Charuvila Philippose v. P.V. Sivadasan: Harmonizing India's Civil Procedure Code and the Hague Service Convention

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Globalisation has led to a rise in cross-border disputes, making international service of summons increasingly relevant. While domestic service in India is straightforward, sending summons to foreign defendants involves complex legal procedures. Proper service ensures that the defendant is duly notified and can respond, embodying the principle of *audi alteram partem*. Until recently, the procedure for international service in India was unclear. This ambiguity was addressed by the Kerala High Court in *Charuvila Philippose v. P.V. Sivadasan.*[1] This blog outlines the legal frameworks for international service, revisits the earlier *Mollykutty**[2]*** decision, and analyses the broader implications of *Charuvila Philippose*.

Process of Overseas Service of Summons in India – the Methods

Theoretically, serving of summons abroad should be straightforward. However, in India, the mechanism for international service of summons is tangled due to a patchwork of legal frameworks ranging from international treaties – such as the Hague Service Convention and Mutual Legal Assistance Treaties, to government routes such as Letters Rogatory and even provisions under the Indian Code of Civil Procedure, 1908. This section unpacks the various routes for international service from India; it lays the groundwork for understanding why the *Charuvila Philippose* case and the confusion it sought to resolve, matters.

1. **Letters Rogatory and Mutual Legal Assistance Treaty (MLAT) Route**

Traditionally, Indian courts have relied on letters rogatory for service abroad. A letter rogatory is a formal request issued by a court in one country to the judiciary of another, seeking assistance in serving judicial documents – in the absence of a binding treaty. This method was relied on situations when there were no specific agreements between countries.

In cases where bilateral Mutual Legal Assistance Treaties (MLATs) exist, the process becomes more structured. MLATs provides a treaty framework for cooperation on international service and other matters. Indian currently has MLATs with 14 countries. However, the abovementioned routes are cumbersome and slow.

2. The Hague Service Convention Routes – Article 2, 8 and 10

The rise in the number of cross-border disputes led to the development of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 1965 (henceforth "Hague Service Convention" or "HSC"). India acceded to the treaty in 2006 and ratified it in 2007. Under Article 2 of HSC, India has designated the Ministry of Law and Justice as the Central Authority responsible for receiving and forwarding summons to the relevant authority in the foreign country where the defendant resides. Once received, the foreign Central Authority effects services on the defendants and returns proof of service. The HSC also permits alternate methods of service through Article 8 and Article 10. However, these routes are subject to each country's reservations. Article 8 of HSC allows service through consular or diplomatic agents provided the receiving state has not objected. For example, Indian courts can serve a defendant in Canada directly through its consular or diplomatic agents in Canada as Canada has not opposed such a route. This is in contrast with People's Republic of China which has opposed the Article 8 route, preventing India from serving a Chinese defendant through India's diplomatic/consular agents in China. Article 10 of HSC allows service via postal channels, subject to whether the receiving country has not objected. For example, an Indian court may send a summons directly by post to a defendant in France, which permits such service.

But this route is unavailable for defendants in Germany, as it has formally opposed service through postal channels under Article 10.

Indian Code of Civil Procedure Routes

In addition to international instruments for service, the Code of Civil Procedure, 1908 (henceforth “CPC”) provides a domestic legal framework for overseas service under Order V through Rules 25, 26 and 26A.

Rule 25 allows courts to serve summons via post, courier, or even email if the defendant has no agent in India authorized to accept service. Rule 26 provides for service through political agents or courts specifically appointed by Central Government in a foreign territory. However, this provision remains obsolete as no political agents or courts have been appointed till now. Rule 26A enables service through an officer appointed by a foreign country (and recognized by the Central Government). In this process, the summons is routed through the Ministry to the designated officer abroad. If the officer endorses the summons as served, such endorsement is treated as conclusive proof of service.

In conclusion, the issuance of summons abroad from India becomes complex because of the multiplicity of legal frameworks surrounding summons. The provisions of CPC coupled with the distinct HSC routes and the foundational mechanism of MLAT and letters rogatory significantly muddies the water.

Dissecting Service – Three Connected Principles

Understanding the various legal routes for service is only the first layer of the issue. To fully understand why the procedure of service matters, it remains essential to look deeper into three distinct, but interconnected principles related to service. The three principles are: the act of service, the court's recognition of service and the consequences flowing from such recognition. These principles are foundational to any well-functioning legal system's procedural laws concerning service. And they are present in both HSC and CPC. These three principles are crucial to understand the judicial debate that unfolded in *Mollykutty* and later in *Charuvila Phillipose*.

No.	**General Process**	**Hague Service Convention**	**Indian CPC**
1.	The specific **process** of service by the court i.e., **modality of service** (e.g.: postal, email etc.)	HSC Article 2-5, Article 8 or Article 10	Order V Rule 9(1) and 9(3) [*for domestic service*] Order V Rule 25, 26 and 26A [*for service abroad*]

2.	Once service of summons is done, there is a **declaration of service**. This is important as it recognizes that service of summons to the defendant has been accomplished. i.e., the defendant has been provided sufficient notice of the case against them.		
	Expressly: In the form of acknowledgement certificates or endorsements that prove delivery of summons. This is vital as it indicates that the defendant had the opportunity to understand the case made against them.	HSC Article 6	Order V Rule 9(5)
	Implicitly: In case there are no acknowledgement certificates or endorsements to prove delivery of summons. The court is occasionally permitted to assume that summons was served ("deemed service").	HSC Article 15 Paragraph 2	Order V Rule 9(5) Proviso

3.	**Issuing decrees** – once declaration of service is done, the parties are given time to respond and make their case before the court. If the defendant does not appear, then an ex-parte decree is issued. This is done on the assumption that despite proper service or best efforts to undertake proper service, the defendant did not appear.	HSC Article 15 Paragraph 1	Order IX Rule 6

Background of the *Mollykutty* Dispute

Although India has ratified HSC and issued multiple notifications appointing the Ministry of Law and Justice as the Central Authority under Article 2 of HSC. The HSC provisions have not been legislatively incorporated into CPC. This has resulted in a fragmented legal framework where both HSC and CPC had overlapping legal regimes which diverged on the three connected principles of service – modality of service, declaration of service and issuing of decrees.

The coexistence of this diverging regimes came to a head in the *Mollykutty* case, a seminal decision of the Kerala High Court. The case concerned a suit in which the defendant resided in the United States. The trial court issued summons directly via registered post to the US defendant – a method permitted under Order V Rule 25 of CPC. However, it failed to obtain any acknowledgement of service. Due to this, the court invoked proviso to Rule 9(5) which allows court to declare deemed service if summons was "properly addressed, pre-paid and duly sent by registered post". This raised concerns across all three foundational principles connected to service.

Act/Modality of Service – the trial court's reliance on registered post conflicted with the procedure set out in HSC which mandates transmission of service through the Central Authority as the main route. The *Mollykutty* judgement held that in cases involving service abroad to a HSC signatory country, compliance with the HSC's Central Authority route was mandatory.

Declaration of Service – the trial court declared deemed service based on the Proviso to Rule 9(5) which permits assumption of service if the summons was "properly addressed, pre-paid and duly sent by registered post". The High Court in *Mollykutty* held that deemed service can be declared only as per the conditions stipulated in Article 15 of HSC.

Issuance of Decree – the High Court set aside the trial court's ex parte decree since the method of service and the declaration of deemed service was improper.

The *Mollykutty* judgment mandated strict compliance with the HSC's Central Authority for sending summons abroad. However, this strict interpretation of HSC, in the absence of legislative incorporation into CPC was concerning. Several High Court benches found the *Mollykutty* judgement to be overtly rigid and referred the issue to a larger bench in *Charuvila Phillipose*. The central question before the larger bench was whether, despite the lack of amendment to CPC, will HSC provisions concerning international service override the corresponding provisions in CPC? Or will CPC based routes for international service remain as valid alternatives?

The *Charuvila Philippose* Case

Arguments Raised

The parties primarily debated whether legislative amendment to the CPC is necessary when implementing an international instrument like the Hague Service Convention (HSC). The Amicus Curiae submitted that no such amendment is required unless the treaty affects the rights of citizens or conflicts with municipal law. Given that CPC is procedural in nature, the Amicus argued that litigants do not possess vested rights over specific modes of service and therefore, no individual rights are compromised. Furthermore, the Amicus contended there is no inconsistency between the CPC and the HSC: Order V Rule 25 fails to ensure proof of service; Rule 26 is largely ineffective; and Rule 26A is neutral, aligning with Mutual Legal Assistance Treaties. The Amicus also pointed to various memorandums and notifications to demonstrate the widespread administrative implementation of the HSC across India.

In response, the respondents emphasized that Article 253 of the Indian Constitution mandates parliamentary legislation to implement international treaties domestically. They argued that the CPC does confer substantive rights—such as appeals—and that certain HSC provisions, including Articles 15 and 16, impact citizens by altering domestic rules on ex parte decrees and limitation periods. Addressing criticisms of Order V Rule 25, the respondents asserted that uncertainties in proof of service also exist under the HSC, as enforcement depends on mechanisms in the receiving country, beyond India's control. The respondents further maintained that India's ratification of the HSC does not render Rule 25 obsolete and stressed that mere executive notifications cannot amend statutory provisions. Citing Article 73 of the Constitution, they concluded that executive action cannot override areas governed by existing laws.

Court's Analysis

1. **Regarding International Law and its Application in India**

The court's analysis centered around whether the Parliament needs to legislatively amend CPC for implementing an international convention like HSC. Since this concerns the question of application of international law to a domestic legal system. The court contrasted monistic and dualistic approaches to international law in the Indian legal system. Article 253 of the Indian Constitution states that *"…Parliament has the power to make any law…for implementing a treaty or international convention…."*. This article provides support for a dualistic approach as it empowers the Parliament to make laws for implementing treaties or international conventions. Conversely, monism is supported by Article 51(c) of the Indian Constitution, a directive principle, which encourages respect for international law and treaty obligations. In this case, the court balances dualism and monism by stating that Article 253 is "enabling" or provides the Parliament with the power to make laws for implementing treaties/conventions, only if necessary.

According to the court, Article 253 of the Constitution is by no means mandating the Parliament to make laws, for implementing every treaty or convention.

To support this balanced position, the court then proceeded to examine several precedents including *Maganbhai Ishwarbhai Patel etc. v Union of India and Anr.**[3]*** and *Karan Dileep Nevatia v Union of India, through Commerce Secretary & Ors**[4]***. The position that emerges is as follows: –

"…(iv) The Parliament needs to make laws in respect of a treaty/agreement/convention when the treaty or agreement restricts or affects the rights of citizens or others or modifies the law of India. (v) If the rights of citizens

or others are not affected or the laws of India are not modified, then no legislative measure is needed to give effect to such treaties/agreement/conventions."

Since the Parliament is only required to legislatively implement those treaties/agreements/conventions that are either – (i) restricting or affecting the rights of citizens or others, (ii) or modifies the law of India; the court's subsequent analysis examines these exceptions in detail.

- **Whether Rights of Citizens or Others are Restricted or Affected? No, They Are Not!**

The court held that parties to a litigation have no vested right in procedural mechanism as settled in *BCCI v Kochi Cricket Pvt. Ltd.*[5] And through *Sangram Singh v Election Tribunal and Anr*[6], it emphasized that Hague Service Convention merely addresses procedural aspects of CPC without affecting any substantive rights of parties. On this basis, the court concluded that the HSC does not affect or restrict the rights of citizens or others.

- ***Whether the HSC Modifies the Law of India? The Answer is a Little Complex!***

If the court found that HSC "modifies" the existing laws of India, then it would be forced to hold that the Parliament needs to legislatively amend CPC to incorporate HSC into the Indian legal system. However, relying on *Gramophone Company of India v Birendra Bahadur Pandey and Ors**[7]***, the court held that the standard of "modifies" the laws of India has been significantly tightened. The *Gramophone* case established that Parliamentary intervention is required only where an international convention is "in conflict with" domestic law, not merely if it "modifies" existing provisions.

Moreover, courts are under an obligation to interpret municipal statutes in a way that avoids confrontation with international law. A harmonious approach to interpreting international law and domestic law is encouraged in the *Gramophone* case. Since the focus is on procedural law rather than any substantive law, the court held that it will not readily infer a conflict between HSC and CPC.

Due to the new higher threshold, the court then proceeded to examine if HSC covenants are "in conflict with" the CPC provisions.

