International tech litigation reaches the next level: collective actions against TikTok and Google

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Introduction

We have reported on the Dutch WAMCA procedure for collective actions in a number of previous blogposts. This collective action procedure was introduced on 1 January 2020, enabling claims for damages, and has since resulted in a stream of (interim) judgments addressing different aspects in the preliminary stages of the procedure. This includes questions on the admissibility and funding requirements, some of which are also of importance as examples for the rolling out of the Representative Action Directive for consumers in other Member States. It also poses very interesting questions of private international law, as in particular the collective actions for damages against tech giants are usually international cases. We refer in particular to earlier blogposts on international jurisdiction in the privacy case against *TikTok* and the referral to the CJEU regarding international jurisdiction under the Brussels I-bis Regulation in the competition case against *Apple.*

In this blogpost we focus on two follow-up interim judgments: one in the collective action against TikTok entities and the other against Google. The latter case is being discussed due to its striking similarity to the case against Apple.

The next steps in the *TikTok* collective action

The collective action against *TikTok* that was brought before the Amsterdam District Court under the Dutch WAMCA in 2021. Three representative organisations brought the claim against seven *TikTok* entities located in different countries, on the basis of violation of the Code of Conduct of the Dutch Media Act

and the EU General Data Protection Regulation (GDPR). The series of claims include, among others, the destruction of unlawfully obtained personal data, the implementation of an effective system for age registration, parental permission and control, measures to ensure compliance with the Dutch Media Act and the GDPR as well as the compensation of material and immaterial damages.

In an earlier blogpost we reported that the Amsterdam District Court ruled that it had international jurisdiction under the Brussels I-bis Regulation and the GDPR. In the follow-up of this case, the court reviewed the admissibility requirements, one of which concerns the funding and securing that there is not conflict of interest (see Tzankova and Kramer, 2021). This has led to another interim judgment focusing on the assessment of the third party funding agreement as two out of the three claimant organisations had concluded such agreement, as reported on this blog here. In short, the court conditioned the admissibility of the representative claimant organisations on amendments of the agreement with the commercial funder due to concerns related to the control of the procedure and the potential excessiveness of the fee. The court provided as a guideline that the percentage should be determined in such a way that it is expected that, in total, the financers can receive a maximum of five times the amount invested.

On 10 January 2024 the latest interim judgment was rendered. Without providing further details the Amsterdam District Court concluded that the required adjustments to the funding agreement had been made and that the clauses that had raised concern had been deleted or amended. It considered that the independence of the claimants in taking procedural decisions was sufficiently guaranteed. The court declared the representative organisations admissible, appointing two of them as Exclusive Representative (one for minors and the other for adults) based on their experience, the number of represented people they represent, their collaboration and support. The court confirmed its statement made in a previous interim judgment that the claim for immaterial damages is inadmissible as that would require an assessment per victim, which it considered impossible in a collective action. This is admittedly a setback for the collective protection of privacy rights, notably similar to the one following the 2021 United Kingdom Supreme Court ruling in *Lloyd* v *Google*.

With this last interim judgment the preliminary hurdles have been overcome, and the court proceeded to provide further guidelines as to the opt-out and opt-in as the next step. The WAMCA is an opt-out procedure, but to foreign parties in

principle an opt-in regime applies. The collective action was aimed representing people in the Netherlands, but was extended to people who have moved abroad during the procedure, and these are under the opt-in rule. The information on opt-out and opt-in will be widely published.

It remains to be seen how the case will progress considering the further procedural decisions and the assessment on the merits.

The claim against Google and its private international law implications

Another case with an international dimension is the collective action for damages against Google that was filed under the WAMCA, alleging anticompetitive practices concerning the handling of the app store (DC Amsterdam, 27 December 2023, ECLI:NL:RBAMS:2023:8425; in Dutch). This development comes amidst a landscape marked by high-profile antitrust collective actions with international dimensions, such as the one filed against Apple, in which there is an ongoing legal battle regarding Apple's alleged anticompetitive behavior in the market for app distribution and in-app products on iOS devices. Cases like these are either pending before courts or under investigation by competition authorities worldwide, reflecting a broader global trend towards increased scrutiny of antitrust practices in the digital marketplace.

In the present case, the claimant organisation argues that the anticompetitive nature of Google's business stems from a collection of practices rather than an isolated practice. Such a collection of practices would shield Google from nearly all possible competition and allow it to charge excessive fees due to its dominance in the market. The practices that, taken together, form this anticompetitive behaviour are essentially:

(i) The bundling of pre-installed apps, including Google's Play Store, with the licensing of the Android operating system to the manufacturers of smartphones;

(ii) The imposition that transactions related to the Play Store be undertaken only within Google's own payment system;

(iii) The charging of a fee of 30% from the app's developer, which the claimant organisation deems abusive and only possible due to Google's dominant position created by the abovementioned practices.

Based on these allegations, the claimant organisation accuses Google of engaging in mutually exclusive and exploitative practices, thereby abusing a dominant position in a manner contrary to Article 102 TFEU. This case unfolds within a broader global context where antitrust actions against Google's Play Store, its payment system, and the bundling with the Android operating system have gained significant momentum. Just last December, Google reached a settlement in a multidistrict litigation involving all 50 states of the United States, the District of Columbia, Puerto Rico, and the Virgin Islands. The settlement addressed issues very similar to those raised in this case, as explicitly outlined in the agreement. The Competition and Markets Authority in the United Kingdom is also conducting an antitrust investigation into these aspects of Google's operations. Furthermore, the practice of pre-installing Google apps as a requirement for obtaining a license to use their app store is under investigation by the Brazilian Competition Authority.

From a private international law perspective, this case closely resembles another one against Apple referred to the CJEU by the District Court of Amsterdam and discussed earlier in this blog, in which similar antitrust claims were raised due to the handling of the app store and the exclusionary design of the respective payment system. However, unlike the collective action against Apple, in this case the District Court of Amsterdam clearly did not refer the case to the CJEU and instead decided by itself whether it had jurisdiction to hear the claim. And again, like the Apple case, the court was called upon to decide on both international jurisdiction and its territorial jurisdiction within the Netherlands.

International jurisdiction

The collective action under the Dutch WAMCA in the Google case was filed against a total of eight defendants. Two of the defendants (Google Netherlands B.V. and Google Netherlands Holdings B.V.) against whom the claim was filed are established in the Netherlands, and for them the standard rule of Article 4 Brussels I-bis Regulation applies. There are also three other defendants (Google Ireland Limited, Google Commerce Limited, and Google Payment Ireland Limited) established in another EU Member State, namely Ireland. With regards to these defendants, the court also assessed whether it had jurisdiction based on the Brussels I-bis Regulation. Finally, there are three defendants based outside of the EU – Alphabet Inc. and Google LLC in the United States and Google Payment Limited in the United Kingdom. Jurisdiction with regards to these defendants

based outside of the EU was established under the pertinent rules contained in the Dutch Code of Civil Procedure (DCCP).

The court initiated its assessment by recognizing that, due to the lack of jurisdiction rules specifically addressing collective actions in both the Brussels I-bis Regulation and the Dutch Code of Civil Procedure, the standard rules within these frameworks should be applied. The court's reasoning was based on the established principle that no differentiation exists between individual and collective actions when determining jurisdiction. The court primarily conducted its assessment regarding whether the Netherlands could be considered the *Erfolgsort* under Article 7(2) of the Brussels I-bis Regulation, mostly *ex officio*, as this was not a point of contention between the parties.

The court's view is that the criteria from Case C-27/17 *flyLAL-Lithuanian Airlines* (ECLI:EU:C:2018:533) should be applied, according to which the location of the market affected by the anticompetitive practice is the *Erfolgsort*. The location of the damage is where the initial and direct harm occurred, which primarily involves users overpaying for purchases made on the Play Store. In the present case the court, applying such criteria, decided that the Netherlands can be considered the *Erfolgsort*, given that the claimant organisation represents users that make purchases and reside in the Netherlands. This reasoning is very similar to the one used by the District Court of Amsterdam in deciding to refer the Apple case to the CJEU.

Territorial jurisdiction within the Netherlands

With regards to the jurisdiction of the District Court of Amsterdam to hear this collective action in which the claimant organisation sues on behalf of all the users residing in the Netherlands, the decision contains an assessment starting from the CJEU ruling in Case C-30/20 *Volvo* (ECLI:EU:C:2021:604). Such ruling states that Article 7(2) Brussels I-bis Regulation grants jurisdiction over claims for damages due to infringement of Article 101 TFEU to the court where the goods were purchased. If purchases were made in multiple locations, jurisdiction lies with the court where the alleged victim's registered office is located.

In the case at hand, given the mobile nature of the purchases, it is not possible to pinpoint a specific location. However, under the criteria just mentioned, the District Court of Amsterdam has jurisdiction over the victims' registered offices

for those residing in Amsterdam in accordance with both Article 7(2) Brussels I-bis Regulation (Google Ireland Limited, Google Commerce Limited, and Google Payment Ireland Limited) and the similar provision in Article 102 DCCP (Alphabet Inc., Google LLC, and Google Payment Limited).

For users residing elsewhere in the Netherlands, the parties agreed that the District Court of Amsterdam would serve as the chosen forum for users who are not based in Amsterdam. The court decided that, with regards to Alphabet Inc., Google LLC, and Google Payment Limited, this is possible under Article 108(1) DCCP on choice of court. As to Google Ireland Limited, Google Commerce Limited, and Google Payment Ireland Limited, the court interpreted Article 7(2) Brussels I-bis Regulation in light of the principle of party autonomy (see Kramer and Themeli, 2016) as enshrined in Recitals 15 and 19, as well as Article 25 Brussels I-bis Regulation. The court also noted that no issues concerning exclusive jurisdiction arise in the present case and made a reference to the rule contained in Article 19(1) Brussels I-bis Regulation according to which the protective rule of Article 18 Brussels I-bis Regulation can be set aside by mutual agreement during pending proceedings.

Finally, the court decided that centralising this claim under its jurisdiction is justified under the principle of sound administration of justice and the prevention of parallel proceedings. In the court's understanding, the goal of Article 7 Brussels I-bis Regulation is to place the claim before the court that is better suited to process it given the connection between the two and, given that the mobile nature of the purchases gives rise to damages all over the Netherlands, such a court would be difficult to designate. Hence the need for respecting the choice of court agreement.

Applicable law

The court established the law applicable to the present dispute under Article 6(3)(a) Rome II Regulation. The court used the same reasoning it had laid out to establish jurisdiction in the Netherlands as the *Erfolgsort*, since it is the market affected by the alleged anticompetitive practices where the users concerned reside and made their purchases. The court also considered the claimant organization's argument that, according to Article 10(1) of the Rome II Regulation, the Dutch law of unjust enrichment could govern the claim. Although the court did not provide extensive elaboration, it agreed with this view.

Funding aspects of the claim against Google

Lastly, in a naturally similar way as regarding the TikTok claim explained above, the court assessed the funding arrangements of the claim against Google under the requirements set by the WAMCA. The court took issue with the fact that the funding arrangement entered by the claimant organisation is somewhat indirect, since it is apparent that the funder itself relies on another funder which is not a part of the agreement presented to the court. Under these circumstances, the court deems itself unable to properly assess the claimant organisation's independence from the "actual" funder and its relationship with the remuneration structure.

For this reason, the court ordered the claimant organisation to resubmit the agreement, which it is allowed to do in two versions. One version of the agreement will be presented in full and will be available to the court only, to assess it in its entirety. The other version, also available to Google, will have the parts concerning the overall budget for the claim concealed. However, the parts concerning the funder's compensation share must remain legible for discussion around the organisation's independence from the funder, and confirmation that such agreement reflects the whole funding arrangement of the claim was also required.

Turning Point: China First Recognizes Japanese Bankruptcy Decision

This post is written by Guodong Du and Meng Yu and published at China Justice Observer. It is reproduced here by kind permission of the authors.

