed discussion of the analyses developed, other than by pointing to them in the summary above and advancing the following few remarks, necessarily too general.

The summary above perhaps gives a sense of the scope of the demonstration undertaken. It is particularly impressive and compelling in that it escapes the traditional boundaries of the discipline to embrace the globality of the phenomenon of normative fragmentation. Such an undertaking is remarkable. Global legal incoherences are numerous and addressing them solely through the lens of conflicts of laws or conflicts of jurisdiction would inevitably have been reductive. Moreover, as befits the ambition of a general course, the book offers a comprehensive and original framework for understanding the discipline. It is in a sense conceptualized anew (in object and methods) and endowed with a new vocabulary. This reconceptualization does not however entail revolutionary breaks with existing solutions. Nor is that its ambition: the author warns repeatedly against such ventures. Rather it provides a new perspective that enables regenerating analyses. The author never yields to the temptation of a purely hierarchical response to legal discordances, nor does he idealize horizontality as a sufficient answer to the conflicts generated by the

interpenetration of legal spheres. Instead, he patiently reconstructs the diversity of techniques available—horizontal, vertical, institutional, procedural—and evaluates their respective capacities to achieve coherence without sacrificing pluralism. Also worthy of note is the deliberate choice to avoid doctrinal factionalism (unilateralism vs. bilateralism; localizing vs. substantive approaches; monism vs. pluralism) by adopting a generally pragmatic stance. The demonstration is constantly guided by a concern for individuals and economic actors confronted with the accumulation of fragmented regimes. Without positing the existence of a general subjective right to legal coherence, the author identifies concrete expectations, procedural guarantees, and institutional mechanisms capable of mitigating the most difficult effects of normative fragmentation.

The author concludes with a quote from Savigny, inviting contemporaries to make full use of the doctrinal heritage accumulated in order to contribute to the advancement of scientific progress in the field. This quotation is doubly revealing of the author's approach. First, the call to exploit accumulated doctrinal wealth is followed here with impressive determination. On every page, the author is keen to draw from both older and more recent sources, and to give resonance to the diversity of viewpoints. Second, the demonstration appears to be guided by an idea of progress: not in the sense that contemporary doctrine or case law would be superior to that of the past, but, as Savigny suggests, in the sense that the conflict-of-laws discipline itself progresses—and thus the coherence of law progresses—through "the combined forces of past centuries." Without lapsing into naïveté, the argument reflects a form of optimism on the part of the author regarding the march toward global legal coherence. Such optimism is commendable. It may nevertheless be argued that belief in coherence as a cardinal value is not today universal, within and without the law. Thus, for example, the idea that irrational (incoherent) behavior by a State exposes it to sanctions (from within!, p. 920) unfortunately suffers daily contradiction. Moreover, multilateralism is undergoing a crisis so profound (for instance explored here by P. Franzina, from a private international law perspective) that some argue, not without reason, that it has never existed other than as a façade (as contended by the Prime Minister of Canada in a recent speech in Davos). Just over three years after this course was delivered at The Hague Academy, reasons for optimism are scarce. This does not imply that optimism is impossible, perhaps quite the opposite. The 2026 reader may wonder however what influence (if any)

the recent aggravation of the crisis of multilateralism (as well as the simultaneous rise of adversarial and transactional sovereignism) would have on the demonstration of the author.

As noted above, the perspective of the course is normative in the sense that the search for coherence is presented as both desirable and possible. The temptation of normative disorder is only briefly considered, and then rejected, essentially on the ground that law and normative disorder are incompatible. Some might find this position not entirely convincing. There are several ways of approaching this issue, but one of them is to try to see what risks being lost in the pursuit of coherence (and thus of order). Alternative, non-modern forms of legality may come to mind. There are alternative presentations of the discipline that assign a predominant role to a radical acceptance of otherness (see, for example, the recent book by H. Muir Watt, reviewed here), from a pluralistic perspective. One of the criticisms then directed at contemporary private international law (at least at bilateralism) is its tendency to make room for alternative normativity only at the cost of its intense reconfiguration through the legality of the forum (through the lens or the rationality of the forum). From this perspective, the search for coherence (the process of rendering coherent) risks appearing as an extension of this rationalizing program. In reality, the opposition should perhaps not be overstated. As noted, L. d'Avout demonstrates methodological flexibility, without *a priori* privileging either bilateralism or unilateralism (or monism over pluralism, for that matter). Moreover, the coherence at play here is decentered from the forum, rather than imposed from an overhanging forum. In a sense, it is procedural and dialogical between States (as well as other "legal spheres", i.e. alternative sources of normativity), rather than directly normative. Nevertheless, the demonstration rests on the idea that rationality is the inescapable horizon of law—an idea that maybe will face some pushback. Certain contemporary critiques of the international (legal) order (for instance, the decolonial scholarship, see this paper by S. Brachotte in a PIL perspective) tend instead to deeply deconstruct the very idea of legal coherence. These contemporary dynamics (the deep crisis of multilateralism and the teachings of the critical legal studies) obviously come from very different places and exist on different levels but they have in common a form of skepticism towards the concept of legal coherence. The reader may wonder to what extent they contradict the main thrust of the book, or if they can be reconciled with it, for instance through a reliance on, and reconfiguration of, horizontal (and intrinsically pluralist) modes of coordination.

Trial Supervision System No Longer Impediment in Hong Kong's Recognition and Enforcement of Chinese Mainland Judgments

1. Introduction

For more than 20 years after the handover, Hong Kong courts had regularly noted difficulties with the 'trial supervision system' 审判监督程序 (also known as 'retrial procedure' 再审程序) in the Chinese Mainland when attempting to recognise and enforce Mainland judgments under the common law, as the trial supervision system was thought to mean that these judgments fail to meet the 'final and conclusive' requirement. Such thinking was criticised by scholars as problematic.[1] To address the issue, statutory regimes on the reciprocal recognition and enforcement of judgments between the Chinese Mainland and Hong Kong have been implemented. More recent studies documented changes in the judicial attitude of Hong Kong courts,[2] but there was a lack of definitive rulings to clarify the legal position. This article focuses on the most recent Hong Kong cases which confirmed that the trial supervision system in the Chinese Mainland has no automatic impact on the recognition and enforcement of Mainland judgments in Hong Kong. A party alleging that the trial supervision system has affected the finality and conclusiveness of a Mainland judgment must prove the likelihood of a retrial being ordered through factual and/or expert evidence.

2. Early Cases

This vexed issue was first considered in *Chiyu Banking Corp Ltd v Chan Tin Kwun*, where Cheung J held that a Mainland judgment was not final and conclusive as it was not 'unalterable in the court which pronounced it' due to the trial supervision system.[3] This approach was seemingly affirmed in *Lam Chit Man v Lam Chi To*, but the Court of Appeal did not conclusively decide on the matter, as both parties did not adduce expert evidence on PRC law regarding the effect of the trial supervision system.[4]

Subsequently, in *Lee Yau Wing v Lee Shui Kwan*, the Court of Appeal was faced with a challenge against a Hong Kong summary judgment predicated on a Mainland judgment. The majority of the Court did not rule directly on the effect of the trial supervision system.[5] However, Chung J's dissenting judgment raised the point that the trial supervision system was similar to the grounds of appeal in Hong Kong, and hence should not bar the finding that a Mainland judgment was final and conclusive.[6] This view, although not binding at that time, paved the way for later attempts in distinguishing *Chiyu Banking*.[7]

With no further cases directly addressing the issue or overruling the *Chiyu Banking* approach, the trial supervision system proved to be an obstacle for enforcing Mainland judgments under the common law for nearly two decades. The change in judicial attitude was hinted in the 2016 Court of First Instance decision of *Bank of China Ltd v Yang Fan*.[8] In that case, To J found himself bound by the earlier Court of Appeal decisions, but expressed in *obiter* that the trial supervision system in the Chinese Mainland had undergone significant changes since 2013 and it was 'more like an appellate regime'; as such, the mere possibility of the trial supervision system being applicable did not preclude a Mainland judgment from being final and conclusive.[9] Further cases also expressed similar views in *obiter*.[10] Despite this change in attitude, the law at that time was still ambiguous, and clarifications did not come until much more recently.

3. Recent Cases

Several recent cases in late 2025 and 2026 have substantially clarified the law. It is now evident that under both the common law and statutory regimes in Hong

Kong, the existence of the trial supervision system is no longer accepted as a ground to challenge a Mainland judgment as not 'final and conclusive' if there is no relevant supporting evidence.

3.1 Common Law Regime

In *Sunsco International Holdings Ltd v Lin Chunrong*,[11] one of the disputed issues was whether the trial supervision system would render a Mainland judgment unenforceable for not being final and conclusive under the common law regime. After reviewing the relevant authorities (at [11.1]–[11.25]), DHCJ Jonathan Wong made the following clarifications (at [12.1]–[12.6] and [13.1]–[13.2]):

1. *Chiyu Banking* cannot be read as authority for the proposition that the trial supervision system *per se* renders a Mainland judgment not final and conclusive. With reference to *Lee Yau Wing* (which Cheung J decided the case as Cheung JA), it was emphasised that the line of cases stemming from *Chiyu Banking* had not authoritatively determined the issue.[12]
2. The correct proposition is this: it is only when a retrial has been ordered that any order made in the original trial ceases to be *res judicata* between the parties. The possibility of a retrial would not by itself render an original judgment as not *res judicata*.[13]
3. The trial supervision system *per se* does not render a Mainland judgment not final or not conclusive. A Mainland judgment will likely satisfy the 'final and conclusive' requirement as set out in *Nouvion v Freeman*:[14]
    1. In the Mainland proceedings, there is no limit as to what arguments can be raised and advanced;
    2. The trial supervision system is considered to be akin to an appeal, especially considering the fact that the judgments are enforceable in the Mainland unless and until a retrial is ordered;
    3. A litigant has no right to re-litigate a matter which has been determined by a Mainland judgment, and their avenues to challenge a first instance ruling is by way of appeal or an application for a retrial;
    4. Parties to a Mainland judgment do not have a unilateral right for retrial, and the potential retrial is conditioned upon the exercise of discretion by an external organ, premised on some error or

violation by a judicial officer;

5. An analogy can be drawn with foreign default judgments, which, despite being liable to be varied or set aside by the court granting it, may nevertheless be final and conclusive for the purpose of common law enforcement unless and until it is set aside; and
6. The absence of any time limit on the Mainland court and the procuratorate to invoke the trial supervision system does not affect the foregoing analysis, as the mere possibility of an appeal does not preclude a judgment from being final and conclusive under common law.