2. Whether HSC covenants are "in conflict with" CPC provisions regarding service abroad?

The rigor when examining the standard of "in conflict with", is less for procedural law as compared to substantive law. Since the case hinges on whether the HSC methods for international service are in conflict with the CPC methods. The court examined each of the CPC methods – Order V Rule 25, 26 and 26A with HSC.

To recap, Rule 25 allows summons to be issued to the defendant by post or courier or email if the defendant does not have an agent empowered in India to receive service. Rule 26 pertains to service through a political agent or court in a foreign country. Rule 26A provides for service of summons through an officer appointed by the foreign country as specified by the Central Government.

- **Are HSC covenants "in conflict with" Order V Rule 26A?**

Article 2 and 3 HSC concerns the appointment of a Central Authority by each signatory state for enabling cross-border service. Under this route, service is sent to the requisite authority of the originating state which then forwards the service to the Central Authority of the destination state.

According to the court, the only difference between HSC and Rule 26A is that there is a Central Authority rather than a judicial officer (as laid down in CPC) through which service is to be sent abroad. Since this was the only difference, the court held the Central Authority route in HSC to be close and proximate to Rule 26A. And HSC was not “in conflict with” Rule 26A of CPC.

- **Are HSC covenants “in conflict with” Order V Rule 26?**

The court did not examine this provision in detail as the Government has not appointed any political agent or courts in any foreign country. Due to this, the question of whether HSC is in conflict with Rule 26 does not arise in the first place.

- **Are HSC covenants “in conflict with” Order V Rule 25?**

Article 10 of the Hague Service Convention (HSC) permits alternate methods of serving summons abroad, including through postal channels, subject to the receiving state’s acceptance. India, however, has expressly reserved against these methods, declaring its opposition to the provisions of Article 10. The court clarified that India’s reservation applies specifically to incoming service—i.e., documents sent from other HSC contracting states to India—not to outbound service, from India to states that do not object to direct postal channels.

Based on this, the court held that Order V Rule 25 CPC, which governs service of summons abroad, remains unaffected by the HSC. Article 10 HSC and Rule 25 CPC are not in conflict, as the former itself legitimizes postal service to foreign states that permit such service under HSC.

Nevertheless, the court noted practical challenges with ensuring effective service under Rule 25, particularly when using post or email, as there is often no reliable mechanism to confirm service, which is an essential safeguard to protect the defendant's right to a fair hearing. Recognizing this, the court stressed that all courts must endeavor to attempt to secure effective service on the defendant.

To reconcile the CPC and HSC, the court endorsed a harmonious interpretation. Courts may proceed under Rule 25 for service abroad – if confirmation of service is received or the defendant appears in response. If so, service under Rule 25 is valid. However, if no confirmation is obtained or the defendant fails to appear within a reasonable period, courts must resort to the Central Authority mechanism prescribed under the HSC.

Reference Questions and their Answers

The court based on its analysis, concluded that: *firstly*, HSC is enforceable without a corresponding legislation since it is neither in conflict with provisions of CPC nor affecting the rights of citizens or others. *Secondly*, HSC does not foreclose CPC Order V Rule 25 route for service, as Article 10 HSC itself contemplates service through postal channels. *Thirdly*, the law laid down in *Mollykutty*, which prescribes strict adherence to the procedure prescribed in HSC (Central Authority route) to the exclusion of alternate methods of serving summons, is overruled.

Case Analysis

The Change in Jurisprudence

In addition to the factors identified by the court in *Charuvila Phillipose*, the decision in *Mollykutty* suffers from a significant omission. The judgment failed to account for the fact that Article 10 of the Hague Service Convention (HSC) permits service through postal channels, and the United States (the destination state in the *Mollykutty* case) does not object to inbound service via this route. This is a glaring oversight since none of the government memorandums/notifications specifically address the use of Article 10 for service abroad. A detailed judicial consideration of this aspect was required.

Despite these limitations, prior to *Charuvila Phillipose*, several High Courts had blindly relied on the reasoning in *Mollykutty* to broadly hold that the HSC provides the exclusive mechanism for serving summons outside India. With *Charuvila Phillipose* now having expressly overruled *Mollykutty*, courts are presented with two possible approaches: either to adopt the updated and nuanced reasoning in *Charuvila Phillipose*, which permits the coexistence of the HSC and CPC procedures for service abroad; or to adhere to the dated and restrictive reasoning in *Mollykutty*, which confines service exclusively to the Central Authority route prescribed under the HSC.

This divergence creates the possibility of conflicting High Court judgments on the issue of service abroad—an inconsistency that can ultimately only be resolved through authoritative pronouncement by the Supreme Court, unless the other High Courts also adopt the approach in *Charuvila Phillipose*.

Potential Legal Challenges Following *Charuvila Phillipose*

The *Charuvila Phillipose* decision may give rise to further litigation on two unresolved legal questions. First, whether the use of methods under Order V Rule 25—such as service by email—would be inconsistent with a destination state's objection under Article 10 of the Hague Service Convention (HSC). Second, whether Articles 15 and 16 of the HSC, which pertain to ex parte decrees and limitation periods, are "in conflict with" existing provisions of the Civil Procedure

Code (CPC).

- **Compatibility of email service under CPC Rule 25 and HSC Article 10 objection.**

Article 10 of HSC permits the use of "*postal channels*" to send summons to persons directly abroad, unless the destination state objects to it. Suppose a destination state has made an objection under Article 10 HSC. In such cases, courts are free to take either a broad or a narrow approach to interpret the scope of "*postal channels*".

The broad approach to interpretation would entail construing "*postal channels*" to encompass modern means of communication including social media and email. This approach relies on Article 31 of the Vienna Convention on the Law of Treaties (VCLT), which requires treaty terms to be interpreted in terms of their object and purpose.[8] Under this approach, if a state objects to Article 10 of HSC, it is understood to oppose all alternate channels including email/social media, for direct service abroad.

Conversely, the narrow approach construes "*postal channels*" restrictively – to include direct post only. It excludes modern means of communication such as email and social media. This view draws from the fact that the HSC was concluded in 1965, prior to the advent of electronic communication. This interpretation considers an Article 10 HSC objection by a state, as a bar, only on postal service. It perceives a state objection under Article 10, to not bar service by email/social media, thus validating electronic service under Order V Rule 25.[9]

In *Charuvila Phillipose*, the Kerala High Court endorses a narrow interpretation of Article 10 postal methods by stating *"…we take the call to limit the same…"* in reference to postal channels. This allows litigants in India to send service abroad via email. However, this interpretation carries significant legal risks.

Countries oppose direct “postal channels” under Article 10 HSC for various reasons such as due process concerns, desire for reciprocity or efficiency of Central Authorities. However, certain civil law jurisdictions such as Japan, China and Germany consider service of process as an exercise of judicial sovereignty. They oppose Article 10 HSC on the basis that service is a function exclusively belonging to the state by virtue of its sovereignty.[10] Proceeding with electronic service (through the narrow approach), despite a specific objection, might be perceived as a challenge to a nation’s judicial sovereignty.

A further challenge may arise at the enforcement stage. A foreign court may refuse to recognize or enforce an Indian judgment on the ground that service by email was not compliant with proper service under HSC.[11] While such email service might serve the purpose of adequate notice to the defendant, its legality remains contested. For instance, in *Lancray v Peters*, the Court of Justice of the European Union (CJEU) refused to recognize a foreign judgment due to improper service, even though the defendant had actual notice.[12]

- **Whether Article 15 and 16 of HSC is “in conflict with” CPC?**

One of the arguments canvassed to argue that HSC provisions were in conflict with CPC were Article 15 and 16 of HSC. These provisions concern the setting aside of ex-parte judgements and the extension of limitation periods, areas already governed by CPC. It was argued that these provisions significantly alter the existing procedures under CPC

The court however, sidestepped the issue, noting that this was not one of the questions referred for determination. Nevertheless, the court, recognizing the possibility of a conflict, clarified that its harmonious construction between CPC and HSC was limited to provisions concerning service of summons and cannot automatically result in compatibility between HSC and Indian law for all the other provisions. Since this question remains unresolved, it is likely to be subject to future litigation. The court's avoidance of this issue is particularly notable given that Mollykutty held that a deemed declaration of international service to an HSC signatory state could be made only upon satisfaction of the conditions under Article 15 of the Convention. This however went unaddressed in Charuvila Philippose.

- **Recognition of Problems with HSC Route**

The judgment implicitly acknowledged the practical difficulties associated with serving summons abroad via the Central Authority route under HSC. These include significant delays, often ranging from six to eight months and the risk of non-service. Additionally, the costs associated with the Central Authority route impose a heavy financial burden, particularly on individual litigants and smaller entities. In light of these challenges, the court's harmonized approach serves a dual purpose – it resolves an inconsistency between HSC and CPC and, simultaneously offers an alternate route for service of summons that eases the burden on litigants.

One hurdle that prevents reliance on Rule 25 is the absence of an express mechanism to prove summons was served abroad. The court adopts a practical approach where service is deemed valid under Rule 25 – if the postal authorities of the destination state provide acknowledgement of successful service, or if the defendant voluntarily appears before the court. This is only a temporary fix to address a procedural lacuna in CPC. However, modern technology can prove to be an effective fix. While regular email offers speed, efficiency and accessibility compared to service by post, it is difficult to conclusively prove whether the email was received, opened or read by the defendant. To address these limitations, "certified email" platforms offer an alternative. Such platforms provide encryption, verifiable delivery tracking, time-stamped acknowledgements along with confirmation of when and whether the recipient opened the message. It provides a comprehensive digital trail similar to postal service, while providing a higher evidentiary value. Incorporation of such tools could significantly improve reliability of international service under Order V Rule 25 of CPC.

In conclusion, the *Charuvila Philippose* judgement is a progressive shift in the law concerning service. The judgement performs a dual function. It overrules the faulty reasoning in *Mollykutty* while simultaneously harmonizing the HSC and CPC provisions for international service. The judgement provides litigants with alternate channels for international service that is less cumbersome than the Central Authority mechanism. However, there are a set of hurdles that the judgement unfortunately does not resolve. This includes whether email service is compatible under Article 10 HSC with a destination state's objective, the potential conflict between Article 15 and 16 HSC with Indian procedural law and the likelihood of divergent interpretations by other High Courts. These issues remain ripe for further litigation. While the judgement is clearly a step in the right direction, there is a need to further simplify and clarify the law concerning international service in India.

[1] *Charuvila Philippose Sundaran Pillai and Ors v. P.N Sivadasan and James W Thomas v. Fr. Jose Thomas S.J and Ors.*, 2024/KER/84933

[2] *Mollykutty v Nicey Jacob and Ors*, 2018/KER/67412

[3] (1970) 3 SCC 400

[4] (2010) SCC OnLine Bom 23

[5] (2018) 6 SCC 287

[6] AIR 1955 SC 425

[7] (1984) 2 SCC 534

[8] Nicolás Lozada Pimiento, "From Physical Location to Electronic Address: Omnipresence in the era of the Internet" in The HCCH Service Convention in the

Era of Electronic and Information Technology, Page 90-93. Available at: https://assets.hcch.net/docs/24788478-fa78-426e-a004-0bbd8fe63607.pdf.

[9] See the following US case laws – *Gurung v. Malhotra* [279 F.R.D. 215] and *Philip Morris USA Inc. v. Veles Ltd*. [2007 WL 725412].

[10] Huang, Jie (Jeanne), Can Private Parties Contract Out of The Hague Service Convention? (July 01, 2024). Journal of Private International Law, volume 20, issue 2, 2024[10.1080/17441048.2024.2369366], Available at SSRN: https://ssrn.com/abstract=5157959.

[11] Id.

[12] Case C-305/88 *Lancray v Peters* 1990 E.C.R. I-2742, at § 22-31

Foreign Judgments and Indirect Jurisdiction in Dubai (UAE): One Step Forward, One Step Back?

I. Introduction:

In 2024, the Dubai Supreme Court rendered a significant decision on the issue of indirect jurisdiction under UAE law. Commenting on that decision (see here), I noted that it offered "a welcome, and a *much-awaited clarification* regarding what can be considered one of the most controversial requirements in the UAE enforcement system" (italic in the original).

