Political Immobilisation of Iranian Diaspora Property: Lex Situs, Human Rights and Public Policy

By Faraz Firouzi Mandomi

Iran’s use of property measures against critics abroad is no longer hypothetical. In March 2026, Iran’s Prosecutor-General’s Office warned Iranians living abroad that support for, or cooperation with, states regarded by Iran as hostile could result in confiscation of their property. Reuters reported the warning on the basis of statements carried by Iranian state media.

The policy has since acquired a more concrete form. In May 2026, Amnesty International reported judicial orders to identify, freeze and seize bank accounts, properties and other assets belonging to persons accused of cooperating with “enemy states” or “hostile media”. Iranian authorities had reportedly announced measures affecting more than 750 persons inside and outside Iran, including journalists living abroad.

Administrative measures adopted in 2026 have also brought security screening into the use of consular powers of attorney. A circular concerning power of attorney issued abroad required inquiries where such instruments were presented in Iran and contemplated prosecutorial action where the grantor was identified as an opponent of the Islamic Republic abroad.

For present purposes, this situation can be described as political immobilization. Ownership may formally remain intact, while access to the legal mechanisms required to sell, mortgage, partition or administer the property is conditioned by political or security considerations.

The immediate concern is one of human rights. A separate question arises in private international law once the consequences of such measures are relied upon before courts outside Iran.

Property and the Lex Situs

The conventional starting point is the lex rei sitae. Article 966 of the Iranian Civil Code provides that possession, ownership and other rights over movable and immovable property are governed by the law of the country in which the property is situated. Proprietary questions concerning land situated in Iran therefore fall, in principle, under Iranian law.

That rule does not dispose of every dispute connected with Iranian property. A transaction involving land in Iran may also generate questions of contractual liability, restitution, succession, matrimonial property or insolvency before a foreign court. Those questions require separate characterization and may be governed by a law other than the law governing title itself.

Suppose, for example, that an Iranian resident abroad contracts to sell property in Tehran but cannot complete the transaction because the authorities prevent the use of a power of attorney on security grounds. Proceedings may subsequently be brought abroad for repayment or damages. The foreign court would first have to determine the nature of the claim and the law applicable to it. An Iranian administrative instruction addressed to prosecutors, consular authorities, notaries or registries does not automatically govern contractual liability in another legal system.

An additional distinction is important. The Iranian restriction might appear before the foreign court simply as a fact explaining why performance could not occur. In that situation, public policy cannot make the factual impediment disappear. A different problem arises where a party asks the forum to attribute legal effect to the measure itself, whether through the applicable foreign law, a claimed proprietary consequence, or recognition of an Iranian decision.

Human Rights and Public Policy

Human rights do not replace ordinary conflicts rules, nor do they ordinarily operate as connecting factors permitting a court to disregard foreign law merely because its application produces an objectionable result.

Their influence is nevertheless visible within established mechanisms of private international law. A useful contemporary restatement appears in the Institut de Droit international's 2021 Resolution on Human Rights and Private International Law. Article 8 provides that, in assessing whether the application of foreign law designated by conflicts rules complies with international public policy, due consideration must be given to human rights, notably the principle of non-discrimination. Public policy therefore remains an exceptional control mechanism, not a competing choice-of-law rule. It may permit the forum to refuse effect to a consequence of otherwise applicable foreign law that is incompatible with its fundamental principles.

The distinction between territorial effectiveness and legal effect abroad is familiar in conflicts jurisprudence. In Luther v Sagor, English courts accepted the proprietary consequences of Soviet confiscatory legislation concerning property situated within Soviet territory. *Oppenheimer v Cattermole* demonstrated that such deference was not unlimited where foreign legislation was fundamentally incompatible with public policy. In Kuwait Airways v Iraqi Airways, the House of Lords likewise began from ordinary choice-of-law principles concerning proprietary rights but refused effect to Iraqi confiscatory legislation on public-policy grounds. Belhaj v Straw subsequently discussed *Oppenheimer* and *Kuwait Airways* within this public-policy line of authority.

The comparison is doctrinal, not historical. The Iranian measures are not equated with Soviet nationalization, Nazi persecution or Iraqi confiscation. These authorities instead illustrate that the territorial operation of foreign law and the legal consequences accorded to it by another legal system are separate questions.

Iranian law will ordinarily govern proprietary rights in assets situated in Iran. The private international law issue arises only when a consequence of the Iranian measure is invoked before a foreign court. The forum must first characterize the issue, determine the applicable law and establish the scope of the relevant foreign rule. Only then can public policy become relevant. Where the consequence for which legal effect is sought rests on discrimination based on political opinion or opposition activity, human-rights considerations may properly enter that assessment.

Political immobilization thus becomes a private international law problem when a measure effective within Iran is invoked as the basis for legal consequences outside Iran.

The Demise of the Lex Domicilii Matrimonii in South African Private International Law

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For many years, South African private international law relied on the *lex domicilii matrimonii* as connecting factor to determine the legal system applicable to the proprietary consequences of a marriage. The *lex domicilii matrimonii* is interpreted as the husband's domicile at the time of entering into the marriage. This rule was firmly entrenched in South African law since it was formally adopted in ***Frankel's Estate v The Master & Another*** **1950(1) SA 220 (A)** and reinforced in subsequent decisions, the latest being ***LE v LA 2024*** **(5) SA 539 (GJ)**. Despite the courts' reliance on this rule, it became increasingly evident that it is not compatible with South Africa's Constitutional commitment to equality, dignity and non-discrimination **(Constitution of the Republic of South Africa, 1996)**. The Westen Cape High Court has finally addressed this discriminatory connecting factor in a judgment delivered on 24 June 2026 in ***Pringle v Minister of Justice and Constitutional Development and Others*** **(2468 / 2024) [2026] ZAWCHC 343**.

The challenge to the *lex domicilii matrimonii* emerged from a divorce dispute between *Nina Pringle* (applicant) and *Ian Norman Pringle* (third respondent), both of whom, at the time of their marriage, were domiciled outside South Africa. The marriage between the parties also took place outside South Africa, therefore South African private international law rules came into play in the case. The applicant challenged the application of the *lex domicilii matrimonii* rule on the basis that it automatically preferred the husband's domicile at the time of the marriage, which has the result that the rule discriminates against women and fails to accommodate same-sex marriages.

The applicant argued that the *lex domicilii matrimonii* is inconsistent with the Constitution in that it discriminated between spouses on the on grounds of sex, gender and sexual orientation. Historically, the rule developed from patriarchal assumptions that the husband was the head of the family and that the wife's identity followed his (*para 60* of the case). Although such assumptions show the legacy of earlier legal systems, they have long since been rejected by South African constitutional jurisprudence. What is also interesting is that, while the wife's domicile of dependence was abolished through the **Domicile Act 3 of 1992**, the *lex domicilii matrimonii* continued to determine the proprietary consequences of marriage according to the husband's domicile. The applicant therefore challenged validity of the *lex domicilii matrimonii*, that this rule no longer serves any legitimate purpose within a constitutional democracy founded on equality and human dignity (*para 3.1 of the Pringle case*).

The court concurred with the applicant's argument. It held that the *lex domicilii matrimonii* rule unfairly discriminates based on sex, gender and sexual orientation, which renders the rule inconsistent with the Constitution (*paras 70 & 72*). The court acknowledged that there exists no rational justification to continue employing the husband's domicile when South African law has already abolished the idea that a married woman's legal identity is dependent upon her husband (*para 64*). The court further acknowledged that the rule failed to accommodate same-sex marriages (*para 67*). In arriving at this conclusion, the court recognised that the common law must evolve to reflect the values enshrined in the Constitution, specifically where private international law rules perpetuate historical inequalities.

The court's declaration that the rule is unconstitutional and invalid in terms of s 172(1)(a) of the Constitution, means that it had to pronounce a just and equitable replacement (s 172(1)(b)) that will determine the legal system applicable to the proprietary consequences of marriages with an international element. In this vein, the court used its powers to develop the common-law by drawing inspiration from international instruments such as the **1978 Hague Convention on the Law Applicable to Matrimonial Property Regimes and the European Union's Matrimonial Property Regulation 2016/1103** (*paras 85 – 93*). The court developed a new hierarchical applicable law framework. The new rule prioritises party autonomy by enabling spouses to choose the legal system that will govern the proprietary consequences of their marriage, this is subject to the chosen system having a substantial link to either or both spouses (*para 2.1. of the order*). Should there be no choice made by the spouses or their choice has no substantial connection to them, the applicable law is determined successively by the parties' common domicile, common habitual residence, common nationality and finally, the legal system with the closest connection to the spouses (*para 2.5 of the order*). The court also considered the South African Law Reform Commission's (SALRC) ***Project 100E, Review of Aspects of Matrimonial Property Law,*** **Discussion Paper 160**, that considered the constitutionality of the *lex domicilii matrimonii* and any suitable replacement. The court departed from the SALRC Discussion Paper 160 in respect of the choice of the applicable law. The court pronounced that there should be a substantial connection between the parties and the designated legal system (*para 95*).

The new common-law rule developed by the court has retrospective effect; subject to certain exceptions. Firstly, where spouses concluded an antenuptial contract choosing the law governing the proprietary consequences of their marriage, the new rule will not apply for two years from the date of the order, allowing the parties time to amend their contract if necessary (*para 3.1 of the order*). Secondly, in the absence of a choice of law by the parties, the new rule shall not apply if it would lead to substantial prejudice (*para 3.2 of the order*). Thirdly, the order will not disturb vested rights or invalidate transactions and decisions already taken under the previous *lex domicilii matrimonii* rule (*para 3.3 of the order*). Finally, the new rule will not apply to marriages already dissolved by death or divorce before the date of the order (*para 3.4 of the order*).

The court's declaration of invalidity and replacement of the *lex domicilii matrimonii* rule marks a significant development in South African private international law. Unlike the previous rule, which by default preferred the husband's domicile, the new framework recognises the equal status of spouses while advancing legal certainty and flexibility in international marriages. The court's adoption of connecting factors internationally applied and recognised as best practice, advances harmonisation between South African private international law and other jurisdictions. It also promotes predictability for parties involved in cross-border relationships.

The judgement is widely welcomed, given the fact that many experts in the field have long criticised and called for the rule to be replaced. The courts did not wait for legislative intervention to align the South African law with internationally accepted principles. This indicates that the courts are prepared to ensure that common-law rules align with the constitution. Some aspects still need to be explored, namely the practical application of the concept of “closest connection” and the extent to which courts will interpret the requirement of a “substantial connection” when spouses exercise their right to choose a legal system. Another aspect that would need to be explored is the court’s order that the new common-law rule shall not apply to existing marriages if it would lead to substantial prejudice. The meaning of substantial prejudice will require interpretation from our courts. These issues will undoubtedly be addressed through future scholarship and litigation.

Nevertheless, *Pringle* marks the demise of the *lex domicilii matrimonii* which was rooted in outdated patriarchal assumptions and confirms that South African private international law must develop in line with the Constitution.

Support in cross-border transactions by Adults: Contract law vs capacity law

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This piece is based on a paper that I presented at the World Congress on Adults Protection, held in Amsterdam from 8 to 10 July 2026. It is still work in progress.