4. The paramount consideration when considering whether a Mainland judgment is final and conclusive, is the likelihood of a retrial being ordered under the trial supervision system. This is a matter to be demonstrated by factual evidence or expert evidence, or a combination of both. Some relevant considerations include:
    1. The cogency of the Mainland judgment being challenged;
    2. Whether the conditions leading to the invocation of the trial supervision system are satisfied;
    3. Whether the party has made an application under the trial supervision system; and if so, whether the application has been decided and the outcome of the application, or if not, the reasons for not applying; and
    4. If the party has not made or is no longer able to make an application under the trial supervision system, what is the likelihood of the Mainland court or the procuratorate initiating the Retrial Procedure on their own motion.

Sunsco International Holdings Ltd clarified the applicability of previous authorities and definitively affirmed that the trial supervision system is in no way *per se* an impediment in finding Mainland judgments as final and conclusive under the common law. The mere theoretical possibility of the trial supervision system being invoked should not strip the judgment of finality; such possibility should instead be supported by evidence. In *Tsoi Chung Tat Prince v Wei Zhongxia*, DHCJ Gary CC Lam further suggested that the question should be determined by expert evidence (but not necessarily oral expert evidence), and the burden of proof is on the party relying on the Mainland judgment to prove that it is final and conclusive by adducing expert evidence on Mainland law.[15]

The principles in *Sunsco International Holdings Ltd* received support in *Beijing Renji Real Estate Development Group Co Ltd v Zhu Min*.[16] The plaintiff in that case sought to enforce a judgment made by the Beijing Higher People's Court under the common law regime. The decision of DHCJ MK Liu (at [43]–[52]) provided a useful illustration of the application of the clarified common law position. The defendants contended that there were substantive grounds for a retrial as the original judgment lacked evidentiary support and that there might be new evidence not previously considered in the Mainland judgment. These contentions were rejected as flawed or fanciful, and the defendants failed to show an arguable case that there is a likelihood that a retrial would be ordered under the trial supervision system. The Mainland judgment was therefore held to be final and conclusive.

3.2 Statutory Regimes

The clarifications under the statutory regimes were provided in *Huzhou Shenghua Financial Services Co Ltd v Hang Pin Living Technology Co Ltd*.[17] In that case, the plaintiff was seeking to enforce a Mainland judgment handed down by the Huzhou Intermediate People's Court. The issue was whether the judgment was final and conclusive under the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) ('**MJREO**'), which took effect in 2008.

In delivering the Court of Appeal's judgment, G Lam JA held that subsections (a) to (d) of section 6(1) of the MJREO were meant to be disjunctive and exhaustive regarding the categories of judgments that fall under the MJREO. Specifically, G Lam JA explicitly mapped out the relationship between the relevant provisions of the MJREO and the trial supervision system (at [63]–[66]):

1. Prior to the 'Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned' signed in 2006 ('**the 2006 Arrangement**'), it had already been noted that the trial supervision system had given rise to issues as to whether Mainland judgments are final and conclusive.[18] Accordingly, draft provisions were designed to address the common law requirements of finality. These provisions eventually made their way into Article 2 of the 2006 Arrangement.
2. Further, in the Report of the Bills Committee on the Mainland Judgments

(Reciprocal Enforcement) Bill, it was noted that the trial supervision system may give rise to finality issues, and 'special procedures would be adopted in order to address the common law requirements of finality'.[19] As such, section 6(1) of the MJREO was specifically enacted to address the common law requirement that the judgment is final and conclusive.

Hence, it was held that under the statutory regime, potential issues on the 'final and conclusive' requirement relating to the trial supervision system were pre-emptively addressed by the enactment of section 6(1) of the MJREO. As long as the judgment falls under the categories listed under section 6(1), the judgment is deemed to be final and conclusive irrespective of the operation of the trial supervision system, and one should not be required to fall back on the common law. The same reasoning was explained by DHCJ KC Chan earlier in *Re Shenzhen Qianhai Orient Ruichen Fund Management Co Ltd* in early 2025.[20]

It is submitted that the foregoing principles are also very likely be applicable to the expanded statutory regime of the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (Cap 645) ('**MJCCMREO**'), which came into effect in 2024:

1. The MJCCMREO sought to give effect to the 'Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region' signed in 2019 ('**the 2019 Arrangement**'). Similar to Article 2 of the 2006 Arrangement, Article 4 of the 2019 Arrangement includes provisions relating to the trial supervision system.
2. Section 8 of the MJCCMREO stipulates a list of 'effective' Mainland judgments akin to section 6(1) of the MJREO. Thus, the foregoing reasoning by G Lam JA can be applied to section 8 of the MJCCMREO: the list should be treated as exhaustive, and as long as the Mainland judgment falls under any category explicitly stated under section 8, it is capable of being enforced regardless of the effect of the trial supervision system.[21]
3. The MJCCMREO intends to provide a mechanism which is similar to the MJREO for a wider range of judgments in civil and commercial matters, not limited to judgments arising out of an exclusive choice of court agreement.[22] The two ordinances serve similar purposes; for consistency reasons, they should adhere to the same principles regarding

the effect of the trial supervision system.[23]

4. Conclusion

These recent clarifications from the Hong Kong courts are much welcomed in resolving the effect of the trial supervision system that had befuddled the courts for almost 30 years. From the author's perspective, this clarified view must also be correct. Under the common law regime, it is consistent with the modern viewpoint that a possible appeal avenue is not by itself an impediment to the recognition and enforcement of the trial judgment.[24] As for the statutory regimes, it is consistent with the provisions of the 2006 and 2019 Arrangements and the subsequent statutes enacted respectively, the MJREO and the MJCCMREO.

This article is written by Wilson Lui (Centre for Private Law, The University of Hong Kong; Melbourne Law School), with research assistance by Avery Cheung (The University of Hong Kong).

[1] See eg Philip St John Smart, 'Finality and the Enforcement of Foreign Judgments under the Common Law in Hong Kong' (2005) 5 Oxford University Commonwealth Law Journal 301; Weixia Gu, 'A Conflict of Laws Study in Hong Kong–China Judgment Regionalism: Legal Challenges and Renewed Momentum' (2020) 52 Cornell International Law Journal 592. See also Section II below.

[2] See eg Wilson Lui and Anselmo Reyes, *Hong Kong Private International Law* (Hart Publishing 2025) 279–80.

[3] *Chiyu Banking Corp Ltd v Chan Tin Kwun* [1996] 2 HKLR 395 (CFI) 399.

[4] *Lam Chit Man v Lam Chi To* [2001–2003] HKCLRT 141 (CA) [18]–[21].

[5] *Lee Yau Wing v Lee Shui Kwan* [2007] 2 HKLRD 749 (CA) [15]–[29], [34]–[38]. See also *Wu Wei v Liu Yi Ping* (unreported, CACV 32/2009, 27 March 2009).

[6] *Lee Yau Wing* (n 5) [55]. In coming to this conclusion, Chung J admitted that

his views had changed from his earlier decision in *Lam Chit Man v Cheung Shun Lin* [2001–2003] HKCLRT 243 (CA).

[7] Gu (n 1) 611.

[8] *Bank of China Ltd v Yang Fan* [2016] 3 HKLRD 7 (CFI).

[9] *Bank of China Ltd* (n 8) [51]–[54].

[10] *Jiang Xi An Fa Da Wine Co Ltd v Zhan King* [2019] HKCFI 2411 [85]–[90]; *Beijing Renji Real Estate Development Group Co Ltd v Zhu Min* [2022] 4 HKC 116, [2022] HKCFI 1027 [65]–[66]; *Poon Sing Wah v Poon Sing Nam* [2025] HKCFI 720 [117(a)].

[11] *Sunsco International Holdings Ltd v Lin Chunrong* [2025] HKCFI 5238.

[12] *Lee Yau Wing* (n 5) [15]; *Sunsco International Holdings Ltd* (n 11) [12.2].

[13] *Bobolas v Economist Newspaper Ltd* [1987] 1 WLR 1101 (CA).

[14] *Nouvion v Freeman* (1889) 15 App Cas 1.

[15] *Tsoi Chung Tat Prince v Wei Zhongxia* [2026] HKCFI 716 [47].

[16] *Beijing Renji Real Estate Development Group Co Ltd v Zhu Min* [2026] HKCFI 197.

[17] *Huzhou Shenghua Financial Services Co Ltd v Hang Pin Living Technology Company Ltd* [2025] 3 HKLRD 447, [2025] HKCA 434.

[18] See also *Huarong Overseas Chinese Asset Management Co Ltd v Li Xiaopeng* (transliteration) [2025] HKCFI 6402 [54].

[19] Legislative Council of Hong Kong, 'Report of the Bills Committee on the Mainland Judgments (Reciprocal Enforcement) Bill' LC Paper No CB(2)1521/07-08 (10 April 2008) para 73.

[20] *Re Shenzhen Qianhai Orient Ruichen Fund Management Co Ltd* [2025] HKCFI 707 [24]–[30], cited in *Huzhou Shenghua Financial Services Co Ltd* (n 17) [67]–[69].

[21] The Court of Appeal observed the striking similarity between the two

sections as well: *Huzhou Shenghua Financial Services Co Ltd* (n 17) [15].

[22] Legislative Council of Hong Kong, 'Report of the Bills Committee on Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Bill' LC Paper No CB(4)871/2022 (12 October 2022).

[23] See eg *Sunsco International Holdings Ltd* (n 11) [11.25].

[24] *Nouvion* (n 14) 13; *China NPL Holdings Pte Ltd v Mo Haidan* [2021] 1 HKLRD 344, [2020] HKCA 1014 [54]–[57].

REFLECTIONS ON RECENT DEVELOPMENTS IN AFRICAN PRIVATE INTERNATIONAL LAW

I. INTRODUCTION

This is the second symposium relating to private international law in Africa to be hosted on this blog, following a series that has run consistently since 2 February 2026. The first symposium, which focused on private international law in Nigeria, took place on 14 December 2020 and was jointly hosted on *Afronomics* and this blog. It was organised by Professor Richard Frimpong Oppong and me.

Professor Beligh Elbalti and I are deeply grateful to the scholars who agreed to participate in this symposium at short notice, including Dr ***Solomon Okorley***, Dr ***Theophilus Edwin Coleman***, Dr ***Elisa Rinaldi***, Miss ***Anam Abdul-Majid,*** Mr ***Kitonga Mulandi***, Dr ***Boris Awa***, and Dr *Abubakri Yekini*.

The idea for this second symposium originated with my dear colleague, Professor Beligh Elbalti, and I am thankful to him for involving me in the leadership and organisation of this project. The symposium finds its true genesis in a larger edited volume we are currently preparing on the recognition and enforcement of foreign judgments in Africa, which examines developments across no fewer than

twenty-six African jurisdictions.

In the course of organising the project, we were struck by the depth and richness of engagement with private international law in African courts. This reality stands in sharp contrast to the popular but mistaken assumption that private international law in Africa is stagnant. On the contrary, the field is very much alive and kicking.

African courts are increasingly being called upon to engage with issues of private international law, and this is an empirical reality that our symposium seeks to demonstrate. At the same time, courts face significant and well-documented challenges, including inadequate legal frameworks, insufficient engagement with comparative law, and research approaches that prioritise the transplantation of foreign perspectives rather than the development of solutions grounded in local realities.