The decision commented on here touches on the same issue. Yet rather than confirming the direction suggested in the above-mentioned decision, the Court regrettably reverted to its prior, more restrictive approach. This shift raises doubts about whether a consistent jurisprudence on indirect jurisdiction is taking shape, or whether the legal framework remains fragmented and unpredictable.

II. The Case

1. Facts

The facts of the case can be summarized as follows:

The appellants (X) filed a petition before the Enforcement Judge seeking the enforcement (*exequatur*) of a judgment rendered by the Business and Property

Courts in Manchester, UK. The judgment, issued against the respondent (Y), ordered the seizure of a luxury penthouse located in Dubai.

The Enforcement Judge declared the English judgment enforceable. However, this decision was overturned on appeal, on the grounds, among others, that UAE courts have jurisdiction over the matter, given that the immovable property in question was located in Dubai.[1]

Dissatisfied with the appellate ruling, X challenged the Court of Appeal's decision before the Supreme Court of Dubai.

Before the Supreme Court, X argued that provision relied on by the Court of Appeal (Art. 21 of the 2022 Federal Civil Procedure Act) does not confer exclusive jurisdiction in matters of provisional measures. They also argued the enforcement of such orders is permissible under international and bilateral treaties concluded by the UAE, and the Letter addressed by UAE Minister of Justice authorizing Dubai courts to enforce English judgments under the principle of reciprocity.[2]

2. The Ruling: *Dubai Supreme Court, Appel No. 156/2025 of 24 April 2025*

After referring to the relevant provisions governing the enforcement of foreign judgments in the UAE (article 222, article 225 of the 2022 Federal Civil Procedure Act), the Supreme Court rejected the appeal on the following grounds (with slight modifications; underline added):

> *"As consistently held by this Court, when the UAE has neither acceded to an international convention nor concluded a treaty with a foreign state concerning the enforcement of judgments, UAE courts must ensure that all the conditions set out in article 222 of the* Federal Civil Procedure Act *are met before ordering enforcement. Among these conditions is <u>the requirement that UAE courts should not have jurisdiction over the dispute on which the foreign judgment was passed, in accordance with the rules of jurisdiction set forth in the Civil Procedure Act</u>.*
>
> *Under the applicable provisions on international jurisdiction (articles 19, 20, 21, and 24*[3] *of the* 2022 Federal Civil Procedure Act*), as consistently held by this Court, procedural matters, including questions of jurisdiction, are governed*

by the law of the forum before which the proceedings are initiated.[4] [In this regard], Dubai courts have jurisdiction to hear the disputes brought before them if the defendant is a foreign national residing or domiciled in Dubai, except for actions in rem concerning immovables located abroad.[5] Dubai courts also have jurisdiction to issue protective and provisional measures to be executed in the UAE, even if they do not have jurisdiction over the main claim.[6] Any agreement to the contrary shall be deemed null and void.[7] Where any of the grounds for jurisdiction as defined by the law are satisfied, UAE courts cannot decline jurisdiction, as matters of jurisdiction concern public policy (al-nizam al-'âm).[8]

That said, given the absence of any treaty between the UAE and the United Kingdom regarding the enforcement of judgments, and considering that the bilateral agreement with the UK on extradition and mutual legal assistance does not address the enforcement of judgments,[9] it is therefore necessary to refer to the conditions stipulated in Article 222 of the 2022 Federal Civil Procedure Act.

In the present case, X filed a petition seeking the enforcement of an English judgment ordering the seizure of an immovable located in Dubai. Accordingly, under the above-stated applicable legal provisions, the Dubai courts have jurisdiction over the case. In this respect, the ruling under appeal correctly applied the law when it rejected the enforcement of the foreign of the foreign judgment.

This conclusion is not affected by X's argument that the enforcement order should have been issued based on the principle of reciprocity. This is because the applicability of the reciprocity principle depends on whether UAE courts lack jurisdiction over the dispute and the foreign court properly assumes jurisdiction. As previously stated, this issue concerns public policy.

Accordingly, the grounds of appeal are without merit, and the appeal must be dismissed.

III. Comments

The decision comment on here is another illustration of the significance of indirect jurisdiction, which I previously described as "one of the most controversial requirements in the UAE enforcement system." On this point, the Court's reasoning and choice of formulation are somewhat disappointing, particularly in comparison with its previous decision on the same issue (*Dubai Supreme Appeal No. 339/2023 of 15 August 2024*).

In that earlier case, the Court clearly held that the enforcement of foreign judgment would be allowed unless UAE courts have exclusive jurisdiction over the dispute in which the foreign judgment to be declared enforceable was rendered. "Therefore, in case of concurrent jurisdiction between UAE courts and the foreign rendering court, and both courts are competent to hear the dispute, this does not, by itself, prevent the granting of the enforcement order."

In contrast, in case commented on here, the Court reverted to its traditional, more stringent approach,[10] holding that the jurisdiction of the foreign court should be denied whenever UAE courts have jurisdiction under UAE law, without distinguishing, as the new wording of the applicable provisions adopted since 2018 requires,[11] between cases falling under the exclusive jurisdiction of UAE courts and those that do not.

Instead of reverting to its old, questionable position, the Court could have approached the issue in one of two possible ways:

First, the Court could have considered that the English judgment ordering the seizure of a property located in Dubai constituted in fact an order of "protective measures", which by nature is temporary and therefore not final and conclusive in the meaning of article 222(2)(c) of the 2022 Federal Civil Procedure Act.

Second, the Court could have found that ordering "protective measures" relating to the seizure of property in Dubai falls within the exclusive jurisdiction of Dubai court.[12] On this basis and applying the same reasoning it adopted in its abovementioned decision of 15 August 2024, the Court could have denied the indirect jurisdiction of English courts.

Such an approach is preferable, as it clearly defines the impact of UAE jurisdictional rules on the indirect jurisdiction of foreign courts, rather than suggesting (imprecisely or overbroadly) that the mere taking of jurisdiction by the UAE courts would automatically exclude the jurisdiction of foreign courts.[13]

In any case, the way the Court framed its reasoning reflects the continuing influence of its long-standing approach to jurisdiction. It also suggests that the more flexible view adopted in the 15 August 2024 decision may still take time to gain a firm footing in judicial practice.

That said, given the lack of clarity in the law itself about what exactly falls within the exclusive jurisdiction of UAE courts, it is perhaps not surprising that judges sometimes fall back on familiar ground when deciding whether to refuse enforcement of foreign judgments.

Still, even if the outcome can be understood, the reasoning remains open to criticism. It risks adding further uncertainty to an area where greater consistency and predictability are badly needed, especially if the UAE seeks to consolidate its position as a global center for international dispute resolution.

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[1] Various issues were raised in this case, notably the question of the notification of the decision, the validity of which was examined by the courts. However, these aspects will not be discussed here.

[2] On this Letter, see my comments here and here.

[3] The Court erroneously cited Article 24; it is likely that Article 23 was meant instead.

[4] This rule is actually found in the 1985 Federal Act on Civil Transactions (article 21) and not the provisions cited in the decision.

[5] See Article 19 of the 2022 Federal Civil Procedure Act. For an example of a case in which the UAE courts declined jurisdiction on the ground that the case concerned an *in rem* right over an immovable located abroad, see the *Abu Dhabi Supreme Court, Appeal No. 238/2017 of 25 March 2018*.

[6] In one case, it was declared that "the jurisdiction of national courts to order protective or provisional measures is not contingent upon the court's jurisdiction over the merits of the case, nor is it linked to the nationality of the parties or the existence of a domicile or residence within the country, but it is due, in addition

to the general principle of territoriality of judicial jurisdiction, to the fact that requiring parties to await the outcome of proceedings before a foreign court may be detrimental to their interests”. See *Federal Supreme Court, Appeal No. 693/24 of 9 October 2005*.

[7] Therefore, choice-of-court agreements are deemed null and void in the UAE. For a very recent application of this rule, see *Dubai Supreme Court, Appeal No. 875/2024 of 24 September 2024*. The rule applies even to choice-of-court agreements between different Emirates within the UAE. See, e.g., *Dubai Supreme Court, Appeal No. 21/2010 of 31 May 2010*, in which the Court held that jurisdictional rules cannot be derogated from by agreeing to the courts of another Emirate. The rule also applies when the parties agree to submit to the jurisdiction of a UAE court. See, e.g., *Dubai Court of Appeal, Appeals Nos. 162 and 623/2022 of 8 June 2022*. This principle has implications for the indirect jurisdiction of foreign courts, particularly where the foreign court assumes jurisdiction on the basis of a choice-of-court agreement between the parties. See, e.g., *Dubai Supreme Court, Appeal No. 52/2019 of 18 April 2019*, where the Court refused to enforce an English judgment on the grounds that the English court had assumed jurisdiction pursuant to the parties’ choice-of-court agreement.

[8] For examples of cases in which the courts refused to decline jurisdiction, particularly on the grounds that the parties had agreed to the jurisdiction of a foreign court, see *Dubai Supreme Court, Appeal No. 86/1996 of 6 April 1997*. For a more recent case, see *Dubai Supreme Court, Appeal No. 1176/2024 of 4 March 2025*.

[9] Courts have ruled in the same manner in the past. See, e.g., the decision of the *Dubai Court of First Instance, Case No. 574/2017 of 28 November 2017*, cited here.

[10] On this approach with some examples, see the brief overview outlined here.

[11] On the legislative evolution of the applicable rules, see here and here.

[12] *Comp.* with Article 8(4) of the Tunisian Code of Private International Law of 1998, according to which “Tunisian courts shall have exclusive jurisdiction: (4) If the action concerns a request for protective or enforcement measures against properties situated in Tunisia”. For a translation of the relevant provisions, see Béligh Elbalti, “The Jurisdiction of Foreign Courts and the Enforcement of Their

Judgments in Tunisia: A Need for Reconsideration" (2012) 8(2) *Journal of Private International Law* 221-224.

[13] For some examples on this approach, see my previous comment here and here.

Sovereign Immunity and the Enforcement of Investor–State Arbitration Awards: Lessons from Devas V. India in Australia, The United Kingdom and India

Written by Samhith Malladi, Dual-qualified lawyer (India and England & Wales), and Senior Associate, Shardul Amarchand Mangaldas [Bombay office]; and Niyati Gandhi, Partner, Dispute Resolution, Shardul Amarchand Mangaldas [Bombay office]

The Recalibration of Enforcement Doctrine

The global campaign to enforce arbitral awards against the Republic of India arising from its long-running dispute with Devas Multimedia has witnessed a significant doctrinal shift in the treatment of sovereign immunity within the enforcement of investor–state dispute settlement (**ISDS**) awards.

To recall, the dispute arises from a contract entered in 2005 between Devas Multimedia Private Limited (**Devas**) and the Indian state-owned Antrix Corporation (**Antrix**), which was the commercial arm of the Indian Space Research Organisation. Antrix had agreed to lease S-band spectrum to Devas to broadcast its multimedia services in India. Antrix terminated this contract in 2011 citing national security concerns. In a nutshell, the dispute spawned three concluded arbitrations – a commercial ICC arbitration between Devas and Antrix and two investor-state arbitrations between Devas' shareholders and India under the India-Mauritius Bilateral Investment Treaty (**BIT**) 1998 and the India-Germany BIT 1995. In 2022, Devas' Mauritian shareholders commenced another investor-state arbitration against India under the India-Mauritius BIT in relation to India's efforts to thwart the award against Antrix in the ICC arbitration, which currently remains pending before the Permanent Court of Arbitration. An overview of the various proceedings arising from this dispute has been previously discussed on this blog here.

Devas and its shareholders won favourable awards in all three concluded arbitrations. Since then, Devas and its shareholders have commenced enforcement proceedings in several jurisdictions across the world. Recent judgments from courts in the United Kingdom and Australia – arising from the Mauritian shareholders' attempts to enforce the favourable ISDS award in various jurisdictions – have not only reaffirmed the centrality of sovereign immunity in enforcement proceedings but have also echoed the analytical approach to assessing the enforceability of ISDS awards adopted by Indian courts. This post situates the UK and Australian judgments within the broader trajectory of Indian jurisprudence and considers the implications for the future of ISDS enforcement.

Early Presumption in Favour of Enforcement of Arbitral Awards

The early efforts by Devas' investors to enforce an ISDS award against India were successful in overcoming India's defence based on sovereign immunity. In *Deutsche Telekom v. India*, German investors in Devas won a favourable ISDS award in a Geneva-seated UNCITRAL arbitration against India for compensation in 2020. Thereafter, aside from successfully resisting India's efforts to set aside the award in the seat courts in Switzerland, the investors have been successful in having the award recognised as enforceable in the US, Singapore and Germany under the New York Convention 1958 (**NYC**).