Key takeaways:

- In September 2023, the Shanghai Third Intermediate People's Court ruled to recognize the Tokyo District Court's decision to commence civil rehabilitation proceedings and the order appointing the supervisor ((2021) Hu 03 Xie Wai Ren No.1).
- This marks not only the first time that China has recognized a Japanese court's decision in a bankruptcy procedure, but also the first time that China has recognized a Japanese judgment.
- The case establishes a legal precedent for cross-border bankruptcy decisions, demonstrating that prior non-recognition patterns between China and Japan in civil and commercial judgments may not apply in such cross-border scenarios.
- While not resolving the broader recognition challenges between the two nations, this acknowledgment sends a positive signal from the Chinese court, hinting at potential future breakthroughs and fostering hope for improved legal cooperation.

This marks not only the first time that China has recognized a Japanese court's decision in a bankruptcy procedure, but also the first time that China has recognized a Japanese judgment (See the Chinese Court Ruling (2021) Hu 03 Xie Wai Ren No.1 ((2021)?03???1)).

Related Posts:

- China Recognizes Another German Bankruptcy Judgment in 2023
- How Chinese Judges Recognize Foreign Bankruptcy Judgments
- The First Time Chinese Court Recognizes Singapore Bankruptcy Judgment

The Japanese law firm Nagashima Ohno & Tsunematsu, representing a Japanese company, applied to the Tokyo District Court to initiate civil rehabilitation proceedings (a type of restructuring-type bankruptcy procedure under Japanese bankruptcy law). According to the application, the Tokyo District Court decided to commence civil rehabilitation proceedings and appointed a supervisor to monitor the debtor's activities.

As the Japanese company had certain assets in Shanghai, to facilitate the smooth progress of the civil rehabilitation proceedings in Japan, the company filed an application with the Shanghai Third Intermediate People's Court (the "Shanghai

Court"), requesting recognition of the Tokyo District Court's to commence civil rehabilitation proceedings and the order appointing the supervisor. Nagashima Ohno & Tsunematsu provided legal opinions on relevant Japanese laws during the recognition process.

On 6 Sept. 2023, the Shanghai Court made a ruling recognizing the Japanese company's civil rehabilitation proceedings and the identity of the supervisor, and allowing the supervisor to monitor the company's self-management of property and business affairs within China under certain conditions.

In reviewing whether there was a reciprocal relationship between China and Japan in recognizing bankruptcy decisions, the Shanghai Court found that:

(1) Both sides have precedents of refusing to recognize each other's civil and commercial judgments, but these precedents do not necessarily apply to cross-border bankruptcy cases;

(2) According to Japanese laws, there are no legal obstacles to the recognition of Chinese bankruptcy decisions by Japanese courts, which confirms the existence of a reciprocal relationship between China and Japan in the recognition of cross-border bankruptcy cases.

This is the first time that China has recognized a decision made by a Japanese court in bankruptcy proceedings.

China and Japan have been at an impasse regarding the mutual recognition and enforcement of judgments. For more details, please read our earlier post *How to Start the Recognition and Enforcement of Court Judgments between China and Japan?*.

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- Some Thoughts on the Sino-Japanese Reciprocal Recognition Dilemma in Light of the Recent Developments in the Recognition and Enforcement of Foreign Judgments in China
- How to Start the Recognition and Enforcement of Court Judgments between China and Japan?

According to the Shanghai Court's statement, this case does not mean that the impasse between China and Japan has been broken, but it does send a positive

signal from the Chinese court regarding Japanese judgments. We look forward to further breakthroughs between the two sides.

We have not yet obtained the original text of the judgment made by the Shanghai Court in this case. The above case information is from the website of Fangda Partners, the Chinese law firm representing the Japanese company in this case.

Another case commentary can be found here on the website of the Asian Business Law Institute (ABLI).

Disentangling Legal Knots: Intersection of Foreign Law and English Law in Overseas Marriages

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Introduction:

In a recent judgment *Tousi v Gaydukova* [2024] EWCA Civ 203, the Court of Appeal dealt with the issue of the relevance of foreign law to the remedy available under English law in respect of an overseas ceremony of marriage. Earlier the High Court had held that the foreign law determines not only the validity or invalidity of the ceremony of marriage but also the ramifications of the validity or invalidity of the ceremony. The Court of Appeal disagreed and reiterated the rule that *lex loci celebrationis* is limited to the determination of the validity or invalidity of the ceremony of marriage. Therefore, English law will apply to provide a remedy or relief upon the breakdown of the relationship of the parties to a marriage ceremony that took place abroad.

In this comment, I argue that the judgment of the Court of Appeal conflates the distinction between the formal recognition of the relationship under the foreign law and the relief available thereto. The judgment of the Court of Appeal does not appreciate this distinction along with the distinction between the void marriage and 'non-qualifying ceremony' of marriage, which does not entitle the parties to any remedy or financial relief under the law in England and Wales.

The Facts:

The ceremony of marriage between the parties, an Iranian husband and a Ukrainian wife, took place at the Iranian Embassy in Kyiv on 12 December 1997 in the presence of two official witnesses. The marriage was not registered with the state authorities in Ukraine. The parties knew about the requirement of the registration of their marriage for its validity, but the husband refused to cooperate with the wife when she attempted to register the marriage. In 2000, the parties moved to the UK for the husband to study for a PhD. The Home Office granted entry clearance to the wife as the spouse of the husband. In 2010, the parties were granted the tenancy of a property in their joint names, but they separated in December 2019. In April 2020, the wife applied for non-molestation and occupation orders. The court granted a non-molestation order *ex parte* but refused an occupation order and observed that the wife could apply for the transfer of the tenancy. Therefore, the wife applied for the transfer of tenancy of the former matrimonial home into her sole name.

The wife made the application under section 53 and Schedule 7 of the Family Law Act 1996 which empowers the court to transfer a tenancy to cohabitants. Paragraph 3 of Schedule 7 of the Act authorises the court to make such orders when cohabitants cease to cohabit. It is a curious aspect of this Act, that it puts a cohabitant applicant in a better position than a married applicant, who must wait until the court terminates their marriage, before their application can be heard. The court granted a transfer of tenancy to the wife by regarding her as a cohabitee because the marriage of the parties was not registered under Ukrainian law and hence it was not recognised under English law, not even as a void marriage.

The husband filed an appeal on the ground that the parties had entered into a

marriage which was capable of recognition under English law. The wife argued that the court should regard the unregistered marriage as a 'non-marriage' which does not entitle the parties even to a nullity order under the Matrimonial Causes Act 1973 (MCA). Mostyn J addressed this single point of appeal in his detailed judgment at the High Court Family Division. He rejected the appeal after holding that the marriage ceremony did not qualify even as a void marriage and therefore, the couple were unmarried cohabitants because Ukrainian law did not recognise their marriage ceremony.

In his judgment, Mostyn J criticised the judicial creation of 'non-qualifying ceremony' (NQC) by the Court of Appeal in *AG v Akhter and Others* [2020] EWCA Civ 122 for its direct conflict with that statute [s. 11 of the MCA 1973]' which extends financial relief even to void marriages to protect the rights of spouse. In highlighting the impact of the category of the NQC on the legal recognition of foreign marriages under English law, he held that foreign law determines not only the validity of a ceremony of marriage, but also the ramifications of the validity or invalidity of the ceremony.

Ruling and Comments:

Earlier, Mostyn J had observed that it is "well established under our rules of private international law that the formal validity of a marriage celebrated overseas (*forma*) is governed by the *lex loci celebrationis*" [para 65]. He held that "If the foreign law not only determines the question of validity, but also determines the ramifications of invalidity (if found), then in my judgment that corollary should also be binding, provided that it is not obviously contrary to justice." [para 68]

At the Court of Appeal, Moylan LJ observed, "The effect of the judge's approach … was that the relief available under the foreign law should determine … the relief available under English law." [para 29]. This, according to Moylan LJ was wrong because "the relief available, or not available, is determined by the law governing the dissolution and annulment of marriages, not the law governing the formation of marriages." [para 35]. In this case however the issue was not related to "the dissolution and annulment of marriages" because both Mostyn J and Moylan LJ agreed that the ceremony of marriage of the parties did not "qualify" as a

marriage and hence did not require to be dissolved or annulled because it did not have any legal effect at all. Therefore, the main issue in this case was whether Ukrainian law recognised the marriage ceremony that took place at the Iranian embassy in Kyiv. Both judges found that Ukrainian law did not recognise the marriage ceremony, not even as a void marriage and hence did not provide any remedy or relief.

It is important to note that the judges of the Court of Appeal did not appreciate that there is a third stage between the validity of marriage and relief on breakdown of marriage, and it is the stage of legal recognition or non-recognition of a marriage as valid, void or non-marriage. For instance, in *Hudson v Leigh* [2009] EWHC 1306, South African law recognised the ceremony as a void marriage; and in *Asaad v Kurter* [2013] EWHC 3852, the ceremony could be subsequently ratified, but a similar option was not available under Ukrainian law. Ukrainian law however recognised since 2002 a "so-called in-fact marriage relations" which provided the parties with rights and remedies in respect of property acquired during their cohabitation. Similar provisions are available for the transfer of tenancy but not for the provision of other financial relief under English law.

Moylan LJ highlighted that "there is a fundamental distinction between the law governing the formation of marriages and the law governing the dissolution and annulment of marriages. The remedies or relief which might be available under the latter are distinct from former." [para 73]. This binary distinction however does not cater to the situations where "the law governing the formation of marriages" regards the marriage ceremony as "non-qualifying ceremony" and hence "the law governing the dissolution and annulment of marriages" does not provide any "remedies or relief". In *Hudson v Leigh*, the former category of the law regarded the marriage as void and the latter category provided financial relief. In the case at hand, "the law governing the formation of marriages" regarded the marriage ceremony as "non-marriage" and hence "the law governing the dissolution and annulment of marriages" did not apply and could not provide any remedy or relief.

As the category of "non-qualifying ceremony" which was previously described as "non-marriage" is relatively new under English law, the case law is unclear about their treatment especially in cases involving conflict of laws. Mostyn J argued that the category of "non-qualifying ceremony" would be treated under the foreign law

as the governing law both for the determination of such ceremonies and their consequent legal ramifications while Moylan LJ has favoured limiting the foreign law to the question of validity or invalidity of marriage ceremonies. I submit that the tension between these two conflicting views can be resolved by appreciating a third stage between the formation and dissolution/annulment of marriage, which is the legal recognition or non-recognition of the marital relationship by taking into account the possibilities of subsequent ratification or registration of marriages. In this way, the governing law of marriage regulates both the formation of the marriage and its subsequent treatment as legally recognised or not while the remedy or relief is determined under *lex fori* when the relationship breaks down.

Egyptian Supreme Court on the Enforcement of Foreign Judgments – Special Focus on the Service Requirement

I . Introduction

Egypt and its legal system occupy a unique position within the MENA region. Egyptian law and scholarship exert a significant influence on many countries in the region. Scholars, lawyers, and judges from Egypt are actively involved in teaching and practicing law in many countries in the region, particularly in the Gulf States. Consequently, it is no exaggeration to say that developments in Egyptian law are likely to have a profound impact on neighboring countries and beyond, and warrant special attention.

The cases presented here were recently released by the Egyptian Supreme Court (*mahkamat al-naqdh*). They are of particular interest because they illustrate the

complex nature of legal sources, particularly with respect to the enforcement of foreign judgments (on this topic, see Béligh Elbalti, "Perspective of Arab Countries", *in* M. Weller et al. (eds.), *The 2019 HCCH Judgments Convention – Cornerstones, Prospects, Outlook* (Hart, 2023), pp. 195 ff). These cases also provide a good opportunity to elucidate the basic principles regarding the service requirement, which, as the cases discussed here and the comments that follow show, can pose particular challenges.