We therefore hope that courts, legislators, and researchers will actively engage with, develop, and refine the principles of private international law from an African perspective, in a manner that is context-sensitive, doctrinally sound, and responsive to the continent's lived legal experience.

In this post, I briefly reflect on five overarching themes: situating African private international law within its broader context; the use of comparative law to promote independent and critical thinking; strengthening cooperation among African scholars; the importance of sustainable funding; and the need for stronger local institutional infrastructure.

II. RE-SITUATING AFRICAN PRIVATE INTERNATIONAL LAW WITHIN ITS PROPER CONTEXT

One of the central challenges confronting African private international law is its continuing reliance on inherited colonial traditions, particularly those of European powers such as England, France, the Netherlands, Spain and Portugal. Across the continent, many legal systems still mirror the frameworks they received during the colonial period. Thus, common law African jurisdictions tend to follow the English approach; Francophone systems largely adopt French doctrine; Roman–Dutch jurisdictions reflect a mixture of Dutch and English

influences; Lusophone countries retain Portuguese models; and there are also Spanish law influences on few African countries.

This inherited structure has not always served African private international law well. While many European states have modernised their rules to facilitate economic integration, cross-border commerce, and development, numerous African jurisdictions have yet to undertake comparable reform. The result is often a body of law that is historically derivative rather than functionally responsive to contemporary African realities.

These concerns have long been recognised in the scholarship. More than three decades ago, Professor Uche Uche, delivering lectures at the Hague Academy of International Law, called for "a genuinely African-based and African-influenced work on the conflict of laws." Professor Christopher Forsyth similarly cautioned against the "unthinking" acceptance of foreign solutions, warning that African private international law should not behave like "the weathervane flipping one way or the other as the winds blow from abroad." In the same spirit, Professor Richard Frimpong Oppong has argued that, while extra-African sources remain relevant, African scholarship should draw primarily on African case law, legislation, and academic commentary, and should situate its analysis within the continent's present challenges, including regional economic integration, the promotion of trade and investment, migration, globalisation, and legal pluralism.

Encouragingly, contemporary African scholarship increasingly reflects this intellectual independence. The present symposium offers a clear illustration. Contributors rely principally on local African sources and contexts rather than treating European doctrine as the default template. My joint post with Yekini highlights the growing importance of recognition and enforcement of international court judgments in Anglophone Africa and shows that African jurisdictions are beginning to lead intellectually in an area that remains underdeveloped elsewhere. Awa's blog demonstrates that Member States of the Central African Economic and Monetary Community (CEMAC) have a significant number of situations in which they attempt recognising and enforcing each other's judgments. Elbalti's study of Mozambique illustrates the risks of scholars mechanically interpreting colonial transplanted rules without close attention to local jurisprudence. Abdul-Majid and Mulandi's discussion of Kenya reveals judicial concern that exclusive jurisdiction clauses may export dispute resolution to foreign courts to the detriment of domestic adjudication. Rinaldi shows that

South African courts are attentive to cross-border employment disputes involving restraints of trade, and that any critique of their rulings by practitioners or scholars should be carefully anchored in sound legal principle. Coleman further demonstrates Ghana's distinctive approach to proving foreign law in cross-border marriages, including potentially polygamous unions. Finally, Okorley examines a decision of the South African Supreme Court of Appeal affirming that a child's habitual residence under the Hague Child Abduction Convention is not determined by the marital status of the parents.

Externally, in another contribution, Coleman draws on the South African concept of *ubuntu* to interrogate the inequalities that may be embedded in party autonomy. Oppong and I also argue that African government contracts should not be subjected to foreign governing laws on public policy grounds.

None of this suggests that African private international law should become insular or excessively interest based. On the contrary, comparative engagement remains indispensable. The point is not to reject foreign influence, but to adapt it critically and constructively, ensuring that private international law develops in a manner that reflects African realities while participating confidently in global legal discourse.

III. UTILIITY OF COMPARATIVE LAW IN ENHANCING INDEPENDENCE AND CRITICAL THINKING

A further area in which private international law in Africa can be strengthened is through deeper and more systematic engagement with comparative law. In a recent study I co-authored with Yekini, we concluded that private international law in Nigeria—and, by extension, in several other African jurisdictions—remains underdeveloped in part because of limited comparative engagement. Indeed, it has been persuasively argued by Professor Diego Arroyo that private international law is scarcely conceivable without comparative law. As Professor Otto Kahn-Freund, famously remarks "comparative law is the mother of private international law." I share these views as well.

Comparative analysis, however, should not be equated with continued dependence on the approaches of former colonial powers. Far from it. Properly understood, comparative law entails a broad and critical examination of diverse

legal systems across the world in order to identify solutions best suited to local needs. Its purpose is intellectual openness, not slavish imitation. Currently, Asian private international law has evolved primarily through imitation before transitioning into a phase of innovation and eventual exportation (see here). This has primarily been done through extensive comparisons with legal systems around the world. I have also remarked that the Asian approach can "significantly benefit the ongoing development and reform of private international law in Africa" (see here).

This underscores the importance of legal education and professional training. Outside South Africa and a small number of other jurisdictions, legal education in many African countries remains heavily shaped by inherited colonial curricula, with limited exposure to comparative or regional perspectives. Moreover, meaningful dialogue across African legal systems is often lacking. Apart from parts of Southern Africa—and, to a lesser extent East Africa—many jurisdictions rarely engage systematically with developments elsewhere on the continent.

The practical consequences of this insularity are tangible. In a recent blog post, I discussed a Nigerian Court of Appeal decision that enforced a South African choice-of-court agreement in a dispute that was otherwise entirely domestic. Counsel for the claimant had undertaken no research into South African law. Had they done so, they would likely have discovered that South African courts themselves would decline jurisdiction on that case for want of a sufficient connection to South Africa, leaving the claimant without a forum to sue! A modest comparative inquiry might therefore have altered both the litigation strategy and the outcome.

South Africa has, in many respects, emerged as a leader in fostering comparative engagement. In this regard, particular credit is due to Professor Jan Neels for his work at the University of Johannesburg as Director of the Research Centre for Private International Law in Emerging Countries, which has trained and mentored a growing cohort of African scholars with strong comparative expertise. Elbalti and I have benefited greatly from collaboration with many of these scholars.

Importantly, the tools for comparative research are increasingly accessible. Open-access databases such as AfricanLII and SAFLII provide rich repositories of African jurisprudence that can and should be utilised more systematically by

lawyers, judges, and scholars. Comparative engagement of this kind promotes intellectual independence rather than dependence. By examining a range of possible approaches before making doctrinal choices, African courts and legislatures can craft solutions that are both contextually appropriate and globally informed.

IV. COOPERATION AMONG AFRICAN SCHOLARS

A further area in which private international law in Africa can and should be strengthened is scholarly cooperation. The South African concept of *Ubuntu* aptly captures the spirit required: "I am because we are." The development of African private international law cannot be the achievement of a single scholar or even a single jurisdiction. It must instead be the product of sustained collaboration across the continent. Collective intellectual effort, rather than isolated national initiatives, is essential to building a coherent and contextually responsive body of doctrine.

Encouragingly, some institutional foundations already exist. In addition to the important work facilitated by Neels at the University of Johannesburg, the Nigeria Group on Private International Law (NGPIL) has sought to promote dialogue and capacity building within Nigeria. The NGPIL, co-founded by Dr Onyoja Momoh, Dr Abubakri Yekini, Dr Chukwudi Ojiegbe, Dr Pontian Okoli and myself, brings together primarily UK-based scholars committed to strengthening Nigerian private international law through regular lectures, mentorship of early-career researchers, prize initiatives for students, and policy engagement aimed at encouraging the Nigerian government to recognise the strategic importance of private international law for economic development.

Nevertheless, more remains to be done. Efforts by Elbalti and me to establish a broader, continent-wide African private international law network have thus far proved difficult to sustain, particularly in terms of consistent participation. This highlights both the logistical challenges and the need for stronger institutional support structures.

Comparative experience demonstrates what is possible. Other regions have successfully institutionalised scholarly cooperation through bodies such as the Asian Private International Law Academy and the European Association of Private

International Law, which provide regular forums for dialogue, research collaboration, and the exchange of ideas. A similar, genuinely pan-African platform would significantly advance the field. It is my hope that such an initiative will soon emerge and help consolidate the growing momentum behind African private international law.

VI. FUNDING AND LOCAL INFRASTRUCTURE

For private international law in Africa to generate meaningful and lasting value, it requires sustained and significant funding. The blunt reality is that this responsibility must rest primarily with African stakeholders — including governments, businesses, professional bodies, and regional institutions.

By contrast, established dispute-resolution hubs such as England, New York, Singapore, and Switzerland derive substantial economic and reputational benefits from international commercial adjudication. With deliberate investment in modern, efficient, and credible private international law frameworks, African jurisdictions can retain similar revenue within the continent and reduce the persistent dominance of Global North fora in resolving African disputes.

Elbalti in his forthcoming paper on foreign law in Africa, has called for the establishment of a dedicated research centre for comparative law, akin to the Max Planck Institute or the Swiss Institute of Comparative Law. He further suggests that Neel's centre at the University of Johannesburg could play such a role by serving as a hub for sustained comparative research and doctrinal development.

If Africa is to compete effectively for international litigation and arbitration business, however, funding alone will not suffice. Serious institutional reform is indispensable. Infrastructure must be strengthened, judicial quality and consistency enhanced, delays reduced, training regularised, and corruption decisively addressed. Without these structural improvements, even the most sophisticated legal rules will struggle to attract confidence.

VI. CONCLUSION

Taken together, the reflections offered in this symposium challenge the persistent misconception that private international law in Africa is marginal or stagnant. The opposite is true. Across the continent, courts are engaging meaningfully with cross-border disputes, scholars are producing increasingly rich and context sensitive analyses, and new networks of cooperation are beginning to emerge. African private international law is no longer merely derivative of external models; rather, it is slowly but steadily becoming more self-aware, self-confident, and intellectually independent.

The path forward is clear. By grounding doctrine in African realities, embracing comparative learning without slipping into slavish imitation, strengthening scholarly collaboration, and investing seriously in funding and institutional capacity, African jurisdictions can build private international law systems that are both locally responsive and globally competitive. If these foundations continue to develop, Africa will not simply follow global trends but will increasingly help shape them.

Professor Ralf Michaels made a comment in the Asian context which I will quote and adapt to the African context by inserting “Africa” instead of the original use of “Asia”, “Africa is no longer object or subject but method, no longer one but many parts that are in dialogue with each other, no longer recipient or opponent of Western law and instead co-producer of modernity and of modern law. In this, the West has at least as much to learn from Africa as Africa did from the West. “

The energy, creativity, and commitment demonstrated by the contributors to this symposium — and by the wider community of African scholars and judges — give ample reason for optimism. The future of private international law in Africa is not only promising; it is bright.