The observations of a US Court in 2024 while enforcing the award are illustrative of a presumption in favour of the enforcement of ISDS awards. The US Court rejected India's claim to sovereign immunity under the Foreign Sovereign Immunities Act 1976 (**FSIA**) on the basis of the "*arbitration exception*" in the FSIA. The court held that India could not claim immunity given that it had agreed to arbitrate under the India-Germany BIT in accordance with the UNCITRAL Rules. Tellingly, the US Court proclaimed "*Enough is Enough!*". The approach of the US court, enforcing the award under the New York Convention, is reflective of the restrictive theory of sovereign immunity, which limits a state's immunity from lawsuits in foreign courts to acts of a private nature, such as commercial activities, while preserving immunity for acts performed in its sovereign capacity. This theory acknowledges that states often engage in commercial activities and should be held accountable like private entities in those contexts.

At the time of these enforcement efforts, there was no discussion of India's commercial reservation to the NYC and whether the dispute before an ISDS tribunal is considered "*commercial*" under Indian law. India's reservation to the NYC states: "*India will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered <u>commercial</u> under the national law.*" India is not the only state to have made such a reservation to NYC, and not the only State refused this defence. In *Zhongshan Fucheng Industrial Investment Co. Ltd v Nigeria* 112 F.4th 1054 (D.C. Cir. 2024), a Chinese investor sought to enforce an award against Nigeria under the China-Nigeria BIT before a US court. The US has adopted a commercial reservation under the NYC. Nigeria sought to resist enforcement of the award on the ground that the dispute arose out of a relationship that was not commercial in nature. The court disagreed and adopted a broad interpretation of the word "*commercial*", observing that the BIT itself was signed to promote commerce and the dispute did not need to arise from a contract in order to be commercial.

However, as discussed below, in recent enforcement attempts against India, India's arguments on the question of whether ISDS awards were "*commercial*" in nature and fell within the scope of this reservation have been assessed in new light. Courts in Australia and the UK have in recent judgments accepted the renvoi to Indian law's characterisation of enforceable "*commercial*" awards as not including ISDS awards.

Australia: Treaty Reservations and Domestic Legal Classification

As discussed here, the Full Federal Court of Australia's decision in *Republic of India v. CCDM Holdings, LLC* [2025] FCAFC 2 illustrates the growing judicial circumspection in enforcement proceedings against sovereign states. The court reversed the prior decision in the first instance by the Federal Court, where the court had enforced the award against India. The court of first instance had concluded that India was not immune under the Australian Foreign States Immunities Act 1985 (**Australian FSIA**) as it had waived its sovereign immunity by ratifying the NYC. The court had not been convinced of the impact of India's commercial reservation to the NYC, noting that enforcement was sought in Australia and Australia had not made any such commercial reservation.

The Full Federal Court disagreed with the reasoning of the court of first instance. Applying the Vienna Convention on the Law of Treaties, 1969, the court noted that the commercial reservation had modified the relationship between India and other NYC contracting states as regards the obligation to enforce foreign awards in Article III of the NYC. Given that it applied, the court concluded that the arbitral award related to a dispute as to rights under public international law – which was different from a "*commercial*" dispute. This was reinforced by the fact that the termination of the contract with Devas had arisen from "*public policy*" concerns, which were again not commercial in nature.

The Australian court's willingness to defer to India's own legal characterisation of the transaction underscores the significance of domestic law in the enforcement calculus. The decision demonstrates that, even in the presence of an otherwise valid arbitral award, the classification of the underlying relationship and the scope of the respondent state's reservations can decisively shape the outcome of enforcement proceedings under the NYC.

United Kingdom: Consent to Arbitrate Is Not Consent to Enforce

The English Commercial Court's decision in *CC/Devas et al. v Republic of India* [2025] EWHC 964 (Comm) continued the trend of upholding sovereign immunity as a bar to enforcement of ISDS awards against a country that has made a commercial reservation under the NYC. Devas argued that India's ratification of the NYC constituted a waiver of sovereign immunity under the UK's State Immunity Act 1978 (**SIA**). India took the position that there was no such waiver because of the limited scope of the NYC and the commercial reservation that India made when ratifying the NYC.

The court was not convinced that India's ratification of the NYC was sufficient evidence of a "*prior written agreement*" under Section 2(2) of the SIA. The court observed that the drafters of the NYC had not intended to preclude the ability of states to assert their sovereign immunity in enforcement proceedings. A crucial cog in his analysis was that Article III of the NYC directs contracting states to recognise foreign arbitral awards as binding and "*enforce them in accordance in accordance with the rules of procedure of the territory where the award is relied upon …*", which preserved states' sovereign immunity "*in its own terms*". He concluded that the ratification of the NYC was in and of itself insufficient to constitute waiver in accordance with English law. Finally, on India's commercial reservation to the NYC, the court accepted that while under English law the dispute could be termed "*commercial*", it could not be assumed that this was necessarily the case under Indian law. The court did not go much further except for noting that the claimants had not advanced a case under Indian law on what constituted a "*commercial*" dispute. The court simply concluded that "*on appeal, the Full Federal Court of Australia has decided this issue in favour of India, which must carry considerable weight in this jurisdiction*" (para 98).

At the end of the judgment, the court clarified that its conclusion was "*not intended to contradict in any way the enforcement friendly aspect of the NYC, which is its purpose, and the reason for its success, and which has been consistently upheld in the English courts … It simply recognises that international jurisprudence, which holds that '… state immunity occupies an important place in international law and international relations', also has to be taken into account in deciding the narrow, but important, issue of whether a state has by treaty given its consent to waive that immunity*" (para 108). The Court's closing remark suggests that while the enforcement of foreign arbitral awards continued to be the guiding principle of the NYC, it must co-exist with the domestic procedural law of the enforcing state, particularly on an issue as fundamental as sovereign immunity.

This judgment reinforces the principle that sovereign immunity is not a mere procedural hurdle but a fundamental organising principle of enforcement. The NYC, while facilitating recognition of arbitral awards, does not itself override the statutory requirements for waiver of immunity under domestic law. The English court's insistence on explicit and unambiguous consent places the burden squarely on investors to secure such waivers at the outset.

Comparative Analysis: Convergence and Doctrinal Resonance

The recent UK and Australian judgments represent a deference to domestic law treatment of awards and the fundamental nature of sovereign immunity as a boundary as central pillars of judicial reasoning. The judgments have the potential to be the inflection points towards a global trend in which the enforceability of investor–state awards is increasingly contingent upon the precise contours of state consent, both at the treaty-drafting stage and in domestic statutory frameworks.

Historical Approach of Indian Courts

The analytical approach now being adopted in the UK and Australia seems to mirror the jurisprudence of Indian courts, which have not treated ISDS awards as enforceable under the New York Convention, and thus the Indian Arbitration and Conciliation Act, 1996.

Section 44 of the Indian Arbitration and Conciliation Act, 1996 is a unique statutory expression of India's emphasis on sovereign choice when enforcing arbitral awards. Section 44 enforces only those awards that are considered as "*commercial under the law in force in India*", rendered pursuant to the NYC and are made in a territory notified by the Central Government. Indian courts have scrutinized when an international arbitration award can be considered "*commercial*" in nature. In *Union of India v. Khaitan Holdings (Mauritius) Limited & Ors.* [CS (OS) 46/2019 I.As. 1235/2019 & 1238/2019 dated January 29, 2019] (**Khaitan Holdings**), India requested the Delhi High Court to issue an anti-arbitration injunction against a BIT arbitration commenced against India by Khaitan Holdings under the India-Mauritius BIT 1998. The court observed that the Arbitration and Conciliation Act (Part II of which incorporates the New York Convention and the Model Law) did not apply to BIT arbitrations, which were different in nature from "*commercial*" arbitrations given they also involved questions of public international law. The Delhi High Court's decision in Khaitan Holdings echoed its previous decision along similar lines in *Union of India v. Vodafone Group Plc* [AIR Online 2018 Del 1656].

To be clear, neither the US nor the Australian courts have considered or relied on these decisions.

India's Recent Treaty Practice

Recognising the limitations of the existing enforcement paradigm, India has begun to address these concerns proactively in its treaty practice. The India–UAE

Bilateral Investment Treaty (2023) includes an express waiver of immunity from both jurisdiction and execution in respect of disputes submitted to arbitration under the treaty. In a chapter aptly titled "Finality and enforcement of awards", the India-UAE BIT's Article 28.4 states that: *"Each Party shall provide for the enforcement of an award in its Territory in accordance with its Law. For the avoidance of doubt, this Article 28.4 shall not prevent the enforcement of an award in accordance with* [the] *New York Convention."* Following Article 27.5 of the India's Model BIT (2016), Article 28.5 clarifies that: *"A claim that is submitted to arbitration … shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention."* Similar language inspired by the Model BIT has been incorporated into Article 29.5 of the recently ratified India-Uzbekistan BIT 2024.

As such, if an ISDS dispute were to arise from an investment made pursuant to these BITs, India has committed to not resist an eventual award's enforcement as it has done in the various Devas award enforcement actions around the world. This development marks a significant departure from India's historical approach and signals an emerging consensus that enforcement concerns must be resolved at the outset, rather than left to the uncertainties of enforcement litigation.

Conclusion: Sovereignty as the Organising Principle of Enforcement

The Devas enforcement saga has brought into sharp relief the centrality of sovereign immunity in the enforcement of investor–state arbitral awards. The doctrinal evolution witnessed in the UK and Australia is not a departure from established principles but a reaffirmation of the analytical approach long adopted by Indian courts. As the global legal community grapples with the challenges of ISDS enforcement, the future effectiveness of arbitral awards will depend less on the reasoning of arbitral tribunals and more on the clarity with which states define—and limit—their consent to enforcement, both in domestic law and in treaty practice. It will be important to watch this trend closely as courts interpret the interplay between sovereignty and the enforcement of international arbitral awards.

Conflict of Law Rules in the Early 20th Century Ethiopia: A Brief Legal History

Guest post by Bebizuh Mulugeta Menkir, former Lecturer of Laws in University of Gondar, currently working as a Lawyer and Senior National Consultant for a legal reform project. E-mail: babimulugeta@gmail.com

The Ethiopian legal system is characterized by the absence of codified rules on conflict of laws. Though it cannot be considered as the exact period in which conflict of laws have emerged in Ethiopia, some elements of such rules can be found even in the early 1900s, which is long before the modern codes were developed in 1950s and 1960s.

A book written by *Mersehazen Woledekirkos* titled *"Ye Hayagenawe Keflezemen Mebacha:Ye Zemen Tarik Tezetaye Kayehute ena Kesemahute 1896–1922"*[1] is a record of historical events that happened in 20th century Ethiopia. One of the records is the "Trade Agreement (1908)" that was signed between Ethiopia and France. This agreement, among others, regulates the adjudication of disputes between Ethiopian and French nationals/dependents. This short piece aims to briefly discuss the salient conflict of laws rules that are incorporated in this trade agreement.

The 1908 Trade Agreement and Conflict of Laws

The trade agreement between Ethiopia and France was signed on January 10, 1908. In this agreement Ethiopia was represented by Emperor Menelik II and Antony Klobukowski signed on the behalf of France.[2]

This agreement consists of a total of nine articles (sections) covering a range of issues, including custom tax, immigration and security matters in performance of trade between the two nations.[3] Specifically, Article 7 of the agreement stipulates the agreed terms with respect to the adjudication of disputes, of civil as well as criminal nature, that would arise between Ethiopian and French nationals/dependents. In other words this provision was devoted to regulate questions in cases involving a foreign element.

Accordingly to the contemporary conception, it is a foreign element that triggers questions that require the application of conflict of laws. In the trade agreement a foreign element is established based on the nationality of parties to the dispute that the application of rules stated under Art. 7 of the agreement would arise in case when either one or both of the disputant parties are French nationals/dependents.

