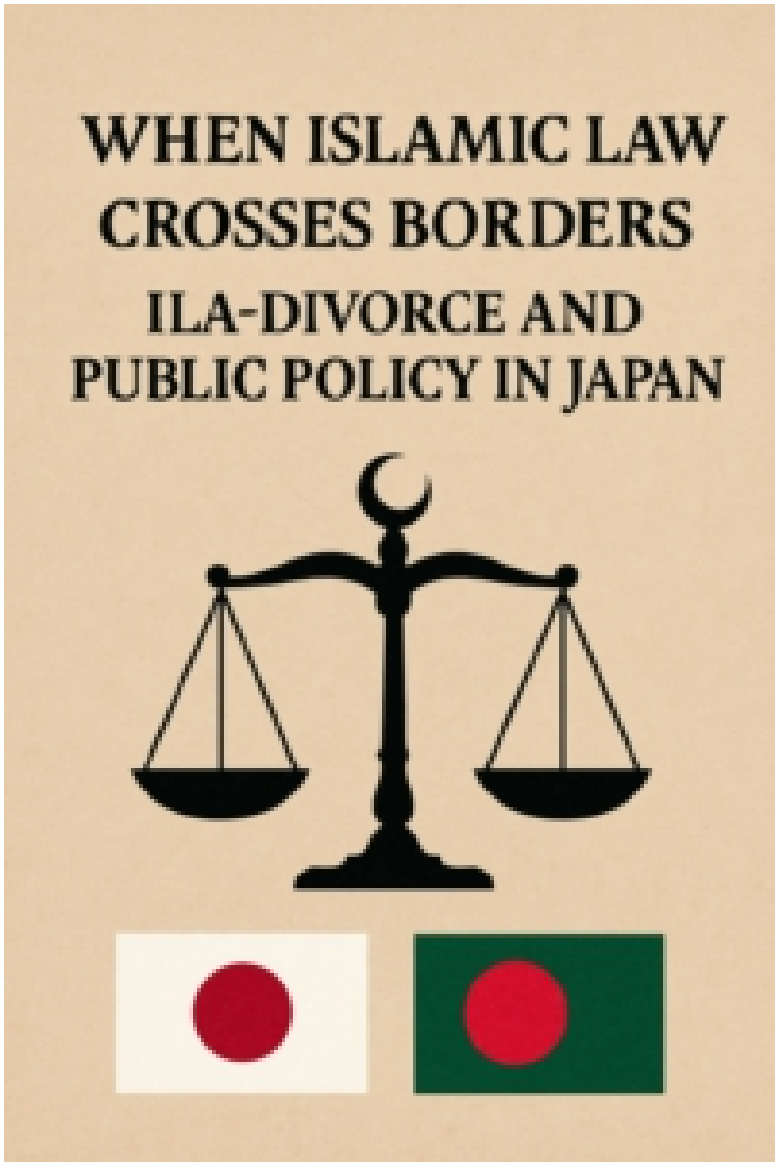
When Islamic Law Crosses Borders: Ila-Divorce and Public Policy in Japan



I. Introduction

The question of the application of Islamic law in non-Muslim countries has triggered extensive discussions and debates regarding the consistency of Islamic law rules – whether codified in modern legislation or not – with the forum's public policy. This issue has attracted particular attention in the field of family law, where various legal Islamic institutions (such as dower, polygamy, and early marriage) have sparked considerable controversy and posed significant challenges in both court practice and academic debate. This is particularly salient in the field of dissolution of marriage, as Islamic practices such as *talaq* and *khul*

have often been the subject of intense discussions concerning their recognition and validity in non-Muslim jurisdictions.

The case presented here is another example of the complexity inherent in the reception of peculiar Islamic law institutions in private international law. Recently decided by the **Nagoya High Court (second-instance court) in its ruling of 12 June 2025**, it concerns a type of marital dissolution based on *ila* (an oath of sexual abstention). To the best of my knowledge, no comparable case involving *ila* has been decided before in any jurisdiction, which makes this ruling particularly important both in theory and in practice. This is especially so given that resorting to *ila* in this case appears to have been part of a litigation strategy, anticipating an unfavourable outcome if the case had been brought before the court as a *talaq* case (see *infra* V). As such, the case provides an opportunity to consider the nature of this unusual Islamic legal institution, its specific features, and the challenges it may raise when examined by foreign courts.

II. The Case:

The parties in this case are a Bangladeshi Muslim couple who married in accordance with Islamic law in Bangladesh and subsequently moved to Japan, where they had their children. All parties, including the children, are permanent residents of Japan.

The case concerns a divorce action filed by the husband (X) against his wife (Y), seeking dissolution of marriage primarily under Bangladeshi law, and alternatively under Japanese law. X argued that, in his complaint, he declared his intention "in the name of Allah" to abstain from sexual relations with his wife; and since four months had passed without any sexual relations with Y, a "*talaq*-divorce" had been effected and thereby completed in accordance with Bangladeshi law. The divorce action was filed as a result of continuous disagreement and disputes between the parties on various issues including property rights, management of the household finance, and alleged misbehaviour and even violence on the wife's side. At the time the action was filed, X and Y had already been living separately for some time.

One of the main issues revolved around whether the application of Bangladeshi law, which provides for this form of marital dissolution (referred to in the

judgment as "*talaq*-divorce"), should be excluded due to inconsistency with Japanese public policy under Article 42 of the Act on the General Rules of Application of Laws (AGRAL).

The court of first instance (Nagoya Family Court, judgment of 26 November 2024) held that the "*talaq*-divorce" (as referred to in the judgment) was valid under Bangladeshi law and that its recognition did not contravene Japanese public policy. Notably, the court emphasized that "any assessment of whether the legal rules applicable between spouses who share the same religious and cultural background violate Japanese public policy should be approached with a certain degree of restraint", given the strong cultural and religious elements involved in the personal status of the parties, who are both originally Bangladeshi nationals and Muslims who were married in accordance with Islamic law, even if they had been living and residing in Japan for some time.

Dissatisfied with the judgment, Y appealed before the High Court.

Y challenged the first instance judgment on various grounds. She basically argued – *inter alia* – that, given the strong ties the parties and their children have with Japan and their established life there, the mere fact that the parties are Bangladeshi nationals and Muslims should not justify a restrained implication of public policy, especially considering that the effects and consequences of the divorce would take place in Japan.

III. The Ruling

The Nagoya High Court upheld the judgment of the court of first instance, stating as follows (only a summary is provided here, with modifications and adjustments):

> *Under Bangladeshi law, which governs the present divorce, a husband may dissolve the marriage either through talaq (a unilateral declaration of divorce by the husband) or through other modes. There are several forms of talaq-divorce available to the husband, including ila. The latter entails the husband taking an oath in the name of Allah to abstain from sexual relations with his wife. If no intercourse occurs within four months following the oath, the divorce is considered to have taken effect.*

In the present case, considering that Bangladeshi law is the applicable law, the talaq-divorce would be deemed valid, and would be recognized, since a period of four months had passed without any sexual contact between the parties after X made his declaration in the complaint.

Generally, when determining the applicability of Article 42 of the AGRAL, it is not the foreign law's provisions themselves that should be assessed in abstracto. Rather, the application of the foreign law as the governing law may be excluded [only] where (1)its concrete application would result in a consequence that is contrary to public policy, and (2) the case has a close connection with Japan.

Regarding (1), the marital relationship between the parties had deteriorated over time, and various elements, when taken together, indicate that the parties had already reached a serious state of discord that could reasonably be seen as leading to separation or divorce. Consequently, considering all these circumstances, and taking into account the background of the case, the nature of the parties' interactions, and the duration of their separation, it cannot be said that applying Bangladeshi law and recognizing the talaq-divorce in this case would be contrary to public policy.

With respect to (2), Y argued that, due to the strong connection between the case and Japan, the exclusion of the application of Bangladeshi in application of article 42 of the AGRAL should be admitted. However, as previously noted, the application of Bangladeshi law in this case does not result in a violation of public policy. Therefore, even considering the strong connection of the case to Japan, the application of Article 42 of the AGRAL cannot be justified.

IV. Comments

(*) Unless otherwise indicated, all references to Islamic law here are about classical Islamic law as developed by the orthodox Sunni schools, and not Islamic law as codified and/or practiced in modern Muslim countries.

1. Islamic law before Japanese Court

There are several cases in which Japanese courts have addressed the application of foreign laws influenced by or based on Islamic law. These cases have involved matters such as the establishment of filiation, annulment of marriage, parental authority, adoption, and divorce (whether based on the unilateral will of the husband or not). While in few instances the courts have applied the relevant foreign law without particular difficulties (for example, allowing a Japanese woman married to a Pakistani Muslim man to seek and obtain a divorce under Pakistani law), in most cases, the courts have refused to apply such laws on the grounds that they were contrary to Japanese public policy. The rules found incompatible with public policy include, among others, the non-recognition of out-of-wedlock filiation, the prohibition of interfaith marriage, the prohibition of adoption, the automatic attribution of parental authority to the father, and *talaq*-based divorce (triple *talaq*). The foreign laws at issue in these cases originate either from Muslim-majority countries such as Iran, Pakistan, Indonesia, and Egypt, or from non-Muslim countries with Muslim minorities who are governed by their own personal status laws, such as Myanmar and the Philippines.

The case commented on here provides a new example of a Japanese court grappling with the application of foreign law grounded in Islamic legal principles.

2. *Ila* and dissolution of marriage

Like many other traditional – and in some views, "exotic" – Islamic legal institutions (such as *zihar*, *li'an*, *khul*, *tamlik*, *tafwidh*, *mubara'a* …… definitions are intentionally omitted), *ila* is often difficult to apprehend correctly, both in substance and in function.

a) What is *ila*?

Generally speaking, *ila* can be defined as "the swearing of an oath by a man that he will not have intercourse with his wife" for a period fixed in the Quran (chapter 2, verse 226) at four months (See Ibn Rushd (I. A. Khan Nyazee, trans.), *The Distinguished Jurist's Primer – Vol. II: Bidayat Al-Mujtahid wa Nihayat Al-*

Muqtasid (Garnet Publishing, 2000) 121).

It worth mentioning first that *ila* is not an Islamic invention but was practiced in pre-Islamic society. In that context, *ila* allowed the husband to place considerable pressure on his wife by placing her in a state of marital limbo, which can be for an indefinite period. This left the woman in a vulnerable and uncertain position, as she was neither fully married in practice, nor legally divorced.