Protection of Forced Heirs and International Public Policy

Written by Matteo Mangone, PhD candidate in Private Law at the University of Turin

Protection of Forced Heirs and International Public Policy: A Comparative Analysis of Germany and Italy in Light of the Bundesgerichtshof Judgment of 29 June 2022

1. The German Approach

The Bundesgerichtshof (Federal Court of Justice), in its judgment of 29 June 2022, affirmed the following legal principle: the protection of mandatory heirs pertains to German public policy and, consequently, pursuant to Article 35 of EU Regulation No. 650/2012, it is possible to disregard the *lex successionis* designated under Article 22 of the same Regulation whenever its application does not concretely guarantee mandatory heirs a level of protection at least equivalent to that ensured by German inheritance law.

In the case at hand, the testator, originally from the United Kingdom, but habitually resident in Germany, by will dated 13 March 2015, designated English law as the law applicable to his succession and, as permitted under that law, disposed of his entire estate in favour of a third party, thereby excluding his adopted son. The latter lodged an application with the Regional Court of Cologne seeking information on the existence and scope of his father's estate, asserting the rights granted to him under paragraphs 2303, 2314, 1754 and 1755 BGB. The court seized dismissed the application, but, on the claimant's appeal, the Higher Regional Court of Cologne, by judgment of 22 April 2021, setting aside the contested decision, ordered the appointed heir to draw up an inventory of the estate assets. The testamentary heir then appealed to the Federal Court of Justice, seeking the full dismissal of the claim.

The Federal Court of Justice, having preliminarily confirmed, on the basis of Articles 22 and 83 of Regulation (EU) No. 650/2012, the validity of the *professio iuris* contained in the will, even though the will predated 17 August 2015, the date on which the Regulation became applicable, examined the compatibility of English succession law with German public policy. On the one hand, the 1975 Inheritance Act does not provide a forced share for descendants as such, regardless of their economic circumstances, but it merely allows the judge, at his discretion, to grant financially needy descendants a monetary provision against the testator's will, provided that the latter was resident in England or Wales at the time of death. On the other hand, paragraph 2303 BGB guarantees to the descendant a forced share amounting to half the value of the share to which he would be entitled in intestate succession, regardless of any assessment of the heir's financial situation; paragraph 2314 BGB grants an excluded mandatory heir the right to obtain information from the testamentary heir regarding the estate and to request the preparation of an inventory, the costs of which are borne by the estate. The Federal Court of Justice held that the provisions of the Inheritance Act contradict German inheritance law, which enjoys constitutional protection under Articles 6 and 14 of the Grundgesetz. These provisions reflect the principle that children's participation in the estate of their parents is a necessary consequence of their familial bond and an expression of family solidarity, therefore, descendants must always be guaranteed a share of the deceased's estate, regardless of their financial circumstances.

The Federal Court of Justice further referred to the reasoning of the Federal Constitutional Court in its judgment of 19 April 2005, which characterized the right of mandatory heirs to their forced share as an inalienable fundamental right, intended to ensure the continuation of the ideal and economic bond between the family's assets and its members. Participation of the descendant in the ascendant's estate is thus viewed as an expression of the reciprocal moral and material assistance obligations that underpin family life and which, pursuant to Articles 6 and 14 GG, constitute a constitutionally relevant limit to testamentary freedom. Having established that mandatory succession enjoys constitutional protection, the Court examined whether a violation of the rights granted to mandatory heirs under German law constitutes a breach of German public order and, to this end, it identified three different doctrinal approaches.

A first view holds that, even where the *lex successionis* does not provide forced

shares, German law cannot apply, because the protection of mandatory heirs does not fall within the German notion of *ordre public*, and therefore Article 35 of Regulation (EU) No. 650/2012 cannot be invoked to set aside the *lex causae*. An intermediate position states that, although the protection of mandatory heirs may in principle be linked to the fundamental principles forming part of the German *ordre public*, no concrete public order issue arises when, as in the present case, only economically self-sufficient mandatory heirs are left without protection. The prevailing view, followed by the judgment under comment, instead, holds that German public order is violated whenever the law applicable to the succession does not provide mandatory heirs with a level of protection at least equivalent to that offered by German law and, consequently, leads – on a case-by-case assessment – to an outcome incompatible with Articles 6 and 14 GG.

On the basis of these arguments, the Federal Court of Justice concluded that, in the present case, English succession law conflicts with German public policy, to the extent that the possibility of obtaining a monetary provision only where the mandatory heir is in situations of financial need – which, moreover, was inapplicable in the case at hand, given that the de cuius was resident and domiciled in Germany – is considered incompatible with the forced share guaranteed to descendants under German law. The Federal Court of Justice, therefore, applied Article 35 EuErbVO (Regulation EU No. 650/2012), which provides that "the application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum." The violation of public policy entails the non-application of the foreign rule. However, to ensure minimal interference between *lex causae* and *lex fori*, any resulting gap must, where possible, be filled by reference to the *lex causae* itself and, only where this is not possible, should be applied the *lex fori* instead. In this case, since English law does not guarantee the mandatory heir a forced share meeting the requirements of Articles 6 and 14 GG, the Federal Court of Justice deemed it necessary to apply German succession law.

Finally, the Federal Court of Justice supports its conclusion by stating that is precisely from Regulation (EU) No. 650/2012 that it can be inferred that provisions on forced heirship pertain to public policy. Indeed, according to the German judges, given that Article 22 allows parties to choose the law of the State of their nationality as the law governing their succession, one of the functions of

Article 35 is precisely to protect mandatory heirs who may be disadvantaged by the chosen law, thereby preventing the *professio iuris* from being used to frustrate the expectations of those entitled to a forced share.

2. The Italian Approach

The decision under examination makes it possible to compare the approach followed by the German Federal Court of Justice with the approach followed by the Italian Supreme Court and to highlight the relative nature of the notion of international public policy.

The possibility of tracing the protection of forced heirs back to the notion of international public policy has assumed particular relevance with the adoption of EU Regulation No. 650/2012 (I. Riva, Certificato successorio europeo. Tutele e vicende acquisitive, Napoli, 2017, 51 ss). Indeed, unlike Article 46 (2) of Law No. 218/1995, which excluded that a *professio iuris* made by an Italian testator in favour of the State of residence could prejudice the rights of forced heirs residing in Italy, Regulation No. 650/2012 does not provide that the rules on forced heirship constitute a limit to the applicability in Italy of a foreign law that does not provide for any protection of forced heirs or provides for a less favourable protection than the one offered under Italian law.

Consequently, only if Articles 536 et seq. of the Italian Civil Code are regarded as a fundamental and non-waivable principle of the Italian legal order (G. Perlingieri, G. Zarra, Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale, Napoli, 2019; V. Barba, L'ordine pubblico internazionale, in Rass. dir. civ., 2018, 403 ss) and, therefore, are brought within the notion of international public policy, will it be possible to exclude, pursuant to Article 35 of Regulation (EU) No. 650/2012, the application in Italy of a foreign law that violates the rights that Italian law reserves to forced heirs. Since in Italy forced heirship does not enjoy constitutional protection, the resolution of the issue at hand requires, preliminarily, clarification as to whether the principles referable to international public policy may also be derived from provisions of ordinary legislation.

The notion of international public policy, in the Italian legal order, has undergone significant evolution: originally it was held that this limit was respected and, consequently, that the foreign law was applicable in Italy, only where, in relation

to the same institution, it was compatible with Italian ordinary legislation (Cass., 5 dicembre 1969, n. 3881; Cass., 14 aprile 1980, n. 2414; Cass., 13 marzo 1984, n. 1680). Subsequently, as a result of the influence of supranational law, it began to be affirmed that international public policy corresponded to the fundamental values expressed by the Constitution and by international and supranational sources (Cass., 15 giugno 2017, n. 14878.). The most recent approach of the Court of Cassation is placed in an intermediate position between the two theses just mentioned, affirming that the notion of international public policy is derived from the Constitution, from international and supranational sources, but also from provisions of ordinary legislation, provided that they express fundamental values of the legal order (Cass., sez. un., 8 maggio 2019, n. 12193).

Having clarified, therefore, that ordinary legislation may also contribute to shaping the notion of international public policy, the point is to understand, as already anticipated, whether the codified rules concerning forced heirship implement a non-waivable principle expressing a value that identifies the Italian legal order.

Italian case-law, in numerous decisions (Cass., 30 giugno 2014, n. 14811; Cass., 24 giugno 1996, n. 5832; App. Milano, 4 dicembre 1992; Trib. Termini Imerese, 15 luglio 1965), contrary to what was maintained by the Bundesgerichtshof in the previously examined judgment, has affirmed that the protection of forced heirs does not pertain to international public policy since, although the protection of forced heirs is safeguarded by mandatory internal rules, its limitation does not entail a restriction of an inviolable human right. This is also argued in light of the fact that forced heirship, as stated, does not enjoy constitutional protection, neither with reference to Article 42 (4) nor with reference to Article 29 of the Constitution, with the consequence that the ordinary legislator could even abolish it. Consequently, in the Italian legal order, foreign rules providing a level of protection of forced heirs lower than the one guaranteed by Italian law may be applied (M.C. Gruppuso, Ordine pubblico e diritto delle successioni. Spunti in tema di divieto di discriminazione basata sul sesso, in Fenomeni migratori, famiglie cross border e questioni di diritto successorio. Una prospettiva di genere., I. Riva (ed.), Napoli, 2024, 256).

This solution, unlike the German one, is consistent with the approach of the Strasbourg Court which, with reference to forced heirship, has affirmed that it does not find protection under Article 8 ECHR, given the absence of any general

and unconditional right of children to inherit a share of their parents' assets (ECtHR, 15 February 2024, Colombier v. France), nor under Article 1 of the First Additional Protocol, since where the law applicable to the succession does not provide any protection of the rights of forced heirs, they are neither holders of an "existing" property right nor of a "legitimate expectation" (ECtHR, 15 February 2024, Jarre v. France), and consequently do not fall within the scope of protection guaranteed by that provision.

Even if the inclusion of forced heirship within the concept of international public policy has been excluded, a conflict between the latter and the law applicable to the succession may nonetheless arise where the foreign succession law violates other fundamental principles of the Italian legal order. Thus, for example, pursuant to Article 35 of Regulation (EU) No. 650/2012, a foreign law that infringes the principle of non-discrimination – which, also in light of recital No. 58 of Regulation (EU) No. 650/2012, is almost unanimously regarded as falling within the notion of international public policy – may in no case be applied in Italy (M.M. Francisetti Brolin, Divieto di discriminazione, autonomia testamentaria e vicende mortis causa. Riflessioni preliminari, in Fenomeni migratori, famiglie cross border e questioni di diritto successorio. Una prospettiva di genere., I. Riva (ed.), Napoli, 2024, 325 observes a potential paradox in this context).