II. Facts

Two cases are presented here. Both involve the enforcement of judgments from neighboring countries (Kuwait in the first case and Saudi Arabia in the second) with which Egypt has concluded conventions on the enforcement of foreign judgments. In both cases, enforcement was granted by lower courts. The parties challenging the enforcement then appealed to the Supreme Court. The main grounds of appeal in both cases revolve around the issue of proper service of process. Ultimately, the Supreme Court ruled in favor of the appellants in both cases.

III. Summary of the Rulings

- **Case 1: Appeal No. 2765 of 25 June 2023 (Enforcement of a Kuwaiti Monetary Judgment)**

Proper service is a prerequisite to be verified by the enforcing court before declaring a foreign judgment enforceable, as stipulated in Article 298 of the Code of Civil Procedure (hereinafter CCP). Enforcement should be refused unless it is established that the parties were duly served and represented. This is in line with the provisions of the Convention on the Enforcement of Judgments concluded between States of the Arab League, in particular Article 2(b), as well as Article 30 of the Riyadh Convention on Judicial Cooperation, which was ratified by Egypt by Presidential Decree No. 278 of 2014, and according to which foreign default judgments rendered in a contracting state shall not be recognized if the defendant has not been properly served with the proceedings or the judgment. […] [The record indicates that the appellant challenged the enforcement of the

foreign judgment on the basis of insufficient service. The enforcing court admitted the regularity of the service, but without stating the basis for its conclusion. As a result, the appealed decision is flawed and requires reversal with remand].

- **Case 2: Appeal No. 17383 of 14 November 2023 (Enforcement of a Saudi custody judgment)**

According to Article 301 of the CCP, conventions signed by Egypt take precedence over domestic law. Egypt ratified the Convention on the Enforcement of Judgments issued by the Council of the League of Arab States by Law No. 29 of 1954 and deposited the instruments of ratification with the General Secretariat of the League on July 25, 1954. The Kingdom of Saudi Arabia also signed the Convention on May 23, 1953. Consequently, the provisions of this Convention are applicable to the present case. […] The appellant argued that he had not been properly served with the summons because he had left the Kingdom of Saudi Arabia before the trial, which led to the foreign judgment. However, the judgment under appeal did not contain any valid response to the appellant's defense or any indication that the enforcing court had reviewed the procedures for serving the appellant. Furthermore, it did not examine whether the service of the appellant was in accordance with the procedures laid down by the law of the rendering State. Consequently, the appealed decision is vitiated by an error of law which requires it to be quashed.

Comments

The enforcement of foreign judgments in Egypt is regulated by Articles 296 to 301 of the CCP (for an English translation of these provisions, see J. Basedow *et al.* (eds.), *Encyclopedia of Private International Law – Vol. IV* (Elgar Editions, 2017), pages 3163-4). It is also governed by the conventions on the enforcement of foreign judgments ratified by Egypt (for a detailed overview in English of the enforcement of foreign judgments in Egypt under the applicable conventions and domestic law, see Karim El Chazli, "Recognition and Enforcement of Foreign Decisions in Egypt", *Yearbook of Private International Law*, Vol. 15 (2013/2014), pp. 387). The two cases presented above concern enforcement under these

conventions.

In this regard, it is noteworthy that Egypt has established an extensive network of bilateral and regional multilateral conventions (for a detailed list, see Elbalti, *op. cit.* pp. 196, 199). With regard to multilateral conventions, Egypt has ratified two conventions adopted under the auspices of the League of Arab States: (1) The Arab League Convention on the Enforcement of Foreign Judgments and Arbitral Award of 1952 (hereinafter referred to as the "1952 Arab Judgments Convention". On this Convention, see eg, El Chazli, *op. cit.* pp. 395-399) and (2) The Riyadh Convention on Judicial Cooperation of 1983 (hereinafter referred to as the "1983 Riyadh Convention". On this Convention, see eg, Elbalti, *op. cit.* pp. 197-198). It is important to note that the 1983 Riyadh Convention is intended to replace the 1952 Arab Judgments Convention in relations between the States Parties to both Conventions (see Article 72).

Bilateral conventions include a convention concluded with Kuwait in 1977. This convention was replaced by a new one in 2017.

1. With regard to the first case, the following observations can be made:

a. This case appears to be the first case in which the Supreme Court has referred to the 1983 Riyadh Convention since its ratification in 2014. This is noteworthy in light of the numerous missed opportunities for the Court to apply the Convention (see eg., *Supreme Court Appeal No. 5182 of 16 September 2018*. In the *Appeal No. 16894 of June 6, 2015*, the Riyadh Convention was invoked by the parties, but the Court did not refer to it. See also 2(b) below).

b. It is also noteworthy, and somewhat surprising, that the Supreme Court referred to the 1983 Riyadh Convention in a case concerning the enforcement of a Kuwaiti judgment. This is because, contrary to what is widely acknowledged, Kuwait has *only signed* but *did not ratify* the Riyadh Convention (on this point see Elbalti, *op. cit.*, page 197 fn (118)). Since Kuwait is a party only to the 1952 Arab Judgments Convention, the Supreme Court's reference to the 1983 Riyadh Convention was inaccurate. Moreover, if the 1983 Riyadh Convention had been applicable, there would have been no need to refer to the 1952 Arab Judgments Convention, since the former is intended to replace the latter (Article 72 of the Riyadh Convention).

c. Conversely, the Supreme Court completely overlooked the application of the 2017 bilateral convention with Kuwait, which, as noted above, superseded the 1977 bilateral convention between the two countries. This case provided another missed opportunity for the Court to address the so-called problem of conflict of conventions, as both the 1952 Arab Convention and the 2017 bilateral convention were applicable with overlapping scopes. In the absence of special guidance in the text of the conventions, such a conflict could have been solved on the basis of one of the two generally admitted principles: *lex posteriori derogat priori* or *lex specialis derogat generali* (for an example of a case adopting the latter solution from the UAE, see *Abu Dhabi Supreme Court, Appeal No. 950 of 26 December 2022*).

d. This is not the first time the Egyptian Supreme Court has dealt with the enforcement of Kuwaiti judgments (there are 10 cases, by my count). In all of these cases, the court referred to the 1952 Arab Judgments Convention in addition to domestic law. It is only in two cases that the Court referred to the 1977 Kuwait-Egypt bilateral convention in addition to the 1952 Arab Judgments Convention (*Supreme Court Appeal No. 3804 of 23 June 2010* and *Appeal No. 15207 of 11 April 2017*). In the majority of cases (8 out of 10), the Court refused to enforce Kuwaiti judgments. The main ground of refusal was mainly due to, or including, lack of proper service.

2. With regard to the second case, the following observations can be made:

a. Egypt does not have a bilateral convention with Saudi Arabia. However, both Egypt and Saudi Arabia are parties to the 1952 Arab Judgments Convention and the 1983 Riyadh Convention. As noted above, the 1983 Riyadh Convention replaces the 1952 Arab Judgments Convention for all States that have ratified it (Article 72). Therefore, the Supreme Court's affirmation that "the provisions of the [1952 Arab Judgments] Convention are therefore applicable to the present case" is incorrect. It is also surprising that the court made such a statement, especially considering that the party seeking enforcement relied on the 1983 Riyadh Convention, and given its erroneous application in Case 1.

b. This is not the first time that the Supreme Court has overlooked the application of the 1983 Riyadh Convention in a case involving the enforcement of a Saudi

judgment. In a case decided in 2016, almost two years after the Convention entered into force in Egypt, the Supreme Court referred to the 1952 Arab Judgments Convention to reject the enforceability of a Saudi judgment, again citing the lack of proper service (*Supreme Court, Appeal No. 11540 of 24 February 2016*).

3. Enforcement of Foreign Judgments and Service Requirement in Egypt

As a general rule, service of process under Egyptian law is considered a procedural matter that should be governed by the *lex fori* (Article 22 of the Civil Code. For an English translation, see Basedow *et al, op. cit.;* see also El Chazli, pp. 397, 402). In the context of foreign judgments, this means that the service of process or judgment is, in principle, governed by the law of the state of origin, subject, however, to considerations of public policy (see eg., *Supreme Court, Appeal No. 2014 of 20 March 2003*). Based on the case law of the Supreme Court, the following features are noteworthy:

- Service by publication was considered sufficient for enforcement purposes if the court could confirm that it had been duly carried out in accordance with the law of the State of origin (*Supreme Court, Appeal No. 232 of 2 July 1964*).
- However, if it appears that the service by publication did not comply with the requirements of the foreign law, the regularity of the service will be denied (*Supreme Court of, Appeal No. 14777 of 15 December 2016* [service of summons]; *Appeal No. 1441 of 20 April 1999* [notification of judgment]).
- Conversely, the Court held that the service irregularities may be cured if the defendant voluntarily appears before the foreign court and presents arguments on the merits of the case (*Supreme Court, Appeal No. 18249 of April 13, 2008*).
- Merely asserting that service was made in accordance with the law of the country of origin is not sufficient. Egyptian courts are required to verify that the judgment debtor has been properly served in accordance with the law of the country of origin and that such service is not contrary to Egyptian public policy (*Supreme Court of Cassation, Appeal No. 558 of 29 June 1988*). This aspect can be particularly important when it appears

that the judgment debtor had permanently left the State of origin at the time when the service was made (*Supreme Court, Appeal No. 8376 of 4 March 2010*; *Appeal No. 14235 of 1 January 2014*; *Appeal No. 1671 of 18 February 2016*).

- With regard to ensuring that the defendant has been duly served, the courts are not bound by any specific method imposed by Egyptian law; therefore, the conclusions made by the enforcing court as to the regularity of the service based on the findings of the foreign judgment and not disputed by the appellant may be accepted (*Supreme Court, Appeal No. 1136 of 28 November 1990*).
- Where an international convention applies, the rules for service set out in the convention must be complied with, even if they differ from the rules of domestic law. Failure to comply with the methods of service prescribed by the applicable convention would render the foreign judgment unenforceable (*Supreme Court, Appeal No. 137 of 8 March 1952*).
- The rules provided for by the conventions prevail, including the method of determining whether proper service has been made (eg., the submission of a certificate that the parties were duly served with summons to appear before the proper authorities). Therefore, failure to comply with this rule would result in the rejection of the application for enforcement by the party seeking enforcement (*Supreme Court, Appeal No. 5039 of 15 November 2001*; *Appeal No. 3804 of 23 June 2010*).

4. Service under Conventions

Most of the bilateral and regional conventions ratified by Egypt contain provisions on the service of judicial documents. The Riyadh Convention is particularly noteworthy in this regard, as 18 of the 22 members of the League of Arab States are parties to it (see Elbalti, *op. cit.*, pp. 196-197). In addition, Egypt has been a party to the HCCH 1965 Service Convention since 1968.

The proliferation of these international instruments inevitably leads to the problem of conflict of conventions. This problem can be particularly acute in some cases, where as many as three competing instruments may come into play. This scenario often arises with some Arab countries, such as Tunisia or Morocco, with which Egypt is bound by (1) bilateral conventions, (2) a regional convention

(namely the Riyadh Convention), and (3) a global convention (namely the HCCH Hague Service Convention).

In this context, the solution adopted by the Hague Convention deserves attention. Article 25 of the Convention provides that "[…] *this Convention shall not derogate from conventions containing provisions on matters governed by this Convention to which the Contracting States are or will become Parties*". However, the evaluation of this solution deserves a separate comment (for analyses on a similar issue regarding the HCCH 2019 Judgments Convention, see Elbalti, *op. cit.*, p. 206).

International Jurisdiction between Nationality and Domicile in Tunisian Private International Law – Has the Perennial Debate Finally been Resolved?

I would like to thank Prof. Lotfi Chedly for providing me with the text of the decision on which this post is based.