Islamic Sharia addressed this practice and, while it did not abolish it – unlike some other pre-Islamic institutions and practices –, it attempted to alleviate its harmful effects, by introducing a period of four months, during which the husband is invited to reconsider his decision and either resume marital life (Quran chapter 2, verse 226) or dissolve the marriage (Quran chapter 2, verse 227).

b) *Ila* – Different Practices

However, regarding the actual operation of *ila*, the schools of Islamic religio-legal jurisprudence (*fiqh*) diverge significantly on several points (Ibn Rushd, *op. cit.*). Two issues are particularly relevant here:

i. The first concerns whether :

(i-a) the four-month period stated in the Quran represents a maximum period, at the end of which the marriage is dissolved; or

(i-b) the four-month period merely marks the threshold between an oath of abstention that does *not* lead to marital dissolution and one that *does*. According to this latter view, only an oath exceeding four months, or one made for an indefinite duration, qualifies as *ila* that may result in the dissolution of marriage.

ii. The second issue concerns whether

(ii-a) the marriage is *automatically* dissolved once the four-month period has elapsed, if the husband does take the necessary actions to resume the marital life, that is after performing an act of expiation (*kaffara*) in accordance with the Quranic prescriptions (notably Chapter 5, verse 89); or

(ii-b), upon expiry of the term, the wife may petition a *qadhi* (Muslim judge), requesting that her husband either end the marriage by pronouncing *talaq*, or resume marital relations after performing an act of expiation (Chapter 5, verse 89). In such a case, the *qadhi* would then grant the husband a specified period to decide. If the husband fails to take either course of action, the *qadhi* may pronounce the dissolution of the marriage on account of his inaction. Depending on the legal opinion, this dissolution may be categorized either as a *talaq* issued on behalf of the husband, or as a judicial annulment (*faskh*).

Traditionally, the Hanafi school, prevalent in Bangladesh, follows positions (1-a) and (2-a), while the other major schools adopt views (1-b) and (2-b).

3. *Ila* and *talaq* – what's the difference?

It is not uncommon for *ila* to be described as "a form of *talaq*." This appears to be the position of the High Court, seemingly based on the arguments presented by X's representative during the trial. It is true that both *ila* and *talaq* are prerogatives reserved exclusively for men; women do not have equivalent right (except, in the case of *talaq*, where the husband may contractually delegate this right to his wife at the time of the marriage). It is also true that both *ila* and *talaq* may lead to the dissolution of marriage based on the unilateral intention of the husband. However, describing *ila* as a "form of *talaq*" is not – technically speaking – entirely accurate.

i. Under the majority of schools of fiqh – except for the Hanafi –, the distinction is quite clear. This is because unlike *talaq*, *ila*, by itself, does not lead to dissolution of marriage. A judicial intervention is required upon the wife's request for the marriage to be dissolved (which is not required for *talaq*).

ii. Under the Hanafi school, however, the distinction between *ila* and *talaq* may be blurred due to their substantial and functional similarities. In both cases, a qualified verbal formula places the marriage in a suspended state[(*)] for a specified period (the waiting period (*iddah*) in the case of *talaq*, and the four-month period in the case of *ila*). If the husband fails to retract his declaration within this period, the marriage is dissolved.

(*) However, this does not apply in the case of a talaq that immediately dissolves the marriage: that is, a talaq occurring for the third time after two previous ones (whether or not those resulted in the dissolution of the marriage), or in the case of the so-called triple talaq, where the husband pronounces three talaqs in a single formula with the intention of producing the effect of three successive talaqs.

Nevertheless, a number of important distinctions remain between the two, even within the Hanafi doctrine.

a. The first concerns the frequency with which talaq *and* ila *may be resorted to.* Similar to *ila*, *talaq* does not necessarily lead to the dissolution of the marriage if the husband retracts during the wife's waiting period (*iddah*). However, its use – even if followed by retraction – is limited to two occurrences (Chapter 2, verse 229). A third pronouncement of *talaq* results in immediate and irrevocable dissolution of the marriage, and creates a temporary impediment to remarriage. This impediment can only be lifted if the woman marries another man and that subsequent marriage is irrevocably dissolved (Quran, Chapter 2, verse 230). By contrast, *ila*, does not have such limitation and can be repeated without restriction (in terms of frequency), provided that the husband retracts by performing the act of expiation each time.

b. The second concerns the form of retraction. In the case of *talaq*, the husband can resume conjugal life at will. No particular formality is required; and retraction can be explicit or implied. In the case of *ila*, however, retraction must take the form of an act of expiation (*kaffara*) in accordance with the Quranic prescriptions (Chapter 5, verse 89) before marital relations may resume.

4. *Ila* and public policy

a) *Ila – some inherent aspects*

As previously noted, *ila* has traditionally been used as a means for a husband to exert pressure or express discontent within the marriage by vowing abstinence

from sexual relations. Under Islamic Sharia, this practice is preserved: husbands – even without making any formal oath of abstinence (*ila*) – are allowed to "discipline their wives" in cases of marital discord by abstaining from sharing the marital bed (*hajr*) as a corrective measure (Quran, Chapter 4, verse 34). Indeed, it is not uncommon that Muslim scholars justify the "rationale" behind this practice by stating that "a man may resort to *ila*…when he sees no other option but to abstain from sharing the marital bed *as a means of disciplining and correcting his wife* (*italic* added)…. In this case, his abstention during this period serves as a warning to deter her from repeating such behavior" (O. A. Abd Al-Hamid Lillu, 'Mirath al-mutallaqa bi-al-'ila – Dirasa fiqhiyya muqarana ma'a ba'dh al-tashri'at al-'arabiyya [The Inheritance Rights of a Woman Divorced by *Ila'*: A Comparative Jurisprudential Study with Selected Arab Legislations]' (2020) 4(3) *Journal of the Faculty of Islamic and Arabic Studies for Women* 630). It is therefore not surprising that some would view *ila* as "troubling" due to its perceived "sexism" and the fact that wives may find themselves at their husbands' "mercy" with little thing to do (Raj Bhala, *Understanding Islamic Law* (Shar'ia) (Carolina Academic Press, 2023) 803).

These aspects, in addition with inherent gender asymmetry in the rights involved, calls into question the compatibility of *ila* with the public policy of the forum.

b) The position of the Nagoya High Court

As the Nagoya High Court rightly indicated, the exclusion of foreign law under the public policy exception does not depend on the content of the foreign law itself, assessed *in abstracto*. On the contrary, as it is generally accepted in Japanese private international law, public policy may be invoked based on two elements: (1) the result of applying the foreign law in a concrete case is found unacceptable in the eyes of Japanese law, and (2) there is a strong connection between the case and the forum (see K. Nishioka & Y. Nishitani, *Japanese Private International Law* (Hart, 2019) 22).

The Nagoya High Court's explicit adherence to this framework, notably by engaging in an *in concreto* examination of the foreign law and avoiding invoking public policy solely on the ground of its content as some earlier court decisions suggest (see e.g. Tokyo Family Court judgment of 17 January 2019; see my

English translation in 63 (2020) *Japanese Yearbook of International Law* 373), is noteworthy and should be welcomed.

That said, the Court's overall approach raises some questions. The impression conveyed by the Court's reasoning is that it focused primarily on the irretrievable breakdown of the marital relationship and the period of separation to conclude that there was no violation of public policy. In other words, since the marital relationship had reached a dead end, dissolving the marriage on the basis of objective grounds or on the basis of *ila* does not alter the outcome.

Although this approach is understandable, it would have been more convincing if the Court had carefully considered the nature of *ila* and its specific implications in this case, and eventually explicitly state that such elements were not established. These aspects appear to have been largely overlooked by the High Court, seemingly due to its unfamiliarity with Islamic legal institutions. It would have been advisable for the Court to address these aspects, at least to demonstrate its concerns regarding the potential abusive use of *ila*.

V. Concluding Remarks: *Ila* as a litigation strategy?

One may wonder why the husband in this case chose to resort to *ila* to end his marriage. One possible explanation is that Japanese courts have previously ruled that a *talaq* divorce in the form of triple *talaq* is inconsistent with public policy (Tokyo Family Court judgment of 17 January 2019, *op. cit.*). It appears that, anticipating a similar outcome, the husband in this case was advised to take a "safer approach" by relying on *ila* rather than resorting to triple *talaq* (see the comment by the law firm representing the husband in this case, available here – in Japanese only). To be sure, associating *talaq* solely with its most contested form (i.e., triple *talaq*) is not entirely accurate. That said, considering how the case under discussion was decided, it is now open to question whether it would have been simpler for the husband to perform a single *talaq* and then abstain from retracting during his wife's waiting period (*iddah*). At least in this way, the aspect of "disciplining the wife" inherent in *ila* would not be an issue that the courts would need to address

Torts and Tourists in the Supreme Court of Canada

In *Sinclair v Venezia Turismo*, 2025 SCC 27 (available here) the Supreme Court of Canada has, by 5-4 decision, held that the Ontario court does not have jurisdiction to hear claims by Ontario residents against three Italian defendants in respect of a tort in Italy. The Sinclair family members were injured in a gondola collision in Venice that they alleged was caused by the Italian defendants. But there were several connections to Ontario. The trip to Italy had been booked by Mr Sinclair using a premium credit card's concierge and travel agency service [4, 156] and the gondola ride had been arranged through that service [15, 160]. The card was with Amex Canada and one or more contracts connected to the gondola ride had been made in Ontario. The Sinclairs were also suing Amex Canada and the travel service for carelessness in making the arrangements with the Italian defendants, and those defendants attorned in Ontario [167, 172]. A core overall issue, then, was whether the plaintiffs would be able to pursue all of their claims arising from the gondola collision, against various defendants, in one legal proceeding in Ontario.

For assumed jurisdiction, Canadian common law requires that the plaintiff establish a presumed connecting factor (PCF) in respect of each defendant. Once established, the defendant can rebut the PCF by showing that it does not point to a real relationship, or only a weak relationship, with the plaintiff's chosen forum [7, 49, 202, 216]. It is well established that damage sustained by the plaintiff abroad, and continuing to be suffered in the forum, is not a PCF. While less clear, the better view of the law is that the defendant's being a "proper party" to a proceeding advanced against a local defendant is not a PCF. So neither of these routes to jurisdiction, familiar in some legal systems, was available despite their fitting the facts.

Canadian courts have held that the fact that a contract connected with a tort was made in the forum is a PCF. This is controversial because many have questioned the strength of this connection, based as it is on the place of making a contract,

but it has been repeatedly endorsed by the Supreme Court of Canada. *Sinclair* turned on whether this PCF had been established and if so rebutted [1, 51, 146]. The majority (decision written by Justice Cote) found the defendants had rebutted the PCF; the dissent (decision written by Justice Jamal) found not.

The reasons are a challenging read. The majority and dissent disagree on many discrete points (including the standard of review and the standard of proof). Many of these are essentially factual. Because they do not see the facts the same way, it is hard to compare the legal analysis. A key example is on the issue of what contract(s) had been made in Ontario. The majority is not overly satisfied that any contract had been, but is prepared to accept that Mr Sinclair's cardmember agreement was made in Ontario [102-103]. That contract is in a loose sense connected with the tort in Italy, but it is easy to see how one might think this is at best a very weak link [9]. In contrast, the dissent has no issue with the cardmember agreement having been made in Ontario [253, 259] and finds an additional contract also made in Ontario in respect of arranging the specific gondola ride [268]. That second contract is more closely linked to the tort and so the rebuttal analysis would be expected to differ from that relating to the cardmember agreement. The majority does not find any such second contract at all: it sees this as a reservation made to arrange that the gondola be available, which is not a separate contract but rather a part of the way Amex Canada performs its service obligations under the cardmember agreement [105-107].