Online Symposium on Recent Developments in African PIL (VII) – South Africa's Supreme Court of Appeal orders the return of a child under the Hague Child Abduction

Convention

As part of the second online symposium on ***recent developments in African private international law****, we are pleased to present the seventh an final contribution, kindly prepared by* ***Solomon Okorley (University of Johannesburg, South Africa)****,* which examines a ***decision of the South African Supreme Court of Appeal ordering the return of a child under the Hague Child Abduction Convention****.*

South Africa's Supreme Court of Appeal Orders the Return of a Child under the Hague Child Abduction Convention: Marital Status of Parents not Important in Determining the Child's Habitual Residence

1 Introduction

International child abduction[1] refers to the unilateral removal or retention of a child by a parent or guardian in a State other than that of the child's habitual residence, without the consent of the other parent or in breach of existing custodial rights.[2] This phenomenon has increasingly been characterised as both global in reach and growing in prevalence,[3] reflecting the intensification of cross-border mobility, transnational families, and jurisdictional fragmentation in

family law. In cases of international child abduction, the left-behind parent seeks judicial relief in the form of a return order, the purpose of which is to restore the status quo ante by returning the child to the State of habitual residence.

South Africa occupies a pivotal position in the adjudication of international child abduction matters,[4] with its judicial decisions exerting significant influence on the development of jurisprudence within the Southern African Development Community (SADC) region.[5] This paper will briefly analyse the recent case of *The Central Authority for the Republic of South Africa v MV and Another*,[6] where the South African Supreme Court of Appeal upheld an appeal for the return of a child who was wrongly removed from Switzerland. The court held that "the minor child (L) be returned forthwith, subject to the terms of this order, to the jurisdiction of the Central Authority of Switzerland".[7]

This case is significant because the case addresses an important factor in international child abduction cases: ascertaining the habitual residence of the child. Consequently, it is a case that other contracting states of the 1980 Hague Child Abduction Convention would find useful when ascertaining the habitual residence of a child in an international child abduction dispute.

2 Facts of the case

The case concerns a minor child (L), born in Italy in May 2021 to unmarried parents. The mother (MV) is a dual South African–Italian citizen, while the father (VL) is an Italian national who later acquired Swiss citizenship. The parents were engaged and had lived together prior to and after the child's birth. Before the child's birth, the parties resided together in Switzerland, where the father was employed. Following the child's birth in Italy, the parents returned with the child to Switzerland and continued to live together as a family. The father purchased an apartment in Geneva, financially supported the mother and child, and took steps consistent with establishing family life there, including enrolling the child in a crèche and applying for Swiss identification documentation for the child.

In May 2022, the parents and the child travelled together to South Africa to attend the wedding of the mother's brother. Return flights to Switzerland were booked shortly after the wedding. On the scheduled return date, the mother tested positive for COVID-19. As a result, the father returned to Switzerland

alone, with the understanding that the mother and child would return once she had recovered. After recovering, the mother did not return to Switzerland with the child. She delayed her return and ultimately decided to remain permanently in South Africa with the child, citing the breakdown of the relationship and the presence of her family support network in South Africa.

The father objected to the child remaining in South Africa without his consent and initiated steps through Italian and Swiss authorities, which culminated in an application by the South African Central Authority for the child's return to Switzerland. While in South Africa, the mother obtained an *ex parte* order from the High Court granting her primary care and parental responsibilities over the child and directing that the child be registered as a South African citizen. The father opposed the order and continued to pursue the child's return through the South African Central Authority by filing a return application at the High Court. As at the time court was adjudicating the case in 2025, the boy was four-year-old.

2.1 High Court Ruling

According to the High court, it seemed that neither the minor child nor MV had settled in the Swiss community and that MV did not intend to remain in Switzerland permanently unless VL married her. The court further found that it is not certain that Mr VL regarded Geneva as the minor child's habitual residence. The court did not believe that the parties had the settled purpose of residing in Switzerland. Consequently, it found that the minor child was not a habitually resident in Switzerland at the time of his removal to South Africa.[8] The court further held that removing the minor child from Ms MV's care would cause the minor child, serious emotional harm.[9] In the exercise of its discretion, the High Court dismissed the return application. Dissatisfied with the ruling, the Central Authority and MV appealed to the SCA with the leave of the High Court.

2.2 Summary of the Judgment of the Supreme Court of Appeal (SCA)

According to the SCA, the core issue was the minor child's habitual residence prior to his alleged unlawful retention in South Africa.[10] The resolution of the core issue will, of necessity entail determining (i) whether the removal of the

child was wrongful; (ii) whether the relevant rights of custody were actually being exercised at the time of the minor child L's removal.

In its bid to resolve the issue, the SCA indicated that the applicable Legislative Framework included: the 1980 Hague Child Abduction Convention;[11] the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children;[12] Swiss Federal Act on Private International Law (PILA);[13] the Swiss Civil Code;[14] the Constitution of the Republic of South Africa of 1996;[15] and South Africa's Children's Act.[16]

As an important preliminary issue, the court set out to address the applicability of the Hague Convention.[17] The court noted that Switzerland is a signatory to the 1996 Hague Convention whereas South Africa is a signatory to the 1980 Hague Convention. According to the SCA, "It is the 1996 Hague Convention that enables the determination of the issues that are extra-territorial such as these. Absent the 1996 and the 1980 Hague Conventions, our courts and so is our State would not be able to lean on the international agreements between states on matters involving, amongst others, the international abduction and retention of children."[18] The SCA then made reference to the Constitutional Court case of *Sonderup*[19] where the apex court outlined the purpose of the 1980 Hague Convention, which *inter alia* ensures the prompt return of children to the state of their habitual residence. The SCA thus concluded that the 1980 Hague Convention applies to this case.

According to the court, since the child is Italian and had been registered as such at birth, his initial habitual residence was Italy. And per the combined effect of Articles 316 and 337 of the Italian Code, both parents had parental responsibility which included joint custody.[20] The court opined that the parental responsibility was not extinguished when they moved to Switzerland by virtue of the 1996 Hague Convention, which is applicable between Italy and Switzerland: "Parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another state."[21]

According to the SCA, the continuity of parental rights where there is a change of habitual residence accords with the best interests of the child principle that the Hague Convention seeks to protect. The court held that the father has custodial rights over the child. Since both parents had custodial rights towards the child in

Switzerland, Mr VL's consent to the retention of the child in South Africa was peremptory. The court therefore held that the failure to seek and obtain Mr VL's consent before retaining the child in South Africa was wrongful.

The court had to address the core issue which was the habitual residence of the child. According to the SCA, the high court misdirected itself when it focused on the issue of marriage as an important issue when determining the issue of habitual residence.[22] According to the court, Italy was the child's habitual residence and his birth residence until his parents moved to Switzerland. At that point, the minor child's habitual residence and his parents became Switzerland.[23]

The mother contended that the child's habitual residence was Italy and that she had no intention of residing in Switzerland permanently – a place she had lived for almost two years. The SCA rejected this arguments by relying on the Swiss law definition of habitual residence where it is stipulated that a natural person 'has their habitual residence in the state where they live for a certain period of time, even if this period is of limited duration from the outset'.[24] The court in rejecting the argument by the mother also relied on the dependency model which espouses that the child acquires the habitual residence of his or her custodians. Thus, since the custodians were habitually resident in Switzerland, he acquires the habitual residence of Switzerland and not that of Italy.

An attempt by the mother to invoke an article 13(b) [of the 1980 Hague Convention] defence on the ground that the mental and psychological state of Mr VL poses a grave risk of harm to the minor child also failed. According to the court, the body of evidence showed that both Ms MV and Mr VL do have some mental challenges and that those challenges will be better addressed by the Swiss Court.[25]

3 Analysis

3.1 Preliminary issue: The territorial scope of the 1980 Hague Convention

Although the SCA was correct in its conclusion that the 1980 Hage Convention was applicable, it is submitted that the approach adopted in the judgment was

marked by an unnecessarily circuitous analysis, which generated avoidable doctrinal and interpretive difficulties. Although not mentioned by the SCA, Switzerland is a contracting state to the 1980 Hague Convention, likewise South Africa.[26] The convention is applicable if the abduction took place from one convention state (where the child had his or her habitual residence) to another convention state.[27] Thus, per the territorial scope of the 1980 Hague Convention, this makes the convention applicable to the case simpliciter.

3.2 Habitual residence of the child

A central concept underpinning the Hague Convention is that of the "habitual residence" of the child. However, the term is neither expressly defined in the Convention itself nor in South Africa's Children's Act. The question of whether a person is or is not habitually resident in a specified country is a fact-specific inquiry, where the essence of a 'stable territorial link' is established through length of stay or through evidence of a particularly close tie between the person and the place.[28]

Judicial efforts to give content to the notion of habitual residence have crystallised into three dominant models of analysis: the dependency model, the parental rights model, and the child-centred model.[29] In terms of the dependency model, a child acquires the habitual residence of his or her custodians. Applying the facts of this case to this model, the parents are habitually resident in Switzerland. *Ipso facto*, the child is also habitually resident in Switzerland.

The parental rights model proposes that habitual residence should be determined by the parent who has the right to determine where the child lives, irrespective of where the child actually lives; and where both parents have the right to determine where the child should live, neither may change the child's habitual residence without the consent of the other. Per the facts of this case, both parents have the right to determine where the child lives, thus, only the mother cannot determine the habitual residence of the child.

In terms of the child-centred model, the habitual residence of a child depends on the child's connections or intentions and the child's habitual residence is defined as the place where the child has been physically present for an amount of time

sufficient to form social, cultural, linguistic and other connections. From the facts of the case, the child has been present for a considerable amount of time in Switzerland before the mother wrongly removed him. The parents had agreed for him to be enrolled at a crèche in Switzerland and Mr VL had also applied for the minor child to be issued with an official Swiss identity document. All these also point to the fact that the child's habitual resident in Switzerland.

The South African Courts have adopted a hybrid of the models in determining habitual residence of children which is based upon the life experiences of the child and the intentions of the parents of the dependent child.[30] The courts have further held that with very young children the habitual residence of the child is usually that of the custodian parent.[31] Also, following this hybrid approach of the South African courts, it leads to the same result that the child is habitually resident in Switzerland: the intention of the parents is for the child to be habitually resident in Switzerland. This is evinced in the enrolment of the child in crèche; the application for a Swiss identity document; and the return air ticket to Switzerland that was purchased.