I. Introduction

Scholars of private international law are well familiar with the classic debate on nationality and domicile as connecting factors in the choice of applicable law (see, for example, L. I. de Winter, "Nationality or Domicile? The Present State of Affairs" 128 *Collected Cours*es III (1969) pp. 357 ff). In Tunisian private international law, this controversy has been particularly pronounced with regard to the role of nationality as a ground for the international jurisdiction of Tunisian

courts. Since the enactment of the Tunisian Private International Law Code ("PILC") in 1998 (for an English translation, see J. Basedow *et al.* (eds.) *Encyclopedia of Private International Law – Vol. IV* (Elgar Editions, 2017) 3895 and my own translation of the provisions dealing with international jurisdiction and the enforcement of foreign judgments in 8 *Journal of Private International Law* 2 (2012) pp. 221 ff)), the debate between opponents and proponents of nationality as a ground for international jurisdiction, especially in family law matters, has never ceased to be intense (for detailed analyses, see eg. Salma Triki, "La compétence internationale tunisienne et le critère de nationalité" in Ben Achour/Triki (eds.), *Le Code de droit international privé – Vingt ans d'application (1998-2018)* (Latrach edition, 2020) 119ff). This divergence in academic opinion is also reflected in the judicial practice of the courts, with the emergence of two opposing trends: one extends the international jurisdiction of the Tunisian courts when the dispute involves a Tunisian party, in particular as a defendant even when domiciled abroad. The other firmly rejects nationality as a ground for international jurisdiction.

The case commented here illustrates the culmination of this disagreement within the courts. The Supreme Court (*mahkamat al-ta'qib – cour de cassation*), in a second appeal, strongly denied the existence of such a privilege and emphasized the primacy of domicile over nationality as a basis for international jurisdiction in Tunisia. The Court of Appeal, acting as a court of remand, explicitly recognized that the jurisdiction of the Tunisian courts could be based on what is commonly referred to as "privilege of jurisdiction". The Court of Appeal went even further by describing the decision of the Supreme Court, from which the case had been remanded, as "legally incorrect". This stark contrast between the two courts prompted the intervention of the Joint Chambers (*chambres réunies*) of the Supreme Court, which issued what appears to be the first decision of its kind in the field of private international law in Tunisia (*Ruling No. 36665 of 15 June 2023*), signed by 62 judges of the Supreme Court (including the Chief Justice (President of the Court), 21 Presidents of Chambers and 40 other judges as counsellors).

II. Facts

The case concerns a divorce action brought in Tunisia by X (plaintiff husband and appellee in subsequent appeals) against his wife, Y (defendant and appellant in subsequent appeals). The text of the decision indicates that X and Y were married in 2012 and had a child. Moreover, while X's Tunisian nationality appears to be undisputed, there may surprisingly be some doubts about Y's Tunisian nationality, as emerged later in the parties' arguments before the Joint Chambers.

In 2017, the Court of First Instance of Sousse (a city located about 150 km south of the capital Tunis) declared the parties divorced and ordered some measures regarding maintenance, custody and visitation. Dissatisfied, Y appealed to the Court of Appeal of Sousse. In 2018, the court overturned the appealed decision, considering that the Tunisian courts did not have jurisdiction over the dispute. X appealed to the Supreme Court (1st appeal). In its decision issued later in 2018, the Supreme Court overturned the appealed decision with remand, holding that the Court of Appeal did not correctly examine the existence (or not) of a foreign element in the dispute in order to decline jurisdiction on the grounds that X claimed that the spouses' matrimonial domicile was in Tunisia, where Y lived and worked.

In 2019, the Court of Appeal of Sousse, as the court of remand, accepted jurisdiction and confirmed the decision of the court of first instance with some modifications. Y appealed to the Supreme Court (2nd appeal). Y argued, *inter alia*, that the rules of international jurisdiction laid down in the PILC had been violated, since the spouses' matrimonial domicile was in France and that the couple had only returned to Tunisia during the summer vacations. In 2020, the Supreme Court ruled in favor of Y, stating, *inter alia*, that the Tunisian legislator had made from "the domicile of the defendant the decisive ground for the international jurisdiction of the Tunisian courts". The Court also held that the Court of Appeal had reached an erroneous conclusion based on a misapplication of the facts and a misinterpretation of the law. The case was referred back again to the Court of Appeal.

In 2021, the Court of Appeal, in a frontal opposition, declared that the decision of the Supreme Court, according to which the domicile of the defendant was the ground based on which Tunisian courts could assume international jurisdiction, "cannot be followed" and is "legally incorrect". Then the court affirmed that Tunisian nationals enjoy a "privilege of jurisdiction", and this "means that Tunisian defendants should be subject to their national courts, even if they are

domiciled abroad, since the purpose of granting jurisdiction to Tunisian courts in this category of disputes is to ensure better protection of their interests".

Y challenged the decision of the Court of Appeal again before the Supreme Court (3rd appeal). As this was a disagreement between the Court of Appeal and the Supreme Court on a second appeal, the jurisdiction of the Joint Chambers was justified (articles 176 and 177 of the Code of Civil and Commercial Procedure, hereafter "CCCP").

Before the Joint Chambers, Y argued, *inter alia*, that (1) that she was not a Tunisian national but a holder of dual Algerian/French nationality; (2) that the court had also based its decision on the fact that she was resident in Tunisia, ignoring the fact that she had returned to Tunisia only to spend her summer vacation; (3) that she had left Tunisia for France.

On the other hand, X argued that the Court of Appeal was right to hold that disputes in which one of the parties is Tunisian and in which the subject matter concerns matters of personal status fall within the jurisdiction of the Tunisian courts, since matters concerning the family and its protection concern public policy, especially when the dispute also involves a Tunisian minor.

III. Ruling

The Joint Chamber of the Supreme Court held that the Tunisian courts did not have jurisdiction and decided to overturn the decision of the Court of Appeal without further remand. The court ruled as follows (only relevant parts are reproduced here. The gendered style reflects the language used in the text of the Court's decision):

"The dispute concerns the question whether the international jurisdiction of the Tunisian courts should be determined on the basis of the defendant's domicile (*maqarr*), in accordance with Article 3 of the PILC, or on the basis of the privilege of jurisdiction, according to which a Tunisian national is subject to the jurisdiction of his national courts even if he is domiciled abroad.

It goes without saying that in Articles 3 to 10 of the PILC, the legislator has sought to confer jurisdiction on the Tunisian courts on the basis of close

connections between the Tunisian legal system and the legal relationship, thereby abolishing the exceptional grounds such as nationality, representation or reciprocity. The reason for the abolition of these exceptional grounds lies in the fact that they do not constitute a genuine connection between the dispute and the Tunisian legal system […].

[…]

As appears from the files of the case, the residence (*iqama*) of Y in France is established either on the basis of the service of the summons […] on her domicile (*maqarr*) in France […] or the judicial admission made by X […] [in which he] admitted that his wife had moved to France where she had settled with their daughter and refused to return to Tunisia.

[However], by considering that the privilege of jurisdiction entails subjecting the Tunisian defendant to the jurisdiction of his or her national courts, even if he resides (*muqim*) abroad, the remand court misjudged the facts and drew erroneous conclusion, leading to a misunderstanding and misapplication of article 3 of the PILC […]."

IV. Comments

The principle established by the Joint Chamber regarding the role of the defendant's Tunisian nationality as a ground for international jurisdiction can be considered a welcome clarification of the interpretation and application of Tunisian law. However, it must also be said that the decision commented on here contains some intriguing and to some extent confusing features, particularly in the parts of the decision not reproduced above relating to the meaning of and the distinction between "domicile (*maqarr*)" and "residence (*iqama*)". For the sake of brevity, only the issue of nationality as a ground of international jurisdiction will be commented on here.

1. Prior to the Enactment of the PILC

Prior to the enactment of a PILC, nationality – especially that of the defendant – was used as a general ground for international jurisdiction in all disputes brought

against Tunisians, even if they were domiciled abroad (former art. 2 of the CCPC). This rule is common in the MENA region and is generally followed even if it is not explicitly stated in the law (For the case of Bahrain, see here, for the case of Morocco, where a new draft code of civil procedure proposes to introduce a similar rule *ex lege*, see here).

2. Nationality as a ground for international jurisdiction under the PILC

The PILC, adopted in 1998, introduced a radical change in this regard by completely excluding nationality as a ground for international jurisdiction (see eg. Imen Gallala-Arndt, "Tunisia", *in* J. Basedow *et al.* (eds.) *Encyclopedia of Private International Law – Vol. III* (Elgar Editions, 2017) p. 2586). Henceforth, the PILC recognizes only one legitimate ground of *general jurisdiction* over any civil or commercial dispute (including family law disputes) arising between persons *regardless of their nationality*, if the defendant has its "residence (*iqama*)" in Tunisia, although the semi-official French version of the PILC (as officially published in the Official Gazette) refers to "*domicile*" (*maqarr* in Arabic). In literature, there is a general consensus among Tunisian scholars that the word *iqama* (residence) in the Arabic version of article 3 actually means "*maqarr* (domicile)". Case law is, however, quite inconsistent on this issue, with Tunisian courts, including the Supreme Court itself, reaching contradictory decisions on the interpretation and application these basic notions. This issue was addressed in the decision commented here (although in a quite unsatisfactory manner as the Joint Chambers, while distinguishing between "residence" and "domicile", used both notions interchangeably in a particularly intriguing manner). However, this aspect of the decision will not be discussed here.

It is worth mentioning that the solutions introduced in the PILC have attracted the attention of renowned foreign scholars, who have highlighted the peculiarity of the Tunisian solutions in this regard, describing the Tunisian solutions as "interesting" and the exclusion of nationality as ground for international jurisdiction in all matters, including family law disputes, as "courageous" (see eg., Diego P. Fernando Arroyo, "Compétence exclusive et compétence exorbitantes dans les relations privées internationales" 323 *Collected Courses* 2006, pp. 140-141).

3. Judicial Application

However, as soon as the PILC entered into force, a trend developed in judicial practice whereby Tunisian courts at all levels showed a willingness to extend their jurisdiction when the dispute involved Tunisian nationals. At the same time, there has been a parallel trend whereby some courts, also at all levels, have strictly adhered to the new policy of international jurisdiction and have refused to assume jurisdiction whenever it appeared that the defendant (whether a a Tunisian national or not) was domiciled abroad. (For a detailed analysis with different scenarios and cases, see Souhayma Ben Achour, "L'accès à la justice tunisienne en droit international privé tunisien" *in* Ben Achour/Ben Jemia (dir.), *Droit fondamentaux & droit international privé* (La Maison du Livre, 2016) pp. 11 ff).

a. Regarding the former, Tunisian judges have used various approaches and methods to circumvent the law and extend their jurisdiction beyond the limits set by the PILC. For example:

- In some cases, the courts have simply denied the international nature of the dispute on the grounds that all the parties were Tunisian, even though it was established that all or some of the parties (particularly the defendant) were domiciled abroad (see eg. *Supreme Court, Ruling No. 12295 of 14 February 2002*).
- In other cases, the courts have inferred a tacit submission to the jurisdiction of the Tunisian courts, even in the absence of the appearance of the defendant (often a foreign wife) (see eg. *First Instance Court of Tunis, Ruling No. 30605 of 18 January 2000*).
- In some other cases, the courts have confirmed their jurisdiction either on the basis of
    - the choice-of-law rules, according to which personal status shall be governed by the *lex patriae* of the parties (*Supreme Court, Ruling No. 3181 of 22 October 2004*), or,
    - on the basis of the rules of indirect jurisdiction laid down in bilateral conventions on mutual judicial assistance, knowing that these conventions do not contain rules of direct jurisdiction (see eg., *Supreme Court, Ruling No. 6238 of 23 December 2004*).
- More problematically, some courts have relied on the "place of

performance" as a ground for international jurisdiction in contractual matters, considering the marriage to be a "contract" and its "performance" to have taken place in Tunisia when the parties consummated the marriage or established their matrimonial residence/domicile there (see eg. *First Instance Court of Tunis, Ruling No. 77280 of 12 July 2010*).