The result of the appeal is highly fact-specific. But some useful general points can be extracted from the reasons. First, the decision may add to our understanding of the test for when a contract made in the forum is "connected" to the tort. In *Lapointe* (available here) the court had said that this is satisfied if "a defendant's conduct brings him or her within the scope of the contractual relationship" AND "the events that give rise to the claim flow from the relationship created by the contract" [58, 215]. I confess to having had trouble understanding what the former aspect means. What is it to be brought within the scope of the contractual relationship? Is this a factual or legal question? In what way would the Italian defendants be brought within the scope of the cardmember agreement (this does not seem possible) or even the second contract between Amex Canada and Carey International to arrange a gondola? Do they get brought within the scope just because they end up being the relevant gondola providers? Anyway, in this case, both the majority and the dissent seem to focus all of their

analysis of whether the contract is connected to the tort on the second aspect: whether the tort "flows" from the earlier contract (a pretty easy test to meet here for all contracts involved) [128, 246].

Second, the judges engage in a lively debate about the standard of establishing a PCF. This is understandable given the extent to which they disagree about the facts. But their debate ends up being inconclusive. For the majority see [59] to [62] and the conclusion that this is not an appropriate case to develop the law on this point (so these paragraphs, then, are markers for arguments parties might make in future cases in which the law might be developed). For the dissent see [224] to [236] and the conclusion that what it considers the status quo on the issue remains the law (yet this is in dissent). There may be common ground, since in both discussions care is taken, at least in places, to refer specifically to the distinction between disputes about facts and disputes about the application of the law to those facts. A standard of proof, whether a balance of probabilities or a good arguable case, must be about facts and not law. It does not make sense to talk about the standard of proof for establishing a point of law or satisfying a legal test.

Third, few Canadian cases have provided a detailed analysis of how the rebuttal of a PCF works, so this case is most welcome on that specific issue. The majority offers some general considerations that feed into the analysis [67-72]. It also rejects the contention that rebuttal is a "heavy" burden on the defendant [74]. It calls the rebuttal "a shift in burden and perspective, not a shift in difficulty" [74, quoting the intervener BC Chamber of Commerce]. This language is likely be repeated quoted in subsequent decisions. The majority also says that the PCF and rebuttal stages work in tandem and are complementary [74-75]. This reflects the idea that if the PCF is broad, there should be more scope for rebuttal, and if the PCF is narrow, less so. The dissent does not disagree with this stated approach to the rebuttal analysis [see 217]. However, the judges disagree about whether the defendant's reasonable expectations of where it might be sued can be considered as part of the rebuttal analysis. The dissent says no [218, 291]. The majority says yes [71-72].

Finally, on the broader question of how willing courts should be to take jurisdiction over a defendant on grounds of efficiency, access to justice and avoidance of multiple proceedings, most comments from the judges are indirect. The majority stresses the importance of "fairness" to defendants [45]. It rejects

"bootstrapping" and insists that a PCF must be shown for each defendant [63]. It cautions against a jurisdiction analysis that considers "the factual and legal situation writ large" [63]. In contrast, the dissent sees the proceeding as one that "claims inseparable damages for these integrally related torts" [281] and rejects focusing on the collision as something separate from other facts and claims [249]. More directly, it states "[i]n a case alleging multiple torts, as in this case, or a case raising claims under multiple heads of liability, focussing on the dispute as a whole ensures that a court does not inappropriately hear only part of the case in the forum while leaving related claims to be heard in the extra-provincial or foreign court" [244]. In doing so it quotes the notorious para 99 of *Club Resorts* (available here), language that continues to trouble courts more than a decade later. After *Sinclair*, are we closer to a principled answer for cases with related claims against multiple defendants? By focusing on the narrow and specific questions raised by the particular PCF at issue, including identifying whether and where certain contracts were made, the broader debate is being conducted covertly rather than in the open.

According to the French Cour de Cassation, the law applicable to the sub-purchaser's direct action against the original seller depends on who brings the claim!



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In two rulings dated 28 May 2025, the French Cour de cassation (Supreme Court) ruled on the issue of the law applicable to a sub-purchaser's direct action in a chain of contracts transferring ownership, under European private international law. The issue is sensitive. The contractual classification under French law —an outlier in comparative law— had not been upheld by the Court of Justice of the European Union (CJEU) to determine international jurisdiction under the Brussels system (CJEU, 17 June 1992, C-26/91, *Jakob Handte*). Despite CJEU's position, the Cour de cassation had consistently refused to adopt a tort-based qualification to determine the applicable law (esp. Civ. 1st, 18 dec. 1990, n° 89-12.177 ; 10 oct. 1995, n° 93-17.359 ; 6 feb. 1996, n° 94-11.143 ; Civ. 3rd, 16 janv. 2019, n° 11-13.509. See also, Civ. 1st, 16 jan. 2019, n° 17-21.477), until these two rulings rendered under the Rome II Regulation.

The proceedings

In the first case (No. 23-13.687), a Luxembourgian company made available to a Belgian company certain equipment it had obtained through two lease contracts. The lessor had acquired the equipment from a French intermediate seller, who had purchased it from a French distributor, who had sourced it from a Belgian manufacturer (whose rights were ultimately transferred to a Czech company).

Following a fire that destroyed the equipment, the Dutch insurer — subrogated in the rights of the Luxembourgian policyholder — brought proceedings against the French companies before the French courts on the basis of latent defects. The manufacturer's general terms and conditions included a choice-of-law clause in favour of Belgian law. The Belgian and Luxembourg companies sought various sums based on latent defects, lack of conformity, and breach of the selller's duty to advise. The manufacturer voluntarily joined the proceedings.

Applying French law, the Court of Appeal held the insurer's subrogated claims admissible and dismissed the French intermediary seller's claims. The Court ordered the Czech manufacturer and French companies jointly and severally liable to compensate the Luxembourg company for its uninsured losses and to reimburse the French intermediary seller for the insured equipment. The manufacturer appealed to the Cour de cassation, and the French distributor lodged a cross appeal.

In the second case (No. 23-20.341), a French company was in charge of designing and building a photovoltaic power plant in Portugal. The French company purchased the solar panels from a German company. The sales contract included a jurisdiction clause in favour of the courts of Leipzig and a choice-of-law clause in favour of German law. In 2018, the Portuguese company, as assignee of the original contract, brought proceedings against the French and German companies seeking avoidance of the successive sales and restitution of the purchase price. Alternatively, the Portuguese final purchaser invoked the contractual warranty granted by the German manufacturer and sought damages. The Court of Appeal dismissed the purchaser's claim under German law, which was applicable to the original contract. The Court of Appeal also declined jurisdiction over the French company's claims against the German company due to the jurisdiction clause. The purchaser appealed to the Cour de cassation.

The legal question

Both appeals raised the question of the determination of the law applicable to the sub-purchaser's direct action in a chain of contracts transferring ownership under European private international law, especially where a choice-of-law clause is included in the original contract.

The rulings of 28 May 2025

The Cour de cassation adopted the reasoning of the *Jacob Handte* judgment. The Court held that, in conflict of laws, the sub-purchaser's action against the manufacturer does not qualify as a "contractual matter" but must be classified as "non-contractual" and therefore be governed by the Rome II Regulation (§§ 16 seq n° 23-13.687 ; §§ 18 seq n° 23-20.341).

The Court concluded that: "*A choice-of-law clause stipulated in the original contract between the manufacturer and the first purchaser, to which the sub-purchaser is not a party and to which they have not consented,* ***does not constitute a choice of law applicable to the non-contractual obligation within the meaning of Article 14(1) of that Regulation***." (§ 20, n° 23-13.687 ; § 22, n° 23-20.341).

This solution should be also supported by the *Refcomp* ruling (§ 18, n° 23-13.687 ; § 16, n° 23-20.341), in which the Court held that a jurisdiction clause is not enforceable against the sub-purchaser, "*insofar as the sub-purchaser and the*

manufacturer must be regarded, for the purposes of the Brussels I Regulation, as not being bound by a contractual relationship" (CJEU, 7 Feb. 2013, C-543/10, para. 33).

According to the Cour de cassation, the law applicable to sub-purchaser's claims against the manufacturer is the law of the place where the damage occurred, pursuant to Article 4 of the Rome II Regulation.

Comments

Firstly, the rejection of the contractual classification does not necessarily entail a tortious classification. To do so, it must also be established that the action seeks the liability of the defendant, in accordance with the definition adopted in the *Kalfelis* judgment (ECJ, 27 Sept. 1988, Case 189/87). It was not the case here, where the claims were based on latent defects and avoidance of contract.

Secondly, the choice of a non-contractual classification appears contrary to the developments in CJEU's recent case law (H. Meur, *Les accords de distribution en droit international privé*, Bruylant, 2024, pp. 325 seq.), For the CJEU, it is sufficient to establish that the action could not exist in the absence of a contractual link for it to qualify as a "contractual claim" under Brussels I Regulation (CJEU, 20 Apr. 2016, C-366/13, para. 55, *Profit Investment*). The European Court further held that the identity of the parties is irrelevant to determine whether the action falls within the scope of contractual matters ; only the cause of the action matters (CJEU, 7 Mar. 2018, *Flightright*, joined cases C-274/16, C-447/16, C-448/16; and CJEU, 4 Oct. 2018, *Feniks*, C-337/17). Thus, the Court has moved away from its *Jacob Handte* case law.

Thirdly, limiting the effect of the choice-of-law clause to the contracting parties alone is inappropriate, as it will lead to the applicable law to the contract to vary depending on who invokes it (H. Meur, *Dalloz actualité*, 16 June 2025). This solution is also contrary to the European regulations. It is in contradiction with Article 3.1 of the Rome I Regulation, which states that "*a contract shall be governed by the law chosen by the parties*." It is also incompatible with Article 3.2 of the Regulation. This article provides that "*any change in the law to be applied that is made after the conclusion of the contract shall not […] adversely affect the rights of third parties*," from which it must be inferred *a contrario* that the original choice-of-law clause is enforceable against third parties (see the

report by Reporting Judge S. Corneloup, pp. 21 seq.; also see the Report on the Convention on the Law Applicable to Contractual Obligations, OJEC, C 282, 31 Oct. 1980, para. 7 under the commentary on Article 3). For the sake of consistency, this understanding of the principle of party autonomy should also apply to Article 14 of the Rome II Regulation. Finally, Article 12 of the Rome I Regulation confirms that it is for the law applicable to the contract to determine the persons entitled to invoke it and the conditions under which they may do so (by contrast, the Vienna Convention on the International Sale of Goods and the Hague Convention do not apply to the question of the effect of the contract on third parties – see in particular Hague Convention, 1955, Art. 5.4; Civ. 1st, 12 July 2023, No. 21-22.843).

Thus, the law applicable to the sub-purchaser's direct action should be the one chosen by the parties to the original contract (regardless of the claiming party), provided that this choice is intended to govern the contract. In the absence of a chosen law, the law of the habitual residence of the seller, as the debtor of the characteristic performance, should apply. If the designated law recognises, in principle, that a third party may invoke the rights available to the original contracting purchaser, the Vienna and Hague Conventions, which are applicable before the French courts, may regain their relevance in determining the content of those rights (see V. Heuzé, *RCDIP*, 2019, p. 534; E. Farnoux, *AJ Contrat*, 2020, p. 521).