Though the provision also brought criminal matters within its scope of application, the part concerning civil cases regulates jurisdictional and choice of law matters that are part of conflict of laws. Regarding jurisdiction, the agreement states that:

> *Until the Ethiopian legal system is in par with the Europeans, disputes between French nationals (dependents) in civil as well as criminal matters shall be under the jurisdiction of French consulate.*[4] *(Translation mine)*

As it can be inferred from this provision conditionally makes disputes between French nationals/dependents under the exclusive jurisdiction of France, until Ethiopian laws are harmonized with European legal frameworks. Though the provision lacks clarity as to when do Ethiopian laws would be considered to be in par with the European counterparts, Ethiopian courts wouldn't claim primary as well as secondary jurisdiction in civil cases over with both of the disputant parties are French nationals/dependents.

However, the jurisdictional stand will be changed when the dispute is between French national (dependent) and Ethiopian national (dependent). This stipulated in the agreement that reads:

> *If a French national (dependent) brings legal action against Ethiopian citizen (dependent), in civil and criminal matter, it shall be adjudicated by an Ethiopian judge together with a representative from French consulate.*[5] *(Translation mine)*

As per the above quoted provision of the agreement, disputes between an Ethiopian national/dependent and French national/dependent is under the jurisdiction of Ethiopian (specialized) court. This court was later on established in the Ministry of Foreign Affairs, in the year 1920/21.[6] While this court is supposed to adjudicate disputes in a bench composed of an Ethiopian judge and a representative from French consulate; and in case of ties between the two the case shall be submitted to the Emperor of Ethiopia, for final decision.[7]

Moreover, the agreement also has a different stand regarding the choice of applicable law in case when the dispute is between an Ethiopian national/dependent and French national/dependent. As such, if one of the parties to the dispute is an Ethiopian national/dependent, the case will disposed according to Ethiopian law. In this respect, Art 7 of the agreement reads as follows:

> *If the defendant is an Ethiopian national (dependent), the case shall be adjudicated based on Ethiopian law; which shall also be applicable in case when the defendant is a French national (dependent).[8] (Translation mine)*

Generally, according to the trade agreement, legal disputes between French nationals/dependents in Ethiopia are under the jurisdiction of France. Cases involving disputes Ethiopian national/dependent and French national/dependent are under the jurisdiction of Ethiopian court; that shall resolve the case by applying Ethiopian laws.

However, the trade agreement is silent regarding disputes between French national/dependent and another foreign national/dependent residing in Ethiopia. Here, it is interesting to mention that despite what was clearly stated under article 7 of the trade agreement, the provision was later on started to be applicable to foreigners other than French.[9]

[1] *Mersehazen Woledekirkos, Ye hayagenawe keflezemen Mebacha:Ye Zemen Tarik Tezetaye kayehute ena Kesemahute 1896–1922 (Amharic*), Addis Ababa University Press, 3rd ed. (2016/17)

[2] Id. p.243

[3] Id.

[4] The Trade Agreement, Art 7, paragraph 1 (as stated , *Mersehazen supra* 1, p. 243)

[5] Id., Art 7, paragraph 2

[6] *Mersehazen*, supra1, p. 242&243

[7] The Trade Agreement, Art 7, paragraph 4

[8] *Id*. Paragraph 3

[9] *Mersehazen*, *supra* 1 , p.245

US Supreme Court: Hearing in Smith & Wesson Brands, Inc. et al. v. Estados Unidos Mexicanos (Mexico). Selling guns comparable to selling beer to teenagers?

Written by Mayela Celis, Maastricht University

The hearing in the case of Smith & Wesson Brands, Inc. et al. v. Estados Unidos Mexicanos (Mexico) No. 23-1141 took place in March 2025 before the US Supreme Court. We have previously reported on this case here and here. The transcript and the audio files can be found here.

As previously indicated, this is a much-politicized case brought by Mexico against US gun manufacturers. Mexico alleges *inter alia* that defendants actively assist and facilitate trafficking of their guns to drug cartels in Mexico. Among the claims for relief are: Negligence, public nuisance, defective condition – unreasonably dangerous, negligence per se, gross negligence, unjust enrichment and restitution, violation of CUTPA [Connecticut Unfair Trade Practices Act], Violation of Mass. G.L. c. 93A [Massachusetts Consumer Protection Act] and punitive damages.

From the perspective of Mexico, this case is of crucial importance because it has a direct impact on its access to US courts to seek justice for all the mayhem that cartels have inflicted using American-made weapons smuggled into Mexico. However, from an American perspective, this case seems to raise many questions and confusion as to how legal standards of proximate cause / aiding and abetting could actually apply, and all of this against the backdrop of the immunity conferred by congress to weapon manufacturers.

Perhaps controversially, counsel for Smith & Wesson Brands, Inc. et al. contended as part of his opening argument that (our summary): no case in American history supports Mexico's theory. And if Mexico is right then every law enforcement organization in America has missed the largest criminal conspiracy in America, and a large beer company is liable for every accident caused by every underage drinker since it knows that teenagers will buy beer, drive drunk and crash. More on this further down.

The proceedings

This case before the US Supreme Court is about overcoming a motion to dismiss. Consequently, it is not about determining which aspects of Mexico's allegations would survive during the litigation (and some are controversial), as indicated by one of the counsels, but whether they pass this legal hurdle.

The US District Court for the District of Massachusetts dismissed the case under the Protection of Lawful Commerce in Arms Act (PLCAA). But the First Circuit reversed, holding that the PLCAA does not bar this suit as Mexico adequately alleged that defendants have "aided and abetted the knowingly unlawful downstream trafficking of their guns into Mexico".

Unsatisfied with the decision, defendants filed a petition for a writ of certiorari before the US Supreme Court, which was granted. The hearing before the US Supreme Court took place on 4 March 2025. No judgment has yet been rendered.

The hearing

Some prominent statutes and case law mentioned

The applicable statute is the Protection of Lawful Commerce in Arms (PLCAA), which is codified in 15 U.S. Code Chapter 105, sections: §7901. Findings; purposes; §7902. Prohibition on bringing of qualified civil liability actions in Federal or State court; §7903. Definitions – 15 U.S. Code § 7903 (5)(A)(iii)).

As its title suggests, section §7902 sets forth a prohibition on bringing of qualified civil liability actions in Federal or State court, the purpose of which is to protect the Second Amendment.

The predicate exception / aiding and abetting is contained in 15 U.S. Code § 7903 (5)(A)(iii), which states the following:

> *(5) Qualified civil liability action*
>
> *(A) In general*
> *The term "qualified civil liability action" means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party,* ***but shall not include****— […]*
>
> *(iii) an action in which a manufacturer or seller of a qualified product* ***knowingly violated*** *a State or Federal statute applicable to the sale or marketing of the product, and the violation was* ***a proximate cause of the harm*** *for which relief is sought, including—*
>
> *(I)any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product,* ***or aided, abetted****, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or*
>
> *(II)any case in which the manufacturer or seller* ***aided, abetted,*** *or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of title 18; (our emphasis)*

However, other statutes were also alleged to be applicable but the extent to which they were was the subject of controversy. Mention was made to 18 U.S.C. 922, 923, 924 and 18 U.S.C. Section 2 (and other state statutes in the complaint).

Throughout the argument, the *Twitter* case was mentioned (Twitter, Inc. v.

Taamneh, 598 U. S. 471 (2023)). This case is relevant because it deals with aiding and abetting. In its ruling, the Supreme Court held that “Plaintiffs’ allegations that these social-media companies aided and abetted ISIS in its terrorist attack on the Reina nightclub fail to state a claim under 18 U. S. C. §2333(d)(2).” However, this case deals with a different statute as will be pointed out later in this post.

Among other decisions mentioned are:

- Hemi Group, LLC v. City of New York, 559 U. S. 1 (2010). This case is significant because it deals with proximate cause. It concerns the filing of tax reports with respect to the sale of cigarettes online.
- Direct Sales Co. v. United States, 319 U. S. 703 (1943) concerns a manufacturer selling narcotics/morphine to a specific doctor in great quantities, offering them at significant discounts.

Key concepts and some allegations

The hearing revolved around some key concepts: proximate cause, foreseeability, aiding and abetting, knowingly violated, statutory interpretation, predicate exception and immunity.

With regard to ***the relationship between manufacturers, distributors and retailers***, it was pointed out that *licensed* manufacturers sell weapons to *licensed* distributors who then sell them to *licensed* retailers, a small percentage of whom sell those weapons to straw purchasers, some of whom sell them to other purchasers who transfer them to smugglers, who then transfer them to cartels that in turn do mayhem in Mexico. In the US, there is a tier-distribution chain.

One of the key allegations put forth by Mexico was that manufacturers ***aided and abetted*** the retailers because manufacturers knew that they would sell the weapons to straw purchasers. Some retailers were identified in a Washington Post article. However, a comment was made to the effect that if the government ignores which retailers are committing such actions how are the manufacturers supposed to know this fact.

A discussion ensued whether ***proximate cause*** related to the violation of the manufacturers and Mexico’s injury or to the retail sellers and Mexico’s injury. However, under the theory that aid and abetting is a form of vicarious liability then it would point to the retail sellers and Mexico’s injury. Interestingly, Justice

Sotomayor noticed that the proximate cases are a mess and going into that would be like opening Pandora's box.

Several cases were discussed including ***Twitter* and *Direct Sales*** and the fact that they relate to a specific violation. While counsel contended that this case is much easier, in many different respects, than the *Twitter* case, a justice said that *Twitter* dealt with a different statute. While discussing case law, and in particular a case from 1876 (St Paul Railway), there was a fleeting exchange (a telling jest) between counsel and two justices (Sotomayor and Gorsuch) about the role of the court as a collective body operating across time.

To the question whether the ***PLCAA's objective*** was to bar lawsuits such as this one by foreseeing immunity, it was contended by the counsel for Mexico that this was not the case. Allegations were also made that Mexico is a direct victim and that the actions were foreseeable. Importantly, serial numbers could be erased for some weapons.

Finally, it was noted that 2% of the guns manufactured in the US (about 300,000 -600,000 guns) are likely trafficked into Mexico each year and end up in the cartels. Three models of guns made by the manufacturer seem to target Mexican cartels: the Super El Jefe, the Super El Grito, and the Emiliano Zapata 1911. These are smuggled to Mexico in volume. Whether this mere fact was enough for aiding and abetting was qualified as absurd by the opposite counsel.

Comments

This is a very complex case. Not only are the civil and criminal aspects intertwined but the allegations also concern independent crimes or actions committed by multiple parties before the weapons cross the border and reach Mexico. In addition, very few retailers have been named, and allegedly on the basis of a newspaper article published in the Washington Post. Importantly, unlike *Twitter* and *Direct Sales*, there is no specific violation identified.

In my view, there is certain hesitancy with regard to this case. In particular, the consequences of this case can be far-reaching. Think for example of the production of baseball bats, knives, prescription medicines and unavoidably, selling beer to teenagers, all of which were mentioned during the hearing.

Having said that, this case has been politicized and emotions run high on both sides of the border. The need for justice is clear and compelling. There is also a growing sympathy for Mexico and for the need to remedy the wrongs committed in its territory.

From a legal perspective, however, we must recall that this case falls within the confines of PLCAA (and perhaps other statutes) and thus it is a matter of statutory interpretation. With regard to the PLCAA's predicate exception, it would seem very hard to prove that there are substantial allegations regarding a violation and that manufacturers "knowingly violated" a state or federal statute and that the violation was the "proximate cause of the harm" of Mexico's injury. Equally difficult is to prove that there are substantial allegations of "aiding and abetting", which is an example of the predicate exception and should be read as such. Accordingly, the court could rule that there is no *prima facie* violation (or substantial allegations of a violation) and thus the immunity foreseen by Congress applies. If the court favors this approach, it may not need to go into the analysis of complex concepts such as proximate cause, and in this way, avoid opening Pandora's box.

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Brexit and PIL – Belgian Supreme Court confirms the application of the 2005 Hague Convention to jurisdiction clauses designating UK courts concluded after 1

October 2015

By Guillaume Croisant (Linklaters LLP)

The United Kingdom deposited an instrument of accession to the Hague Convention of 30 June 2005 on Choice of Court Agreements (the "**Convention**") on 28 September 2020. This instrument of accession became effective after the Brexit's transition period, on 1 January 2021, and gained binding force within the UK legal order following the adoption of the Private International Law (Implementation of Agreements) Act 2020.

As many readers will be aware, a controversy exists regarding the temporal scope of the Convention. It applies to exclusive choice of court agreements concluded after its entry into force for the State of the chosen court and to disputes initiated after its entry into force for the State of the seized court. EU Member States have been bound by the Hague Convention since its approval by the European Union on 1 October 2015, but what about the UK after its withdrawal from the EU?