- In some cases, the courts have invoked *forum necessitatis* to extend their jurisdiction without indicating whether the requirements of its invocation were met (see eg. *First Instance Court of Tunis, Ruling No. 75738 of 22 February 2010*).
- Last but not least, in some cases, and in direct violation of the law, the courts have declared themselves to be the "natural" courts in family law disputes involving Tunisians, and that their jurisdiction could be based on the idea of "jurisdictional privilege" based on the Tunisian nationality of the defendant (see eg., *Tunis Court of Appeal, Ruling No. 76011 of 12 November 2008*) (interestingly, the grounds invoked here are similar to those invoked by the Bahraini courts here).

All these cases, and many others (see eg., Ben Achour *op. cit.*), have given the impression that Tunisian courts would go to any lengths to assume jurisdiction over disputes involving Tunisians in family law matters (cf., eg., Sami Bostanji, "Brefs propos sur un traité maltraité" *Revue tunisienne de droit*, 2005, p. 347).

b. This trend should not, however, be allowed to overshadow another that has also developed in parallel as mentioned above. The Supreme Court itself, despite some inconsistencies in its case law, has reaffirmed on several occasions that the jurisdiction of the Tunisian courts can be established only on the basis of the rules laid down in the CPIL, thereby rejecting the idea of nationality as an additional ground of jurisdiction in disputes involving Tunisian nationals (see eg., *Supreme Court, Ruling No. 32684 of 4 June 2009*).

c. In this respect, the decision of the Joint Chambers is likely to bring some order to the judicial cacophony on this issue, although it may not put an end to the ongoing debate and divergence of opinions among legal practitioners and scholars on the relevance of nationality as a criterion of international jurisdiction. Moreover, the tendency of some judges – sometimes described as "conservative" (cf. Arroyo *op. cit.*) – to continue to assume jurisdiction in disputes involving Tunisians (particularly in family law disputes) seems to be so entrenched that

some scholars in Tunisia have described it as a “movement of resistance” against the legislative policy of the State (cf. eg. Lotfi Chedly, “Droit d’accès à la justice tunisienne dans les relations internationales de famille et for nationalité” *in Mélanges offerts à Dali Jazi* (Centre de Publication Universitaire, 2010) p. 264). This state of affairs has led some leading authors in Tunisia to question the state’s policy of excluding nationality altogether, even in family law disputes. One of the arguments put forward is that nationality in family law disputes is not an excessive ground for jurisdiction and is widely used in other legal systems (for the various arguments in favor of nationality, see Triki, *op. cit.*).

4. Legislative amendment?

These voices found their way into two legislative proposals in 2010 and 2019 to amend the PILC and introduce nationality as a ground for international jurisdiction in divorce cases (on the 2019 proposal, its background and peculiarities, see *Triki, op. cit.*). However, these attempts were unsuccessful, mainly due to the unstable political situation in Tunisia (the outbreak of the Tunisian revolution at the end of 2010 and the political crisis that led to the dissolution of the parliament and the suspension of the post-revolutionary constitution of 2014 in 2021). In this general context, and despite the decision of the Joint Chambers, it would not be surprising if some courts persisted in extending their jurisdiction in a disguised manner, based on the methods they themselves have developed to circumvent the constraint imposed by the PILC, when the dispute – particularly in matters of family law – involves Tunisians.

An Answer to the Billion-Dollar Choice-of-Law Question

On February 20, 2024, the New York Court of Appeals handed down its opinion in *Petróleos de Venezuela S.A. v. MUFG Union Bank, N.A.* The issue presented—which I described in a previous post as the billion-dollar choice-of-law

question—was whether a court sitting in New York should apply the law of New York or the law of Venezuela to determine the validity of certain bonds issued by a state-owned oil company in Venezuela. The bondholders, represented by MUFG Union Bank, argued for New York law. The oil company, Petróleos de Venezuela, S.A. ("PDVSA"), argued for Venezuelan law.

In a victory for PDVSA, the New York Court of Appeals unanimously held that the validity of the bonds was governed by the law of Venezuela. It then sent the case back to the federal courts to determine whether the bonds are, in fact, invalid under Venezuelan law.

Facts

In 2016, PDVSA approved a bond exchange whereby holders of notes with principal due in 2017 (the "2017 Notes") could exchange them for notes with principal due in 2020 (the "2020 Notes"). Unlike the 2017 Notes, the 2020 Notes were secured by a pledge of a 50.1% equity interest in CITGO Holding, Inc. ("CITGO"). CITGO is owned by PDVSA through a series of subsidiaries and is considered by many to be the "crown jewel" of Venezuela's strategic assets abroad.

The PDVSA board formally approved the exchange of notes in 2016. The exchange was also approved by the company's sole shareholder—the Venezuelan government—and by the boards of the PDVSA's subsidiaries with oversight and control of CITGO.

The National Assembly of Venezuela refused to support the exchange. It passed two resolutions—one in May 2016 and one in September 2016—challenging the power of the executive branch to proceed with the transaction and expressly rejecting the pledge of CITGO assets in the 2020 Notes. The National Assembly took the position that these notes were "contracts of public interest" that required legislative approval pursuant to Article 150 of the Venezuelan Constitution. These legislative objections notwithstanding, PDVSA followed through with the exchange. Creditors holding roughly $2.8 billion in 2017 Notes decided to participate and exchanged their notes for 2020 Notes.

In 2019, the United States recognized Venezuela's Interim President Juan Guaidó as the lawful head of state. Guaidó appointed a new PDVSA board of directors,

which was recognized as the legitimate board by the United States even though it does not control the company's operations inside Venezuela. The new board of directors filed a lawsuit in the Southern District of New York (SDNY) against the trustee and the collateral agent for the 2020 Notes. It sought a declaration that the entire bond transaction was void and unenforceable because it was never approved by the National Assembly. It also sought a declaration that the creditors were prohibited from executing against the CITGO collateral.

The choice-of-law issue at the heart of the case related to the validity of the 2020 Notes. Whether the Notes were validly issued depended on whether the court applied New York law or Venezuelan law. The SDNY (Judge Katherine Polk Failla) ruled in favor of the bondholders after concluding that the issue was governed by the laws of New York. On appeal, the Second Circuit certified the choice-of-law question to the New York Court of Appeals. The Court of Appeals reformulated this question to read as follows:

> *Given the presence of New York choice-of-law clauses in the Governing Documents, does UCC 8-110(a)(1), which provides that the validity of securities is determined by the local law of the issuer's jurisdiction, require the application of Venezuela's law to determine whether the 2020 Notes are invalid due to a defect in the process by which the securities were issued?*

In a decision rendered on February 20, 2024, the Court of Appeals unanimously concluded that the answer was yes.

Section 8-110

The court began with the New York choice-of-law clauses in the Indenture, the Note, and the Pledge Agreement. Under ordinary circumstances, it observed, New York courts will enforce New York choice-of-law clauses by operation of Section 5-1401 of the New York General Obligations Law. That statute provides that the parties to any commercial contract arising out of a transaction worth more than $250,000 may select New York law to govern their agreement even if the transaction has no connection to New York. In this particular case, however, a different part of Section 5-1401 dictated a different result.

Section 5-1401 also states that even when parties choose New York law, that law

"shall not apply . . . to the extent provided to the contrary in subsection (c) of section 1-301 of the uniform commercial code." UCC 1-301(c)(6) states, in turn, that if UCC 8-110 "specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted." Finally, UCC 8-110(a)(1) states that "[t]he local law of the issuer's jurisdiction . . . governs . . . the validity of a security."

After following the chain of choice-of-law rules from Section 5-1401 to UCC 1-301(c) to UCC 8-110, the court observed that the validity of a security is governed by the law of the issuer's jurisdiction. The court further observed, based on the statutory text, that Section 8-110 was a mandatory rule that could not be altered by a choice-of-law clause. Against this backdrop, the court held that "because UCC 8-110 is applicable here, any issue of the validity of a security issued pursuant to the Governing Documents is determined by the law of the issuer's jurisdiction. In this case, the issuer is a Venezuelan entity, so the law of Venezuela is determinative of the issue of validity."

Validity

The court next addressed the meaning of "validity" as used in Section 8-110. The bondholders argued that this term did not sweep broadly enough to encompass the requirement in Article 150 of the Venezuelan Constitution, which provides that the National Assembly must approve all "contracts of public interest." They argued that the word encompassed only the usual corporate formalities for issuing a security. PDVSA argued that "validity" could be interpreted to include constitutional provisions that bear on the issue of whether a security was duly authorized. The Court of Appeals agreed.

In reaching this conclusion, the court first observed that the issue of "validity" had to be distinguished from the issue of "enforceability." The first term refers to the "nature of the obligor and its internal processes." The second term refers to "requirements of general applicability as going to the nature of the rights and obligations purportedly created, irrespective of the nature of the obligor and its processes." The court cited usury laws and anti-fraud laws as examples of laws that dealt with enforceability rather than validity. Although these laws may prohibit a court from *enforcing* a contract, they do not bear on the *validity* of that same contract because they do not address the procedures that must be followed

for the contract to be duly authorized.

The court then distinguished between (1) validity and (2) the consequences of invalidity. While Section 8-110 stated the controlling choice-of-law rule with respect to the validity, it was not controlling with respect to the consequences stemming from that invalidity. "Even if a court determines that a security is invalid under the local law of the issuer's jurisdiction," the court held, "the effects of that determination will depend on New York law."

With these distinctions in mind, the court held that "Article 150 and its related constitutional provisions could potentially implicate validity because they speak to whether an entity has the power or authority to issue a security, and relatedly, what *procedures* are required to exercise such authority." In particular, the court observed that this constitutional provision required the approval of the National Assembly before certain contracts could be executed. Since Article 150 identified procedural requirements rather than substantive ones, the court reasoned, it spoke to the issue of validity rather than enforceability. In so holding, the court reasoned that the term "validity," as used in Section 8-110, could implicate constitutional provisions of the issuer's jurisdiction that speak to whether a security is duly authorized.

Caveats

After holding that the issue of validity was governed by the law of the issuer's jurisdiction, and that Section 150 of the Venezuelan Constitution might be relevant to the issue of validity, the court went on to announce several important caveats.

First, the court stated that the application of Venezuelan law on these facts must be "narrowly confined." It held that the "exception provided by UCC 8-110 provides no opportunity for the application of foreign laws going to the enforceability of a security, nor does it affect the adjudication of any question under the contract other than whether a security issued by a foreign entity is valid when issued."

Second, the court emphasized that "none of this is to say that plaintiffs will ultimately be victorious." It noted that the federal courts would still have to determine whether the securities were, in fact, invalid under the laws of

Venezuela.

Third, the court went out of its way to emphasize the fact that—issues of validity notwithstanding—New York law governs the transaction in all other respects, including the consequences if a security was issued with a defect going to its validity.

Conclusion

This long list of caveats suggests that the Court of Appeals *wanted* to apply to New York law in this case to the maximum extent possible. Enforcing New York choice-of-law clauses, after all, generates business for New York lawyers, and the generation of such business ultimately benefits the State of New York. The Court was, however, unable to find an interpretive path that permitted it to apply New York law in light of the text of Section 8-110.

In the days following the court's decision, several news outlets reported that the value of the PDVSA bonds at issue had fallen precipitously. This decline in price presumably reflects the market's perception that the bondholders are less likely to gain access to the CITGO assets anytime soon (if at all) if Venezuelan law governs the validity issue. TLB will report on developments in this case going forward.

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New EU Digitalisation Regulation: A Stepping Stone to Digitalised EU?

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On 13 December 2023, two years after the first legislative proposal has been published, the new Regulation (EU) 2023/2844 of the European
Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation (Digitalisation Regulation) has been adopted. While the process of digitalisation of judicial cooperation and cross-border procedures in the EU has been ongoing for some time already, the new Digitalisation Regulation represents a major step for advancing digitalisation practices in the EU.