From a comparative perspective, in *Monasky v. Taglieri*,[32] the US Supreme Court enunciated a stricter threshold in determining the habitual residence of the child. The court, in uniformity with the decisions of the courts of other contracting states of the 1980 Hague Convention held that "a child's habitual residence depends on the totality of the circumstances specific to the case." This threshold is higher than the one espoused by the South African court in the *Houtman* case where it stated that the habitual residence "must be determined by reference to the circumstances of each case".[33] It is submitted that the South African court in determining the habitual residence of the child should apply the "totality of circumstances standard". In this case, it is clear that the SCA took into consideration the entire circumstances of the case in arriving at its decision,

4 Marital status of parents and the habitual residence of the child

In all of the crystallised models analysed in the immediate preceding paragraph, it is clear that marital status is not a determinant of the habitual residence of the child. In a more recent case, *Ad Hoc Central Authority for the Republic of South Africa and Another v DM*,[34] which also involved unmarried parents, in

determining the habitual residence of the child, the court did not take into account the marital status of the parents.

Marital status (e.g., married, divorced, separated, or never married) does not appear in the text of the 1980 Hague Convention as a criterion for return decisions, exceptions (like grave risk under Article 13(b), child objection, consent, or non-exercise of rights), or any other core determination. The Convention is deliberately status-neutral to promote uniformity across signatory countries. However, marital status can have indirect relevance in limited ways, depending on the law of the child's habitual residence. In some jurisdictions, married parents automatically share joint custody rights from birth, making it easier for either to establish a breach of those rights. For unmarried parents, the rights of custody are not always automatic. In some countries, an unmarried father may need to establish paternity legally, obtain a court order for custody/access, or meet other requirements to have enforceable "rights of custody". If no such rights exist under the law of the habitual residence of the child, the removal might not qualify as "wrongful" under the Hague Convention. This is a question of domestic law in the country of the habitual residence of the child, not the Convention itself imposing a marital status test. In this instance case, although the parents were unmarried, based on Italian Family Law, the father had custody rights.

In any event, determining the child's habitual residence is a necessary antecedent to any analysis of whether the applicable law confers custody rights on an unmarried father. It is submitted that reliance on the marital status of the parents in determining a child's habitual residence is conceptually misplaced. The Hague Convention adopts a distinctly child-centred approach; accordingly, an examination of the parents' marital status introduces adult-centred considerations that are extraneous to the Convention's underlying objectives.

It is therefore submitted that marital status should not be a factor to consider in determining a child's habitual residence in international child abduction cases. At most, it may serve as a contextual evidential factor in assessing shared parental intention and family stability, but the decisive inquiry must remain anchored in the child's lived reality, social integration, and factual circumstances.

5 Conclusion

This decision reflects the South African Supreme Court of Appeal's firm commitment to the prompt return of children to their State of habitual residence, in line with the objectives of the 1980 Hague Convention. The High Court's attempt to introduce marital status as a "novel" determinant of habitual residence was correctly rejected on appeal. The SCA's refusal to endorse this approach is commendable, as elevating parental marital status to a determinative factor risks transforming child abduction proceedings into an adult-centred inquiry, thereby undermining the child-focused framework and core objectives of the Convention.

Previous contributions:

1. ***Online Symposium on Recent Developments in African Private International Law**, by Béligh Elbalti & Chukwuma S.A. Okoli* (Introductory post)
2. ***Recognition and Enforcement of International Judgments in Nigeria**, by Abubakri Yekini & Chukwuma Samuel Adesina Okoli*
3. ***The Recognition and Enforcement of Foreign Judgments within the CEMAC Zone**, by Boris Awa*
4. ***Foreign Judgments in Mozambique through the Lens of the Enforcement of a Chinese Judgment: Liberal Practice in the Shadow of Statutory Rigidity**, by Béligh Elbalti*
5. ***Party Autonomy, Genuine Connection, Convenience, Costs, Privity, and Public Policy: The Kenyan High Court on Exclusive Jurisdiction Clauses**, by Anam Abdul – Majid and Kitonga Mulandi*
6. ***Cross-border employment, competition and delictual liability merge in the South African High Court: Placement International Group Limited v Pretorius and Others**, by Elisa Rinaldi*
7. ***From Daddy to Zaddy or Both? Proof of Foreign Law and the Fragility of Foreign Marriages in Ghanaian Courts – Reflections on Akosua Serwaah Fosuh v. Abusua-Panin Kofi Owusu & 2 Others, Suit No. GJ12/20/2026**, by Theophilus Edwin Coleman*

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[1] Formerly known as 'legal kidnapping' or 'childnapping'. See Dyer "The Hague

Convention on the Civil Aspects of International Child Abduction – Towards Global Cooperation: Its Successes and Failures" 1993 *The International Journal of Children's Rights* 273 275.

[2] Baruffi and Holliday "Child Abduction" in Beaumont and Holliday (eds) *A Guide to Global Private International Law* (2022) 481.

[3] Freeman and Taylor "Domestic violence and child participation: Contemporary challenges for the 1980 Hague child abduction convention" 2020 *Journal of Social Welfare and Family Law* 154.

[4] See INCADAT which currently contains 21 reported South African child abduction decisions in its database.

[5] https://www.sadc.int/member-states

[6] [2025] ZASCA 197.

[7] *The Central Authority for the Republic of South Africa v MV and Another* (n 6) par 87.

[8] *The Central Authority for the Republic of South Africa v MV and Another* (n 6) par 13.4

[9] *The Central Authority for the Republic of South Africa v MV and Another* (n 6) par 13.5.

[10] *The Central Authority for the Republic of South Africa v MV and Another* (n 6) par 29.

[11] Articles 3, 5, 12, 13, 16, 18, and 19 of the 1980 Hague Convention.

[12] Articles 3 and 17 of the 1996 Hague Convention.

[13] Articles 14, 20 and 82 of PILA.

[14] Article 296 of the Swiss Civil Code

[15] Section 28 of the 1996 Constitution of South Africa.

[16] Chapter 17 of the Children's Act 38 of 2005.

[17] *The Central Authority for the Republic of South Africa v MV and Another* (n 6) par 41.

[18] *The Central Authority for the Republic of South Africa v MV and Another* (n 6) par 43.

[19] *Sonderup v Tondelli and Another* 2001 1 SA 1171 (CC).

[20] *The Central Authority for the Republic of South Africa v MV and Another* (n 6) pars 48 and 51.

[21] Article 16(3) of the 1996 Hague Convention.

[22] *The Central Authority for the Republic of South Africa v MV and Another* (n 6) par 67.

[23] *The Central Authority for the Republic of South Africa v MV and Another* (n 6) par 62.

[24] Article 20(b) of the PILA.

[25] *The Central Authority for the Republic of South Africa v MV and Another* (n 6) par 77.

[26] See the status table of the 1980 Hague Convention.

[27] Kruger *International Child Abduction: The Inadequacies of the Law* (2011) 112.

[28] *Senior Family Advocate, Cape Town, and Another v Houtman* 2004 (6) SA 274 (CPD) par 9.

[29] *Central Authority for the Republic of South Africa and Another v C* 2021 (2) SA 471 (GJ) par 63.

[30] *Central Authority for the Central Republic of South Africa and Another v C* 2021 (2) SA 471 (GJ) par 63.

[31] *Central Authority for the Central Republic of South Africa and Another v C* 2021 (2) SA 471 (GJ) par 63.

[32] 140 S. Ct. 719 (2020).

[33] *Senior Family Advocate, Cape Town, and Another v Houtman* 2004 (6) SA 274 (CPD) par 11.

[34] [2024] ZAWCHC 170.

Online Symposium on Recent Developments in African PIL (VI) – Proof of Foreign Law and the Fragility of Foreign Marriages in Ghanaian Courts

As part of the second online symposium on ***recent developments in African private international law****, we are pleased to present the sixth contribution, kindly prepared by* ***Theophilus Edwin Coleman (University at Buffalo School***

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From Daddy to Zaddy or Both? Proof of Foreign Law and the Fragility of Foreign Marriages in Ghanaian Courts – Reflections on *Akosua Serwaah Fosuh v. Abusua-Panin Kofi Owusu & 2 Others*, Suit No. GJ12/20/2026

1. Introduction

Few aspects of conflict of laws generate more confusion in practice than proving foreign law. For a layperson, the idea that law must sometimes be proven as a fact using evidence might seem counterintuitive. However, this doctrinal stance is central to how many legal systems, including Ghana, treat foreign law. The recent decision of the High Court of Ghana in *Akosua Serwaah Fosuh v. Abusua-Panin Kofi Owusu & 2 others*[1] (hereinafter *Akosua Serwaah Fosuh*) highlights the complex issues that arise from the lack of proof or otherwise of foreign law governing marriages conducted outside Ghana. Indeed, this decision has highlighted the apparent fragility of foreign marriages. At the same time, it serves as a valuable reminder to litigants, lawyers, and the Ghanaian public, given the case's extensive publicity, that foreign law must be pleaded in Ghanaian courts in accordance with strict benchmarks and standards.

At stake in the *Akosua Serwaah Fosuh* case was not merely marital status and competing spousal rights, but also the social stability of the institution of monogamous civil marriage under Ghanaian law, spousal rights, particularly inheritance expectations, and issues concerning customary widowhood rites. The plaintiff primarily based her claim on an alleged civil marriage under German law to assert her spousal rights. Despite the emotionally charged nature of the case, especially among some Ghanaians, the court, as expected, focused on evidentiary principles and the requirements of substantiating foreign law. Considering the sentimental and public nature of the case, this contribution aims to clearly outline the legal consequences of the decision in *Akosua Serwaah Fosuh*, the risks of failing to meet the evidentiary standard for foreign law on spousal rights, and how this can create uncertainty for foreign marriages in Ghanaian courts.

This contribution is organised into six main sections. The first section outlines the

factual background in *Akosua Serwaa Fosuh*, focusing on the issue of proving the validity of a civil marriage contracted in Germany. It then briefly reviews the types of marriages recognised under Ghanaian law and their relevance to the facts of the case. The third section examines Ghana's legal framework governing proof of foreign law. The fourth section analyses the court's position in *Akosua Serwaa Fosuh*, considering statutory and judicial standards for establishing foreign law. The fifth part examines the broader implications of the case for litigants and for those entering foreign marriages. The sixth section briefly addresses the need to reconsider the strict standards governing the proof of foreign law in Ghana. The final part emphasises that litigants and attorneys should not treat foreign law as an afterthought, as their failure to meet technical requirements may have dire consequences for the outcome of their case.