The World Conference focused on capacity rather than vulnerability and incapacity of Adults. This choice of theme resulted in much discussion on support for the exercise of capacity. Supported decision-making rather than replaced decision-making for an incapacitated person poses challenges for Private International Law, especially of the Von Savigny tradition. Our approach is to first characterise and then find which laws we can apply. But it is exactly this characterisation that is becoming blurry: to be fully in compliance with the UN

Convention on the Rights of Persons with Disabilities people should be allowed to make decisions, i.e. conclude contracts with the help of others. There should be no boxes of capacitated and incapacitated persons. No longer can only the former conclude contracts, while the latter have to be represented by guardians or other persons with a representation function. In Adult law some concepts are phasing out, while others are being reinterpreted by legislators and courts.

Below, after briefly explaining the move towards supported decision-making in substantive family law and human rights law, I turn to the available legal framework for cross-border cases, then to the difficult question of characterisation, and lastly to cross-border recognition.

The move towards supported decision-making

The civil laws of various countries are adapting to be in conformity with the UN Convention on the Rights of Persons with Disabilities (UNCRPD), which recognises the legal capacity of persons with disabilities on an equal basis with others (Art. 12,2). It also imposes an obligation on States to take appropriate measures to support persons with disabilities to exercise their legal capacity. The Convention was ratified by all EU Member States, and confirmed by the European Union. It further states the full and effective participation and inclusion in society as a general principle (Art. 3), and calls on States to ensure effective access to justice for persons with disabilities, equal to other (Art. 13). And importantly from a private international law perspective, the Convention requires States to recognise the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others (Art. 18).

Germany and Ireland have strongly amended their civil laws to adapt to this. Other EU Member States are still in the process of doing so. It was clear at the conference that the law needs to make a paradigm shift. It is not easy for legislators and even legal scholars, to let go of the concept of “incapacity” and to accept that people may need support without being represented in their legal acts. This reality requires different thinking about personal law as well as contract law, and the intersection of both.

Legal framework for cross-border cases

In private international law, the main international source for Adult law is the Hague Adults Convention of 2000. This Convention was avant-garde when it was concluded. It dealt with the issue of Adults even before the UNCRPD came about. It provided a framework to ensure cross-border continuity of protection of adults, as well as for the legal acts they and/or their representatives performed. The Convention uses open-ended and respectful terminology. Yet, the Convention also suffers from its stagnant nature (as Conventions do – set in stone the moment they are adopted). The Convention was inspired by the Hague Child Protection Convention 1996, which is also a good Convention, ensuring the continuity of child protection and parental responsibility. This has the unfortunate result that the Convention uses concepts like incapacity, protection, guardianship, curatorship, placement, and representation. Yet, as explained in the previous section, the UNCRPD is requiring a shift away from such ideas.

To my mind the Convention, as a living instrument, can still stand in the emerging legal landscape. This requires a purpose-driven and context-sensitive interpretation of its provisions. Such reinterpretation will no-doubt soon reach domestic courts, and is already being discussed. The first Special Commission on this Convention held by the Hague Conference in November 2022, acknowledged that the terms 'guardianship' and 'curatorship' no longer exist in some legal systems, that have moved to supported decision-making. However, they concluded to keep the terms in the Convention, and not amend the Convention at that time (para 69). They also discussed the possible reinterpretation of 'powers of representation' (in Arts 15 to 17) to include advance unilateral acts or expressions of decisions, for instance on health care (paras 23 to 26). They concluded that courts could undertake such appreciation on a case-by-case basis. Thus, the door remains open for an interpretation fit for new legal and societal contexts.

The Hague Adults Convention is currently in force in sixteen States (thirteen EU Member States, the other three neighbouring States to the EU). In addition, five States (all of them EU States) signed the Convention without following up by a ratification yet.

After two resolutions by the European Parliament (in 2008 and in 2017), the

European Commission in 2023 published two proposals on Adults. One proposal is for a Council Decision to authorise Member States that have not already done so to ratify the 2000 Hague Convention. The other is to complement the Convention in the EU by a Regulation, which enhances or slightly adapt some rules. The Commission's approach can thus be described as a 'Hague+' one, similar to the approaches taken in parental responsibility and maintenance. Under the latest agreement between the Council and the Parliament (May 2026) the Regulation would place emphasis on 'support'. The legislators do not seem to modify the Hague Convention's private international law rules, but would include 'support' when reference is made to representation.

How should we then characterise?

The shift is monumental. For us to rethink private international law in this sphere, it is helpful to think in terms of two different scenarios that can arise when an Adult in need of assistance concludes a contract. The first is representation of the adult by another person. This other person is the one negotiating, deciding and contracting. The Adult involved stays in the shadow . The other is where the Adult is involved in the preparation, negotiation and conclusion of the contract. The Adult is the one signing, but with the help of a support person. This construction is different from current (traditional) contract law. Some argue that it does not comply with the standards of legal certainty.

The characterisation would be contract law to check the validity of the contract, i.e. to verify whether there was really a meeting of the minds (consensus) between the persons involved. If legal systems recognise the capacity of every person (or like the German system reduces capacity in only a very limited number of situations), then the characterisation stays within contract law. Thus it stops at the question of validity and consensus. In legal systems that still have the notion of incapacity, the characterisation for this question switches to the appropriate connecting factor under the law of persons (often the law of the nationality).

The Hague Adults Convention refers to 'measures' to protect an adult. These measures would however, in an ideal world, only involve the appointment of support persons for the Adult. Such appointment can happen under the jurisdiction bases and applicable law rules of the Convention. The Convention also foresees the possibility for Adults to appoint the representative(s) of their choice

(Arts 15 to 17). The same private international law would apply for the appointment by Adults of support persons.

Recognition across borders

Getting to recognition, a court order or authentic instrument appointing a support person for an Adult would benefit from the recognition regime of the Hague Convention and the proposed Regulation. If a support person was appointed in an informal way, their role would not be up for recognition (in the private international law sense), but would turn on the law applicable to the legal relation. As explained above, that will to a large extent by contract law, in the absence of incapacity.

There is still much to think through. Private international law will probably be in flux for some time still, while domestic laws are being amended.

Recognition of Italian Extrajudicial Divorces in Tunisia — Between Methodological Uncertainty and the Need to Preserve Continuity of Personal Status Across Borders

I. Introduction

Recent years have witnessed a movement towards the dejudicialization of consensual divorce and the proliferation of extrajudicial divorce mechanisms notably in Europe. While this mode of “private divorce” is not, as such, a new phenomenon and extrajudicial divorce has been practised in different forms across various parts of the world (see e.g., Béligh Elbalti, “Le divorce au Japon et son accueil en Tunisie” (2026) 73 *Osaka University Law Review* 6), it has attracted increasing attention in recent years, given the growing number of European jurisdictions that have introduced mechanisms allowing spouses to dissolve their marriage outside the courts, as well as the complex questions that such divorces raise in terms of their recognition and circulation across borders (for a comparative view in Europe, see e.g., CJEU, Directorate for Research and Documentation, “Extrajudicial Divorce: Rules, Procedures and Cross-Border Recognition in Member States” (Research Note, February 2022) 3; Pablo Quinzá Redondo, “The Recognition of Non-Judicial Divorces in Europe” in Konrad Duden and Denise Wiedemann (eds), *Changing Families, Changing Family Law in Europe* (Intersentia, 2024) 23). This is particularly true of the Italian form of extrajudicial divorce, introduced by Decree-Law No. 132/2014, converted into Law No. 162/2014, which allows spouses meeting specified conditions to obtain a divorce through an agreement before the civil registrar, rather than through a court.

As previously reported on this blog, the recognition of such an Italian divorce in another Member State gave rise to a CJEU decision in *Senatsverwaltung für*

Inneres und Sport v TB (Case C-646/20) and to scholarly discussion, notably concerning the appropriateness of the CJEU's treatment of such a divorce agreement as a "decision" for the purposes of its recognition under the Brussels IIa Regulation, later replaced by the Brussels IIb Regulation (for critical comments, see e.g., Elena Bargelli, "Reshaping the Boundaries Between 'Decision' and Party Autonomy. The CJEU on the Extrajudicial Italian Divorce" (2023) 8(1) *European Papers* 43; Quinzá Redondo, *op.cit.*, 35 ; Sabine Corneloup, "La circulation européenne du divorce sans juge : nouvel arrêt et toujours des incertitudes" (2023) *RCDIP* 409).

The issue of the recognition of Italian extrajudicial divorces has recently crossed the Mediterranean and reached the Tunisian courts. While this is not the first time that Tunisian courts have dealt with the issue (for an earlier case concerning the recognition of a French out-of-court divorce, Souhayma Ben Achour, "Le divorce extrajudiciaire français devant le juge tunisien, une tolérance à contrecœur…À propos du jugement du tribunal de première instance de Tunis du 14 novembre 2017 (no 86358)" (2018) *RCDIP* 211; on this issue in general, see Elbalti, *op cit.* 48-49, and, more specifically, on the recognition of Japanese extrajudicial divorce, pp. 50 *et seq.*), to my knowledge, this is the first time that the issue of the recognition of an Italian extrajudicial divorce has been brought before the courts in Tunisia. The issue is particularly interesting from a comparative law perspective, as it provides insights into the way in which Tunisian courts approach a form of marital dissolution originating in a different legal system, as well as the challenges that may arise in the cross-border circulation of such divorces from the perspective of non-EU law.

II. The Case

The petitioner, X (a Tunisian national), married the first respondent, Y (an Albanian national), in Italy in 1996. Since 2005, pursuant to a judgment of personal separation issued by an Italian court, the parties had been legally separated. In 2021, the parties obtained a divorce by mutual agreement before the Italian civil registrar, in accordance with the applicable Italian rules on extrajudicial divorce. Later, in 2025, X initiated summary proceedings against Y and the Public Prosecutor, as the second respondent, seeking an order from the First Instance Court of Nabeul (one of the 28 courts of first instance in Tunisia) seeking a summary order allowing the entry of the divorce agreement in X's civil-status records.

In support of the application, X argued that the divorce had been obtained by mutual consent before the Italian civil registrar and that the resulting agreement should be entered in his civil-status records. X relied, in particular, on the 1967 Tunisian–Italian Convention on judicial assistance, arguing that the Convention provides for the recognition in Tunisia of decisions issued by Italian authorities and that this should also extend to extrajudicial divorces under Italian law, introduced as a simplified procedure allowing spouses, subject to certain conditions, to dissolve their marriage before the civil registrar. X further argued that the agreement concluded by the parties complied with all the requirements under Italian law: in particular, the parties had no children and had appeared before the civil registrar twice, more than thirty days apart, to confirm their agreement. X also argued that the Italian divorce had been issued by a competent authority in accordance with Italian law, had become final and effective in Italy, and had already produced its effects there, as demonstrated by the official documents submitted to the court.

III. The Ruling

In its summary order dated 24 February 2026, the First Instance Court of Nabeul admitted the application and ruled as follows.