Unfortunately, this is not the path taken by the Cour de cassation in its rulings of 28 May 2025. In practice, the original seller may be bound in respect of certain sub-purchasers, particularly those established in France, even though it may have had no knowledge of the successive sales. Such a solution increases legal uncertainty.

"Towards an EU Law on

International Commercial Arbitration?" A Sorbonne Law School Research Project



Written by Dr. Nima Nasrollahi-Shahri (Sorbonne Law School) and Vincent Bassani-Winckler (PhD Candidate, Sorbonne Law School), both authors participated in the Working Group.

A few days ago, the Sorbonne Law School released the final report of a collective research project chaired by Professors Mathias Audit and Sylvain Bollée, entitled "*Towards an EU Law on International Commercial Arbitration?*".

Conducted within the IRJS (Institut de Recherche Juridique de la Sorbonne), and more specifically its research group on private international law, SERPI (Sorbonne – Étude des Relations Privées Internationales), this project sets out to examine whether and how to improve the relationship between commercial arbitration and EU law.

Aims of the project and content of the report

Rather than proposing a full-scale harmonisation, the group focused on identifying limited and concrete modifications, focused on procedural issues, that would improve clarity, consistency, and the mutual recognition of arbitration-related judgments across Member States. Most notably, the report contains a proposal to qualify the arbitration exclusion in the Brussels I recast regulation and to add several provisions granting jurisdiction to the court of the seat of the arbitration, giving priority to these courts to prevent *forum* shopping and allowing arbitration-related judgments to circulate automatically within the EU.

The report is divided into three main parts. The first part of the report maps out the fragmented legal landscape currently governing international commercial arbitration within the European Union. Although arbitration is expressly excluded from the scope of the Brussels I Recast Regulation and Rome I regulation, it is not entirely isolated from EU law. For instance Regulation 2015/848 on insolvency proceedings refers to the effects of insolvency on pending arbitral proceedings, effects solely governed by the *lex loci arbitri*. By contrast, the jurisprudence of the CJEU has had a more substantial impact on arbitration-related matters, whether it is on application of EU public policy in arbitration (Mostaza Claro and Eco-Swiss) or of course investment arbitration between EU Member States (*Achmea*, *Komstroy*, and *PL Holdings* rulings). The CJEU has also shaped the scope of the arbitration exclusion in the Brussels I system. While early cases seemed fairly uncontroversial, *West Tankers* precluded Member States' courts from issuing anti-suit injunctions relating to arbitration. Particularly controversial was the *London Steamship Judgement*, in which the Court limited the ability of a (then) Member State to refuse recognition of a judgment on the basis of a prior arbitration award – even where the award had already been confirmed by a court in that Member State (where the seat of arbitration was located).

The second part of the report lays out the rationale behind the working group's proposals. It begins by acknowledging the political and legal constraints of a full-scale harmonisation, before arguing that targeted integration of arbitration-related rules into EU law – in particular the Brussels I Recast Regulation – would meaningfully enhance legal certainty, coherence, and the effectiveness of

commercial arbitration within the Union. The report identifies a series of concrete legal issues where the current exclusion of arbitration from Brussels I Recast creates legal uncertainty or unfair outcomes. The first issue is certainly the risk of competing proceedings: the current framework does not give any priority, where the validity or applicability of an arbitration agreement is contested, to the judge of the seat of arbitration. Uncertainties remain, additionally, regarding the leeway of a judge of a Member State faced with a judgment rendered on the merits by the judge of another Member State after the latter has dismissed an arbitration agreement. Litigation concerning the constitution of the arbitral tribunal can also give rise to procedural conflicts. The circulation of decisions on the constitution of the arbitral tribunal and relating to the validity of the award are currently governed by a patchwork of national laws. Both could be ensured by a European recognition regime. In the wake of the London Steamship ruling the handling of conflicts between judgments and awards has never been more uncertain. In short, the current regime gives no clear priority to the court of the seat of arbitration, nor does it offer sufficient predictability to parties who rely on arbitration within the European judicial area.

In the final part of the report, the working group sets out a targeted reform plan for the Brussels I Recast Regulation. These proposed amendments are designed to strengthen the effectiveness of arbitration within the EU judicial area without harmonising the substance of arbitration law. Each provision responds to existing legal uncertainties or procedural inconsistencies and aims to enhance predictability, mutual trust, and party autonomy.

The proposed amendments to the Brussels I Recast Regulation

The amendments focus on six areas:

1. Limited extension to arbitration of the scope of application of the Regulation

(Article 1(2)(d))

Proposed provision (art. 1(2)(d)):

> *"This Regulation shall not apply to: (…) (d) arbitration, save as provided for in Articles 25 bis, 31 bis, 45 1. (d) and 45 3"*

The first proposed amendment refines the current exclusion of arbitration from the Brussels I Recast Regulation. Presently, Article 1(2)(d) excludes arbitration entirely, which has led to interpretive tensions when arbitration-related issues intersect with judicial proceedings. The proposed reform retains the general exclusion but introduces narrowly defined exceptions – specifically for (proposed) Articles 25 bis, 31 bis, 45(1)(d), and 45(3).

This opening is not meant to harmonise arbitration law within the EU, but rather to create bridges where interaction with judicial mechanisms is unavoidable. It provides gateways for EU procedural law to engage with arbitration in discrete and functional ways, particularly around jurisdictional conflicts, enforcement of judgments, and safeguarding the role of the arbitral seat. Crucially, this shift does **not** introduce EU-wide arbitration rules. Instead, it merely extends the scope of the Regulation in a way that strengthens procedural consistency while continuing to respect the autonomy of Member States in substantive arbitration matters.

2. Recognition of Judgments Related to Arbitration (Article 2)

Proposed provision (art. 2):

> *"For the purposes of this Regulation: (a)(…) (…)*
>
> *For the purposes of Chapter III, 'judgment' includes a judgment given by virtue of Article 25 bis paragraph 1 in the Member State where the seat of arbitration is located. It also includes a judgment given by virtue of Article 25 bis paragraph 1 (a) in another Member State, the court of which was expressly designated by the parties. It does not include a judgment issued by the court of another Member State on matters referred to in Article 25 bis paragraph 1; (…)"*

This reform targets a critical gap in the existing system: the inability of arbitration-related court judgments (e.g. those concerning the annulment or enforcement of arbitral awards) to circulate within the EU under the automatic recognition regime of the Brussels I Recast.

The proposal amends Article 2 to include within the definition of "judgment" those decisions rendered either by the courts of the seat of arbitration (under Article 25 bis) or by courts expressly designated by the parties. Such judgments would now benefit from the mutual recognition mechanism of Chapter III. Conversely, judgments by other courts, not falling under these categories, would be excluded from automatic recognition.

This shift would enable decisions such as annulment or enforcement of awards issued by courts at the arbitral seat to circulate seamlessly across Member States. In effect, it creates a "European passport" for arbitration-related judicial decisions – enhancing legal certainty and mutual trust – and preventing inconsistencies where one Member State's court upholds an award and another ignores or contradicts it.

Importantly, this proposal, read in conjunction with article 25 bis, also ensures that parties retain freedom: they may still seek enforcement under national rules of jurisdiction if they prefer (art. 25, 3.). The reform merely introduces a uniform recognition track, based on mutual trust, building on the legitimacy of decisions from the arbitral seat.

3. Jurisdiction of the Courts of the Seat of Arbitration (Article 25 bis)

Proposed provision:

> *Article 25 bis:*
>
> *"1. If the parties, regardless of their domicile, have agreed to settle their dispute by arbitration with its seat in the territory of a Member State, the courts of that Member State shall have jurisdiction over the following actions:*
>
> *(a) Actions relating to the support for the constitution of the arbitral tribunal or the conduct of the arbitration procedure. This should be without prejudice to*

the jurisdiction of any other court expressly designated by the parties;

(b) Actions relating to the existence, validity or enforceability of the arbitration agreement. This should be without prejudice to:

- *provisions of the national law of that State Member empowering the arbitral tribunal to rule on its own jurisdiction and, as the case may be, recognising it a priority in this respect; and*
- *article 31 bis paragraph2.*

(c) Actions for annulment, recognition or enforcement of the arbitral award.

2. Actions referred to in paragraph 1 (a) and (b) may not be brought before a court of a Member State on the basis of national rules of jurisdiction.

3. Paragraph 1 (c) should be without prejudice to the right for a party to seek recognition and enforcement of an arbitral award before a court of a Member State on the basis of its national rules of jurisdiction.

4. The provisions of this article are without pre judice to the application of a rule of national law of the Member State where the seat of arbitration is located enabling the parties to waive their right to bring an action for annulment.

5. The provision of this article do not apply in disputes concerning matters referred to in Sections 3, 4 or 5 of Chapter II."

This core reform introduces a new jurisdictional rule under EU law that recognises the centrality of the seat of arbitration. Under the proposed Article 25 bis, when parties have agreed to seat their arbitration in the territory of a Member State, the courts of that State will have jurisdiction over three key types of actions:

- (a) Requests for judicial assistance, such as the appointment of arbitrators;
- (b) Challenges to the existence, validity, or enforceability of the arbitration agreement; and
- (c) Actions for annulment, recognition, or enforcement of the award.

However, this is not a rule of exclusive jurisdiction in all cases. While Article 25

bis bars recourse to national jurisdiction rules for actions falling under (a) and (b), paragraph 3 expressly preserves the right for parties to seek enforcement of arbitral awards before other Member State courts, under those States' existing national jurisdiction rules. In other words, a party could still apply directly for enforcement in a Member State other than the seat — which remains particularly important in practice for seeking execution against assets wherever they are located.

What this rule achieves, then, is not exclusivity per say, but a harmonised baseline: it grants primary jurisdiction to the courts of the seat for core functions, while preserving flexibility where appropriate. It also enhances coherence and foreseeability, notably by ensuring that judgments rendered by the court of the seat (especially on annulment or validity of awards) will benefit from automatic circulation under Chapter III of the Brussels I Recast (which is the effect of the proposed addition to article 2 (a)) — effectively granting them a "European passport."

In addition, the rule accommodates Member States' domestic doctrines, such as competence-competence and its negative effect, and waiver of annulment actions, making it fully compatible with diverse national legal cultures.

4. Priority of the Seat's Courts in Conflicting Proceedings (Article 31 bis)

Proposed provision:

> *Article 31 Bis:*
>
> *"1. Where a court of a Member State is seized of an action and its jurisdiction is contested on the basis of an arbitration agreement establishing the seat of the arbitration in another Member State, it shall, on the application of the party seeking to rely upon the said agreement, stay the proceedings until the courts of this other Member State have ruled or may no longer rule on the existence, validity or enforceability of the arbitration agreement.*
>
> *2. However the court whose jurisdiction is contested continues the proceedings if:*

(a) the arbitration agreement is manifestly inexistent, invalid or unenforceable under the law of the Member State where the seat is located; or

(b) the arbitral tribunal was seized and declined jurisdiction, and the arbitration agreement is inexistent, invalid or unenforceable under the law of the Member State where the seat is located.

For the purposes of this paragraph, reference to the law of the Member State where the seat is located encompasses conflict-of laws rules applicable in that Member State.