According to a first viewpoint, reflected in the UK's instrument of accession, " *In accordance with Article 30 of the 2005 Hague Convention, the United Kingdom became bound by the Convention on 1 October 2015 by virtue of its membership of the European Union, which approved the Convention on that date.*"

Conversely, under a second viewpoint (apparently shared by the European Commission in its 'Notice to stakeholders – Withdrawal of the United Kingdom and EU rules in the field of civil justice and private international law' dated 27 August 2020, p. 9), the Convention could only apply after the United Kingdom's 'independent' ratification, which occurred on 1 January 2021. If this second perspective were accepted, jurisdiction agreements concluded before this date would not benefit from the mutual recognition system established by the Convention.

In a judgment (in French) dated 27 March 2025 (C.24.0012.F), the Belgian Supreme Court (*Court de Cassation/Hof van Cassatie*) ruled in favour of the first viewpoint, holding that "*The Hague Convention of 30 June 2005 has been applicable to the United Kingdom as a bound State, owing to the European Union's approval of the Convention, from 1 October 2015 until 31 December 2020, and as a contracting party from 1 January 2021. The argument, in this* *regard, that the United Kingdom ceased to be bound by the Convention following its withdrawal from the European Union on 1 February 2020, is without legal basis.”*

Foreign Sovereign Immunity and Historical Justice: Inside the US Supreme Court’s Restrictive Turn in Holocaust-Related Cases

By Livia Solaro, PhD candidate at Maastricht University, working on the transnational restitution of Nazi-looted art

On 21 February 2025, the US Supreme Court issued a ruling in *Republic of Hungary v. Simon*,[1] a Holocaust restitution case with a lengthy procedural history. Delivering this unanimous decision, Justice Sotomayor confirmed the restrictive approach to cases involving foreign states inaugurated in 2021 by *Federal Republic of Germany v. Philipp*.[2] In light of the importance of US practice for the development of customary law around sovereign immunity,[3] and its impact on questions of historical justice and transnational accountability, the *Simon* development deserves particular attention.

The Jurisdictional Treatment of Foreign States as an "American Anomaly"[4]

In 2010, a group of Holocaust survivors filed a suit before the US District Court for the District of Columbia against the Republic of Hungary, the Hungarian State-owned national railway (Magyar Államvasutak Zrt., or MÁV) and its successor-in-interest Rail Cargo Hungaria Zrt. (RCH), seeking compensation for the Hungarian government's treatment of its Jewish population during World War II.[5] The survivors claimed that, in connection to their deportation, their properties had been expropriated and subsequently liquidated by defendants.

As the case repeatedly moved through federal courts (in fact, this was not the first time it reached the Supreme Court),[6] the possibility for the US judge to extend its adjudicative jurisdiction over the Hungarian State remained controversial. Claimants based their action on the so-called "expropriation exception" to sovereign immunity, codified by §1605(a)(3) of the 1976 Foreign Sovereign Immunities Act (FSIA).[7] This provision excludes immunity in all cases revolving around rights in property taken in violation of international law, at the condition that that property, or any property exchanged for such property: 1) is present in the US in connection with a commercial activity carried on in the US by the foreign state, or 2) is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the US.

This exception represents an *unicum* within the law of sovereign immunity, as it allows courts to extend their jurisdiction over a state's acta iure imperii (expropriations are indeed quintessential sovereign acts).[8] In recent years, this provision has often been invoked in claims of restitution of Nazi-looted art owned by European states (see, for example, Altmann v. Republic of Austria,[9] Toren v. Federal Republic of Germany,[10] Berg v. Kingdom of Netherlands,[11] Cassirer v. Kingdom of Spain).[12] Crucially, this exception also requires a commercial nexus between the initial expropriation and the US. In its *Simon* decision, the US Supreme Court addressed the standard that plaintiffs need to meet to establish this commercial nexus in cases where the expropriated property was subsequently liquidated. The Court read a "tracing requirement" in the text of the provision, thus establishing a very high threshold.

Property Taken in Violation of International Law

The Court had recently addressed the interpretation of §1605(a)(3 in *Federal Republic of Germany* v. *Philipp,* where the heirs of German Jewish art dealers sought the restitution of a collection of medieval reliquaries known as the Guelph Treasure (*Welfenschatz*), In that case, the Supreme Court focused on the opening line of the expropriation exception, which requires that the rights in property at issue were "taken in violation of international law". By explicitly recognizing that this language incorporates the domestic takings rule,[13] the Court set in motion a trend of increasingly restrictive interpretations of the expropriation exception that is still developing today.

To reach this result, the Supreme Court interpreted the expropriation exception as referring specifically to the international law *of expropriation*. This narrow reading of §1605(a)(3) allowed the Court to assert that the domestic takings rule had "survived the advent of modern human rights law", as the two remained insulated from one another. Accordingly, even if the Nazi plunder were considered as an act of genocide, in violation of human rights law and the Genocide Convention,[14] it would not fall under §1605(a)(3), as this provision only applies to property takings against aliens (reflecting the traditional opinion that international law is concerned solely with the relations between states). From this perspective, the *Philipp* decision adhered to the International Court of Justice's highly criticized conclusion in Jurisdictional Immunities of the State (Germany v. Italy) that immunity is not excluded by serious violations of ius cogens.[15]

The impact of this restrictive turn has already emerged in a couple of cases adjudicated after *Philipp*. In order to circumvent the domestic takings rule, claimants have tried to argue that the persecutory treatment of Jewish individuals by several states during the Holocaust deprived them of their nationality, rendering them either *de iure* or *de facto* stateless. In the wake of *Philipp*, courts have been sceptical of this statelessness theory – although they appear to have left the door ajar for stronger arguments in its support.[16] A recent decision by the District Court for the District of Columbia has gone so far as to exclude the expropriation exception in cases involving a states' taking of property from nationals of an enemy state in times of war.[17] The District Court followed the same reasoning as in *Philipp*: if §1605(a)(3) refers to the international law of expropriation, not only human rights law but also international humanitarian law are excluded by its scope of application. As I noted elsewhere,[18] post-*Philipp* court practice now excludes the expropriation exception in the vast majority of takings by sovereign actors, regardless of whether they targeted their own nationals, the nationals of an enemy state or stateless individuals.

The Commercial Nexus and the Commingling Theory

The recent *Simon* decision adopts the same restrictive approach as *Philipp,* but shifts focus to the expropriation exception's second requirement: the commercial nexus with the US. Under §1605(a)(3), the property that was taken in violation of international law, or *any* property exchanged for such property (emphasis added), needs to have a connection with a commercial activity carried by the foreign state, or one of its agencies or instrumentalities, in the US. Crucially, the Hungarian government liquidated the assets allegedly expropriated from defendants. The Supreme Court was asked to decide whether the claimants' allegation that Hungary used the proceedings to issue bonds in the US met the commercial nexus requirement. Complicating matters further, the proceeds were absorbed into the national treasury where, over the years, they had mingled with billions in other revenues.

The *Simon* question concerns an important portion of expropriation cases, since property is often taken for its monetary rather than intrinsic value. Therefore, with some specific exceptions (such as takings of artworks or land), expropriated properties are likely going to be liquidated, and the proceeds are bound to be commingled with other funds. Years after the initial liquidation, proving the location of the money originally exchanged for those properties is extremely challenging, if not impossible. In 2023, the Circuit Court had indeed concluded that "[r]equiring plaintiffs whose property was liquidated to allege and prove that they have traced funds in the foreign state's or instrumentality's possession to proceeds of the sale of their property would render the FSIA's expropriation exception a nullity for virtually all claims involving liquidation".[19]

The *Simon* claimants thus proposed a "commingling theory", arguing that instead of tracing the initial proceeds, it is enough to show that they eventually mixed with funds later used in commercial activity in the US. Delivering the opinion of the Court, Justice Sotomayor rejected this theory, reading a specific tracing requirement into the wording of the expropriation exception. In order to meet this requirement, claimants can identify a US account holding proceeds from expropriated property, or allege that a foreign sovereign spent *all* funds from a commingled account in the United States. As clarified by the Justice, these are but some examples of how a claimant might chose to proceed. Rather than examining various common law tracing principles, however, the Court here simply ruled that alleging that a foreign sovereign liquidated the expropriated property, commingled the proceeds with general funds, and later used *some portion* of those funds for commercial activities in the US does not establish a plausible commercial nexus. Although this ruling imposes a high bar for claimants seeking to invoke the expropriation exception, the Court found this outcome less detrimental to the FSIA's rationale than accepting the "attenuated fiction" that commingled accounts still contain funds from the original property's liquidation. In *Simon*, for example, while the initial commingling of funds occurred in the 1940s, the suit was only brought in the 2010s, after "several institutional collapses and regime changes".

A Restrictive Parable

The Supreme Court based its *Simon* decision on a textual interpretation of the expropriation exception, which identifies "*that* property or *any* property exchanged for such property", without providing a specific alternative criterion for property exchanged for money. The Court also looked at the legislative history of the FSIA, rooted in the 1964 B*anco Nacional de Cuba v. Sabbatino* decision.[20] *The Sabbatino* case prompted US Congress to pass the FSIA's predecessor, the Second Hickenlooper Amendment to the Foreign Assistance Act of 1964, "to permit adjudication of claims the Sabbatino decision had avoided".[21] In *Simon*, the Court read its *Sabbatino* precedent as part of the FSIA's history, and as such relevant to its interpretation – especially considering that *Sabbatino* also revolved around property that had been liquidated. Crucially in *Sabbatino* "the proceeds . . . in controversy" could be clearly traced to a New York account, aligning the case with the tracing requirement identified in *Simon*.

The *Simon* Court also echoed the foreign relations concerns that it already discussed in *Philipp*, justifying its restrictive interpretation of the FSIA on the Act's potential to cause international friction, and trigger reciprocity among other states' courts. In this regard, the *Philipp* and *Simon* decisions seem particularly keen to do some "damage control" on the effects of the expropriation exception, reducing its scope from a "radical" to a "limited" departure from the restrictive theory of foreign sovereign immunity.

This restrictive turn mirrors the trajectory of human rights litigation under the Alien Tort Statute (ATS).[22] Starting with the Second Circuit's decision in *Filártiga v. Peña-Irala*,[23] the 1789 ATS was used by US courts to extend their jurisdiction on human rights claims brought by aliens. In 2004 (the same year as the seminal Altmann decision on the FSIA's retroactive application),[24] the Supreme Court rejected the interpretation of the ATS as a gateway for "foreign-cubed" human rights cases.[25] Warning against the risk of "adverse foreign policy consequences", the Court provided a narrow interpretation of the ATS. This conservative approach has been framed as part of the shift in attitudes that marked the passage from the Third to the Fourth Restatement of the Foreign Relations Law of the United States.[26] The decision to restrict the reach of the ATS was in fact rooted in political considerations, as testified by the pressure exercised by the Bush administration to hear the case.[27] The new geopolitical landscape had diminished the strategic importance of vindicating international human rights law, and the use of domestic courts to advance public rights agendas had faced severe criticism, with US courts being accused of acting as judges of world history.[28] The *Philipp* and *Simon* interpretations of the FSIA reproduce this passage from an offensive to a defensive approach within the law of foreign sovereign immunity.

Conclusion

Since *Philipp*, the expropriation exception has been limited to property takings by foreign sovereigns against aliens during peacetime. This development has arguably returned the FSIA to its original intent: to protect the property of US citizens abroad, as an expression of "America's free enterprise system". With *Simon*, this provision's application has been further restricted where the expropriated property was liquidated. This approach explicitly aims at aligning US law with international law. In this process, however, the US judiciary's controversial yet proactive contribution to human rights litigation, with its potential to influence the development of customary law, is taking a more conservative and isolationist stance.

[1] *Republic of Hungary v. Simon,* 604 U. S. ___ (2025).

[2] *Federal Republic of Germany* v. *Philipp,* 592 U. S. 169 (2021).

[3] Thomas Giegerich, 'The Holy See, a Former Somalian Prime Minister, and a Confiscated Pissarro Painting: Recent Us Case Law on Foreign Sovereign Immunity' in Anne Peters and others (eds), *Immunities in the Age of Global Constitutionalism* (Brill | Nijhoff 2014) 52. <https://brill.com/view/book/edcoll/9789004251632/B9789004251632_006.xml> accessed 11 December 2024. An important conference on the state of the art on the international law of foreign sovereign immunity recently took place at Villa Vigoni (Italy), under the auspices of the Max Planck Institute for Comparative Public Law and International Law. The full program of the event can be found here: https://www.mpil.de/en/pub/news/conferences-workshops/the-future-of-remedies-against.cfm.