The Court began by recalling the general context of the case and referring to the relevant provisions of Italian law submitted by the applicant. It then identified three legal issues to be addressed: first, whether the Court, sitting in summary proceedings, had jurisdiction to deal with an application seeking an order allowing the entry of the Italian divorce in the Tunisian civil-status records; second, whether judicial review of the Italian divorce by agreement by a court sitting in summary proceedings was permissible; and third, whether the Court should order the entry of the Italian divorce by agreement in the Tunisian civil-status records.

Regarding the first issue, the Court recalled that the jurisdiction of a court sitting in summary proceedings depends on the satisfaction of two conditions: (1) the existence of a situation of urgency; and (2) the summary proceedings must not prejudice the merits of the case. With respect to (1), the Court considered that the requirement of urgency was satisfied given the instability and discrepancy in the applicant's civil status resulting from the foreign divorce, and the potentially serious consequences of such a situation for family stability. With respect to (2), the Court considered, referring to Tunisian scholarly opinions, that this requirement was also satisfied, since the substance of the right invoked had already been addressed in the foreign country.

Regarding the second issue, the Court invoked four grounds justifying judicial review of the Italian extrajudicial divorce by a court sitting in summary proceedings. The first was a legal ground, based on the view that the extrajudicial divorce could be treated as a "decision" under the Tunisian–Italian Convention and the 1998 Tunisian Code of Private International Law (TCPIL). The Court considered that the TCPIL aims to recognize legal situations created abroad and that its provisions could therefore be applied to the recognition of extrajudicial divorces, whether consensual, notarial, or administrative. The second was a scholarly ground: the Court referred to the prevailing opinion in Tunisian legal literature in favour of the recognition of extrajudicial divorces. The third was a case-law ground: the Court referred to previous cases in which the entry of extrajudicial divorces obtained abroad into the Tunisian civil-status records had been allowed. The fourth was based on practical considerations, namely that summary proceedings allow time and effort to be saved, the need to take into account the Tunisian diaspora living in countries where extrajudicial divorce is permitted, and the absence of any serious controversy between the parties.

Regarding the third issue, the Court held that the Italian extrajudicial divorce should be entered in the Tunisian civil-status records. It considered that refusing to recognize a divorce that had already taken effect in Italy, in the absence of any serious dispute between the parties, would create an inconsistency in their civil status and potentially interfere with their private lives and the exercise of rights resulting from their changed marital status. The Court also noted that the divorce had already been recorded in the parties' Italian civil-status records, that the respondent had authorized X to seek its registration in Tunisia, and that the agreement complied with the requirements of Italian law and did not prejudice the interests of either spouse or of any children.

On this basis, the Court issued the order allowing the entry into the Italian divorce in X's Tunisian civil-status records.

IV. Comments

While the outcome of the case can be agreed with, the Court's reasoning raises serious questions concerning the manner in which an extrajudicial divorce can be given effect in Tunisia. Various aspects – notably from the perspective of the general legal and procedural framework applicable to the "recognition" of foreign divorces in Tunisia – deserve a more thorough analysis, which may not be appropriate for a blog post, (for a detailed analysis of this issue, see Elbalti, *op cit.* 24 *et seq.*). Three particular issues, however, will be addressed here.

1. Summary Proceedings and the Recognition of Foreign Divorce

First, regarding the jurisdiction of the First Instance Court sitting in summary proceedings, it is sufficient to point out that, in assessing the requirement that summary proceedings must not prejudice the merits of the case, the Court seems to have confused the substantive merits of the case (i.e. the dissolution of the marriage) with the object of the proceedings, which, in the Court's own words, was to obtain the "recognition" of the Italian divorce for the purpose of its entry in the Tunisian civil-status records. However, given that, under the current legal framework in Tunisia – and despite the prevailing view in Tunisia to the contrary – "recognition" is not automatic (for details, see Elbalti, *op. cit.*, p. 29, describing the issue as "thorny" (*épineuse*)), a formal exequatur procedure for giving effect to the foreign divorce would have been required. Such a procedure falls within the subject-matter jurisdiction of the courts of first instance exercising their ordinary jurisdiction (Elbalti, *op. cit.*, p. 41). In other words, the requirement that summary proceedings must not prejudice the merits of the case should have been examined with regard to the exequatur procedure that should have been initiated pursuant to the applicable rules governing the recognition and enforcement of foreign judgments, rather than with regard to the dissolution of the marriage itself. In that respect, examining the "recognition" of the foreign divorce necessarily entails an examination of the conditions governing its recognition and enforcement and, therefore, requires the court to determine issues that properly belong to the exequatur proceedings. In this sense, the exercise of jurisdiction by the First Instance Court sitting in summary proceedings would not, under the applicable legal framework currently in force, be legally justified.

In any event, it is worth noting that, in recent years, the practice of initiating summary proceedings for the "recognition" of foreign divorces for the purpose of ordering their entry in the Tunisian civil-status records (as well as other procedural modalities) has developed in judicial practice in Tunisia, generally with the approval of Tunisian scholars (see Elbalti, *op. cit.*, p. 43).

2. The Uncertain Method of Recognition

Second, it is remarkable that the Court began its analysis by placing itself on the terrain of the "recognition of foreign decisions", either under the 1967 Tunisian–Italian bilateral Convention or under the TCPIL. Leaving aside the question of whether an Italian extrajudicial divorce can properly be treated as a "decision" (on this issue, see the convincing analysis of Bargelli, *op. cit.*, arguing that it should not), such an approach would suggest that the recognition of the Italian divorce should have been examined by reference to the requirements governing the recognition and enforcement of foreign judgments, notably those prescribed by Article 3 of the 1967 Tunisian–Italian Convention, which the Court expressly referred to. (It is worth noting, however, that Tunisian scholars are generally in favour of applying domestic law, namely the TCPIL, as it sets out less restrictive requirements for the enforcement of foreign judgments than those provided for in the international conventions concluded by Tunisia. On this issue, see e.g., Souhayma Ben Achour, *La réception des decisions étrangères dans l'ordre juridique tunisien* (CPU, 2017) 33).

However, this is not what the Court did. It did not examine the recognition of the Italian divorce under the applicable rules governing recognition, whether under the convention-based framework or the requirements set out in the TCPIL. Instead, the Court seems to have focused on the need to prevent and remedy the harm resulting from the discrepancy in the parties' civil status created by the divorce abroad. It emphasized the need to recognize the divorce agreement concluded abroad and to order its entry in the Tunisian civil-status records, particularly because the divorce had already produced its effects in Italy. This approach is reminiscent of recent discussions concerning the "recognition of situations created abroad" as an alternative method for giving effect to foreign legal situations (see e.g., Dagmar Coester-Waltjen, "Recognition of Legal Situations Evidenced by Documents" in Jürgen Basedow et al. (eds), *Encyclopedia of Private International Law – Vol. 2* (Edward Elgar Publishing, 2017) 1495).

The Court went even further, however, by stating that the divorce complied with the requirements and procedures prescribed by Italian law. Such a reference to Italian law would not have been necessary under either of the two approaches mentioned above. It would, by contrast, have been entirely justified had the Court proceeded to examine the validity of the divorce under Tunisian choice-of-law rules under the so-called "method of acceptance by conflict-of-laws" (Susanne Lilian Gössl, "Open Issues in European International Family Law: Sahyouni, 'Private Divorces' and Islamic Law Under the Rome III Regulation" (2017) *European Legal Forum* 69). Such an approach would have led to the application of Italian law as the law of the parties' common domicile, pursuant to Article 49 of the TCPIL (see Elbalti, *op cit.* p. 57). Importantly, however, such an approach would not have required the Italian divorce to be characterized as a "decision" under the Tunisian–Italian Convention or under the Tunisian rules on the recognition and enforcement of foreign judgments.

3. Towards a More Tolerant Approach to Extrajudicial Divorce

Finally, the case illustrates the evolving treatment of extrajudicial divorces in Tunisian PIL. Until recently, the "judicial nature" of divorce was generally regarded as a matter of public policy, leading Tunisian courts to (almost) systematically refuse to give effect to divorces that had not been pronounced by a judicial authority (see Elbalti, *op. cit.*, pp. 46–49). This was particularly true of extrajudicial divorces obtained in other Arab jurisdictions, whether in the form of traditional *talaq* or *khul'*, as well as administrative divorces permitted in some other countries (see Elbalti, *op. cit.*, p. 59). The position of the courts has been consistent in this respect and was endorsed by the Tunisian *Cour de cassation*, which had the opportunity on several occasions to state that the judicial nature of divorce forms part of Tunisian public policy (see, e.g., the Tunisian *Cour de cassation* ruling of 7 November 2018, in which the Court stated, *in dictum*, that the principle that divorce must be judicial forms part of Tunisian public policy in the meaning of PIL).

Since the introduction of the French *divorce sans juge* in 2016, however, the situation has gradually begun to change, particularly in legal scholarship and in the judicial practice of the courts of first instance (see Elbalti, *op. cit.*, p. 63). While Tunisian courts have generally continued to refuse recognition of extrajudicial divorces originating in other Arab jurisdictions (see Elbalti, *op. cit.*, p. 60 and the cases cited therein), even where recognition is sought by the wife (see Elbalti, *op. cit.*, p. 63, fn 239), they have shown greater tolerance towards extrajudicial divorces originating in certain European countries, notably France, as well as Japan (see Elbalti, *op. cit.*, p. 63, contrasting the "great tolerance" shown towards French extrajudicial divorce with the "consistent hostility" towards forms of dissolution of marriage originating in other Arab jurisdictions).

One of the possible explanations for this difference in treatment lies in the generally hostile attitude of Tunisian courts and legal scholarship (see Elbalti, *op. cit.*, p. 48 and the various opinions cited therein at fn 196) towards traditional forms of divorce, which are often regarded as incompatible with the legislative policy pursued by the Tunisian State since independence. That policy has sought, among other things, to distance Tunisian family law from unilateral and traditional forms of divorce. By contrast, extrajudicial divorces based on the mutual agreement of the spouses appear more compatible with this legislative policy, which is grounded in the principles of equality between men and women and non-discrimination, particularly in matters relating to the dissolution of marriage. They have therefore encountered less resistance in Tunisian judicial practice (in this sense, see Ben Achour, *op. cit.*, 222), despite their non-judicial character. This suggests an evolving approach towards the judicial nature of divorce in Tunisian PIL, at least with regard to extrajudicial divorces originating in Europe and Japan. This approach has been largely endorsed by the Tunisian lower courts (see Elbalti, *op. cit.*, p. 59), but remains to be confirmed by the higher courts, including the Tunisian *Cour de cassation*.

Private International Law and European Society

from Marlene Tiede, a Research Fellow and PhD Candidate at the Max Planck Institute for Comparative Public Law and International Law.

Can one speak of a European society without speaking about private relations? Recent scholarship on European society has largely approached the concept through the lens of public law. Yet societies are constituted at least as much by the horizontal relations between individuals and groups as by public institutions. In the absence of a comprehensive European private law, this blogpost turns to EU private international law (PIL), the principal framework for coordinating interactions between the diverse private laws of the Member States and structuring cross-border private life within the Union. I will argue that EU PIL brings into view the importance of coordination frameworks for organising a mode of integration based not on unification, but on interdependence.