2. *Akosua Serwaa Fosuh*: The facts

Akosua Serwaa Fosuh, the plaintiff, requested the High Court to declare her as the sole surviving spouse of the late Charles Kwadwo Fosuh, also known as Daddy Lumba, a renowned musician and public figure. As the only surviving spouse, she was entitled to conduct the widowhood rites for the deceased.[2] The plaintiff further sought an order from the court to prohibit the Head of Family of the deceased from dealing with the second defendant, Priscilla Ofori, as a spouse of the deceased. Additionally, the plaintiff asked the court to prevent Priscilla Ofori from presenting herself as a surviving spouse of Daddy Lumba. The plaintiff's main claim was that she and the deceased were married at the Civil Marriage Registry in Germany in 2004, and that this monogamous marriage lasted until Daddy Lumba's death. Prior to the civil marriage in Germany, the plaintiff and the deceased had also married under Ghanaian customary law in 1991.[3]

Conversely, the defendants opposed the plaintiff's claim and the validity of the German marriage.[4] The second defendant also challenged the validity and authenticity of the documents tendered by the plaintiff in support of the civil marriage under German Law. Additionally, the second defendant stated that the deceased publicly presented her as his wife for over fifteen years and considered her his surviving widow.[5] In addition to presenting the second defendant as the surviving spouse in the public showcase, she argued that the deceased married her under Ghanaian customary law in 2010.[6] In essence, the civil marriage

between Akosua Serwaa and the deceased preceded the alleged customary marriage between the deceased and Priscilla Ofori, a fact that is important to consider.

The case primarily focused on whether the plaintiff was the deceased's sole surviving spouse and therefore the only person authorised to perform the widowhood rites. This issue was crucial because establishing that the plaintiff was the sole surviving spouse following a civil union or marriage concluded in Germany would render any subsequent marriage and the deceased's public display of Priscilla Ofori as a spouse null and legally invalid under Ghanaian law. To fully understand the case, it is helpful to briefly outline the types of marriages recognised under Ghanaian law.

3. A brief outlook of the forms of marriage in Ghana

Ghanaian law recognises three main types of marriage: customary, Ordinance, and Islamic (Mohammedan) marriages. Each type of marriage is distinct, with its own characteristics and rights.[7] Customary marriage follows the traditions of the couple's tribe or ethnic group and is based on the mutual consent of the families of the couple. Customary marriage typically involves the exchange of a dowry or head drink between the two families, symbolising their consent, acceptance, and support for the union between the man and the woman.[8] The Customary Marriage and Divorce (Registration) Law (PNDCL 112) of 1985 allows customary marriages to be officially registered. A key characteristic of customary marriage is its inherently polygamous nature, permitting the man to marry multiple wives (unlimited in number), so long as he remains exclusively married under customary law.[9]

Ordinance marriage, on the other hand, is statutory, monogamous and a civil union that must be registered, executed by the couple (man and woman), who are then issued a marriage certificate.[10] The formal process for concluding an ordinance marriage requires following the registration procedures at a district or municipal assembly or a court registry. An Ordinance marriage is strictly monogamous, meaning it involves only one man and one woman. Once married, the spouses are legally forbidden from entering into any other marriage until the current marriage is dissolved by a court of law. Notwithstanding this, it is

increasingly common for many Ghanaians to celebrate Ghanaian custom by marrying under customary law and then converting their marriage to ordinance by registering it with a court registry or a district or municipal assembly. Converting a customary marriage to an Ordinance extinguishes all rights acquired under customary law, including the man's right to have multiple spouses.[11]

The third type of marriage, which does not apply in this case, is Islamic marriage. It is performed in accordance with Islamic practices and officiated by an Islamic religious leader. Islamic marriages are typically polygamous. Both partners must be Muslims, and Ghanaian law mandates that the marriage be registered under the Marriage of Mohammedans Ordinance. The registrar for Mohammedan marriages and divorces must be informed within one week of the marriage. Such ceremonies may be officiated only by an Imam or a Kadhi. A man may marry up to four wives, and marriages between close family members or cousins are not permitted.[12] It is noteworthy that the validity of marriages under Ghanaian law is determined following the Marriage Act Ordinance, 1951 (Cap 127).[13] To synthesise the various types of marriage under Ghanaian law and for the purposes of this case, it is worth noting the following:

(1) A couple has the right to marry under customary law. So long as a man is exclusively married under customary law, he is permitted to have multiple wives.

(2) A couple has the option to marry under ordinance. Such a marriage is strictly monogamous, and once established, neither party is legally permitted to marry another person until the marriage is officially dissolved by a court of law.

(3) The relationship between customary and ordinance marriage is that a couple married under customary law can convert to ordinance marriage. However, once this conversion occurs, the man's rights, including the right to marry more than one wife under customary law is extinguished. The marriage then becomes fully monogamous.[14]

Hence, in *Akosua Serwaah Fosuh*, the assertion that the plaintiff and the deceased concluded a civil monogamous union under German law, if proven

under Ghanaian law, would convert their marriage into a civil or ordinance marriage, thereby extinguishing the deceased's rights to marry more than one wife or to marry under any other marriage type. Proving the validity of the German marriage implies that any later marriage between the deceased and the second defendant would be considered invalid, legally void and of no effect.

This, in turn, raises the question of the longstanding conflict of laws issue concerning the stringent evidentiary burden required for a plaintiff to prove foreign law, as illustrated by the plaintiff's attempt to demonstrate that the marriage was monogamous under German law. If the plaintiff cannot demonstrate the validity of the German marriage as per German law, any later marriage under customary law, such as the deceased's marriage to the second defendant, Priscilla Ofori, would be considered valid.

4. Proof of foreign law in Ghana: An overview

Generally, under common law, courts are presumed to know only their domestic law. Foreign law, including statutes, case law, and other procedural rules from a different legal system, must be properly pleaded and substantiated with the required evidence. In conflict of laws, this approach is doctrinally justified on the ground that a judge, such as one in Ghana, is typically not expected to possess or be aware of the content of foreign laws, such as South African, German, or Canadian law. Based on this understanding, under the common law, foreign law is treated as evidence that must be substantiated, rather than as a legal question. Consequently, a court is not required to investigate the content of foreign law on its own initiative.

Indeed, according to section 1(2) of Ghana's Evidence Act 1975 (NRCD 323), the "determination of the law of an organization of states to the extent that such law is not part of the law of Ghana, or of the law of a foreign state or sub-division of a foreign, state, is a question of fact, but it shall be determined by a court".[15] Statutory requirements consider foreign law as a matter of fact, a position consistently upheld by Ghanaian courts. For example, in *Davis v. Randall*,[16] it was held that Sierra Leonean law is foreign law and must be proven as a fact.[17] A party seeking to rely on foreign law in a Ghanaian court, per the decision in *In Re Canfor (Deceased); Canfor v. Kpodo*,[18] will be required to plead that law and

prove it.[19] To plead the foreign law is one thing, but the most crucial aspect is proving its content. Where a party seeking to rely on foreign law fails to prove it, section 40 of the Evidence Act provides that "the law of the foreign state is presumed to be the same as the law of Ghana".[20]

The standard of proof for establishing foreign law is the preponderance of probabilities, as in other civil case matters.[21] However, meeting this evidentiary standard would require the court to assess the consistency of the evidence, the credibility of the witnesses, and the veracity and reliability of the documents submitted. Foreign law is, therefore, a matter of fact and must be proven on a case-by-case basis. As the Supreme Court of Ghana stated in *Ama Serwaa v. Gariba Hashimu & another*,[22] "foreign law is a question of fact and ought to be pleaded and proven at the trial stage. This method of proving foreign law, is by offering expert witnesses, merely presenting a lawyer with the text of a foreign will not be sufficient".[23] Also, in *Godka Group of Companies v. PS International Ltd*,[24] it was held that merely presenting or providing the text of a foreign law to a judge to draw the judge's conclusion does not satisfy the requirement of proof of the foreign law.[25] *Godka* established that an expert witness is preferred. The *Godka* Court stated: "the general principle has been that no person is a competent witness unless he is a practising lawyer in the particular legal system in question, or unless he occupies a position or follows a calling in which he must necessarily acquire a practical working knowledge of the foreign law."[26]

The question of an expert's competency is a legal issue decided by the judge. Therefore, the court must be convinced that the individual is an "expert trained on the subject to which his testimony relates by reason of his special skill, experience or training." Also, per the decision in *Val Cap Marketing v. The Owners of M V Vinta*,[27] Ghanaian courts do not permit the use of affidavits to prove foreign law.[28] Additionally, the opinions of an expert witness serve as a persuasive influence on Ghanaian courts.[29] Accordingly, the court is not bound to accept the opinion of the expert witness.[30] Based on the foregoing, the treatment of foreign law is a highly technical and complex process. Even if a plaintiff follows the procedural technicalities established by various case law, including pleading and proving the law with an expert witness, the evidence remains just persuasive, with the court ultimately deciding how much weight to give it.

5. *Akosua Serwaah Fosuh*, the treatment of foreign documents and law

The plaintiff submitted a marriage certificate issued under German law, but the defendants questioned its authenticity. The court rejected the certificate and advised the plaintiff's counsel to meet the Evidence Act requirements.[31] According to the Court, the plaintiff's counsel failed to meet the specified requirement. Most notably, the defendant's counsel indicated that the marriage certificate and its translated copy submitted to the court lacked probative value.[32] Since the marriage certificate was a foreign document, the plaintiff needed to fulfil the requirements of section 161 of the Evidence Act. Section 161 of the Evidence Act presumes signatures are genuine if they are affixed by officials of recognised public entities, accompanied by certification of authenticity and official position.[33] The law also mandates that this certification be signed and sealed by a diplomatic agent from Ghana or a Commonwealth country who is assigned or accredited to that nation.[34] Be that as it may, if all parties are given a reasonable opportunity to verify a foreign official's signature, the court may, for good cause, treat it as presumptively authentic without certification.[35]

The court observed that the plaintiff did not comply with the provisions. The plaintiff acknowledged the real difficulty in fulfilling the statutory requirements of section 161(2) of the Evidence Act.[36] The authenticity of the marriage certificate was therefore challenged. Additionally, beyond the authentication concerns, the plaintiff failed to submit the original certificate for the court to compare, despite being informed that an original certificate existed. The plaintiff submitted a family book extract that does not establish a civil marriage, particularly because the certificate lacked signatures from both spouses.[37] In addition to the plaintiff's failure to prove the authenticity of the marriage certificate and to comply with the Evidence Act, they also failed to meet the *Godka* requirement to prove foreign law through an expert witness.[38] The Court also highlighted the significance of the expert witness in verifying the authenticity of the marriage certificate by outlining the key features of a valid marriage certificate from Germany.[39]

Since the plaintiff did not prove the foreign law and the documents did not meet the applicable statutory requirements under the Evidence Act, the court inferred that the failure to establish the foreign law creates a presumption that German

and Ghanaian law are the same, unless the contrary is shown. Thus, under Ghanaian law, an ordinance marriage certificate is valid only if it bears the signatures of the parties to the marriage. In the words of the Court, "without the marriage certificate and or video, the court cannot prove the civil marriage on a photograph alone. In the era of photo shoots and Artificial Intelligence, the court is cautious in accepting photographs alone without further credible corroborating documentary evidence, where proof of a fact demands strict documentary proof".[40]

The court found that the plaintiff failed to prove her marriage under German law, as proving foreign law is a factual matter. The plaintiff did not meet the presumption that she entered into the marriage by providing an authentic, identified, and certified copy of the marriage certificate. Considering the lack of authentication and identification, coupled with the plaintiff's failure to rely on an expert witness from Germany, the court rejected the documents presented as having no probative value and would not be considered for purposes of proving any civil marriage between the plaintiff and the deceased.[41] Because the plaintiff did not demonstrate the existence of a valid monogamous marriage under German law, the court determined that a customary marriage between the plaintiff and the deceased existed. As previously explained, such a customary marriage allows a man to have more than one wife. The implication was that the plaintiff was not the sole surviving spouse. The court therefore determined that both the plaintiff and the second defendant were both customarily married to the deceased, Daddy Lumba, and declared that they were the surviving spouses of the deceased.[42]

6. Broader implications of *Akosua Serwaah Fosuh*

In Ghana, litigation practices have not fully adapted to the transnational context and the complexities associated with cross-border marriages. *Akosua Serwaah Fosuh* highlights the increasing prevalence of cross-border marriages and how fragile such marriages become when strongly tested against the legal microscope and the evidentiary standards required by Ghanaian law. It also indicates the extent to which the failure or otherwise to prove foreign law and present the relevant documents in accordance with the statutorily prescribed format can impact several aspects of spousal rights. Hence, couples contracting marriages

outside of Ghana must now be informed of the legal implications of such marriages. The significance of foreign law, such as establishing the validity of the marriage and authenticating relevant documents, should not be an afterthought for either the couple or their lawyers when legal issues arise. The court bases its decisions on law and evidence, not emotions, and failing to substantiate a legal position can lead to an unfavourable outcome.