[4] As described by Riccardo Pavoni, 'An American Anomaly? On the ICJ's Selective Reading of United States Practice in Jurisdictional Immunities of the State' (2011) 21 *The Italian Yearbook of International Law Online* 143.

[5] For an historical contextualization, see Szabolcs Szita, 'It Happened Seventy Years Ago, in Hungary' [2014] Témoigner. Entre histoire et mémoire. Revue pluridisciplinaire de la Fondation Auschwitz 146.

[6] See *Republic of Hungary v. Simon*, 592 U. S. 207 (2021) (per curiam) (Supreme Court of the United States).

[7] The FSIA, enacted through Public Law 94-583 on October 21 on 1976, is codified in Title 28 of the U.S. Code, Chapter 97, Part IV – Jurisdictional Immunities of Foreign States.

[8] Charlene Sun and Aloysius Llamzon, 'Acta Iure Gestionis and Acta Iure Imperii' (*Oxford Constitutions – Max Planck Encyclopedia of Comparative Constitutional Law [MPECCoL]*) <https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e188> accessed 30 April 2025.

[9] *Altmann v Republic of Austria* [2001] 142 F. Supp. 2d 1187 (United States District Court, CD California).

[10] *Toren v Federal Republic of Germany* 2023 WL 7103263 (United States Court of Appeals, District of Columbia Circuit) (unreported).

[11] *Berg v Kingdom of the Netherlands* 2020 WL 2829757 (United States District Court, D. South Carolina, Charleston Division) (unreported).

[12] *Cassirer v Kingdom of Spain* [2006] 461 F.Supp.2d 1157 (United States District Court, CD California).

[13] Mayer Brown, '"Domestic Takings" Rule Bars Suit Against Foreign Nations in U.S. Court' (*Lexology*, 3 February 2021) <https://www.lexology.com/library/detail.aspx?g=1d4af991-a497-47be-80f2-dd78c184baa1> accessed 30 April 2025.

[14] UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, United Nations, Treaty Series, vol. 78, p. 277, 9 December 1948, https://www.refworld.org/legal/agreements/unga/1948/en/13495 [accessed 29 April 2025].

[15] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012. For a critical discussion of this judgment, see Benedetto Conforti, 'The Judgment of the International Court of Justice on the Immunity of Foreign States: A Missed Opportunity' (2011) 21 *The Italian Yearbook of International Law Online* 133.

[16] See *Simon v Republic of Hungary* [2023] 77 F4th 1077 (United States Court of Appeals, District of Columbia Circuit). The court here clarified that its decision did not "foreclose the possibility that such support exists in sources of international law not before us in this case or based on arguments not advanced here"> Ibid, para 1098.

[17] *de Csepel v Republic of Hungary* 2024 WL 4345811 (United States District Court, District of Columbia).

[18] Livia Solaro, 'US Case Further Restricts Holocaust-Related Art Claims' (*The Institute of Art & Law*, 11 November 2024) <https://ial.uk.com/author/livia-solaro/> accessed 30 April 2025.

[19] *Simon v Republic of Hungary* (n 16) para 1118.

[20] *Banco Nacional de Cuba v. Sabbatino,* 376 U. S. 398 (1964) (Supreme Court of the United States).This case revolved around the expropriation of sugar by Cuba against a private company in protest for the reduction of the US sugar quota for this country. After the sugar in question was delivered to a customer in Morocco, both the Cuban state and the private company claimed the payment of the price, which in the meantime had been transferred to a New York commodity broker. The case eventually was adjudicated in favour of the National Bank of Cuba, based on the Act of State doctrine.

[21] As noted by the Court in *Republic of Hungary* v. *Simon,* 604 U. S. ___ (2025) (Supreme Court of the United States) 15–16.

[22] 28 U.S. Code § 1350.

[23] *Filartiga v Pena-Irala* [1980] 630 F.2d 876 (United States Court of Appeals, Second Circuit).

[24] *Republic of Austria v. Altmann,* 541 U. S. 677 (2004) (Supreme Court of the United States).

[25] *Sosa v. Alvarez-Machain,* 542 U. S. 692 (2004) (Supreme Court of the United States); for a definition of 'foreign-cubed' claims, see Robert S Wiener, 'Foreign Jurisdictional Algebra and Kiobel v. Royal Dutch Petroleum: Foreign Cubed And Foreign Squared Cases' (2014) 32 *North East Journal of Legal Studies* 156, 157.

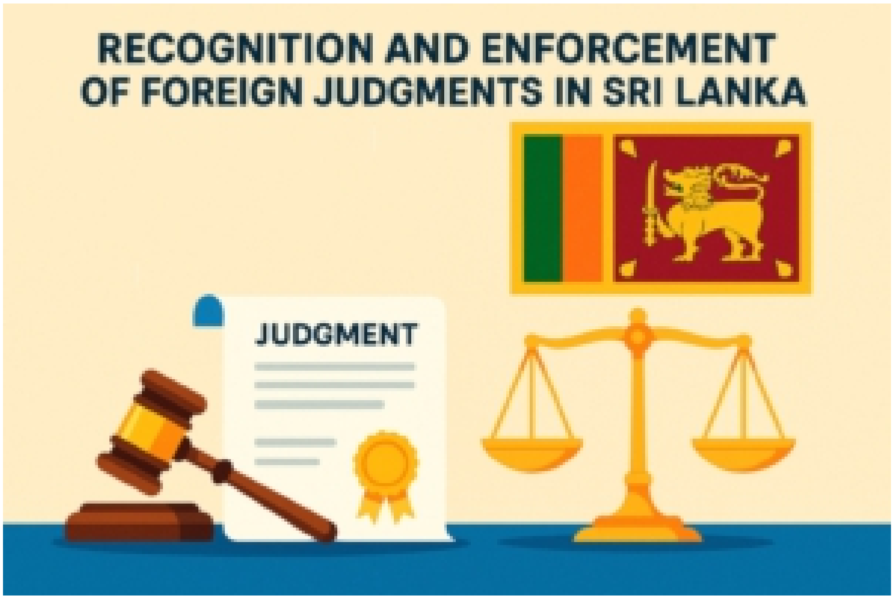
[26] See Thomas H Lee, 'Customary International Law and U.S. Judicial Power: From the Third to the Fourth Restatements', *SSRN Electronic Journal* (2020) <https://www.ssrn.com/abstract=3629791> accessed 14 March 2025.

[27] Naomi Norberg, 'The US Supreme Court Affirms the Filartiga Paradigm' (2006) 4 *Journal of International Criminal Justice* 387, 390.

[28] Ugo Mattei, 'A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance' (2003) 10 *Indiana Journal of Global Legal Indiana Journal of Global Legal Studies* 67, 420.

Legislative direction for recognition of foreign judgments in Sri Lanka: A new sign-post in the private international law landscape

This post was written by Rose Wijeyesekera, Professor of Private and Comparative Law, Chair / Department of Private and Comparative Law – Faculty of Law, University of Colombo



Introduction

Sri Lanka (formerly known as 'Ceylon') is an island in the Indian Ocean, and is home to a total population of 21,763,170, consisting of Sinhalese 74.9%, Tamils 15.4%, Muslims 9.3%, and 0.5% consisting of others such as Veddhas, Burghers, and gypsies.The legal system of this island nation is a unique blend of native laws and the laws that were placed by the colonial powers from 1505 to 1947, when the country gained independence. Since then, Sri Lanka has been a democratic republic and a Unitary State governed by a constitution. The Sri Lankan legal system is primarily based on Roman-Dutch law, inherited from its colonial past under the Dutch, and English common law introduced by the British colonial rulers. Apart from these two, the legal system incorporates elements of Kandyan law (representing indigenous customs of the Sinhalese), Tesawalamai(customary laws of the Tamils of the Northern province of the country) and Muslim law. These personal laws apply in matters of personal law, such as marriage, divorce, and inheritance, depending on the community to which an individual belongs. All Muslims including the sub-categories such as Moors and Malays, are governed by Muslim Law in their personal matters, while Kandyan Sinhalese (a minority of the Sinhalese who hail from “Kandyan Provinces” / the hill country, are governed by Kandyan Law. These customary laws bear a territorial and/or a religious nature. Most of these laws are enacted, but some remain open leaving room for judicial interpretation. The court system in Sri Lanka is structured hierarchically and is designed to ensure justice through a combination of traditional and modern legal principles. The system comprises the Supreme Court at the apex, the Court of Appeal, Provincial High Courts, District Courts, Magistrate Courts, and tribunals such as Labour Tribunals, Quazi Courts, and Mediation Boards.

The legislative sources of private international law are derived from multiple frameworks in Sri Lanka including the Civil Procedure Code (1889), Companies Act, No. 7 of 2007, Arbitration Act No. 11 of 1995 and Intellectual Property Act, No. 36 of 2003. The Reciprocal Enforcement of Foreign Judgments Ordinance No. 41 of 1921 (REJO) and the Enforcement of Foreign Judgements Ordinance No. 3 of 1937 (EFJO) were the most relevant in the sphere of reciprocal recognition, registration and enforcement of foreign judgments. Yet, these statutes, which were enacted during the British colonial era, were limited in their application as they applied only in judgments relating to commercial matters. The lacunae created by the absence of legal direction with regard to the recognition of foreign judgments in matters relating to divorce, annulment and separation of spouses, was huge in a socio-economic context where outward migration has become unprecedently large in recent times.

Pre-legislative judicial activism

In December 2023, the Court of Appeal had to face this lacuna, where *Champika Harendra Silva v. M.B. Weerasekara Registrar General and Others*. The case concerned a Sri Lankan-born couple who had registered their marriage in Sri Lanka and migrated thereafter to England, had obtained a divorce decree from a competent court in England. The divorcee man applied to the Registrar General (RG) of Sri Lanka to register the divorce, but it was rejected on the basis that the divorce was obtained from a British court, which according to the RG, was not a 'competent court' under the Marriage Registration Ordinance of Sri Lanka. Upon rejection by the RG, the divorcee filed for a writ of certiorari pleading the court to quash the RG's rejection, and a writ of Mandamus recognizing the decree of divorce granted by the English court. The court made headlines when, through judicial interpretation, it granted both writs declaring that a foreign decree of dissolution of a marriage contracted in Sri Lanka is valid and effectual in Sri Lanka subject to three guidelines. (a) Such Court must be in law vested with the jurisdiction in respect of the dissolution of a marriage and be the 'Competent Court' in the foreign country; (b) the Parties must have been residents of the foreign country for a reasonable period of time; and (c) the parties must have been properly represented and participated in the legal proceedings according to the laws and procedures of the foreign country. The decision was progressive and timely, and reiterated the necessity and urgency of legislative intervention in addressing this issue of recognizing foreign judgments especially with regard to matrimonial matters.

The legislature intervened promptly to address this legal lacuna by introducing the Reciprocal Recognition, Registration, and Enforcement of Foreign Judgments Act, No. 49 of 2024 (RRREFJ). The Act is effective from March 26, 2025, in respect of 53 countries listed in the Schedule. It repeals both REJO and EFJO.

Limited application of Private International law through REJO, EFJO, and Hague Conventions

REJO and EFJO, which were introduced to facilitate the cross-enforcement of foreign and Ceylonese (Sri Lanka as it was known then) judgments, had proved woefully inadequate to cater to the country's ever increasing cross-border transactions in both commercial and personal matters. One of the main reasons was REJO's limited scope, as it catered to rather uncomplicated monetary matters arose during the colonial times. It did not address matrimonial matters, perhaps because of limited overseas travel and limited marriages between Sri Lankans and foreigners. It has also been subjected to criticism due to stringent rules and procedural complexities, and understandably, they catered to procedural requirements of a far-less technologically facilitated financial world. Another deficiency was the absence of clear provisions for appeals. This hindered the enforcement process, and created legal uncertainty.