Unity Through Interdependence

The Commission v Hungary judgment refers to “a society in which pluralism prevails” (paras. 551, 556). By placing that formula in the context of the Union and its common legal order (paras. 551, 556) and explicitly invoking European society (para. 554), the judgment leaves little room for doubt that it understands “a society in which pluralism prevails” as denoting a single European society. Yet this raises a fundamental question. If European society is constituted by pluralism – that is, by heterogeneity rather than homogeneity – what holds it together? Much like the Union’s own aspiration to be “united in diversity”, the notion of a single European society defined by pluralism appears almost oxymoronic. How is unity achieved under conditions of diversity?

A clue may lie in the particular mode through which European integration has proceeded in important domains. Read against the background of more than seventy-five years of integration, “a society in which pluralism prevails” appears as a fitting description of a European project in which integration has often advanced not by replacing the plurality of national legal orders with a single one, but by weaving them together into an increasingly dense web of legal, economic, and social interdependence. Rather than pursuing unification, integration in many domains has relied on ever closer cooperation between the diverse legal orders of the Member States. The resulting web of relations and interdependencies is sufficiently deep to sustain the idea of a single European society, while leaving intact the plurality of national legal orders. From this view, unity is achieved not through unification, but through interdependence.

I explore this mode of integration through the lens of EU PIL, a field particularly well suited to bringing into view both the horizontal relations between individuals and groups that have largely remained overlooked in accounts of European society and the coordinating structures through which interdependence is organised.

Mutual Trust and the Case for Private International Law

Mutual trust provides the normative foundation for cooperation between the diverse legal orders of the Member States. Although criticised as a judicial construct lacking a clear legal and empirical basis, it has become a structural principle of EU constitutional law. Resting on the presumption that all Member States comply with the values enshrined in Art. 2 TEU, mutual trust is a precondition for the functioning of the Union's legal order. By requiring Member States to presume the adequacy of one another's legal systems, it enables them to enter into relations of growing mutual dependence. Its significance is particularly pronounced in areas that remain only marginally harmonised, where cooperation relies less on common substantive standards than on confidence in the adequacy of the legal solutions adopted by the Member States.

Mutual trust occupies a central place within the Area of Freedom, Security and Justice (AFSJ), a policy area based on cooperation rather than unification. Within the AFSJ, the following reflections turn to judicial cooperation in civil matters – better known outside the Treaties as PIL – to investigate more closely how integration through interdependence operates in practice.

Admittedly, one might hesitate before venturing deeper into a field of law famously disparaged as a "dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon". Yet, before the reader hastily retreats to firmer ground, two considerations make this "swamp" particularly worth exploring. First, accounts of European society, as developed most prominently by Armin von Bogdandy and Loïc Azoulai, have so far focused primarily on its public law dimension, leaving largely unexplored the horizontal relations between private individuals and groups – despite their centrality to any notion of society. Second, PIL brings into view the importance of coordination frameworks for a mode of integration based on interdependence rather than unification.

PIL deals with legal issues arising from private relations connected to more than one legal system and, in doing so, provides a framework for coordinating the interaction between diverse private legal orders. While substantive private law remains only marginally harmonised at the EU level – save for specific areas such as consumer protection, intellectual property, anti-discrimination law, and parts of labour and company law – PIL has been extensively harmonised. The result is a highly integrated coordination framework governing interactions between substantive laws that continue largely to be constituted by the diverse legal orders of the Member States. To return to the "dismal swamp" metaphor, what was once dismissed as an obscure and largely technical discipline has become a framework of central importance for the everyday lives of individuals and businesses throughout the Union. The denser the web of cross-border relations, the more indispensable coordination frameworks become.

In the following two sections, I demonstrate that EU PIL performs a dual function: first, it renders growing social and economic interdependence compatible with the continued plurality of national private laws; second, through the design of conflict rules, it regulates the externalities generated by interdependence.

Mobility Across Private Legal Orders

By facilitating mobility, openness, and cooperation across diverse private legal orders, EU PIL renders the growing density of cross-border relations compatible with the continued plurality of national private laws.

The increasing free circulation of civil judgments provides a prominent illustration of this dynamic. Following the abolition of exequatur – an intermediary procedure under which a judgment rendered in one Member State first had to be declared enforceable by the courts of another in order to be enforced there – judgments rendered in one Member State are, in most cases, recognised and enforced in another under the same conditions as domestic judgments. By rendering the outputs of one national judicial system effective throughout the Union, this closer form of cooperation reduces the costs and uncertainties associated with cross-border litigation and, in doing so, lowers the barriers for individuals and businesses to enter into cross-border relationships.

The growing mobility of individuals within the EU is further reflected in the reconfiguration of the connecting techniques of classical continental PIL. EU instruments have shifted the principal connecting factor from nationality to habitual residence and expanded the scope for party autonomy. By relying on less static connecting factors, EU legislation adapts conflict rules to increasingly transnational patterns of life and facilitates engagement with the private legal orders of other Member States.

Where harmonised PIL rules are absent or prove insufficient to structure cross-border social life within the EU, recognition-based mechanisms grounded in EU primary law have come to complement traditional PIL. Legal statuses validly established in one Member State increasingly circulate throughout the Union by virtue of fundamental freedoms, Union citizenship, and fundamental rights. These recognition-based mechanisms enable legal statuses created under one legal order to produce effects across borders irrespective of the law designated by traditional choice-of-law rules. Prominent examples can be found in both economic and family law: corporationsvalidly incorporated in one Member State must, on the basis of fundamental freedoms, be recognised throughout the Union; same-sex marriages or surnames lawfully established under the law of one Member State increasingly require recognition in other Member States on the basis of Union citizenship. Rather than replacing national private laws with a uniform European law, these recognition-based mechanisms render the private legal orders of the Member States progressively more interdependent by allowing individuals and businesses to carry their legal identities and relationships across borders.

Regulating Interdependence Through Conflict Rules

The growing interdependence of diverse legal orders gives rise not only to new forms of cooperation, but also to new governance challenges. A common concern is that private actors will exploit differences between legal regimes, circumventing regulation and triggering a race to the bottom. Yet, unlike mechanisms based solely on mutual recognition or the country-of-origin principle, which generally privilege the legal order of the Member State of origin, PIL is capable of employing more finely calibrated connecting factors that take account of the regulatory consequences of the applicable law. In this way, PIL does not merely accommodate legal diversity but also governs the externalities generated by interdependence, thereby assuming a regulatory function.

Art. 7 Rome II Regulation provides an instructive example of how conflict rules can be used to pursue substantive policy objectives. The provision allows claimants in environmental damage cases to choose between the law of the place of conduct and the law of the place of injury. Either connecting factor, if applied in isolation, would create opportunities for undertakings to exploit differences in national environmental standards. A pure place-of-conduct rule might encourage undertakings to locate polluting activities in low-protection jurisdictions, while a pure place-of-injury rule could create incentives to establish operations in higher-protection Member States where natural conditions, e.g. downwinds, ensure that the harmful effects are realised elsewhere. By conferring the choice upon the injured party, who is likely to opt for the more favourable law, Art. 7 Rome II seeks to reduce incentives for regulatory arbitrage, thereby aligning the operation of PIL with the Union's objective of ensuring a high level of environmental protection.

Art. 7 Rome II thus demonstrates that conflict rules are not neutral techniques for allocating claims of regulatory authority. Their design can itself pursue substantive objectives and shape the conditions under which cross-border private relations unfold. More broadly, the extensive incorporation of PIL into the EU legal framework has transferred the design of conflict rules to a supranational level that stands above the legal systems whose interactions it seeks to organise.

I would like to thank Iris Canor, whose forthcoming contribution, "In Mutual Trust We Trust – A Structural Principle of a Diverse Union", in Bast/von Bogdandy (eds.), The Constitutional Core of the Union (OUP, forthcoming), articulated with particular force the idea of European integration as a process driven by interdependence rather than unification. This contribution has greatly benefited from her insights.

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The New Zealand Supreme Court’s judgment in Kea Investments Ltd v Wikeley on anti-enforcement relief

In *Kea Investments Ltd v Wikeley* [2026] NZSC 97, the New Zealand Supreme Court recently delivered its reasons for reinstating world-wide anti-enforcement orders in relation to a fraudulently obtained default judgment from Kentucky. The judgment, given by Kós J, contains a useful analysis of the principles on anti-suit and anti-enforcement injunctions and offers guidance on the interrelationship between fraud and comity.

The background to the case is set out in previous posts (here, here and here). In summary, Kea Investments Ltd (Kea), a British Virgin Islands company, alleged that the default judgment obtained by Wikeley Family Trustee Ltd (WFTL), a New Zealand company, was based on fabricated claims intended to defraud Kea. The New Zealand High Court found that the defendants had perpetrated a tortious conspiracy. The Court of Appeal upheld the findings of fraud but allowed an appeal against the grant of the injunction, concluding that an injunction could only be granted as a step of last resort, which required Kea to pursue its right of appeal against the Kentucky judgment.

It was not in issue before the Supreme Court that the claim in the Kentucky court formed part of a conspiracy to defraud Kea (at [102]). It was also not in issue that New Zealand was the proper jurisdiction to deal with the claim of fraud (at [102]). In these circumstances, the Court found that comity did not stand in the way of anti-enforcement relief.

Relevant principles

The Court considered that the *in personam* nature of anti-suit and anti-enforcement injunctions remains “fundamental”, even though “the jurisdictional conflict” that arises “may indirectly impinge on the freedoms of the foreign jurisdiction” (at [105]). The Court also confirmed that the grant of such an injunction “tends to depend on there being something wrongful”, which could be "unconscionable (or vexatious or oppressive) litigation in the foreign state", such as a fraudulent proceeding, or "the disregard of a right in contract not to be sued in the foreign state" (at [107]).

Turning to anti-enforcement injunctions more specifically, the Court did not think it was helpful to say that they "should only be granted in 'exceptional circumstances'", although it would be "a rare case that the conditions for their grant will be met" (at [108], adopting the language of Males LJ in *SAS Institute Inc v World Programming Ltd* [2020] EWCA Civ 599, [2020] 1 CLC 816). Citing Adrian Briggs (*Civil Jurisdiction and Judgments* (8th ed, Routledge, Oxford, 2025) at 463), the Court noted that the enforcement of a judgment that has been wrongfully obtained "aggravates the original wrong" (at [108]). However, an applicant would have to be able to explain why there had been no earlier application for an anti-suit injunction; and where the anti-enforcement injunction seeks to prevent enforcement in the country in which the judgment was given, "comity may demand particular restraint" (at [109]).

The Court described comity as "the need for domestic courts to respect the legitimate exercise of jurisdiction by the courts of a foreign state" (at [10], [113], citing Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [1.29]). It accepted that "comity is a consideration necessitating caution in making anti-suit or anti-enforcement injunctions that cut across the authority of a foreign court acting within its legitimate jurisdiction" (at [116]). However, comity had "a measure of elasticity"; it did not "entail blind deference" (at [116]).