3. The provisions of this article are without prejudice of the application of a rule of national law of the Member State where the seat of arbitration is located empowering the arbitral tribunal to rule on its own juris diction and, as the case may be, recognizing it a priority in this respect."

This reform introduces a stay mechanism to prevent jurisdictional races and forum shopping when disputes arise about the validity of an arbitration agreement.

When a court in one Member State is seized and the arbitration agreement designates a seat in another, the seized court must stay its proceedings until the courts of the seat have ruled — unless:

- The arbitration agreement is manifestly invalid, or
- The arbitral tribunal has already declined jurisdiction.

This reform addresses the recurring problem of inconsistent rulings and tactical litigation, where parties rush to court in jurisdictions likely to undermine arbitration. The proposed rule:

- Respects the primacy of the seat in deciding the validity of the arbitration agreement;
- Integrates negative effect competence-competence where national laws so provide (see para. 3);
- Ensures minimal interference by requiring only a prima facie validity to continue proceedings, thus filtering abusive challenges;
- Maintains consistency with the New York Convention, especially Article II(3), by offering a more favourable approach (per Article VII).

In practice, this rule harmonises procedural treatment of arbitration agreements across the EU and strengthens the parties' contractual choices, giving effect to their selection of the arbitral seat as the appropriate forum for judicial review.

5. Clarification on Provisional Measures (Article 35)

Proposed provision:

> *Article 35: "Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State or an arbitral tribunal have jurisdiction as to the substance of the matter."*

This is a seemingly modest, but practically important clarification. Currently, Article 35 allows courts to grant provisional measures even if they lack jurisdiction on the merits — but it does not expressly mention arbitration.

The proposal amends this article to state that courts may issue such measures even if an arbitral tribunal has jurisdiction over the dispute. This codifies the approach taken by the ECJ in *Van Uden*.

6. Refusal of Recognition in Case of Conflict with Arbitral Awards (Article 45)

Proposed provision:

> *Article 45:*
>
> *"1. On the application of any interested party, the recognition of a judgment shall be refused:*
>
> *(…)*
>
> *(d) if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State, or an arbitral award, involving the same cause of action and between the same parties, provided that the earlier*

> *judgment or arbitral award fulfils the conditions necessary for its recognition in the Member State addressed; or (…)*
>
> *3. Without prejudice to point (e) of paragraph 1, the jurisdiction of the court of origin may not be reviewed. The test of public policy referred to in point (a) of paragraph 1 may not be applied to the rules relating to jurisdiction, including the rules governing the existence, validity or enforceability of arbitral agreements."*

This reform targets one of the most pressing weaknesses exposed by the *London Steamship* case: under current law, an arbitral award cannot itself prevent the recognition of a conflicting court judgment within the Brussels I framework.

The proposed change adds arbitral awards to the list of prior decisions that can bar recognition of later inconsistent judgments, provided that:

1. The award was rendered before the judgment,
2. Both involve the same cause of action and parties, and
3. The award meets the conditions for recognition in the requested state.

This ensures that awards enjoy the same *res judicata* value as earlier judgments, preventing inconsistent decisions and protecting the authority of arbitration.

In addition, paragraph 3 of Article 45 is revised merely to extend the prohibition of the use of public policy exceptions to the rules relating to jurisdiction, even when the rules governing the existence, validity or enforceability of arbitral agreements are at stake.

Conclusion: A Coherent and Functional Reform

These proposals are carefully calibrated. They do not seek to harmonise the substance of arbitration law in the EU – something neither realistic nor desirable given the diversity of legal traditions. Rather, the proposals aim to:

- Close procedural loopholes in the Brussels I Recast Regulation;
- Ensure legal certainty in cross-border litigation involving arbitration;

- Support party autonomy and reward the choice of a Member State seat;
- Enhance the attractiveness of European arbitration venues, through mutual trust in court supervision and support for arbitration.

In short, the proposals promote integration without harmonisation. They offer a modest but meaningful step towards a more coherent and predictable European framework for arbitration—one that recognises both the autonomy of arbitration and the importance of judicial cooperation in the EU.

Civil Personal Status Law in the UAE and the Paradox of the Application of Foreign Law: A Legal Trap?



I. Introduction [(*)]

(*) For the sake of simplicity, reference will be made only to Federal Decree-Law No. 41/2022 of 2 October 2022 on Civil Personal Status. The Emirate of Abu Dhabi has enacted a separate law that addresses similar matters at the local level. For a comparison of the various applicable legal frameworks in family law in the UAE, see Béligh Elbalti, "The Personal Status Regimes in the UAE — What's New and What Are the Implications for Private International Law? A Brief Critical Appraisal".

There is no doubt that the introduction of the Civil Personal Status Law (CPSL) in the United Arab Emirates marks a significant turning point in the region's legal landscape, particularly in areas traditionally governed by religious norms. The CPSL refers to the special law adopted at the federal level, which allows family law disputes involving non-Muslims (both foreigners and UAE citizens) to be resolved under a legal framework, that is intended to be modern, flexible, based on "rules of justice and fairness" and "the best international practices from comparative legal systems" (cf. article 19 of the Cabinet Resolution Concerning the Executive Regulation of Federal Decree-Law on the Civil Personal Status). However, the incorporation of the CPSL into the existing legal frameworks in the UAE has raised several issues. These include, among others, the articulation of the CPSL with the other applicable legal frameworks, and more importantly, the extent to which parties may opt out of this "modern" regime in favor of applying their own national laws (for a general overview, see Elbalti, *op. cit.*).

The question has so far remained the subject of legal speculation, as the available court decisions have not directly or explicitly addressed the issue (available court decisions have mainly been rendered by Abu Dhabi courts. However, as mentioned earlier, in Abu Dhabi, a different legal framework applies). Optimistic views rely on the wording of the law, which – in theory – allow for the application of foreign law when invoked by foreign non-Muslims (article 1 of the CPSL). Pessimistic views (including my own) are based on the almost consistent judicial practice in the UAE regarding the application of foreign law in general, and in personal status matters in particular. From this perspective, even when foreign law is invoked, its actual application remains extremely limited due to structural and systemic obstacles that render the use of foreign law nearly impossible in practice (although, *this does not mean that foreign law is never applied*, but

rather that its application is particularly difficult).

The decision discussed here is not publicly available and is presented based on private access. Although it is very likely that the Dubai Supreme Court has issued numerous rulings applying the CPSL, such judgments (unlike those in civil and commercial matters) are generally not published on the official website managed by the Dubai Courts. For reasons of privacy, the case reference and the nationality of the parties will not be disclosed.

II. Facts

The case concerns divorce between a husband (X) and a wife (Y), both of whom are non-Muslim foreigners and share the same nationality. X and Y were married more than a decade ago in their home country (State A, a European country), where they also had children, before relocating to Dubai, where they eventually settled. The parties concluded a special agreement regarding matrimonial property, in which they expressly agreed that the law of State A would apply.

Later, X initiated divorce proceedings before the Dubai Court of First Instance, seeking the dissolution of marriage in accordance with the CPSL. Y, however, contested the application of the CPSL and argued that the law of State A should apply, requesting that X's claim be dismissed on that basis. In support of her defense, Y submitted a certified and authenticated translation of the applicable law of State A.

i) Before the first instance court

The Court of First Instance, however, rejected the application of State A's law on the grounds that the submitted translation was dated, poorly legible, and that no original copy of the law had been provided. As a result, the court concluded that the conditions for applying foreign law were not met and proceeded to dissolve the marriage under the CPSL, on no-fault divorce grounds, as requested by X.

ii) Before the Court of Appeal

Dissatisfied with the judgment, Y filed an appeal before the Dubai Court of Appeal, arguing that the law of State A should have been applied instead of the CPSL, given that both parties shared the same nationality and had expressly

agreed to the application of that law in their matrimonial property arrangement. She further contended, among other things, that translating the entire law would have been prohibitively expensive, and that she had not been given an opportunity to submit an original copy of the law. The Court of Appeal, however, was unpersuaded by these arguments. It reaffirmed the principle that when a foreign law is applicable, the burden lies on the party invoking its application to submit an authenticated copy of the law. Moreover, if the original text is not in Arabic, the law must be translated by a translation office certified by the Ministry of Justice. This is because, according to the Court of Appeal, foreign law is treated as a question of fact, and its content must be duly established by the party relying on it.

Unhappy with the outcome, Y appealed to the Supreme Court, reiterating the same arguments raised before the Court of Appeal.

III. The Ruling

Unsurprisingly, the Dubai Supreme Court rejected the appeal, holding as follows:

> *According to the established case law of this Court and pursuant to Article 1(1) of the CPSL, 'the provisions of this Decree-Law shall apply to non-Muslim citizens of the United Arab Emirates and to foreign non-Muslim residents in the UAE, unless one of them invokes the application of his own law […]'*
>
> *It is therefore well established that the burden of proving and submitting the foreign law lies with the party seeking its application. That party must submit a complete and unabridged copy of the foreign law, including all amendments, duly authenticated and officially certified. If the foreign law is not in Arabic, it must be translated by an officially certified translator. This is because foreign law is considered a matter of fact, and it lies with the party relying on it to prove its content and that it remains in force in its country of origin.*
>
> *If none of the parties invokes or submits the foreign law, or if the law is invoked but not properly submitted, or is incomplete, irrelevant to the dispute, or lacks the applicable provisions, then domestic law must be applied. This remains the case even if the foreign law is submitted for the first time on appeal, as introducing it at that stage would undermine the principle of double-degree*

jurisdiction and deprive the opposing party of one level of litigation, which is a fundamental rule of judicial organization and part of public order.

It is also well established that the assessment of whether the provisions of the foreign law submitted are sufficiently relevant and complete for resolving the dispute is a legal issue subject to the Supreme Court's control.

Given the above, and since the judgment of the court of first instance, as upheld by the judgment under appeal, complied with the above legal principles and ruled in accordance with the provisions of UAE [civil] personal status law, rejecting the application of [the law of State A] ……, based on sound and well-supported reasoning ….. the ground of appeal is therefore without merit.

IV. Comments

1. Foreign Law in the UAE

As noted by UAE lawyers themselves (albeit in the context of international transactions), "it is almost impossible to apply foreign law" in the UAE, and "[i]n most cases, the courts in the UAE will apply local law and will have little or no regard for the foreign law in the absence of evidence [of its] provisions" (Essam Al Tamimi, *Practical Guide to Litigation and Arbitration in the United Arab Emirates* (Kluwer Law International, 2003) 167).

Prior to 2005, UAE courts were inconsistent in their approach to family law disputes: whereas the Dubai Court of Cassation admitted the application of foreign law *ex officio*, the Federal Supreme Court treated foreign law as a matter of fact, even in family law cases. However, following the enactment of the Federal Personal Status Law in 2005, the Dubai Court of Cassation aligned its position with that of the Federal Supreme Court, treating foreign law as fact whose application depends on the party invoking it and proving its content. This shift reflects the general legislative intent, as expressed in the Explanatory Memorandum to Federal Law No. 28 of 2005 on Personal Status.