The RRREFJ Act of 2024

The 2024 Act comes in to bridge the gap between global realities and the local legal framework. Its scope is much wider than REJO, as it applies to the reciprocal recognition, registration and enforcement of foreign judgments regarding matrimonial matters, i.e. divorce, annulment and separation, as well as monetary obligations. It recognizes final and conclusive judgments of Scheduled jurisdictions. As at present, they are the 53 Commonwealth countries. An application for recognition, registration and enforcement of a foreign judgment can be made within a period of ten years from the final judgment, and by way of summary procedure as provided for in the Civil Procedure Code.

In terms of commercial transactions, its application extends to natural persons as well as companies, including Business Process Outsourcing (BPO) companies, which are increasing in the country. The Act does not apply to tax, charge, fine or other penalty payable under a judgment of a foreign court.

However, the Act is restrictive in terms of the application of matrimonial matters of persons whose marriages have been contracted under special personal laws, which are very much a part of the Sri Lankan law relating to marriage and family.

Section 3(1)(b) of the new Act of 2024 states that the Act applies to a foreign judgment for the dissolution or annulment of a marriage or separation of the parties to a marriage only if such judgment is obtained in respect of marriages entered under the General Marriages Ordinance No. 19 of 1907 (GMO) and where such judgment shall be deemed final and conclusive as long as either party to the marriage was domiciled in such country at the date of the judgement; habitual resident in such country for a period not less than one year before the date of the judgment; was a national of such country at the time of the judgment; or both parties have submitted to the jurisdiction of such country. This leaves out Muslims who, under Sri Lankan law, are compelled to marry under the Muslim Marriage and Divorce Act 13 of 1951 (MMDA), and the Knadyan Sinhalese who may choose to register their marriages under the Kandyan Marriage and Divorce

Act 44 of 1952 (KMDA). While the majority of the population are governed by the General Law and are required to follow the GMO in matters relating to their marriages, a considerable percentage of the Sinhalese population who are recognized as 'Kandyans' still opt to marry under the KMDA. The Muslims who constitute 9.7% of the total population of the country have no choice but to contract their marriages under the MMDA. The exclusion of their marriages from the 2024 Act raises multiple concerns including their right to equality before the law, which is a fundamental right guaranteed under the national constitution.

Way forward

The RRREFJ of 2024 is a timely legislative intervention in the sphere of private international law in Sri Lanka as it addresses a socially relevant legal lacuna in the country. The legislative effort was well-recognized by the apex court of the country when the constitutionality of the RRREFJ Bill was challenged in S.C.(SD) No.80/2024 and S.C.(SD) 81/2024. However, the Act has room to be more democratic in terms of its application, especially in the current social context in which the nation is struggling to overcome socio-economic devastations caused by multiple reasons including ethnicity, race, and religion. With necessary amendments to avoid these obvious racial and religious exclusions, the Act can strengthen the countries ties with the global village more fully.

South Africa Grapples with the Act of State Doctrine and Choice of Law in Delict

By Jason Mitchell, barrister at Maitland Chambers in London and at Group 621 in Johannesburg.

The Supreme Court of Appeal delivered judgment today in East Asian Consortium v MTN Group. The judgment is available here.

East Asian Consortium, a Dutch company, was part of the Turkcell consortium. The consortium bid on an Iranian telecommunications licence. The consortium won the bid. East Asian Consortium alleged that it was later ousted as a shareholder of the ultimate license holder, the Irancell Telecommunications Services Company. East Asian Consortium sued, amongst others, several subsidiaries of the MTN Group, a South African telecommunications company, in South Africa. East Asian Consortium alleged that the defendants unlawfully induced the Iranian government to replace East Asian Consortium with one of the MTN subsidiaries.

In 2022, the South African High Court held that Iranian law applies to East Asian Consortium's claims. But the Court declined to exercise jurisdiction based on, amongst other things, state immunity and the act of state doctrine. East Asian Consortium appealed to the Supreme Court of Appeal.

The Supreme Court of Appeal reversed the High Court on state immunity and on the act of state doctrine. It reached the same conclusion as the High Court on the applicability of Iranian law, but for different reasons—and clarified that South African law uses the *lex loci delicti* as its general rule for choice of law in delict (or tort).

There are two immediate takeaways from the judgment:

South Africa's act of state doctrine differs from the doctrine in English law

> "*…while we owe much to the English common law, and have much to learn from it, our common law is not a supplicant species*."

- English law (*Belhaj*, *Deutche Bank*) articulates the act of state doctrine as an exclusionary rule with limits and exceptions. The Supreme Court of Appeal rejects that approach, critiquing it as a doctrine "*principally comprehended by what it is not*."
- Instead, the Supreme Court of Appeal adopts a broader balancing of interests: a "*doctrine composed not of rules but of reasons that count for and against the court's adjudication of a foreign state's acts*."
- This interest-balancing version of the doctrine applies even when the

lawfulness of the executive acts of a foreign country, taken within its territory, will have to be adjudicated by the South African court.
- The act of state doctrine is a common law doctrine, and the common law is subject to the Constitution. This means that the basis for the doctrine cannot be the separation of powers because, under the Constitution, foreign policy decisions are not beyond judicial scrutiny.
- Comity justifies the doctrine, but comity requires judicial pause not judicial abdication.
- Interest balancing considers, for example, the plaintiff's constitutional rights (and, in particular, its right to have its dispute resolved in court), and the constitutional nature and implications of the claim (here, allegations of public corruption).

South Africa uses the *lex loci delicti*, but it can be displaced

- In 2010, the High Court in *Burchell* held that South Africa's choice of law rule for delict is the legal system that has the most real or significant relationship to the dispute, with the *lex loci delicti* merely being one factor in that analysis.
- The Supreme Court of Appeal held that *Burchell* is wrong: the general rule is lex loci delicti. The lex loci delicti can be displaced if another legal system has a "*manifestly closer connection*".
- The Supreme Court of Appeal also held that for transnational delicts (that is, when the relevant conduct or events do not happen in one country), a plurality approach should be taken to determine the *lex loci delicti*: the country in which the greater part of the events or conduct making up the elements of the delict took place.
- The Supreme Court of Appeal rejected an approach of subsidiary rules for particular delicts. This approach causes uncertainty about which elements should be given primacy for certain delicts. More fundamentally, it is based on the "*doctrinal heresy*" that South Africa has a law of *delicts* (like the English law of torts); South Africa instead has a "*unified scheme of liability*". Subsidiary rules for each type of delict does not rhyme with that unified scheme.

The judgment was a relatively rare 3-2 split. A further appeal to the Constitutional Court is possible.

U.S. Court Issues Worldwide Anti-Enforcement Injunction

This post was written by Hannah Buxbaum, the John E. Schiller Chair in Legal Ethics and Professor of Law at the Indiana University Maurer School of Law in the United States.

Last month, Judge Edward Davila, a federal judge sitting in the Northern District of California in the United States, granted a motion by Google for a rare type of equitable relief: a worldwide anti-enforcement injunction. In *Google v. Nao Tsargrad Media*, a Russian media company obtained a judgment against Google in Russia and then began proceedings to enforce it in nine different countries. Arguing that the judgment was obtained in violation of an exclusive forum selection clause, Google petitioned the court in California for an order to block Tsargrad from enforcing it.

As Ralf Michaels and I found in a recent analysis, the anti-enforcement injunction is an unusual but important device in transnational litigation. There aren't many U.S. cases involving these orders, and one of the leading decisions arose in the context of the wildly complicated and somewhat anomalous Chevron Ecuador litigation. As a result, there is little U.S. authority on a number of important questions, including the legal standard that applies to this form of relief and the mix of factors that courts should assess in considering its availability. Judge Davila's decision in the Google case addresses some of these questions.

Background

In 2020, Google terminated Tsargrad's Google account in order to comply with U.S. sanctions law. Tsargrad sued, alleging that Google violated its terms of service in terminating the account. Although those same terms included an exclusive forum selection clause choosing California courts, Tsargrad initiated the litigation in Russia. It cited a Russian procedural law that vested Russian arbitrazh courts with "exclusive jurisdiction" over disputes involving sanctioned parties, arguing that this rule prevented it from bringing suit in California.

Tsargrad prevailed on the merits in that case. The court ordered Google to restore Tsargrad's account or suffer a compounding monetary penalty. Google did not restore access, and the penalty mounted to more than twenty decillion dollars (in Judge Davila's words, "a number equal to two followed by thirty-four zeroes"). Tsargrad then started filing actions to enforce its judgment in a number of foreign courts. This prompted Google to seek an anti-enforcement injunction in the Northern District of California.

What Legal Standard Applies to Anti-Enforcement Injunctions?

An anti-enforcement injunction orders a party not to initiate or continue legal proceedings to enforce a judgment. It looks like a species of anti-suit injunction and might therefore be subject to the test used to decide those. As Judge Davila correctly recognized, though, the two contexts are quite different.

An anti-suit injunction aims to prevent parallel litigation from developing in the first place, avoiding a race to judgment and the possibility of inconsistent judgments on a single matter. Those risks aren't relevant to anti-enforcement injunctions, where the foreign court has already entered a judgment. In such cases, the policy of res judicata also comes into play. Anti-enforcement injunctions are also potentially much more intrusive into other legal systems than anti-suit injunctions. The type of injunction that Google sought would have worldwide effect, blocking legal proceedings not only in courts with concurrent jurisdiction over the underlying dispute but in any court, anywhere, in which an enforcement proceeding might be brought. For these reasons, Judge Davila chose instead to apply the normal test for preliminary injunctions, requiring Google to demonstrate: (1) likely success on the merits, (2) irreparable harm, (3) a balance of equities favoring injunction, and (4) public interest favoring injunction.

Does Breach of a Forum Selection Clause

Justify an Anti-Enforcement Order?

Once a foreign court has entered a judgment, it is (and should be) very difficult for the judgment debtor to obtain an order from a U.S. court completely blocking any enforcement efforts. In this case, there were two possible grounds for granting that relief. First, as in the *Chevron* case, it appeared that Tsargrad's enforcement campaign was vexatious and oppressive. Apparently, Tsargrad had itself described its strategy as a "global legal war"—and may have viewed the twenty-decillion-dollar penalty as leverage to extort a settlement or force Google to defend itself in multiple forums. Second, it appeared that Tsargrad had procured the Russian judgment in breach of an exclusive forum selection clause. As Google argued, issuing an anti-enforcement injunction under those circumstances would both preserve the jurisdiction of the chosen courts and vindicate Google's contractual rights.

The case proceeded on the second theory. This raised two interesting questions regarding a post-judgment injunction. First, because the breach of the forum selection clause had already happened, was there any ongoing or future harm to justify injunctive relief? Judge Davila concluded that there was—not based on the forum selection clause itself, but based on an additional *implied* term "bar[ring] parties from enforcing judgments obtained in violation of [a] forum selection clause."

Second, wouldn't the balance of equities here suggest that Google was far too late in seeking injunctive relief? It could have filed an ordinary anti-suit injunction based on the exclusive forum selection clause when Tsargrad initiated the litigation in Russia, rather than waiting until that action proceeded to judgment. (In Ralf's and my study, this kind of delay surfaced as one of the most common reasons to deny anti-enforcement injunctions.) Judge Davila maneuvered around this issue. The basis for injunctive relief, he said, wasn't the breach of the forum selection clause but rather the breach of the implied promise not to enforce judgments procured in violation of the clause. And Google couldn't have sought relief for *that* breach until Tsargrad actually began its enforcement efforts.

What About Comity?

Every country has its own rules regarding the recognition and enforcement of foreign judgments. It's one thing for a U.S. court to deny enforcement of a foreign judgment in the United States, under U.S. rules. But by barring a judgment holder from taking steps to enforce its judgment *anywhere*, a worldwide anti-enforcement injunction indirectly prevents other countries from considering the enforceability of that judgment under their rules. Judge Davila appreciated the serious comity concerns this raises. He concluded, however, that those concerns were outweighed in this case, citing the "grossly excessive" penalty imposed on Google and the vexatious nature of Tsargrad's enforcement campaign. With the exception of Russia, then ("it is simply a bridge too far to enjoin a Russian citizen from enforcing a Russian judgment in Russian court"), he gave the order worldwide scope.

Conclusion

Pending a final decision on the merits, the court here did everything it could to block Tsargrad from enforcing the Russian judgment. In addition to entering the anti-enforcement injunction, the court entered an "anti-anti-suit injunction" barring Tsargrad from going back to Russia to seek an anti-suit injunction against the proceedings in California. The open question, as always, is what courts in other countries will do if Tsargard disregards the injunction and continues its efforts to enforce the Russian judgment.

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