Crucially, the Court considered that fraud "reframes ordinary comity considerations" (at [117]). First, fraud is a "paradigm" case of vexatious and oppressive conduct that justifies an injunction if the fraudster is in the court's jurisdiction (*Ellerman Lines Ltd v Read* [1928] 2 KB 144 (CA)) (at [117], [118]-[128]). Second, there is "a mutual interest in both courts to act quickly and effectively to restrain such conduct". In fact, the Court went so far as to say that "[r]espect by the foreign court for the domestic court's anti-fraud orders may reasonably be expected" (at [117], [128]-[130]).

Finally, there was no requirement that an applicant exhausts local remedies in the foreign court before applying for an injunction (at [134]). In this sense, anti-suit or anti-enforcement injunctions are not a "measure of last resort", as the Court of

Appeal had considered. The Court accepted counsel's submission that "the idea that the New Zealand courts should wait and see whether the Kentucky courts do the 'correct' thing is 'not only invidious but the reverse of comity'" (at [134]).

This case

Kea was "that rare case" where direct evidence of fraud justified the grant of anti-enforcement relief (at [120]). According to the Supreme Court, the fraud "[set] out to make a fool of both jurisdictions" (at [127]):

> *One court exerts jurisdiction upon a wholly false premise— both as to jurisdiction and obligations; the other—despite being the proper forum to address the fraud—is then counselled to act with restraint out of a need for comity for the first court.*

The courts that were invoked in this case had "a mutual interest in stifling cross-border fraud of this kind", and their international cooperation was consistent with a commitment to the rule of law (at [128]). From this perspective, the High Court's anti-enforcement orders "enhance, rather than erode, comity" (at [128]). Expert evidence of US law confirmed that an injunction to stop the continued perpetration of a fraud would be consistent with US notions of comity (at [129]).

The fact that WFTL had been placed in protective interim liquidation also reframed the comity considerations in the case (at [131]). WFTL was controlled by the liquidators, who were subject to the High Court's personal jurisdiction. An order "requiring them to seek discharge of the default judgment … ought to be within the remedies that Court ought to be able to exercise" (at [132]). The liquidators recognised "that they cannot take any responsible or lawful action other than to have the default judgment discharged" (at [131]) but the orders were still necessary to allow the liquidators to fulfil their duties (at [132], [136]). In these circumstances, the injunctions were "consistent with protecting the Court's processes and officers" (at [133]).

The Court concluded that the anti-enforcement orders were not only justified but also necessary (at [136]): "If not in this case, then when? If not by the New Zealand High Court, then by whom?" The level of fraud in this case was such that “even requiring a party to apply for a stay or dismissal in the foreign court would be unjust” (at [135], citing Thomas Raphael *The Anti-Suit Injunction* (2nd ed, Oxford University Press, Oxford, 2019) at [5.45]). The proceedings in the Kentucky courts were “a core operative element of the fraud” (at [135]). If the High Court had not made the interim orders in this case, “control of WFTL, and with it the default judgment … would by now have passed well beyond the New Zealand jurisdiction” (at [135]); the “status quo for both jurisdictions would soon have shifted as part of this swirling, evolving fraudulent enterprise” (at [136]).

Comment

The existence of the fraud was not in issue, and neither was the High Court’s conclusion that it had jurisdiction – and that it was the appropriate forum – to determine the claim for fraudulent conspiracy. But the Supreme Court made it clear that the High Court’s approach to jurisdiction, at a time when the existence of fraud was “a strongly arguable possibility”, was “entirely correct” (at [103]). The alleged fraudster was in New Zealand, which made it appropriate for the New Zealand court to become involved, culminating in the grant of anti-enforcement relief once the question of fraud had been finally determined.

Why is it appropriate for a New Zealand court to decide on the right- or wrongfulness of proceedings in a foreign court (see here)? Should such decisions not fall exclusively within the foreign court’s jurisdiction? The Kentucky court in this case had taken the position, at first instance, that the default judgment should stand.

The Supreme Court acknowledged that anti-suit and anti-enforcement injunctions “cut across the authority of a foreign court acting within its legitimate jurisdiction” (at [116]). But in the case of fraudulent proceedings, the fraudster’s jurisdiction, too, is connected to the fraud and has a responsibility to stop it. In fact, comity here requires cooperation to stop the fraud, and within this framing of cooperation, questions about the courts’ relative jurisdictional authority do not arise. If anything, it is the foreign court, the court that entertained the fraudulent proceedings, that may be thought to be interfering with comity if it denies the importance of combatting fraud (see [117]).

While the Court of Appeal had been sceptical of the legitimacy of anti-suit and anti-enforcement injunctions, the Supreme Court recognised them as valid and established tools of the conflict of laws. It pointed to the history of anti-suit and anti-enforcement injunctions as originating in the courts of equity, which granted injunctions to restrain proceedings in the common law courts, to explain why they are "very much a creature of the Anglo-American common law" (at [104], referring to Martin Davies and others *Nygh's Conflict of Laws in Australia* (11th ed, LexisNexis, Sydney, 2026) at [9.2]). At the same time, the Supreme Court's thoughtful analysis of the relationship between fraud and comity may inspire New Zealand courts to tread carefully in future cases. If anti-suit and anti-enforcement injunctions "cut across the authority of a foreign court acting within its legitimate jurisdiction", there needs to be a convincing reason on the facts of a particular case why they are not, in fact, an undue interference with comity.

Beyond Domicile: The BHP Litigation and the Functional Interconnection of Public and Private International Law

from Marcel Vitor de Magalhães e Guerra

On 14 November 2025, the English High Court handed down its Stage 1 judgment in *Município de Mariana and others v. BHP Group Plc and BHP Group Limited* [2025] EWHC 3001 (TCC), finding the defendants liable — under Brazilian law —

for the 2015 collapse of the Fundão tailings dam: over 600,000 claimants, an estimated £36 billion, the largest group litigation in English legal history. This post argues that *Mariana* exposes a functional interconnection between public and private international law at the stage of determining jurisdiction itself: although doctrinally distinct, the court's application of a private international law rule required engaging questions of corporate organisation, adjudicatory legitimacy, and transnational responsibility that traditionally belong to public international law.

A jurisdictional rule that was anything but self-executing

The formal basis for the English courts' competence was straightforward: Article 4(1) of the Brussels I Recast Regulation, under which BHP Group Plc — domiciled in England and Wales, then part of a Dual Listed Company structure with the Australian BHP Group Limited — was subject to mandatory jurisdiction. Yet the rule was anything but self-executing. Turner J struck out the claims (*Municipio de Mariana & Ors v BHP Group Plc & Anor* [2020] EWHC 2930 (TCC)) as an abuse of process, also accepting the Article 34, *forum non conveniens* and case-management applications on alternative grounds. Only the Court of Appeal's 2022 judgment ([2022] EWCA Civ 951) — drawing on *Owusu* (Case C-281/02, [2005] ECR I-1383) and *Vedanta* ([2019] UKSC 20) — rejected those objections, confirming that complexity could not convert mandatory jurisdiction into a discretionary one.

Even this mandatory rule required the courts to engage with contested questions about the defendants' identity, group structure, parallel proceedings and manageability — requiring considerably more than a purely procedural inquiry, and engaging the same transnational corporate reality that later informed the liability determination. The jurisdictional inquiry thus already illustrates the interconnection between public and private international law.

The same underlying corporate

relationships

The jurisdictional history of *Mariana* illustrates a phenomenon that has received surprisingly little explicit attention in scholarship. In Private International Law and Global Governance, Horatia Muir Watt and contributors recast private international law as an instrument of transnational governance, allocating and constraining the regulatory authority exercised by private actors, and Ralf Michaels cautions against treating jurisdiction as a single, uniform concept.[1] Alex Mills, in The Confluence of Public and Private International Law, has argued that the two fields increasingly operate as complementary components of a common transnational legal order. The public international law dimension lies not in the jurisdictional rule itself, but in the international legitimacy of projecting adjudicatory authority over conduct occurring partly outside the forum State — a question traditionally analysed through principles governing the permissible bases of jurisdiction. The procedural application of Article 4 in *Mariana* therefore became inseparable from questions of international jurisdictional legitimacy.

Jurisdiction and liability remain analytically distinct, but such litigation may require successive, asymmetrical reconstructions of the same corporate organisation. Allegations about the coordinated operation of the two BHP parent companies formed part of the factual setting for assessing whether the proceedings were abusive or unmanageable; at the merits stage, Mrs Justice O'Farrell reached a strikingly similar conclusion applying Brazilian law's "multifactorial and evaluative" approach to indirect polluter liability, finding that BHP, through its control of Samarco, caused or permitted the continued raising of the dam despite known risks.

A caveat: although the corporate reality examined is the same at both stages, the evidentiary burden escalates sharply — from threshold plausibility to proof on the balance of probabilities. The relationship is thus telescopic, not repetitive.

The phenomenon is not confined to environmental litigation. Toussaint Nothias's recent account of the Kenyan proceedings against Meta describes a comparable problem: Meta contested jurisdiction by relying on its foreign incorporation and moderators' formal employment status, yet the courts examined its Kenyan operations and subcontractor relationships — relevant both to jurisdiction and to whether Meta was the moderators' true employer.

Morelli had already asked, in 1953, whether States face limitations in exercising judicial jurisdiction over civil actions.[2]*Mariana* and the Kenyan litigation reveal how far that interconnection extends today — distinct from the choice-of-law analysis that resolves the merits, since which court may hear a case does not turn on which law governs it. Jurisdictional doctrine cannot be developed in complete isolation from the evidentiary realities of transnational litigation.

That overlap is rarely made explicit in the jurisdiction literature, which treats domicile, service, and *forum non conveniens*as self-contained inquiries.

A live illustration for the HCCH parallel proceedings debate

This bears on the continuing HCCH debate following the recently concluded consultation on the Draft Text of a future Convention on Parallel Proceedings. As a recent follow-up post on this blog reported, the German Judges Association flags concerns about Articles 9 and 10, which, in bracketed form, would permit courts to assess whether another court is more appropriate — a discretionary test unfamiliar to jurisdictions like Germany's, trading predictability for a *forum non conveniens*-style exercise.

Mariana offers a cautionary data point from a jurisdiction where such discretion is already familiar: BHP's strategy was, in substance, an attempt to secure a comparable reassessment — through *forum non conveniens* and an abuse-of-process argument that the litigation was "irredeemably unmanageable." Both succeeded at first instance, reversed only on appeal, years later — precisely what the Association warns a discretionary regime could produce elsewhere. Its concern that such factors could disadvantage claimants given complex, globalised structures maps onto this case: the Dual Listed Company structure at issue is exactly what such a regime would have to unpack before reaching the forum question.

What this means for private international

law

The upshot is not that domicile-based jurisdiction under Brussels I Recast should be reopened to substantive scrutiny — the Court of Appeal was right that complexity cannot convert a mandatory rule into a discretionary one. The point is narrower: courts adjudicating cases like this may already be engaging in a sequence of partially overlapping inquiries spanning what doctrine presents as separate stages. Future work might therefore pay less attention to treating these stages as entirely self-contained, and more to understanding how their factual and normative interdependence shapes transnational litigation.