Main features

The Digitalisation Regulation establishes a uniform legal framework for the use of electronic communication and digital tools in cross-border legal proceedings. Particularly, it lays down rules on:
– communication between competent authorities/natural or legal persons and competent authorities
– the use of videoconferencing or other distance communication technology
– the application of electronic signatures and electronic seals
-the legal effects of electronic documents
– electronic payment of fees.
The Regulation establishes that communication between competent authorities of different EU Member States, as well as communication between competent authorities of different Member States and between a national competent authority and EU body or agency, shall be carried out through a decentralised IT system whenever possible. On the other hand, for communication between natural or legal persons and competent authorities in civil and commercial matters, a European electronic access point shall be established on the European e-Justice Portal. The Regulation also provides for the possibility of participating in a hearing through videoconference or other distance communication technology,

depending on certain circumstances, e.g., the availability of such technology, parties' opinion on the use of such technology, or appropriateness of the use of technology. Moreover, the Regulation makes a reference to the eIDAS Regulation in terms of electronic signatures and electronic seals, equates the legal effects of electronic documents with effects of non-electronic ones, and provides for the possibility of electronic payment of fees. Finally, it also amends relevant provisions of other legal instruments, including European Enforcement Order Regulation, European Order for Payment Regulation, European Small Claims Procedure Regulation, European Account Preservation Order Regulation, Regulation on mutual recognition of protection measures in civil matters, Insolvency Regulation, Service of Documents Regulation, and Regulation on the mutual recognition of freezing orders and confiscation orders.

Entry into force

The entire legal framework set by the Regulation, however, will not be fully operational until quite some time. The Regulation will apply from 1 May 2025 – with some exceptions. The Regulation requires the adoption of certain implementing acts by the European Commission, which would mainly set out various technical specifications and requirements. Article 10(3) of the Regulation sets out a timetable for the adoption of different implementing acts, ranging from January 2026 to January 2029.

Articles 3 and 4 of the Digitalisation Regulation, which regulate electronic communication (both between competent authorities and between natural or legal persons and competent authorities in civil and commercial matters) will only apply after two-year period has passed from entry into force of the corresponding implementing acts. These Articles will also only apply to proceedings initiated from that same day. It could be concluded that the Regulation will not be applicable in its entirety for the next seven years, until 2031. However, this only holds true in relation to the provisions on electronic communication. The other regulated aspects, i.e., the provisions on the use of videoconferencing, electronic signatures and seals, legal effects of electronic documents and electronic payment of fees, will all be applicable from May 2025.

Remaining challenges

While certainly a big step forward for the e-Justice developments in the EU, some challenges still remain even after the Digitalisation Regulation becomes fully applicable. Perhaps the biggest issue is fragmentation – both at the EU level and

at the national level.

At the EU level, fragmentation is reflected in a complex EU framework and a number of different regulatory sources on different aspects of digitalisation of justice. There are multiple legal acts that address various aspects relevant for the process of digitalisation in the EU, including eIDAS Regulation, e-CODEX Regulation, Directive on Digitalisation of Judicial Cooperation, General Data Protection Regulation, Regulation on processing of data by EU institutions, etc. Moreover, a number of regulations offer specific provisions on digitalisation aspects in a particular procedure, such as European Order for Payment Procedure Regulation, Service Regulation, Evidence Regulation, etc. It is therefore expected that the new Digitalisation Regulation will add to already existing legal framework as an 'umbrella regulation', given that it covers a wide range of issues in various steps of legal proceedings in civil, commercial and criminal matters. It should, however, be noted that it will not apply to two crucial procedural aspects of the intra-EU cross-border relations: the service of documents pursuant to the Service Regulation (despite introducing certain amendments to it) nor to the taking of evidence pursuant to the Evidence Regulation, as highlighted in the Recital 17 of the Preamble.

At the national level, while COVID-19 pandemic certainly urged all of the EU Member States to accelerate the usage of digital tools in all aspects of society, there are still varying levels of digital developments in different jurisdictions. This can clearly be seen from the EU Justice Scoreboard, which includes a specific section on digitalisation developments in the Member States. It must be highlighted, however, that a significant improvement over the years is visible when comparing the yearly reports. With the new Digitalisation Regulation, in addition to all the other work that the EU is currently doing to promote digitalisation, the digital tools and digitalisation practices of the Member States will surely only be getting more advanced.

This having been said, diversity of national procedural rules, different e-justice domestic solutions and different levels of the development and usage of digital tools in the proceedings all may still pose problems. It can be expected that the period of the next few years will be especially difficult, as EU Member States will have a lot of work to do – national access points to the e-CODEX will have to be established; harmonised technical standards adopted; and all participants will have to get accustomed to the functionalities of new digital tools and practices. The Digitalisation Regulation partly touches upon this problem by providing that EU Member States must also offer necessary training to competent authorities

and professionals concerned in order to ensure efficient use of the IT system and distance communication technology.

In order to ensure that adequate information on national particularities is available for all potential parties, the EU Member States are bound to communicate relevant information to the European Commission, including details of national IT portals, description of national laws and procedure on videoconferencing, information on fees, details on electronic payment methods, etc. Such information will be made available on the e-Justice Portal. On the assumption that the relevant information is regularly updated, the e-Justice Portal will be of great help with the smooth functioning of digital legal framework set by the Digitalisation Regulation.

Thus, while challenging period may be ahead, the result will surely be worthwhile.

What about the parties outside of the EU?

While the Digitalisation Regulation definitely brings important changes to the justice system of the EU and its Member States, potential implications for parties and countries outside of the EU should not be overlooked. Member States are now obliged to work on their national IT portals and digital tools, to train legal staff, and to generally provide for the usage of digital tools in the course of the procedure. Such national developments may then also assist in all cross-border cases, including those with countries outside of the EU. This means that the obligations that the Digitalisation Regulation sets for the Member States can also indirectly allow for better usage of IT tools in the course of cross-border procedures with all of the other countries that make use of such tools as well. On the other hand, for those countries that still lack in the department of digitalisation in law and legal system, this may serve as an incentive for further development in order to make cross-border procedure easier for all. After all, promotion of best practices and cooperation with international partners is one of the EU’s aims, as highlighted in the 2020 Communication from the Commission on the Digitalisation of Justice in the EU.

Bahraini High Court on Choice of Court and Choice of Law Agreements

I. Introduction

It is widely recognized that choice of court and choice of law agreements are powerful tools for structuring and planning international dispute resolution. These agreements play an important role in "increasing legal certainty for the parties in cross-border transactions and reducing incentives for (the harmful version of) forum shopping." (Alex Mills, *Party Autonomy in Private International Law* (CUP, 2018) p. 75). However, the realization of these objectives depends on the enforcement of the parties' choice. Unfortunately, general practice in the MENA (North Africa and the Middle East) region shows that, with a few exceptions, the status quo is far from satisfactory. Choice-of-court agreements conferring jurisdiction on foreign courts are often disregarded or declared null and void. Similarly, the foreign law chosen as the governing law of a contract is often not applied because of the procedural status of foreign law as a matter of fact, the content of which must be ascertained by the party invoking its application. The recent judgment of the High Court of Bahrain (a first instance court in the Bahraini judicial system) in the *Case No. 2/13276/2023/02 of 17 January 2024* is nothing but another example of this entrenched practice that can be observed in the vast majority of countries in the region.

II. Facts

X (plaintiff, an English company) entered into a pharmaceutical distribution and sales agreement with Y1 (defendant, a Bahraini company), in 2017 in Bahrain. The agreement provided that disputes arising out of or in connection with the agreement would be subject to the exclusive jurisdiction of the courts of England and Wales. The parties also agreed that English law should be the governing law.

Following Y1's failure to make due payments as agreed, X initiated legal proceedings against Y1, Y2 and Y3 (both Bahraini nationals and partners in Y1) in the High Court of Bahrain, seeking payment and some other related costs under

Bahraini law. The defendants challenged the jurisdiction of the Bahraini court based on the forum selection clause, but did not present any claim as to the merits of the case.

III. The Ruling

The High Court ruled as follow to affirm its jurisdiction and the application of Bahraini law:

[Regarding international jurisdiction]

"[The defendants] challenge the jurisdiction of the Bahraini courts to hear the dispute on the basis that the contract contains a jurisdiction clause which confers exclusive jurisdiction on the English courts to hear any dispute arising out of or relating to the contract. However, according to Articles 14 and 15 of the Code of Civil Procedure, the Bahraini courts have jurisdiction over actions brought against Bahraini nationals, regardless of the nature of the dispute, as long as they have Bahraini nationality at the time the action is brought, without any further conditions, except for in rem actions relating to immovable property located outside Bahrain. Thus, the jurisdiction of the Bahraini courts is based on personal nexus, i.e. the nationality of the defendant, and any agreement to deviate from this jurisdiction is inadmissible because of its connection with public policy. This is because it is the State that determines the jurisdiction of its courts in order to serve the public interest, i.e. to ensure justice, which is one of its primary functions, and to maintain order and peace within its territory. (Underline added).

[Since Y1 is a Bahraini limited liability company and Y2 and Y3, who are partners in Y1, are Bahraini nationals,] it is not permissible to waive the jurisdiction of the Bahraini courts, which retain jurisdiction over the [present] dispute.

[Regarding the applicable law]

It is clear from the contract that the parties agreed that any disputes arising out of the contract should be governed by the laws of England and Wales. Pursuant to Article 4 of Law No. 6 of 2015 on Conflict of Laws in Civil and Commercial Matters with Foreign Elements, the parties may choose the applicable law. [However], Article 6(a) of the same law requires the parties to the dispute to

submit the text of the applicable law, failing which Bahraini law shall be deemed applicable. [In the present case], neither party has submitted the agreed law governing the dispute, and X, which [as the foreign party] , requested the application of Bahraini law and relied on the provisions of the Bahraini Commercial Companies Law in its statement of claim. Since the court is not required to ask the parties [to provide the content] the applicable law, as this obligation rests with the parties themselves, Bahraini law shall be applied to the [present] dispute".

IV. Comments:

1. *Sources of Law*

It should be indicated from the outset that in Bahrain, rules governing international jurisdiction are primarily found in the Code of Civil and Commercial Procedure of 1971 (hereafter referred to as "CCCP," articles 14-20). Regarding choice of law rules, those concerning family law and successions (i.e., personal status) are included in the CCCP (articles 21 and 22), while those concerning civil and commercial matters, including rules pertaining to general theory, are laid down in a special Law on Conflict of Laws in Civil and Commercial Matters with Foreign Elements (Law No. 6 of 2015).[(*)]

[(*)] One may wonder about the reasons behind keeping the choice of law rules in matters of family law and successions within a law dealing with civil and commercial procedure, especially since the Bahraini legislator codified the conflict of law rules in an autonomous act dealing with conflicts of laws (choice of law). There have been some calls to consolidate all private international law rules (including choice of law, international jurisdiction) in a single act dealing with legal relationships involving foreign elements (see eg., Awadallah Shaiba Al-Hamad Al-Sayed, "An Analytical and Critical Study of the Law No. 6 of 2015 on the Conflict of Laws in Civil and Commercial Matters – Kingdom of Bahrain", *Legal Studies*, Vol. 2, 2019, pp. 224 ff (in Arabic)), however, no actions have been taken so far to implement this proposal.

2. *International Jurisdiction*

Interestingly, the rules of international jurisdiction contained in the CCCP deal *mainly* with actions brought against non-Bahraini nationals, either on the basis of their domicile/residence in Bahrain (general jurisdiction, Article 14 of the CCCP) or in certain other matters depending on the category of dispute (special jurisdiction, Article 15 of the CCCP). The fact that the rules on international jurisdiction refer only to foreign defendants raised the question of whether Bahraini courts could assume jurisdiction based on the nationality of the defendant (Cf. Hosam Osama Shaaban, *Treatises on Bahraini Private International Law* (Al-Bayan Media, 2016), p. 277 [in Arabic]).