It is therefore not surprising to read that "[t]raditionally, the UAE courts have a reputation of applying foreign law only reluctantly." This reluctance stems from the general principle that "[f]oreign law is treated as a matter of fact, and a

provision of foreign law must be proven in the proceedings by the party that intends to rely on it." Consequently, "[w]here the parties do not provide sufficient evidence, the Emirati court would apply Emirati law" (Kilian Bälz, "United Arab Emirates," in D. Girsberger et al. (eds), *Choice of Law in International Commercial Contracts* (OUP, 2021) 691). For this reason, invoking foreign law has proven largely unsuccessful, as UAE courts impose very strict requirements for its acceptance. These hurdles become even more significant when the foreign law is not in Arabic. In such cases, the party relying on the foreign law must submit a certified translation of the entire relevant legal instrument (e.g., the Swiss Civil Code in its entirety), authenticated by the official authorities of the state of origin. Courts have routinely refused to apply foreign law when only selected provisions are submitted or when the original text (in its foreign language) is not provided. Any failure to meet these stringent requirements typically results in the exclusion of the foreign law and the application of the *lex fori* instead.

It is against this background that the adoption of the CPSL should be understood. In an attempt to address the challenges associated with the application of foreign law—and rather than facilitating its application—UAE local authorities opted for a radical alternative. Under the guise of modernity, progress, and alignment with the most advanced international practices in family law, they introduced a special legal framework: the CPSL. Indeed, although the CPSL formally leaves room for the application of foreign law (article 1 of the CPSL), it is actually designed to apply *directly* to all disputes falling within its scope, even in cases where foreign law would otherwise apply under the UAE's choice-of-law rules, as set out in the Federal Law on Civil Transactions of 1985 (FLCT), arts. 10-28. (On the different approach under the Abu Dhabi Civil Marriage Law, and the issue of articulation between the choice-of-law rules provided in the 1985 FACT and article 1 of the CPSL, see Elbalti, *op. cit.*). For instance, a Filipino couple who got married in the Philippines and resides in the UAE could be granted a divorce based solely on the unilateral will of one spouse, even though divorce is not permitted under Philippine law, normally applicable here. Similarly, in countries such as Lebanon, where couples married under religious law cannot dissolve their marriage except through religious procedures, one spouse may still obtain a divorce in the UAE. This is more so knowing that jurisdictional rules in the UAE enable UAE courts to assert jurisdiction even in cases with minimal connection to the forum. (For an overview, see Béligh Elbalti, "The Abu Dhabi Civil Family Court on the Law on

Civil Marriage Applicability to Foreign Muslim and the Complex Issue of International Jurisdiction").

2. Heads You Lose, Tails You Still Lose: The Litigant's Dilemma

Faced with a family law dispute in the UAE, litigants (particularly defendants) may find themselves in an inextricable situation. While, in theory, foreign law may be applied if invoked by one of the parties, in practice this is rarely the case. According to testimonies shared on various social media platforms, as well as accounts personally gathered by the author, local lawyers often advise their clients not to engage in a legal battle whose outcome appears predetermined.

However, when such advice is followed, courts typically state: "*Since neither party holds the nationality of the UAE, and neither of them invoked the application of any foreign law, the applicable law shall be the laws of the UAE.*" (see e.g. Dubai Court of First Instance, Case No. 542 of 14 February 2024 [divorce and custody case]). Yet, even when a party does invoke the application of foreign law – as in the case discussed here – the result is often the same: the foreign law is excluded, and UAE law is applied regardless, even when the party has made every effort to comply with procedural requirements.

The obligation to submit the full text of foreign law (an entire civil code!), translated into Arabic by a sworn translator and certified by the state of origin's authorities, renders the task nearly impossible (especially when the competent authorities in the State of origine often content themselves to refer the parties to available online databases and unofficial translations). This cumbersome process renders the attempt to apply foreign law a Sisyphean effort, ultimately providing the court a convenient justification to revert to the *lex fori*—when, according to the UAE's own rules of choice of law, foreign law should have been applied.

3. A Potential Recognition Problem Abroad?

What happens when divorces such as the one in the present case are submitted for recognition abroad?

There is, to be sure, no straightforward answer, as this would depend on the legal

system concerned. However, precisely for such basic reasons, the UAE should exercise caution in its approach to family law disputes involving foreign parties. To return to the examples mentioned above: a divorce involving a Filipino couple or a Christian Lebanese couple is highly unlikely to be recognized in the Philippines or Lebanon. In the Philippines, foreign divorces between Filipino nationals are not recognized as valid (see Elizabeth H. Aguiling-Pangalangan, "Philippines," in A. Reyes et al. (eds.), *Choice of Law and Recognition in Asian Family Law* (Hart, 2023), pp. 273–274). Similarly, in Lebanon, civil divorce judgments rendered abroad have often been refused recognition on public policy grounds, particularly when the marriage was celebrated under religious law involving at least one Lebanese national (see Marie-Claude Najm Kobeh, "Lebanon," in J. Basedow et al. (eds.), *Encyclopedia of Private International Law*, Vol. III (Edward Elgar, 2017), p. 2275).

Moreover, certain international treaties concluded by the UAE explicitly require a control of the law applied by the rendering court. Notably, the 1991 Franco-Emirati Bilateral Convention on Judicial Assistance and the Recognition and Enforcement of Foreign Judgments provides in Article 13(1)(b) that a foreign judgment shall be recognized and enforced only if "the law applied to the dispute is the one designated by the conflict-of-law rules accepted in the territory of the requested State." It is worth noting that the French Cour de cassation relied specifically on this provision in its refusal to enforce a divorce judgment rendered in Abu Dhabi (Ruling No. 15-14.908 of 22 June 2016; see comments by Christelle Chalas, *Revue critique*, 2017(1), p. 82).

Last but not least, in cases similar to the one discussed here, where a party relying on foreign law appears to be effectively prevented from making her case due to the excessively stringent evidentiary requirements imposed by UAE courts, such proceedings may be found incompatible with procedural public policy. This is particularly true where the losing party was not afforded a fair opportunity to present her arguments, raising serious concerns regarding due process and access to justice.

4. Epilogue

Since the emergence of private international law as a legal discipline, debates

over the justification for applying foreign law have occupied scholars. Regardless of the theoretical foundations advanced, it is now widely accepted that, the application of foreign law constitutes “a requirement of justice” (O. Kahn-Freund, “General Problems of Private International Law,” 143 *Collected Courses* (1974), p. 469).

Therefore, while the stated objective of the CPSL is to provide expatriates with a modern and flexible family law based on principles that are in line with the best international practices may be understandable and even commendable, UAE authorities should not lose sight of the fact that the application of foreign law is “an object directed by considerations of justice, convenience, [and] the necessity of international intercourse between individuals” (International Court of Justice, Judgment of 28 November 1958, *ICJ Reports* 1958, p. 94).

Report on the ABLI/HCCH 4th Joint Webinar on “Cross-Border Commercial Dispute Resolution – Electronic Service of Documents and Remote Taking of Evidence“



by Achim Czubaiko-Güntgen, Research Fellow („Wissenschaftlicher Mitarbeiter") and PhD Candidate, supported by the German Scholarship Foundation, Institute for German and International Civil Procedural Law, University of Bonn.

With the fourth instalment in their ongoing webinar series on "**Cross-Border Commercial Dispute Resolution**", the Asian Business Law Institute (ABLI) and the Hague Conference on Private International Law (HCCH) returned to the topic of "**Electronic Service of Documents and Remote Taking of Evidence**". Contrary to the first webinar in 2021, this session focussed not solely on the HCCH 1970 Evidence but equally on the HCCH 1965 Service Convention. Having finally overcome the immediate constraints of the Covid-19 pandemic, this time the renowned speakers were able to elaborate more on the long-term development and visions in the practice of the two legal instruments with regard to their respective areas of law.

As always, formats like this have to manage the balancing act of providing both an introduction to the topic for an unfamiliar audience and in-depth details for experienced practitioners. In this respect, a **survey carried out at the beginning of the webinar** was revealing. While 10 % of participants had already

worked with both Conventions and 29 % had at least heard of them, this event marked the first contact with the topic for 18 % of the audience. Among those who had worked with either Convention, a majority of 18 % had practical experience only with the HCCH 1965 Service Convention, and a minority of 2 % had so far dealt exclusively with the HCCH 1970 Evidence Convention. Although this last result is anecdotal in nature, it still seems to reflect the gap between the two Conventions in terms of their prevalence, with 84 vs. 68 Contracting Parties respectively…

I. Welcome Remarks (*Christophe Bernasconi*)

At the beginning of the webinar, the **Secretary General of the HCCH**, Christophe Bernasconi, offered his **welcome remarks** (pre-recorded). Setting up the stage for the ensuing presentations, he placed the implementation of the gradually developing use of new information technology (IT) in the broader context of the **meta-purpose of all Hague Conventions**, as provided for in Article 1 of the HCCH Statute: "The purpose of the Hague Conference is to work for the progressive unification of the rules of private international law."

Noteworthy, in his address, Bernasconi explicitly mentions *Sharia law* as the third major legal tradition next to common and civil law, instead of using a more general term like "religious law" or "Islamic law". With due caution, this parlance could be a nod to the increased – and long overdue – commitment to the MENA region and sub-Saharan Africa, as shown by the continuation of the Malta Process and the establishment of a HCCH Regional Office for Africa (ROA). Further semantic observations concern the designation of the HCCH 2019 Judgments Convention as "our famous game changer", as well as the recently introduced terminology that more elegantly refers to the interplay of the Hague Conventions on transnational litigation, instead of a "package", as a "comprehensive suite" that forms a robust framework designed to enhance the effective access to justice and attract foreign investment. Finally, the Secretary General recalled that the **digital transformation of the operation of the HCCH Conventions**, which is necessary to further the goals of justice at the heart of each instrument, is primarily "**incumbent on the [state] parties**", who must embrace technology.

II. The HCCH Conventions: Use of Information Technology (*Melissa Ford*)

Second, **Melissa Ford**, HCCH Secretary of the Transnational Litigation and Apostille Division, contributed with a presentation striking the delicate balance between an introduction to the Conventions and the role of the HCCH Permanent Bureau (PB) in general and more detailed insights from the **2024 Special Commission (SC)** as well as from the **2022 Questionnaires**.

The latter is further testimony to a **certain discrepancy between the two HCCH Conventions**. Under the HCCH 1965 Service Convention (responding rate: 59 %) more than two-thirds of the Contracting Parties (67 %) permit the execution of service via different electronic means, such as email (20 %) and specific secured/encrypted variants (10 %) or online platforms (40 %) administered either by the government (33 %) or private service providers (7 %) respectively. Interestingly, no Contracting Party has yet reported that it uses distributed ledger technology (DLT) such as 'block chain'. In addition, one-third of the respondents (33 %) also transferred the requests for service electronically. In contrast, under the HCCH 1970 Evidence Convention, there appears to be a split between Contracting Parties who accept electronic letters of request (55 %) and those who do not (45 %). On a positive note, however, a majority of States (76 %) allows the taking of evidence by video-link under Chapter I of the Convention.