The significance of *Mariana* extends beyond the relationship between jurisdiction and liability: it shows that determining adjudicatory jurisdiction itself increasingly occupies a space where public and private international law interact functionally, requiring courts to evaluate a common transnational corporate reality before either jurisdictional or substantive questions can be resolved.

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[1] Ralf Michaels, 'Some Fundamental Jurisdictional Conceptions as Applied in Judgment Conventions' in Eckart Gottschalk, Ralf Michaels, Giesela Rühl and Jan von Hein (eds), *Conflict of Laws in a Globalized World* (Cambridge University Press 2007) 29–62.

[2] Gaetano Morelli, *Diritto processuale civile internazionale* (2nd edn, CEDAM 1953) 87.

Conflicts of jurisdiction in

Senegal: lesson from the Senegalese Supreme Court on Lis Pendens and the Exequatur of foreign judgments

This post was kindly prepared by Véronique Carole Ngono, Professor of Private Law (agrégée), University of Douala, Cameroon.

I. Introduction

The recognition and enforcement of foreign judgments in French-speaking sub-Saharan Africa has not been the subject of many studies. Although a few such studies do exist, this is in contrast to the field of conflict of laws and personal status law in particular. Consequently, the two rulings issued by the Supreme Court of Senegal on August 12, 2020, in connected disputes went practically unnoticed, even though they offer valuable insights into determining the jurisdiction of Senegalese courts in international disputes and the enforcement of foreign judgments.

The purpose of this note is therefore to shed light on the law and practice of conflict jurisdictions in Senegal.

II. Facts and proceedings

The dispute involves a Senegalese couple, X (the husband) and Y (the wife), who married in Senegal in 1996. They lived there for some time before Y moved to Montreal, Canada, where she settled in 2015.

In 2017, X filed a petition for divorce in Senegal. Y challenged the jurisdiction of the Senegalese courts. The lower court rejected Y's objection and assumed jurisdiction over the dispute. Dissatisfied with the decision, Y appealed to the Supreme Court [Case 1].

Meanwhile, in 2019, Y successfully obtained an interim order from a court in Montreal, Quebec, in the divorce proceedings between the parties. The order, among other things, granted Y the exclusive right to occupy a residence located in Senegal, to the exclusion of X.

The lower court declared the Canadian judgment enforceable in Senegal. Dissatisfied with that decision, X appealed to the Supreme Court [Case 2].

III. Rulings

Case 1 (Ruling No 73 of 12 August 2020)

In the first case, the Supreme Court ruled that when disputes involve spouses of Senegalese nationality, the wife resides abroad, the rule governing the international jurisdiction of Senegalese courts set forth in Article 853 of the Family Code (CF) apply to the exclusion of domestic provisions contained in Article 167 of the same Code, which are confined to matters of territorial jurisdiction. Second, the Court held that, by virtue of the exclusive jurisdiction conferred upon it by Article 853, the Senegalese Court are not required, in the event of international *lis pendens*, to decline jurisdiction in favor of a foreign court hearing the same dispute between the same parties. Consequently, the lower court dismissed the *lis pendens* noting that the – both Senegalese national married in Senegal – had lived there before Y moved to Canada in 2015, properly justified its decision.

Case 2 (Ruling No 74 of 12 August 2020)

In the second case, the supreme Court ruled as follows:

First, the Supreme Court recalled the applicable legal framework for granting exequatur, notably Articles 787-790 of the Code of Civil Procedure (CCP) dealing with the exequatur requirements, and Articles 853 [*op. cit.*] as well as 843 and 846 of the FC dealing with the law applicable to the extra-patrimonial effects of marriage and divorce or legal separation, as well as matrimonial property regimes. The Court then observed that the lower court had declared the Canadian judgment enforceable in Senegal on the ground that it satisfied the requirements for recognition and enforcement.

However, the Supreme Court disagreed and held that, by declaring the Canadian judgment enforceable, the lower court had misapplied the law. First, the Canadian court lacked jurisdiction to order provisional measures in divorce proceedings between Senegalese spouses, since some of those measures were to be enforced in Senegal and the Canadian court had failed to apply Senegalese law, which was designated as the applicable law under the Senegalese conflict-of-laws rules. Second, nothing in the order established that the judgment had been rendered in proceedings in which the parties had been duly served, properly represented, or declared in default.

IV. Comments

An analysis of the two rulings sheds light on how Senegalese Courts deal with parallel proceedings in international disputes (1) and the requirements of the recognition and enforcement of foreign judgments (2).

1. The treatment of parallel proceedings by Senegalese Court

The first ruling in case 1 by the Supreme Court of Senegal provides some useful insights. First according to the supreme court, where one of the defendants is resident abroad, rules on international jurisdiction should apply even when the dispute is between two Senegalese nationals. Second, rules on international jurisdiction do not recognize international *lis pendens*. This is because according to the Court, Article 853 of the FC confers exclusive jurisdiction to Senegalese court whenever either plaintiff or the defendant is Senegalese national.

Accordingly, while Article 853 of the FC does not explicitly refer to the exclusive nature of the ground of jurisdiction based on the Senegalese nationality, the Court interpreted the "privilege of jurisdiction" referred to in the provision as conferring Senegalese courts exclusive jurisdiction. This exclusive nature of the jurisdiction of Senegalese courts precludes the recognition of international *lis pendens*, unless the parties have waived the jurisdictional privilege conferred to them or the judgment resulting from proceedings initiated in Senegal is intended to be enforced abroad.

Consequently, a judgment rendered abroad in a dispute between Senegalese nationals or between a Senegalese national and a foreign national in violation of this exclusive jurisdiction may not be enforced in Senegal. Paragraph 2 of this article further provides that Senegalese courts also have jurisdiction over disputes between foreign nationals when the defendant is domiciled in Senegal or when one of the jurisdictional grounds referred to in article 34 through 36 o the CPC dealing with territorial jurisdiction is located in Senegal.

2. The recognition and enforcement of foreign judgment

a) Applicable legal framework

Under Article 787 of the CCP, in civil, commercial and administrative matters, contentious and non-contentious decisions rendered by foreign courts have de plano the force of res judicata in Senegal territory if they meet the following conditions:

a) The decision was rendered by a court having jurisdiction in accordance with the rules on conflicts of jurisdiction recognized in Senegal;

b) The decision applied the law governing the dispute in accordance with the conflict-of-laws rules recognized in Senegal

c) The decision is, under the law of the State in which it was made, final, binding and enforceable under the law of the rendering State;

d) The parties were duly summoned, represented or declared in default;

e) The judgment is not contrary to Senegalese public policy and does not conflict with a Senegalese court judgment having the force of res judicata.

The application of Article 787 must also be read in conjunction with Article 790 of the CCP, and Articles 843, 846 et 853 of the FC. Article 790 of the CCP determines the scope of the exequatur court's review by providing that, the President of the Regional Court of the place where enforcement is limited to verifying whether the decision for which a declaration of enforceability is sought meets the conditions laid down in Article 787.

Articles 843 and 846 of the FC lay down the rules on conflicts of law relating to personal status in Senegal, particularly in matters of marriage and divorce. These provisions are relevant for determining whether the foreign court had applied the law governing the dispute according to the Senegalese choice of law rules, as required by Article 787(b). Finally, as noted above, Article 853 establishes the rules governing international direct jurisdiction o the Senegalese courts and is relevant to determining whether the foreign court exercised jurisdiction in accordance with the jurisdictional rules recognized in Senegal, as required by Article 787(a).

b) The practice of recognition and enforcement of foreign judgements in Senegal

According to the Supreme Court the conditions laid down in Article 787 were not satisfied. First the Canadian court lacked jurisdiction to order provisional measures to be enforced in Senegal. Second, the Canadian court failed to apply Senegalese law, which was applicable in accordance with the conflict-of-laws rules Articles 843 and 846 of the FC. Those provisions provide that the extra patrimonial effects of marriage as well as divorce and legal separation, are governed by the spouses' common national law where they share same nationality or where they are of different nationalities, by the law of the country where they have their common domicile at the time the proceedings are instituted. In the absence of proof of the existence of a common domicile the *lex fori* applies. Furthermore, the Court noted that nothing in the finding of the appealed order that the foreign judgment was rendered in proceedings which the parties had been duly summoned, represented or declared in default.

Adoption in the proposal for a European Parenthood Regulation

This post was written by Aukje Mens, Jurist at INEA, the Dutch expertise centre on intercountry adoption. She wrote in her own name.

Recently, an article I wrote about adoption in the proposal for a European Parenthood Regulation was published in the Dutch *Journal of Family and Youth Law* (*Tijdschrift voor Familie- en Jeugdrecht*, 2026/3). This article examines the uncertainties and gaps in the regulation of adoption and argues for an autonomous European Adoption Regulation to adequately govern international adoptions. Below is a summary in English of the article.

Introduction

On 7 December 2022, the European Commission submitted a Proposal for a European Parenthood Regulation to govern jurisdiction, applicable law, and the recognition of decisions and authentic instruments relating to parenthood (COM(2022) 695 final). Although adoption is mentioned in the proposal, it remains to a significant extent unclear which types of adoption are covered by the proposal and how these adoptions are regulated. The proposal refers to adoption in three provisions—articles 1(2), 3(2)(e) and 66(3)—while explicitly excluding international (Dutch version) or intercountry (English version) adoption from its scope (article 3(2)(e)). This raises questions concerning the proposal's formal scope, since the terms 'international adoption' and 'intercountry adoption' are not synonymous.

Furthermore, it is initially unclear which substantive forms of adoption are governed by the proposal, since this is not explicitly stated in the provisions. The explanatory memorandum and recitals provide some guidance, but in certain cases it is necessary to consult additional documents to fully understand the material scope, and even then, some aspects remain ambiguous.

The unclear formal and material scope in relation to adoptions is indicative of the inadequate regulation of international adoption law in the proposal. The proposal also remains unclear, incomplete, or even entirely silent on several other essential points. The article addresses the scope of the proposal, and then three questions: whether the proposed international jurisdiction rules and conflict-of-laws rules also apply to adoptions (point 2 below), what the legal consequences are of recognising a foreign adoption (point 3 below), and whether the proposal also governs the (recognition of) conversion of a "simple" or "weak" adoption, *i.e.*, an adoption which does not cut off the legal family ties between the child and the family of origin, into a "strong" or "full" adoption, *i.e.* an adoption which does cut off these ties (point 4 below).