In a number of cases, the Supreme Court has ruled in the affirmative. For example, in a decision issued in 2014, the Bahraini Supreme Court held that "*even if the Bahraini legislator did not establish the rules of international jurisdiction of the Bahraini courts in the CCCP with regard to lawsuits filed against Bahraini nationals, it is understood that the jurisdiction of the national courts over [such lawsuits] stems from the consideration of [judicial jurisdiction] as a manifestation of the sovereignty of the State, which extends to what falls under this sovereignty*" (*Supreme Court, Appeal No. 531/2013 of 15 April 2014*). In another case, the Supreme Court confirmed its ruling by considering that "*persons holding Bahraini nationality are subject to the jurisdiction of Bahraini courts as a manifestation of the state's sovereignty over its citizens*", thus recognizing the jurisdiction of Bahraini courts over Bahraini nationals even if they hold a second nationality and are not resident in Bahrain (*Supreme Court, Appeal No. 77/2017 of 11 April 2018*).

In this regard, it can be said that the High Court's decision commented here is fully consistent with the well-established case law of the Supreme Court.

3. *Choice of Court Agreements*

With respect to the admissibility of choice of court agreements, it should be noted that agreements with *prorogative* effect, i.e., choice of court agreements that confer jurisdiction on Bahraini courts that are not otherwise competent, are generally admitted (see article 17 of the CCCP [dealing with explicit or tacit submission to the jurisdiction of Bahraini courts]; article 19 of Legislative Decree

No. 30 for the year 2009 with respect to the Bahrain Chamber for Economic, Financial and Investment Dispute Resolution (BCDR) [on the jurisdiction of the BCDR based on the agreement of the parties]. See also, eg, *Supreme Court, Appeals Nos. 154 and 165/2017 of 20 May 2017* [tacit submission to the jurisdiction of Bahraini courts]).

However, with respect to agreements with *derogative* effect, although the law is silent on the matter, the Supreme Court has ruled *against* their admissibility. This is particularly the case of the Supreme Court ruling in a decision rendered in 2006 (*Supreme Court, Appeal No. 231/2005 of 27 February 2006*). The case concerned a lawsuit filed by a former foreign employee against his Bahraini employer, claiming overdue employment rights. The employer relied on a choice of forum clause in favor of the English court, arguing that Bahrain's rules on international jurisdiction (articles 14 and 15 of the CCCP) apply only in the absence of a written agreement between the parties when one of them is a foreigner, and that rules on international jurisdiction do not concern public policy; therefore, nothing should prevent the parties from displacing the jurisdiction of Bahraini courts in favor of a foreign court. The Supreme Court disagreed. However, instead of framing its decision in the particular context of the employment relationship, where the employee – as the weaker party – deserves special protection, the Court proclaimed the principle that any agreement by which the parties derogate from the jurisdiction Bahraini courts conferred under Bahraini law "shall be deemed null and void and shall not be invoked" to challenge the jurisdiction of courts in Bahraini (*Supreme Court, Appeal No. 231/2005 of 27 February 2006*).

The High Court's decision commented here is consistent with this ruling. In fact, the underlying part of the first paragraph of the High Court's decision quoted above is almost a verbatim copy from the Supreme Court's decision of 27 February 2007 mentioned above.

Finally, it should be indicated that the position of the Bahraini courts on this issue is broadly similar to that of other countries in the region, as noted in the Introduction. (For a brief overview of some relevant Supreme Court decisions from various MENA Arab countries and the implications of this position for the enforcement of foreign judgments in the region, see Béligh Elbalti, "Perspective of Arab Countries," in M. Weller et al. (eds.), *The 2019 HCCH Judgments Convention – Cornerstones, Prospects, Outlook* (Hart, 2023), p. 188.)

4. *Party Autonomy – Principle*

The principle of party autonomy is enshrined in Article 4 of Law No. 6 of 2015, which states that the "[p]arties may agree to choose the applicable law […]". Bahraini courts have recognized the principle of freedom of parties to choose the applicable law (eg, *Supreme Court, Appeal No. 641/2011 of 27 May 2011*). The courts did so even in the absence of legislative guidance prior to the adoption of the current applicable rules (see eg, *Supreme Court Appeal No. 143/1994 of 4 December 1994*). The High Court in the present case did not deviate from this "well-established" principle, which is rooted in both Bahraini statutes and case law. (For a detailed study based on Bahraini case law, see Béligh Elbalti & Hosam Osama Shabaan, "Bahrain – Bahraini Perspectives on the Hague Principles", in D. Girsberger *et al*. (eds.), *Choice of Law in International Commercial Contracts – Global Perspective on the Hague Principles* (OUP, 2021), pp. 414 ff).

5. *Party Autonomy – Practice*

In practice, however, as demonstrated by the High Court decision, there is a gap between the affirmation of the principle of party autonomy on the one hand and the actual application of the chosen law to a concrete case on the other. This gap arises from the fact that, under Bahraini law as regularly confirmed by case law, foreign law is treated as a fact, the content of which must be determined by the party requesting its application (see eg, Article 6 of Law No. 6 of 2015. For further details and examples, see Elbalti & Shaaban, *op cit.*, at 420-421). Consequently, failure to ascertain the content of the foreign law would normally result in the application of Bahraini law. The same principle applies even in cases where the parties have made a choice of law agreement. For example, in the aforementioned Supreme Court decision in the *Appeal No. 143/1994 of December 4, 1994*, although the Court recognized that the parties had (implicitly) agreed on Pakistani law as the applicable law, it ultimately excluded the application of the chosen law because its content had not been established. (For further details and examples, see Elbalti & Shaaban, *op cit.*). The High Court did not deviate from this general approach showing by this some degree of consistency in the Bahraini courts' practice.

6. *Epilogue*

In the case commented here, the court justified the application of Bahraini law on the grounds that the content of the law chosen by the parties had not been submitted to the court. To some extent, it may be questioned whether such a justification is acceptable, as it could be argued that there was a tacit agreement to apply Bahraini law instead of the chosen law (on the issue of tacit choice of law under Bahraini law and the relevant Supreme Court cases, see Elbalti & Shaaban, *op cit.,* pp. 423-425). However, as evidenced by the facts of the case, the defendants in this case did not present any arguments on the merits, but merely challenged the jurisdiction of the Bahraini court. The mere fact that the plaintiff based its claim on Bahraini law by relying on the relevant provisions of the Bahraini Commercial Companies Law does not in itself constitute an "implied" agreement to apply Bahraini law.

On this particular point, it is interesting to compare the decision of the High Court discussed here with another decision issued by the same court just thirteen days earlier in a case involving similar legal issues, namely the admissibility of a choice of court agreement in favor of the Cayman Islands courts and the application of Cayman Islands law as the law chosen by the parties (*High Court, Case No. 5/11341/2023/02 of 4 January 2024*). In this case, the High Court ruled in exactly the same way as in the present case with regard to the admissibility of the choice of court agreement. However, with respect to the application of Cayman Islands law, the court held that there was an implied agreement to apply Bahraini law in lieu of the chosen law because both parties based their claim on the provisions of Bahraini law and relied on relevant Supreme Court decisions.

U.S. Supreme Court Decides *Great*

Lakes

On February 21, 2024, the U.S. Supreme Court handed down its decision in *Great Lakes Insurance SE v. Raiders Retreat Realty Company, LLC*.

The question presented was whether, under federal admiralty law, a choice-of-law clause in a maritime contract can be rendered unenforceable if enforcement is contrary to the "strong public policy" of the U.S. state whose law is displaced. In a unanimous opinion authored by Justice Kavanaugh, the Court concluded that the answer to this question was no. It held that choice-of-law provisions in maritime contracts are presumptively enforceable as a matter of federal maritime law. It further held that while there are narrow exceptions to this rule, state public policy is not one of them.

Facts

Great Lakes Insurance SE (GLI) is a corporation organized under the laws of the Germany that is headquartered in the United Kingdom. Raiders Retreat Realty Co., LLC (Raiders) is a company organized under the laws of Pennsylvania. GLI insured a yacht owned by Raiders. The marine insurance contract signed by the parties contained the following choice-of-law clause:

> *It is hereby agreed that any dispute arising hereunder shall be adjudicated according to well established, entrenched principles and precedents of substantive United States Federal Admiralty law and practice but where no such well-established, entrenched precedent exists, this insuring agreement is subject to the substantive laws of the State of New York.*

After the yacht ran aground in Florida and sustained significant damage, Raiders filed a claim. GLI denied the claim on the ground that the yacht's fire-extinguishing equipment had not been recertified or inspected. Although the damage to the yacht was not caused by fire, GLI took the position that Raiders had misrepresented the vessel's fire suppression system's operating ability, thereby making the policy void from inception.

After denying the claim, GLI filed an action for a declaratory judgment in the U.S.

District Court for the Eastern District of Pennsylvania. It asked the court to hold that the policy was void due to the alleged misrepresentations by Raiders with respect to the fire extinguishers. In response, Raiders asserted five counterclaims against GLI: (1) breach of contract, (2) breach of implied covenant of good faith and fair dealing, (3) breach of fiduciary duty, (4) bad faith liability under 42 Pa. Const. Stat. §8371, and (5) violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law.

GLI moved for judgment on the pleadings with respect to the fourth and fifth counterclaims. It argued that these claims were not viable because the policy's choice-of-law provision had designated New York as the governing law in the absence of applicable federal maritime law. Because the claims were based on Pennsylvania statutes, it argued, they were barred by the choice-of-law clause. Raiders opposed this motion. It argued that the choice-of-law clause was unenforceable because it was contrary to Pennsylvania's strong public policy of punishing insurers who deny coverage in bad faith.

The trial court ruled in favor of GLI. The Third Circuit ruled in favor of Raiders. The Supreme Court granted GLI's cert petition and heard oral arguments on October 10, 2023.

Decision

The Court held that the issue of whether a choice-of-law clause in a maritime contract is enforceable is governed by federal law. In support of this conclusion, the Court noted that it had previously held that the enforceability of forum selection clauses in these contracts is governed by federal law. It would be strange, the Court reasoned, to adopt a different rule with respect to choice-of-law clauses. The Court further held that choice-of-law clauses in maritime contracts were "presumptively enforceable." Again, this conclusion logically followed from the fact that the Court had previously held that forum selection clauses in maritime contracts are "prima facie valid."

After discussing why the Court's decision in *Wilburn Boat Company v. Fireman's Fund Insurance Company* (1955) did not dictate a different outcome, the Court turned its attention to the question of when a choice-of-law clause in a maritime contract should not be enforced. It held that courts should disregard these

clauses in situations where applying the chosen law would "contravene a controlling federal statute" or "conflict with an established federal maritime policy." It also held that these clauses should not be given effect when there was no "reasonable basis" for selecting the law of the chosen jurisdiction. However, the Court expressly rejected the argument advanced by Raiders that a choice-of-law clause in a maritime contract was unenforceable if applying the law of the chosen state would be contrary to a fundamental policy of a state with a greater interest in the dispute.

In rejecting this argument, the Court explained that a federal presumption of enforceability "would not be much of a presumption if it could be routinely swept aside based on 50 States' public policy determinations." It reasoned that the "ensuing disuniformity and uncertainty caused by such an approach would undermine the fundamental purpose of choice-of-law clauses in maritime contracts: uniform and stable rules for maritime actors." The Court also noted that nothing in its previous decisions relating to the enforceability of forum selection clauses in maritime contracts suggested that state public policy was relevant to whether these clauses should be given effect.