7. Rethinking the strict requirements of proof of foreign law in Ghana in contemporary times

Ghanaian law explicitly requires rigorous proof of foreign law and adherence to statutory and case law principles. This strict approach has faced significant criticism from scholars. In Ghana, proving foreign law can be challenging due to potential manipulation by disputing parties, especially considering the assumption under Section 40 of the Evidence Act that Ghanaian law is the same as foreign law if the plaintiff fails to prove the content of the foreign law. Indeed, Oppong and Agyebeng note that assuming that Ghanaian and foreign law are the same because a plaintiff cannot prove the content of foreign law oversimplifies the matter and can occasionally cause injustice.[43] The learned authors further aver that section 40 of the Evidence Act:

> *"…wrongly assumes that there is a corresponding Ghanaian law for every specific issue on which foreign law would be relevant. This may not always be the case. Ghana's legal system is relatively underdeveloped, and it is unlikely there will be any substantive Ghanaian law on some subjects. Also, the laws of individual states vary. Accordingly, there is a high probability that there may be no corresponding cause of action or remedy in Ghana for any cause of action or remedy that exists in a foreign country on several matters. If a court deems it appropriate in such a situation, it should invite counsel to address the court on the issue, including how the issue is dealt with in the foreign state to ensure that the interest of justice is served."[44]*

A plaintiff's choice to invoke foreign law, coupled with difficulties or inability to provide supporting evidence and the operationalisation of section 40 of the

Evidence Act, can influence the outcome of the case. If Ghanaian law is assumed to align with the foreign law when the plaintiff cannot substantiate their claim, this may allow the plaintiff to escape the applicability and dictates of the foreign law (or a defendant to strongly oppose an unfavourable outcome of applying foreign law).[45] This highlights the difficulties of dealing with foreign law in Ghanaian courts and the extent to which such herculean tasks may be manipulated by a plaintiff to their gain or a defendant against a plaintiff. Notwithstanding these criticisms, the law clearly states that a plaintiff relying on foreign law must first plead it and then prove it; if they fail to do so, the foreign law is assumed to be the same as Ghanaian law.

Flowing from the challenges associated with the legal framework on the proof of foreign law, Oppong and Agyebeng have suggested that Ghanaian courts take judicial notice of English law, thereby eliminating the need to call expert witnesses.[46] This call is based on Ghana's status as a Commonwealth country that follows the common law tradition, with many legal professionals trained, directly or indirectly, in English law.[47] Unfortunately, the suggestion by the learned authors does not apply in the current context, as *Akosua Serwaa Fosuh* concerns the validity of a foreign marriage under German civil law, and many Ghanaian lawyers and the Ghanaian legal system are not trained in such a civil law orientation. Therefore, adherence to the *Godka* principles and the requirements of the Evidence Act, underscoring the probative value of a foreign document, is essential. Indeed, regardless of the sentiments surrounding the case, it is important to emphasise that the court's decision was firmly grounded in relevant precedents and procedural rules that must be followed in such cases.

8. Conclusion

The case of *Akosua Serwaah Fosuh* highlights that in Ghanaian courts, foreign law is not self-executing. It requires careful pleading and rigorous proof, in accordance with specific statutory requirements and the standards set out in case law. A foreign marriage certificate does not automatically substantiate the validity or otherwise of a marriage. Without expert testimony that convincingly clarifies the legal meaning, formalities, requirements, and consequences, such evidence has limited probative value in Ghanaian courts. In fact, transnational disputes require and depend on transnational evidence to verify the parties' rights and

entitlements. The decision in *Akosua Serwaah Fosuh* does not merely concern the rights and entitlements of competing spouses; it embodies the timeless principle in private international law: foreign law enters Ghanaian courts only through the pathway of proof. So long as this timeless rule exists, any marriage contracted outside Ghana and potentially subject to legal dispute may be fragile the moment it enters the annals of the Ghanaian court.

Previous contributions:

1. ***Online Symposium on Recent Developments in African Private International Law**, by Béligh Elbalti & Chukwuma S.A. Okoli* (Introductory post)
2. ***Recognition and Enforcement of International Judgments in Nigeria**, by Abubakri Yekini & Chukwuma Samuel Adesina Okoli*
3. ***The Recognition and Enforcement of Foreign Judgments within the CEMAC Zone**, by Boris Awa*
4. ***Foreign Judgments in Mozambique through the Lens of the Enforcement of a Chinese Judgment: Liberal Practice in the Shadow of Statutory Rigidity**, by Béligh Elbalti*
5. ***Party Autonomy, Genuine Connection, Convenience, Costs, Privity, and Public Policy: The Kenyan High Court on Exclusive Jurisdiction Clauses**, by Anam Abdul – Majid and Kitonga Mulandi*
6. ***Cross-border employment, competition and delictual liability merge in the South African High Court: Placement International Group Limited v Pretorius and Others**, by Elisa Rinaldi*

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[1] *Akosua Serwaah Fosuh v. Abusua-Panin Kofi Owusu & 2 others*, Suit No. GJ12/20/2026 (28 November 2025) (Unreported).

[2] Ibid at par 1.

[3] Ibid.

[4] Ibid at par 10.

[5] Ibid at par 2.

[6] Ibid at par 51.

[7] See, Marriages Act, 1984 (Cap 127). See also, *Obed Hoyah v. Naa Kwarley Quartey* [2020] GHACA 13 (30 July 2020); *Adzraku v Adzraku & Anor* [2023] GHAHC 530 (15 December 2023); *Moro and Another v. Ayebio & others* [2024] GHAHC 31 (12 April 2024); *Raphael Quist v. Matilda Larbi* [2023] GHACC 73 (6 June 2023); *Apomasu v. Bremawuo* [1980] GLR 278.

[8] *Graham v. Graham* [1965] GLR 407; *Yaotey v. Quaye* [1961] GLR 573.

[9] Ibid.

[10] *Coleman v. Shang* (1959) GLR 390; *Adzraku v Adzraku & Anor* [2023] GHAHC 530 (15 December 2023).

[11] *Coleman v. Shang* (1959) GLR 390.

[12] Marriage of Mohammedan Ordinance, 1951 (Rev.) (Cap 129). See also, *Apomasu v. Bremawuo* [1980] GLR 278.

[13] See, Marriage Act Ordinance, 1951 (Cap 127); *Boateng v. Serwa and others* [2021] GHASC 195 (14 April 2021).

[14] See, *Ernestina Boateng v. Phyllis Serwaa and 2 others*, Civil Appeal No. J4/08/2020 (14 April 2021).

[15] Section 1(2) of the Evidence Act, 1975 (NRCD 323).

[16] *Davis v. Randall* [1962] 1 GLR 1.

[17] Ibid. See also, *Clipper Leasing Corporation v. S and Ghana Airways Limited* [2025] GHASC 27 (29 April 2025); Josiah Ofori-Boateng, *The Ghana Law of Evidence* (Waterville Publishing House 1993) pp. 7.

[18] *In Re Canfor (Deceased); Canfor v. Kpodo*, [1968] GLR 177.

[19] Ibid.

[20] Section 40 of the Evidence Act, 1975 (NRCD 323). See also, *Ama Serwah v. Yaw Adu Gyamfi & Vera Adu Gyamfi*, where the High Court of Ghana, in

accordance with section 40 of the Evidence Act, assumed that the Italian law on the subject matter and that of Ghana were the same after the plaintiff failed to prove the foreign law.

[21] *Akosua Serwaah Fosuh* at par 85. See also, Richard Frimpong Oppong & Kissi Agyebeng, *Conflict of Laws in Ghana* (Sedco Publishing 2021) 40.

[22] *Ama Serwaa v. Gariba Hashimu & another*, Civil Appeal No. J4/31/2020 (14 April 2021).

[23] Ibid.

[24] *Godka Group of Companies v. PS International Ltd* (1999-2000) 1 GLR 409.

[25] Ibid.

[26] Ibid.

[27] *Val Cap Marketing v. The Owners of M V Vinta*, Civil Appeal No. 27/98 (Court of Appeal, Accra, 1999).

[28] Ibid.

[29] *See*, section 1(2) of the Evidence Act; *Fenuku v. John Teye* [2001-2002] SCGLR 985; *Tetteh & another v. Hayford 9Substituted by) Larbi & Decker* [2012] 1 SCGLR 417. In effect, the court the court determines the degree of weight to be accorded to the evidence by an expert witness.

[30] Ibid.

[31] *Akosua Serwaah Fosuh* par 88.

[32] *Akosua Serwaah Fosuh* par 90 and 106-107.

[33] Section 161(1) of the Evidence Act, 1975 (NRCD 323).

[34] Section 161(2) of the Evidence Act, 1975 (NRCD 323).

[35] Section 161(3) of the Evidence Act, 1975 (NRCD 323).

[36] *Akosua Serwaah Fosuh* par 91.

[37] *Akosua Serwaah Fosuh* par 94.

[38] *Akosua Serwaah Fosuh* par 87.

[39] *Akosua Serwaah Fosuh* par 101.

[40] *Akosua Serwaah Fosuh* par 104.

[41] *Akosua Serwaah Fosuh* paras 107-108.

[42] *Akosua Serwaah Fosuh* par 164.

[43] Richard Frimpong Oppong & Kissi Agyebeng, *Conflict of Laws in Ghana* (Sedco Publishing 2021) p. 39.

[44] Ibid at 39.

[45] Ibid.

[46] Ibid at 40-41.

[47] Ibid at 40-41.