1 Scope of the proposal with respect to adoption

1.1 Formal scope

a) Domestic adoptions (non-intercountry adoptions)

The proposal distinguishes between *domestic adoptions* (non-intercountry adoptions), and *intercountry adoptions*. Domestic adoptions, where the child and the adoptive parent(s) reside in the same Member State, fall implicitly within the scope, whereas intercountry adoptions—where the child is transferred across borders due to or with the purpose of the adoption—are excluded (article 3(2)(e)). This creates uncertainties, for example, in situations where one adoptive parent resides in another Member State. It is therefore recommended that the regulation explicitly apply to *non-intercountry adoptions*, after which this term should be clearly defined. In my view, this definition should include situations where one adoptive parent resides in another Member State, as long as there is no cross-border transfer of the child. Furthermore, for the sake of clarity, the regulation should also define precisely what is meant by an excluded 'intercountry adoption'.[1] However, the proposal is criticised for excluding intercountry adoptions that fall outside the 1993 Hague Adoption Convention, which could lead to "limping adoptions' within the EU, *i.e.* adoptions that are valid in one Member State, but not in another.

b) Adoptions from a Member State

Furthermore, the proposal is limited to the recognition of non-intercountry adoptions *from a Member State* and excludes adoptions from third countries (article 3(3)). However, I argue that it is conceivable that a European regulation could include recognition rules for decisions from third countries, as the EU appears to have the competence to do so.[2] A uniform recognition policy would increase legal certainty within the Union by providing a clear framework for when (adoption) decisions from outside the EU should or should not be recognised. This would eliminate the need for Member States to rely on national recognition rules and would generally prevent "limping" third-country adoptions.[3] However, the political feasibility of such rules remains questionable.

The article questions whether the proposal requires Member States to recognise a decision from another Member State that recognise a third-country adoption. The proposal does not explicitly address this issue. However, expert group reports suggest that such recognitions would not automatically circulate between Member States.[4] Since the proposal does not clearly regulate this matter, it is recommended that the Regulation specify whether it applies to these cases. Several authors, including Barth,[5] and Kohler and Pintens,[6] oppose the application of European recognition rules to recognition decisions made by Member States. In principle I oppose them too, as this could make the public policy of one Member State decisive for the others.[7] For this reason, a common European recognition policy for third-country adoptions is preferable,[8] although its political feasibility is questionable.

1.2 Material scope

a) Legal parent-child relationship

Only adoptions that establish a legal parent–child relationship are implicitly included in the proposal, so it does not seem to cover forms of care such as *kafala* or foster care.

Recital 26 refers to adoptions that establish a *permanent* parent-child relationship. This raises the question of whether the proposal only covers irrevocable adoptions, meaning adoptions that cannot be undone in the Member State where they were established. However, I believe this is not the case; rather, the intention seems to be that a genuine legal filiation bond must have been created. It is preferable that this be explicitly clarified in the proposal, as is done in het Hague Adoption Convention of 1993 (Article 2(2)), to avoid any misunderstandings.

Recital 26 further indicates that the proposal covers both "full" adoptions—which sever legal ties with the biological family—and "simple" adoptions, where those ties remain. However, this is not expressly regulated. The recitals refer to whether the "legal relationship" between the child and the family of origin is ended or maintained, but since the term "legal relationship" can be interpreted more broadly than "family-law relationship," it would be preferable to use the latter term.

The proposal is silent on whether family-law relationships are created between the child and the legal relatives of the adoptive parent(s), even though this is essential given the distinct legal consequences of adoption compared with regular parentage. The absence of any mention regarding these relevant forms of establishment might suggest that, for the purposes of the proposed regulation, it is immaterial whether they are used. However, this is not certain, and an explicit provision on this point would be preferable.

b) Judgments and authentic instruments with binding effect

According to Article 1, the proposal covers the recognition of both judicial decisions (Article 24 *et seq.*) and authentic instruments with binding legal effects (Article 36 *et seq.*). However, there is considerable uncertainty regarding the distinction between these two types of instruments, particularly as authentic instruments with binding effects presumably do not exist within the European Union.[9] With respect to adoptions, the proposal does not apply to purely contractual adoptions or those established automatically by law. However, such forms do not occur in the European Union.

c) Minor and adult adoptions

Article 4(2) indicates that the proposal covers both minor and adult adoptions, as the term ‘child’ is defined as ‘a person of any age whose parentage must be established, recognised or proved’. While the provision primarily focuses on regular parent-child relationships, if it is accepted that the proposal also applies to adoptions, then the age of the child at the time of adoption appears to be irrelevant.[10]

d) No requirements regarding the adoptive parent(s)

Finally, the proposal does not impose specific requirements regarding the status of adoptive parents. Article 4 refers to “a particular parent or parents” and “any parent”. This indicates that the proposal covers single-parent adoptions—including stepparent or partner-of-parent adoptions—as well as adoptions by two persons jointly, without setting requirements relating to the marital status or sexual orientation of the adoptive parent(s). The European Commission has thus opted for the broadest possible material scope of application in this regard.[11]

2. **International jurisdiction and applicable law**

Although the proposal clearly provides for the recognition of domestic adoptions from Member States, it remains unclear whether the rules on international jurisdiction and conflict-of-laws are applicable to adoption.

The explanatory memorandum and Recital 25 indicate that the proposal does not apply to parentage in purely domestic situations without cross-border elements, such as a domestic adoption that takes place entirely within a single Member State. In this respect, the European Commission appears to assume that non-intercountry adoptions are, by definition, domestic cases without any cross-border aspect. However, this assumption is demonstrably incorrect. In fact, a non-intercountry adoption may well have an international character, for example, where the adopted child and/or the adoptive parent(s), though habitually resident in the same Member State, hold the nationality of another Member State or a third country. In such cases, there is in fact an *international* non-intercountry adoption, which raises questions about whether the court addressed has international jurisdiction to decide on the adoption request and which law should be applied. These questions of jurisdiction and applicable law seem to be left out, however.

Nevertheless, scholars suggest that the proposed international jurisdiction and conflict-of-law rules do apply to adoptions.[12] However, some of them argue that these rules are unsuitable for adoptions, as they are not primarily designed to prioritise the best interests of the child or to grant jurisdiction to the court best placed to assess those interests.[13]

The prevailing opinion in the literature thus seems to be that the proposed international jurisdiction and conflict-of-law rules do indeed apply to adoptions but are nevertheless unsuitable. In my view, however, this position cannot be reconciled with the wording of the regulation, its explanatory memorandum and the recitals. My conclusion is therefore that these rules are not applicable to adoptions. They are clearly drafted solely for regular parentage relationships. Although the European Commission sought to regulate the recognition of non-intercountry adoptions from a Member State under the regulation, it has otherwise left international adoption law untouched. Since there appears to be differing views on this matter, clarity is needed on this point.[14] There should be specific private international law rules on adoption.

3. **Legal effects of recognising foreign adoptions**

The proposal does not explicitly address the legal effects of recognising a foreign adoption, leaving unclear what exactly is recognised. Case law of the Court of Justice of the European Union suggests that a recognised decision must be granted the same authority and effect as in the Member State of origin (*Hoffman/Krieg*; *Apostolides/Orams*; *Prism Investments/v/d Meer*; *Gothaer Allgemeine Versichering/Samskip*; *BNP Paribas SA/TR*). But what does this mean for the recognition of an adoption?

It goes without saying that recognition should at the very least include the legal parent-child relationship between the child and the adoptive parent(s), since establishing such legal relationships is the fundamental aim of the proposal.

Nevertheless, it seems desirable that this be explicitly clarified, so that there can be no doubt—especially in the case of simple adoption.

But does it end there? Should the creation of new family-law ties between the child and the legal relatives of the adoptive parent(s), as well as the possible severance of the original family-law relationships, also be recognised under the proposal, or are these legal consequences left to the ordinary law of the Member States? Perhaps the previously mentioned principle of the Court of Justice can or should be interpreted broadly, so that these legal consequences must also be recognised when they have arisen in the Member State where the adoption was pronounced. However, whether this is the case remains uncertain.

The foregoing leads me to conclude that an explicit provision is necessary, clearly stating the legal consequences of recognising either a full or simple adoption for the legal parentage of the individuals concerned. This is essential to prevent Member States from taking divergent approaches, which could result in inconsistent or limping family law relationships across borders. In my view, it should simply be stipulated that the recognition of a foreign adoption means that *all* legal consequences for the lineage of those concerned are recognised—no more, no less. Such a provision is not only essential for achieving the objectives of the proposal, namely legal certainty and predictability—but is also dogmatically necessary.[15] By its very nature, adoption concerns both the creation of new family-law relationships and the possible dissolution of existing ones, and, consequently, the recognition of a foreign adoption also pertains to these aspects.[16] In short, if new family-law ties have been established between the child and the legal relatives of the adoptive parent(s) in the Member State where the adoption took place, or if the original family-law relationships have been severed there, then not only should the legal parent-child relationship between the child and the adoptive parent(s) be recognised, but these additional legal consequences should be recognised as well. Other possible legal consequences, such as those relating to parental authority, maintenance, name and inheritance, do not fall within the scope of the concept of adoption and therefore remain governed by their own private international law rules. This aligns with Article 3(2) of the proposal, which states, among other things, that the regulation does not apply to parental responsibility (subsection b), maintenance obligations (subsection f) and succession (subsection g).

4. **Conversion of simple adoptions into full adoptions**

The proposal does not explicitly address the conversion of simple adoptions into full adoptions, an important issue in adoption law whereby original family-law ties are severed. Although the EU lacks competence to regulate substantive family law, it may be able to adopt at least recognition rules for conversion decisions. The absence of such rules may lead to legal uncertainty about a child’s legal parentage across Member States, which may also affect the child’s identity development. Greater clarity and regulation in this area are therefore necessary.

By way of conclusion: argument for an autonomous European Adoption Regulation

In the article I argue that the current proposal insufficiently accounts for the special nature and legal consequences of adoption. International adoptions merit an autonomous and clear regulation within European private international family law. A separate European Adoption Regulation would provide space to address adoption-specific issues such as recognition, conversion, jurisdiction, and conflict-of-law rules. Common recognition rules are necessary to prevent “limping adoptions” and to enhance legal certainty for all parties involved. Although political feasibility poses challenges, a separate regulation is seen as the most effective way to regulate international adoptions within the EU.

In sum, the proposed European Parenthood Regulation insufficiently regulates adoption and fails to acknowledge the unique legal consequences associated with it. International adoptions require an autonomous European Adoption Regulation that offers room for careful and effective governance, with the aim of ensuring legal certainty and predictability for all involved, in particular the children.

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[1] See also European Group for Private International Law (EGPIL), *Observations on the Proposal for a Council Regulation in matters of Parenthood*, 2023, https://gedip- egpil.eu/, p. 2, no 7, and C. Budzikiewicz e.a., *The Marburg Group’s Comments on the European Commission’s Parenthood Proposal*, Cambridge: Intersentia 2024, https://epub.ub.uni- muenchen.de/, pp. 10- 11.

[2] See also A. Bonomi, 'European private international law and third states', *IPRax* 2017, pp. 190- 191; D. Martiny, 'The recognition and enforcement of court decisions between the EU and third states', in: A. Trunk & N. Hatzimihail (red.), *EU civil procedure law and third countries. Which way forward?*, Baden- Baden: Nomos Verlagsgesellschaft 2021, pp. 129- 130 en 138.

[3] Compare Bonomi 2017, pp. 190- 191, and Martiny 2021, p. 132 (note 3). See also S.M. Carbone, 'What about recognition of third states' foreign judgments?', in: F. Pocar, I. Viarengo & F.C. Villata (red.), *Recasting Brussels I*, Milaan: Cedam 2012, p. 301 en W. Hau, 'Unified European rules on the recognition and enforceability of third- country judgments', *Law & Criminology Journal* 2025, par. 3.