The former acknowledges the notion of **technological neutrality of the HCCH Conventions** (C&R No. 13). In particular, the Special Commission confirms that Article 10 lit. a) of the HCCH 1965 Service Convention, originally addressing postal channels, also includes the "transmission and service by e-mail, insofar as such method is provided by the law of the State of origin and permitted under the law of the State of destination" (C&R No. 105). However, e-mail domains alone are still not considered a substitute for the address of the person to be served. Hence, the Convention may not apply in such a case according to Article 1 (2). Similarly, the Special Commission recalled for the HCCH 1970 that Article 17 allows that a member of the judicial personnel of the court of origin, if duly appointed as commissioner for the purpose, directly examines a witness located in another Contracting State by video-link (C&R No. 50). In both instances, however, the major caveat remains that these provisions can be made subject to reservations by the Contracting States, which unfortunately a significant number

of Contracting States still has opted for to this day (see C&R No. 17 and No. 107).

Last but not least, Melissa Ford put a special emphasis on the **introduction of the new country profiles** that will replace the practical information table for both legal instruments. Projected to be finalised within 3-4 months, this new section at the HCCH homepage (hcch.net) will contain information on the Central Authorities, direct contact details of contact persons, methods of transmission, data security and privacy, method of transmission, payment methods, acceptance of electronic letters of request and the use of video-link (Chapter I and II) or postal channels respectively.

III. China's Practice and Application of the HCCH Conventions (*Xu Guojian*)

Joining from the "Panda City" Chengdu, **Xu Guojian**, Shanghai University of Political Science and Law, elaborated on "**China's Practice and Application of the HCCH Conventions**". Professor Xu is particularly well, though not exclusively, known to readers of this blog for the numerous entries devoted to his work in the col.*net* repository on the HCCH 2019 Judgments Convention.

Overall, the **use of electronic means for service and taking of evidence** is **fairly advanced** in the People's Republic of China (PRC). In addition to becoming party to the HCCH 1965 Service Convention in 1992, and the HCCH 1970 Service Convention in 1998, which are impliedly neutral towards technological changes, the topic is also explicitly addressed in domestic law. Following the civil law legal tradition, the relevant provisions are codified within the PRC Law on Civil Procedure (as amended in 2024). For example, according to Article 283 (9) service may be affected by electronic means capable of confirming the receipt of the documents by the recipient, unless prohibited by the law of the country where the party is domiciled. Furthermore, Article 283 (2) allows the remote taking of evidence abroad via instant messaging tools with the consent of both parties, if this procedure is not prohibited by the laws of that country.

In **domestic judicial practice**, these days, most courts in the PRC (90 %) use platforms like "court service", SMS, or WeChat to serve documents upon defendants. Likewise, the use of an open-style judicial chain platform based on the blockchain technology providing reliable timestamps and digital signatures ensures the proof of delivery of a certain electronic document.

Morevoer, Xu put a special emphasis on Chinese **data security regulations**. For example, the Data Security Law (2021) and the Personal Information Protection Law (2021) which emphasize strict controls on cross-border data transfers and impose limitations on how data is collected, stored and transferred in the PRC. Comparable to the legal framework in the European Union (EU), litigants need to be aware of these laws when dealing with Chinese parties or data located in the PRC.

IV. England & Wales: Use of E-Service and Remote Taking of Evidence (*Lucinda Orr*)

In the final presentation, **Lucinda Orr**, ENYO Law LLP (London), provided valuable insights on "**The Use of E-Service and Remote Taking of Evidence in England & Wales**". In her dual capacity as practising barrister and appointed Examiner of the Court (2023-2029), she has gained first-hand experience of incoming and outgoing requests for legal assistance in numerous cross-border cases.

Following the ratification by the United Kingdom (UK) of the HCCH 1965 Service Convention in 1969, as well as the HCCH 1970 Service Convention in 1976, the **Senior Master** was designated as the **Central Authority** in both instances for the (non-unified) legal system of England & Wales. The Senior Master is a senior judicial office within the King's Bench Division of the High Court of Justice, who also serves as the King's Remembrancer and Registrar of Judgments as well as in many other capacities according to Section 89 (4) of the Senior Courts Act 1981.

Regarding **service of documents**, the relevant procedure is set out in Part 6 Section V (Rules 6.48-52) of the English Civil Procedure Rules (CPR), which authorise the Senior Master to determine the method of service (R. 6.51). As a rule, service is usually effectuated by means of process server and takes several months. Moreover, the United Kingdom has paved the way for direct service through solicitors as "other competent persons" under Article 10 lit. b) of the HCCH 1965 Service Convention, which allows for a much smoother process. Besides the above encouragement of personal service, English law is generally very generous in relation to the use of electronic means of service where agreed upon between the parties (R. 6.23 (6) CPR in conj. with PD 6A) or authorised by the court (R. 6.15 CPR), which has recently been ordered more frequently in

favour of service via email and social media platforms (e.g. Instagram; Facebook) and even via Non Fungible Token (NFT) when the defendant shows evasive behaviour (see e.g. *NPV v. QEL, ZED* [2018] EWHC 703 (QB); *D'Aloia v. Persons Unknown* [2022] 6 WLUK 545). However, pursuant to the responses to the HCCH 2022 Questionnaire, para. 31, the UK had not, at least at that time, permitted the execution via such method within the framework of the HCCH 1965 Service Convention. However, this may again be due to the fact that in such situations the address of the person concerned is typically unknown and the Convention therefore does not apply at all.

The procedures applicable to the **taking of evidence** can be found in the Evidence (Proceedings in Other Jurisdictions) Act 1975 as well as in Part 34 (R. 34.1-21) of the CPR. In 2023, 5,955 letters of request under Chapter I, and 1,439 letters of request under Chapter II of the HCCH 1970 Evidence Convention were received in England & Wales. Since the powers of the court are limited to the scope of evidence admissible in English civil proceedings under Section 2 (3) of the 1975 Act, these requests must be carefully drafted as English law does not allow for "fishing expeditions". Again, the **requests may be made by foreign courts or private parties**. As foreign courts do not usually instruct local solicitors, their specific questions are dealt with by the Government Legal Department – GLD (formerly known as the "Treasury Solicitor's Department") which will, for example, examine the witnesses in the presence of a Court Examiner and stenographer and return the signed transcript – but no video recording – via the official channels. Whilst most of these depositions or examinations in Greater London are conducted using video-link technology, depositions in other regions are still generally executed in person by agent solicitors. Similarly, applications by private parties to the Senior Master under R. 34.17 CPR are usually made *ex parte.* Therefore, a duty of full and frank disclosure applies. In contrast to the procedure of the GDL, the deposition or examination is also accompanied by a videographer so that the proceedings can be followed or streamed remotely. Although the parties also receive a video recording, this data file is only made available to them in a laborious manner via a USB flash drive.

Drawing on her personal experience, Lucinda Orr, also shared the **general observations** that letters or requests transmitted by the Contracting States are very popular in South-East European Countries (SEE), in particular Romania,

Poland and Bulgaria as well as in Turkish divorce cases, while requests directly from parties are more common in the United States (USA), Canada and Brazil. Furthermore, she also stressed that private parties should definitely engage a local solicitor *before* their request has been reviewed and sealed by the Senior Master.

IV. Outlook (*Anselmo Reyes*)

As final remarks, **Anselmo Reyes**, Justice with the Singapore International Commercial Court (SICC) and former Representative of the HCCH Regional Office for Asia and Pacific (ROAP), put forward **two long-term perspectives for the HCCH Conventions**. In his view, the HCCH itself could develop (into) a hub to which judges could easily reach out to effect service abroad. Equally, in terms of evidence, the HCCH could seek a Memorandum of Understanding with the Standing International Forum of Commercial Courts (SIFoCC) guaranteeing compliance with applicable evidence law, which in turn would result in a blanket general permission for the taking of evidence by Commercial Courts in HCCH Contracting States. Envisioning the future of the HCCH as a **one-stop shop for service and evidence requests** would further the goals of justice and finally create a level playing field in relation to arbitration.

Admittedly, given the current international political climate and the organisation's financial resources, these proposals – just like the ideas put forward in another context of a permanent court or panel of legal experts ensuring the uniform interpretation of the HCCH Conventions –, may at first glance appear almost utopian. However, as Melissa Ford noted, the establishment of the country profiles could be regarded as a modest first step towards a more active and centralised role for HCCH…

The Nigerian Court of Appeal Upholds South African Choice of Court and Choice of Law Agreement

Case Citation:

Sqimnga (Nig.) Ltd v. Systems Applications Products (Nig.) Ltd [2025] 2 NWLR 423 (Court of Appeal, Lagos Division, Nigeria)

The dispute in this case arose between two Nigerian companies, Sqimnga Nigeria Ltd (the appellant) and Systems Applications Products Nigeria Ltd (the respondent). Both parties had entered into a Master Service Agreement in Nigeria, relating specifically to software solutions. A critical provision of this agreement stipulated that the laws of South Africa would govern any disputes, and further, that South African courts would possess exclusive jurisdiction to hear any matters arising from the agreement.

When a disagreement emerged between the parties, Sqimnga Nigeria Ltd initiated legal proceedings at the Lagos State High Court. The respondent immediately contested the jurisdiction of the Nigerian court, relying on the contractual clause mandating the use of South African law and courts.

At the High Court level, the court declined jurisdiction over the matter. This decision hinged on the court's determination that Sqimnga Nigeria Ltd had not provided sufficient evidence or compelling reasons why the Nigerian courts should assume jurisdiction contrary to the clearly stipulated jurisdiction clause in the Master Service Agreement.

Dissatisfied with the High Court's ruling, Sqimnga Nigeria Ltd appealed to the Court of Appeal. The appellant argued that the trial judge had misapplied the relevant legal principles by overlooking uncontroverted pleadings and witness statements. Additionally, the appellant contended that litigating the case in South Africa would impose unnecessary expenses and inconvenience upon the parties.

However, the Court of Appeal unanimously upheld the decision of the trial court, dismissing the appeal. In reaching this conclusion, the Court emphasized several key considerations. First, it reinforced the fundamental principle of contractual agreements through the maxims pacta sunt servanda (agreements must be kept) and consensu facit legem (consent makes law), asserting that freely made agreements, absent fraud or duress, must be upheld.

Secondly, the Court emphasized that the explicit foreign jurisdiction clause agreed upon by the parties could only be set aside if a compelling justification were provided. To evaluate whether such justification existed, the Court applied the Brandon tests derived from the English case of The Eleftheria (1969) 1 Lloyd's L. R. 237. These tests require the party challenging the jurisdictional clause to present clear evidence demonstrating "strong cause" for a local court to assume jurisdiction in deviation from the contractual agreement. The Court concluded that Sqimnga Nigeria Ltd failed to meet this evidentiary standard, as its arguments relied primarily on pleadings, unadopted witness statements, and legal submissions from counsel, none of which constituted adequate evidence to satisfy the Brandon tests.

The Court acknowledged the appellant's concern regarding the inconvenience and additional costs associated with litigating abroad but held that such factors alone, without further compelling justification, were insufficient to disregard the jurisdiction clause explicitly agreed upon by both parties.

Consequently, the appeal was dismissed, thereby reaffirming the position that Nigerian courts will generally respect and enforce foreign jurisdiction clauses and choice of law provisions in contracts unless the challenging party can conclusively demonstrate compelling reasons otherwise. Additionally, the appellant was ordered to pay the associated costs.