Finally, the Court declined to adopt the argument—advanced by me and Kim Roosevelt in an *amicus* brief prepared with the assistance of the North Carolina School of Law Supreme Court Program—that it should resolve the question of enforceability by looking to Section 187(2) of the Restatement (Second) of Conflict of Laws. The Court reasoned that the rule laid down in Section 187 "arose out of interstate cases and does not deal directly with federal-state conflicts, including those that arise in federal enclaves like maritime law." The Court also pointed out that Section 187 was a "poor fit" for maritime cases in part because it would "prevent maritime actors from prospectively identifying the law to govern future disputes."

Analysis

I had two great fears going into this case. Thankfully, neither was realized.

First, I was concerned that the Court might take the test it had previously articulated for determining whether a *forum selection clause* should be given effect as a matter of federal maritime law and apply that test to *choice-of-law*

clauses. This is, in essence, what the Third Circuit did in its decision below. Such an approach would, in my view, have generated a great deal of mischief. Although choice-of-law clauses and forum selection clauses are often invoked in the same breath, they are not the same and the courts should utilize different tests to evaluate whether they should be enforced. I was relieved that the Court chose not to go down this path. The test laid down in *Great Lakes* for determining whether a choice-of-law clause in a maritime contract is enforceable is distinct and different from the test for determining whether a forum selection clause laid down in *The Bremen* and *Carnival Cruise.*

Second, I was concerned that the Court's test for enforcing choice-of-law clauses might be couched in such broad language that it would eventually supplant Section 187 in non-maritime cases. This is essentially what happened when the Court decided *The Bremen* in 1972. Although that decision only applied to forum selection clauses in maritime contracts, the sweeping language utilized by the Court ultimately brought about a significant change in practice in non-maritime cases. The language in *Great Lakes*, by comparison, is much more carefully drawn. Throughout the opinion, Justice Kavanaugh consistently frames the issue as whether a choice-of-law clause is enforceable *in a maritime contract* rather than in a more general sense. The rationales articulated by the Court for declining to adopt the rule laid down in Section 187 are similarly encouraging. The Court stated that Section 187 was not the right rule because it "arose out of interstate cases and does not deal directly with federal-state conflicts." This language suggests that Section 187 should provide the relevant rule of decision in cases relating to the enforceability of choice-of-law clauses when the conflict of laws is between two states—or between a state and foreign country—rather than between state and federal law.

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Implied Jurisdiction Agreements in International Commercial Contracts

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A Introduction

In an increasingly globalised economy, commercial transactions often involve business entities from different countries. These cross-border transactions present complex legal questions, such as the place where potential disputes will be adjudicated. To provide certainty, commercial parties often conclude *ex ante* agreements on the venue for dispute resolution by selecting the court(s) of a particular state. However, what happens if no such express agreement over venue is reached for resolving a contractual dispute? Could consent to the venue be implicitly inferred from the parties' conduct or other factors?

Explicit jurisdiction clauses offer cross-border litigants the benefit of predictability by allowing them to anticipate where disputes arising from their commercial transactions will be resolved. However, business entities sometimes neglect to include express provisions for the venue, whether inadvertently or due to their inexperience. In such cases, firms may have implicitly agreed on a venue through their actions or based on their tacit understanding. This type of 'unwritten' jurisdiction agreement remains largely unexplored in the legal scholarship.

Relatively recently, the validity or enforceability of implied jurisdiction agreements arose in the Privy Council Case of Vizcaya Partners Ltd v Picard & Anor [2016] UKPC 5. In this Case, following a comprehensive survey of the existing academic and judicial authorities, Lord Collins held that since it is commonplace for a contractual agreement or consent to be implied or inferred, 'there is no reason in principle why the position should be any different in the

case of a contractual agreement or consent to the jurisdiction of a foreign court'. However, in the wake of the above Case, the notion of an implied jurisdiction agreement drew limited scholarly research attention (for instance, see Kennedy, (2023); Kupelyants, 2016). Moreover, there has been no systematic analysis of how it aligns with the needs of the international business community.

In our latest article, published in the 2023 edition of the *Journal of Private International Law*, vol. 19(3), we examine the enforceability of implied jurisdiction agreements from a global comparative perspective. Therefore, our paper provides the first comparative global perspective of the enforcement of implied jurisdiction in international contracts. Our analysis reveals uncertain and subjective standards for implied jurisdiction agreements, which undermine the needs of international commerce. While limited scenarios may justify enforcing implied jurisdiction agreements, our paper advocates restraint, given that the criteria for inferring consent are complex, unpredictable, and variable across legal systems.

B Implied Jurisdiction Agreements Create Uncertainty for Business

The main thesis of our article is that implied jurisdiction undermines the core needs of business entities engaging in cross-border commercial transactions. These entities value legal certainty and predictability, in order to make informed choices and plan business activities. However, by their very nature, implied terms offer less clarity concerning the governing law and jurisdiction agreements.

Our article likewise surveys primary legal sources across common law, civil law and mixed legal systems (as well as insights from academics and practising lawyers), assessing whether implied jurisdiction agreements are widely recognised. We find limited consensus on the conduct that demonstrates implied consent or agreement to litigate in a particular forum. Factors such as previous interactions between contracting parties and trade usage in an industry are highly subjective. Even common law tests for inferring implied terms, like the 'officious bystander' and 'business efficacy' rule, fail to clarify how these terms apply specifically to international jurisdiction.

This uncertainty requires the courts to undertake a complex, case-by-case analysis of parties' unspoken intent. However, companies benefit from consistency in interpreting cross-border transactions, whereas a lack of clarity risks complicating commercial disputes, rather than resolving them efficiently.

Overall, the unclear standards surrounding implied jurisdiction agreements are incapable of delivering the stability required by global businesses when operating across legal systems.

C Treatment under International Conventions

International treaties are aimed at harmonising divergent national laws and policies on jurisdiction, applicable law, and the recognition and enforcement of foreign judgments. The 2005 Hague Convention on Choice of Court Agreements (HCCA) governs exclusive choice of court agreements from a global perspective. Articles 3(c) and 5(1) address formal and substantive validity. Our paper suggests that the requirement for the written form under Article 3(c) may present challenges in implying jurisdiction agreements. Consequently, it is difficult to envision situations where implicit jurisdiction agreements could arise under the Hague Choice of Court Convention, given that the initial hurdle is the requirement for the agreement to be in writing.

The spirit of the HCCA is further reflected in the 2019 Hague Judgments Convention, which seeks to promote express – as opposed to implicit – jurisdiction agreements between parties. For instance, Article 5 of the Convention exhaustively lists permitted grounds for establishing international jurisdiction. This provides clarity for commercial parties who are litigating abroad. Consequently, implied jurisdictions agreements are conspicuously absent and so the policy favours explicit consent. Accordingly, we argue that the emerging global consensus dictates caution around enforcing implied jurisdiction agreements that could disrupt settled jurisdictional principles in the international context.

Brussels Ia and the Lugano Convention share provisions for the validity of a jurisdiction agreement. Namely, consent must be in writing, or evidenced in writing. This aligns with the Hague frameworks: the HCCA and the Judgments Convention. While some scholars argue for the validity of implied jurisdiction agreements in specific contexts (especially trade usage and previous dealings between parties), the prevailing view requires clear and precise consent. By way of illustration, CJEU's stance in Cases like Galeries Segoura SPRL, ProfitInvestment SIM SpA and Colzani, implies a stringent approach to consent.

D Should Implied Jurisdiction Agreements be Enforced?

In section IV of our paper, we examine the justification and rationale for the recognition or otherwise of implied jurisdiction agreements, having, *inter alia,* considered the diverse approaches adopted by the many courts across the globe.

1. Business Efficacy and Commercial Expectations

Party autonomy, a cornerstone of private international law, emphasises the importance of upholding the presumed intentions of the contracting parties. The recognition of implied jurisdiction agreements potentially aligns with the principle of party autonomy, since it seeks to fill gaps in contracts and thereby reflect the parties' unexpressed intentions, as noted by Lord Neuberger. In the context of English law, Lord Collins relied on the business efficacy and officious bystander analogy to imply jurisdiction agreements in *Vizcaya*.

Additionally, the application of business efficacy logic can mitigate challenges such as parallel proceedings or the fragmentation of disputes. Extending a jurisdiction agreement to closely related contracts, even in the absence of explicit terms, will reduce uncertainty and meet commercial expectations. Certainty, convenience, and the efficient administration of justice are paramount considerations for rational businessmen who would rather not litigate in separate courts. Nonetheless, Cases like *Terre Neuve Sarl v Yewdale Ltd* [2020] and Etihad *Airways PJSC v Flothe*r [2020] reveal complexities in ascertaining commercial expectations and business efficacy. Divergent approaches to interpreting and implying terms, coupled with the challenge of defining what constitutes a reasonable businessperson, further contribute to the uncertainty and unpredictable outcomes.

2. The Choice of Law Analogy

Implied choice of law is well-established in private international law. Moreover, it is recognised in various international instruments and across common law, mixed, and civil law jurisdictions. While jurisdiction and choice of law are distinct, the underlying principle of implied choice of law may apply to implied jurisdiction agreements.

Globally, the interrelationship between jurisdiction and choice of law is acknowledged. For instance, a choice of court agreement is widely regarded as a highly significant factor in determining an implied choice of law. The applicable law of a contract, while not determinative of jurisdiction, remains significant. However, challenges arise when parties fail to expressly state the applicable law, leading to a strict standard for implying the choice of law based on a number of factors.

Despite the recognition of implied choice of law, we argue against transposing this principle directly to the question of jurisdiction. Jurisdiction involves the exercise of state powers over litigants, and while implied choice of law may indicate a governing law, it does not necessarily imply submission to the jurisdiction of a specific court. Instead, the distinct nature of jurisdiction agreements calls for a nuanced approach.

3. International Jurisdiction and the Recognition of Foreign Judgments

Implied jurisdiction agreements play a dual role, serving as a basis for establishing both direct and indirect jurisdiction. Courts often decide on the enforceability of judgments based on the existence of a jurisdiction agreement, whether express or implied.

Different thresholds apply to direct and indirect jurisdiction. This differentiation reflects the complexities involved in establishing jurisdiction in cross-border disputes. While policy considerations may influence the exercise of direct jurisdiction, recognising and enforcing foreign judgments necessitates adherence to some very specific, often stricter, criteria set by the court addressed.

The inherent connection between jurisdiction and judgments underscores the need for certainty in cross-border litigation. Implied jurisdiction agreements lack globally established criteria. This introduces ambiguity and can lead to prolonged legal proceedings, given that litigants will often draw attention to implicit jurisdiction agreements at the enforcement stage. In short, it undermines the efficiency sought in international business transactions.

On the strength of the inefficiency that can arise from an exercise of jurisdiction based on implicit agreements, we argue that the concept of implied jurisdiction agreements adds little (if any) value to the recognition and enforcement of foreign judgments. Conversely, the HCCH 2019 Judgments Convention provides clear

jurisdictional grounds, consequently averting the need for implied agreements. The Convention's carefully drafted criteria support the global pursuit of certainty and predictability in cross-border commercial legal frameworks.

E Conclusion

In closing, we argue that implied jurisdiction agreements do not align with the needs of international commerce or the emerging global consensus on international jurisdiction. Aside from the very limited recognition of implied jurisdiction agreements under certain international instruments such as Brussels Ia, our study further reveals divergent national approaches to implied jurisdiction agreements. For several reasons, we advocate caution regarding the validity of implicit agreements:

1. Consent is not genuinely mutual if one party disputes the existence of an implied agreement: genuine consent must be clear.
2. Implied agreements provide minimal value: even without them, jurisdiction can be founded on close connections between the contract and forum.
3. The emerging global consensus on jurisdiction, as seen in the HCCH Conventions, emphasises predictability through the requirement for well-defined but restricted grounds. Implied agreements therefore fail to align with the policy behind these instruments and the emerging consensus.

Our overall conclusion is that express jurisdiction agreements should remain the priority for cross-border contracts.