[4] Minutes of 7 February 2022, of the 5th Meeting of the Expert Group on the recognition of parenthood between Member States, 2 December 2021, and Minutes of 20 February 2022, of the 6th Meeting of the Expert Group on the recognition of parenthood between Member States, 9 February 2022.

[5] M. Barth, 'Parent in every country? – Der Kommissionsvorschlag einer EU Abstammungs- VO mit Europäischem Elternschaftszertifikat', *Studentische Zeitschrift fur Rechtswissenschaft Heidelberg Wissenschaft online* 2023, p. 26.

[6] C. Kohler & W. Pintens, 'Entwicklungen im europäischen Personen-, Familien- und Erbrecht 2022- 2023', *FamRZ* 2023, p. 13, note 15.

[7] Compare C.G. van der Plas, A.F. Veldhuis & B.H.B. Verheul, 'Automatische erkenning en tenuitvoerlegging van vonnissen in het Europa van nu: de noodzaak van een nieuwe blik op wederzijds vertrouwen na *J/H Limited', NIPR* 2024, p. 263.

[8] See also C. González Beilfuss & I. Pretelli, 'The proposal for a European Regulation on Filiation Matters – Overview and Analysis', *Yearbook of Private International Law* 2022/2023, p. 292.

[9] Marburg Group 2024, p. 77 (note 1); C. Mayer, 'Keine verfahrensrechtliche Anerkennung von beurkundeten oder registrierten familienrechtlichen Rechtsgeschäften innerhalb der EU', *RabelsZ* 2025, p. 753 *et seq*.

[10] See also P. Twardoch, 'Regulating international filiation law at the EU- level. Comments on applicable law under the European Commission's Proposal',

European Review of Private Law 2024, p. 276.

[11] See also D. Danieli, '"Third- state connections" in the proposal for an EU Regulation on parenthood: More than a regime of circulation of status between member states?', *Cuadernos de Derecho Transnacional* 2023, p. 1392- 1393.

[12] González Beilfuss & Pretelli 2022/2023, p. 291 en 296 (note 8); A. Fillers, 'Proposal for the Regulation in matters of Parenthood: A critical overview of jurisdiction and conflict- of- laws rules', in: *Revisiting the limits of freedom while living under threat. I*, Collection of research papers in conjunction with the 9th International Scientific Conference of the Faculty of Law of the University of Latvia, 2024, p. 227; Marburg Group 2024, p. 50-51 (note 1); Twardoch 2024, p. 275- 276 (note 10); I. Queirolo, 'The proposed EU Regulation on Parenthood: A critical overview of the rules on jurisdiction', *The European Legal Forum* 2024, p. 3.

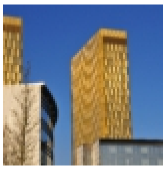
[13] Beilfuss & Pretelli 2022/2023, p. 291 (note 8); Observations EGPIL 2023, p. 1, No 4 (note 1); Fillers 2024, p. 228 *et seq.* (see note 12); Marburg Group 2024, p. 50-51 (note 1).

[14] See also Twardoch 2024, p. 289 (see note 10).

[15] A. Mens, *Erkenning en omzetting van buitenlandse adopties in Nederland. Over de betekenis van beide fenomenen in het Nederlandse internationaal privaatrecht*', diss. 2024, par. II.3.2.2.1.

[16] Ibid, par. II.1.3.2, II.3.2.2.1, III.1.3.2, III.4.3.2, and III.6.3.2.

Copyright, Targeting and Geo-Blocking: The CJEU Stirs the Pot



By Graham Smith, Of Counsel, Bird & Bird LLP, London, UK

The CJEU's recent copyright decision in *Anne Frank* endorses state of the art geo-blocking as an effective way of shielding a website from the different copyright laws of another EU Member State. Although the result on the facts is welcome, the potential implications of the Court's underlying reasoning are less so. At a principled level, the judgment creates post-Brexit divergence with the UK courts' targeting approach to cross-border online copyright infringement.

The EU Position

The *Anne Frank* case concerns a scholarly digital edition of the Anne Frank diaries made available free of charge on a website in Belgium, a country in which copyright in the full diaries has expired. The website owner geo-blocked countries, including the Netherlands, in which parts of the diaries are still in copyright.

Geo-block notwithstanding, the owner of copyright in the diaries (the Anne Frank Fund) sued those involved in the Belgian website project (the Anne Frank Foundation, the Dutch Royal Academy and a Belgian association) in the Dutch courts for infringement of Dutch copyright (specifically, the communication to the public right). The Dutch Supreme Court (Hoge Raad) referred three questions about cross-border copyright infringement to the CJEU.

The Hoge Raad's first question raised the issue of whether a targeting test, familiar from CJEU caselaw on other territorial intellectual property rights, should be applied to the copyright communication to the public right:

> *"Is Article 3(1) of [Directive 2001/29] to be interpreted as meaning that the publication of a work on the internet is only to be regarded as a communication to the public in a particular country if the publication is addressed to the public in that country? If so, what factors must be considered in assessing that?"*

(The unfamiliar term 'addressed' in the first question looks like a quirk of translation. The Dutch language originals use 'gericht', which appears to translate readily into the familiar 'directed' or 'targeted'.)

The CJEU, however, did not give a direct answer to that question. By dint of the time-honoured device of reframing and combining the referring court's questions, it rolled the territoriality question into the labyrinth of its previous substantive jurisprudence on communication to the public. None of that case law was concerned with a cross-border question.

The operative part of its judgment concluded that where a work is in the public domain in some EU Member States but is still in copyright in another, and is published free of charge on a website that implements state of the art geo-blocking designed to prevent access by users from that other Member State, there is no communication to the public under the copyright law of that other Member State. That is the case even if internet users can circumvent the geo-blocking by means of a VPN or similar service.

That is a highly fact-specific formulation. What of the corollary? Does it follow that a website that does not implement geo-blocking necessarily engages the communication to the public right in another Member State? That would imply that mere accessibility of a website on the internet is sufficient to engage the communication to public right of another country; or, which comes to the same thing, that targeting is to be inferred from not geo-blocking.

The CJEU addresses the fact-specific corollary at para 42:

> *"Indeed, where a work is protected by copyright in only one Member State but is in the public domain in other Member States, any person who knows or ought reasonably to have known that to be the case … and who publishes the work on a website must ensure that that work is made accessible only to internet users who are liable to access that website from Member States in which the work is in the public domain, so as not to infringe the exclusive and inexhaustible [communication to the public] right of the copyright holder … in the Member State in which the work is still protected."*

It goes on:

> *"It follows that such a person is under an obligation to adopt effective*

> *technological measures to restrict access to the website solely to those internet users, failing which, given the freely accessible nature of websites, that person would be giving access to the work concerned to all internet users and would thus be infringing that right."*

That starts from either mere accessibility or targeting inferred from lack of geo-blocking, but with the added condition of actual or constructive knowledge of continuing copyright protection in the other Member State. The Court borrowed the knowledge requirement from its CTP jurisprudence on hyperlinks to infringing material on the internet (*G S Media*).

It is unclear whether an equivalent knowledge condition (or indeed some other condition or factor plucked from the CJEU's voluminous CTP caselaw) would apply in other cross-border factual situations. Nor is it clear whether the CJEU's approach would apply to websites located in countries outside the EU.

What can be said is that the Court did not apply the conventional targeting test. Targeting requires evidence of positive conduct directed towards the country in question before its local law can be engaged. To the extent that mere accessibility, or targeting inferred from lack of geo-blocking, underlies the CJEU's reasoning, that either rejects or inverts the targeting test.

The UK position

The *Anne Frank* judgment opens up a post-Brexit divergence of principle with the UK. Five years ago the Court of Appeal in *TuneIn* [2021] EWCA Civ 441 applied the CJEU's well known intellectual property targeting caselaw to the copyright CTP right:

> *"…the internet is global and users in the UK can, in the absence of geo-restriction, access websites hosted, and content posted on or streamed from such websites, from anywhere in the world. Intellectual property rights, however, are territorial. At least in the case of copyright and similar rights and trade marks, the CJEU has held that accessibility of a website from a Member State is not sufficient to give rise to an infringement of rights conferred by the law of that State, and that the relevant act must be targeted at that State: see [L'Oréal v eBay [2011] (trade marks), Donner [EU:C:2012:370] (copyright) and Football Dataco v Sportradar [EU:C:2012:642] (database right)]. This case law*

has been applied in this jurisdiction to communication to the public: EMI Records Ltd v British Sky Broadcasting Ltd [2013] EWHC 379 (Ch).

The principle is clear: mere accessibility is not sufficient. Nor, it follows, can a website be inferred to be targeting a country by reason of not geo-restricting. That would be mere accessibility in a different guise. (The *Donner* case, to be clear, concerned the copyright distribution right, which is separate from the communication to the public right.)

The status of targeting as a prior threshold condition is well illustrated in Birss J's (as he then was) first instance judgment in *TuneIn*:

"I will address [targeting] first because if TuneIn does not target the UK then UK copyright is not engaged at all." [15]

That fundamental territoriality point (subsequently endorsed by the Court of Appeal) is obscured in the CJEU's approach of combining the Hoge Raad's first question with consideration of substantive CTP law. None of the CJEU caselaw on targeting and the territoriality of IP rights relied on by the Court of Appeal is mentioned in the *Anne Frank* judgment.

In the context of trade marks, the UK Supreme Court in *Lifestyle Equities v Amazon* [2024] UKSC 8 summarised the rationale for the targeting test:

"Led by the CJEU, EU jurisprudence has sought to chart a safe course between the Scylla of watching trade mark protection become entirely illusory in the context of internet marketing and sale, and the Charybdis of creating an exorbitant and unprincipled extension into the international sphere of the territorial jurisdiction to protect trade marks. It has done so by reference to two separate concepts. The first is by treating the advertisement and offering for sale of branded goods in a way which is targeted at a protected territory as a use of the mark in the targeted territory. …"

The CJEU in *Anne Frank* justified its conclusion in para 50:

"a [state of the art geo-blocking] measure serves to ensure a fair balance between, on the one hand, the interest of the rightholder in his or her work not

> *being freely accessible in the Member States in which he or she still has an exclusive and inexhaustible right to authorise or prohibit any communication of the work to the public under Article 3(1) and (3) of Directive 2001/29 and, on the other hand, the interest of any third party in making the work freely accessible online free of charge in the Member States in which the work is in the public domain as well as the public's interest in enjoying such access in those Member States, in accordance with both the freedom of expression and the freedom of information."*

However, that recitation of balancing factors appears to assume the conclusion that the legitimate interest of the rightholder is in restraining mere accessibility cross-border. In any event it does not explain why an approach that the CJEU has applied to other territorial intellectual property rights is not appropriate for the copyright CTP right.

Whatever the precise reasoning that may underlie it, the CJEU judgment in *Anne Frank* is for the moment the leading authority on the cross-border aspects of the communication to the public right within the EU. As for the UK courts, as a general matter they are not bound to follow new CJEU judgments although they may have regard to them. However, in any event the formal precedential status of the Court of Appeal judgment in *TuneIn* applying targeting is not altered by the CJEU judgment.

Graham Smith is writing in his personal capacity and opinions expressed are his personal opinions.