It is worth noting that South African courts may also be inaccessible where the parties cannot establish a sufficient connection to that forum. For example, in *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd* (1987) (4) SA 883 (A) at 894 A–B, Viljoen JA held that in a dispute between two foreign parties (*peregrini*), the mere submission of the defendant (a *peregrinus*) is not, by itself, sufficient to confer jurisdiction on the South African court.

In such a case, to which court should the party seeking to enforce its rights turn? Had counsel and the Nigerian courts benefited from comparative research on South African law, the outcome might have been different, potentially on grounds of public policy. The Nigerian Supreme Court's decision in *Sonnar (Nig.) Ltd v. Nordwind* (1987) 4 NWLR (Pt. 66) 520, 535, affirms that where a foreign court is inaccessible, a Nigerian court may decline to enforce a foreign jurisdiction clause on public policy grounds.

In conclusion, a private international law lawyer best serves their client by being well-versed in the comparative dimensions of the subject.

Silence Is Not Submission: Chinese Court Refuses to Enforce U.S. Default Judgment Rendered in Breach of Arbitration Agreement



Written by Dr. Meng Yu, lecturer at China University of Political Science and Law, and co-founder of China Justice Observer.

ABSTRACT

In around 2019, a Chinese court in Hebei Province refused to enforce a US default monetary judgment from a California court on the grounds that a valid arbitration agreement was in place (*Sunvalley Solar Inc. v Baoding Tianwei Solarfilms Co. Ltd.* (2019) Ji 01 Xie Wai Ren No. 3). This decision underscored the court's reliance on the arbitration agreement's validity, even though a subsequent legislative proposal to include arbitration agreements as an indirect jurisdictional filter in China's Civil Procedure Law (2023 Amendment) was ultimately not adopted.

Key takeaways:

- In around 2019, a Chinese court in Hebei Province refused to enforce a US default monetary judgment issued by a California court, on the grounds of the existence of a valid arbitration agreement between the parties (*Sunvalley Solar Inc. v Baoding Tianwei Solarfilms Co. Ltd.* (2019) Ji 01 Xie Wai Ren No. 3).
- The Hebei Court held that the arbitration agreement was valid under Chinese law (the law of the seat of arbitration), since the parties did not specify the law governing the arbitration agreement.
- The Chinese company's failure to appear in the California court did not constitute a waiver of the arbitration agreement, as the Hebei Court ruled that silence does not imply an intention to abandon arbitration.
- The proposed inclusion of "arbitration agreements" as one of the indirect jurisdictional filters in China's Civil Procedure Law (2023 Amendment) was ultimately not adopted, following legislative review which deemed it inappropriate to override foreign courts' determinations regarding the validity of such agreements.

What happens if a foreign court default judgment was rendered despite an arbitration agreement and is later submitted for recognition and enforcement in China?

A local Chinese court in Hebei Province refused to recognize and enforce such a default judgment issued by a California court in the United States, on the grounds that the US court lacked indirect jurisdiction due to the existence of a valid arbitration agreement (*Sunvalley Solar Inc. v Baoding Tianwei Solarfilms Co. Ltd.* (2019) Ji 01 Xie Wai Ren No. 3).

Although the full text of the judgment has not yet been made publicly available, a case brief is included in a recent commentary book – *Understanding and Application of the Conference Summary of the Symposium on Foreign-related Commercial and Maritime Trials of Courts Nationwide*[1] – authored by the Fourth Civil Division of China's Supreme People's Court ('Understanding and Application').

This raises an interesting and complex question: How would Chinese courts assess the indirect jurisdiction of the court of origin today, in particular, when an arbitration agreement is involved?

I. Case background

In January 2011, Sunvalley Solar Inc.("Sunvalley"), a U.S. company, entered into an agreement with Baoding Tianwei Solarfilms ("BTS"), a Chinese company, for the manufacture of solar panels.

Sunvally later allegedly incurred damages due to defective equipment supplied by BTS and subsequently filed a lawsuit against BTS before the Superior Court of California, County of Los Angeles, US ("California Court").

On 7 Sept. 2017, the California court rendered a default judgment (no. KC066342) in favor of Sunvalley, awarding a total amount of USD 4,864,722.35 against BTS.

In 2019, Sunvalley filed an application before Shijiazhuang Intermediate People's Court, Hebei Province, China ("Hebei Court"), seeking the recognition and enforcement of the California judgment ("US Judgment").

II. Court's Reasoning

Upon review, the Hebei Court held that the jurisdiction of a foreign court over a civil case is a prerequisite for courts to lawfully exercise judicial jurisdiction and also forms the basis upon which a foreign civil judgment may acquire *res judicata* and become entitled to be recognized and enforced in other countries.

In this case, the key issue was whether the arbitration clause agreed upon by the parties was valid, and if so, whether it excluded the jurisdiction of the California Court. This issue was essential in deciding whether the US Judgment could be recognized and enforced by the Hebei Court.

First, the Hebei Court examined the validity of the arbitration clause. In this case, the parties had only agreed on the governing law of the main contract, which was the laws of California, under Art. 15, Paragraph 1 of the "Procurement Contract"., The parties, however, had not specified the law governing the arbitration agreement. Accordingly, the Court deemed the arbitration clause to be governed by the law of the seat of arbitration, which in this case Chinese law.[2] Under Art. 15, Paragraph 2 of the "Procurement Contract", the parties had clearly expressed their intention to resolve their disputes through arbitration. According to the said provision, disputes arising out of the contract shall be submitted to the China International Economic and Trade Arbitration Commission (CIETAC). As such, the Hubei Court held that the arbitration clause met the requirements of Art. 16 of China's Arbitration Law and was therefore valid.

Second, the Hebei Court considered whether BTS's default constituted a waiver of the arbitration agreement. According to Art. II, Para. 1 of the New York Convention, Contracting States are required to respect valid arbitration agreements. Such agreements are not only legally binding on the parties but also have the legal effect of excluding the jurisdiction of national courts. This principle is fully consistent with Art. 5 of China's Arbitration Law and Art. 278 of China's Civil Procedure Law (CPL), both of which clearly provide that a valid arbitration agreement excludes court jurisdiction. If the parties intend to waive the arbitration agreement afterward, such waiver must be clear, explicit and mutually agreed upon, in accordance with the general principle of contract modification. Mere non-appearance in court proceedings does not constitute a waiver of

arbitration or submission to the jurisdiction of the California Court. In this case, the existence of a valid arbitration agreement remained unaffected by BTS's failure to respond to the California Court's summons. Accordingly, BTS's silence could not be construed as an intention to waive the arbitration agreement. Thus, the California Court was deemed to lack jurisdiction over the case.

Third, the Hebei Court interpreted Art. 289 of the CPL, which provides for the recognition of "[J]udgments and rulings made by foreign courts that have legal effect". The Court clarified that this refers specifically to judgments rendered by competent foreign courts. Judgments rendered by courts lacking jurisdiction, including in matters that should have been submitted to arbitration, do not qualify. Since the California Court issued its judgment despite the existence of a valid arbitration agreement, and without proper jurisdiction, the resulting US judgment could not be recognized and enforced under Chinese law.

Accordingly, the Hebei Court refused to recognition and enforcement of the US judgment.

III. Comments

Clearly, the existence of a valid arbitration agreement was the decisive reason why the Hebei Court found that the California court lacked proper indirect jurisdiction and thus refused to recognize the judgment it rendered.

While it may seem straightforward that a valid arbitration agreement generally precludes litigation before court, the extent to which such an agreement influences the review of a foreign court's indirect jurisdiction raises a more nuanced and compelling question. This very issue was at the heart of legislative debates during the drafting of China's recently amended CPL ("2023 CPL"), which entered in force on 1 January 2024.

1. The jurisdiction filter once in the draft

Interestingly, the existence of a valid arbitration agreement was initially included as one of the filters for assessing the indirect jurisdiction of foreign courts in the 2023 CPL Draft Amendment (see Art. 303, Para. 4 of the 2022 CPL Draft

Amendment on indirect jurisdiction). Similar judicial views pre-dating the Draft can also be found in Art. 47 of the "Conference Summary of the Symposium on Foreign-related Commercial and Maritime Trials of Courts Nationwide", as well as in the commentary on that Article authored by the Fourth Civil Division of the SPC in the Understanding and Application.

However, this proposed filter was ultimately removed from the final version of the 2023 CPL Amendment.

So why was this filter removed? We can find the answer in the legislative review report on the Draft, the "Report on the Review Results of the 'CPL Draft Amendment'" issued on Aug. 28, 2023, by the Constitution and Law Committee of the National People's Congress (NPC) to the NPC Standing Committee:

"[S]ome members of the Standing Committee suggested that Paragraph 4 was inappropriate. If the arbitration agreement has been deemed invalid by a foreign court and thus jurisdiction is assumed, Chinese courts should not easily deny the jurisdiction of the foreign court. It is recommended to delete it. The Constitution and Law Committee, after research, suggested adopting the above opinion and making corresponding amendments to the provision."

2. What now?

If this case were to occur today, how would a Chinese court approach it? In particular, if there were a valid arbitration agreement between the parties, would the court still assess the indirect jurisdiction of the foreign court based on that agreement, if so, how?

This brings us back to the current rules on indirect jurisdiction set out Art. 301 of the 2023 CPL. It is important to note that where the foreign judgments originates from a country that has entered into a bilateral treaty on judicial assistance with China, the indirect jurisdiction rules in the treaty – rather than those in the CPL – will govern the recognition and enforcement process.

Related Posts:

- *What's New for China's Rules on Foreign Judgments Recognition and Enforcement? – Pocket Guide to 2023 China's Civil Procedure Law (1)*

- *Thus Spoke Chinese Judges on Foreign Judgments Recognition and Enforcement: Insights from Chinese Supreme Court Justices on 2023 Civil Procedure Law Amendment (4)*

Under Art. 301 of the CPL, China adopts a hybrid approach to assessing indirect jurisdiction, one that combines the law of the rendering court and the law of the requested court. Specifically, for a foreign judgment to be recognized and enforced by Chinese courts, the foreign rendering court must meet the following jurisdictional requirements:

(1) it first must have had jurisdiction under its own national laws;

(2) even if a foreign court had jurisdiction under its own national laws, it must also maintain a proper connection with the dispute. If such a connection is lacking, the foreign court will still be considered incompetent for the purpose of recognition and enforcement in China.;

(3) The foreign court will also be deemed incompetent if its exercise of jurisdiction

a) violates Chinese courts' exclusive jurisdiction under 279 and Art. 34 of the 2023 CPL, or

b) contradicts a valid exclusive choice-of-court agreement between the parties

In the context of the hypothetical scenario involving an arbitration agreement, a Chinese court would primarily examine the situation under Art. 301, Para. 1 of the CPL. This provision requires the court to consider whether the foreign court properly determined the validity of the arbitration agreement in accordance with the law of the country where the judgment is rendered and thereby determine whether it had jurisdiction.

a) If the foreign court determined that the arbitration agreement was invalid and exercised jurisdiction accordingly under its own law, a Chinese court would generally not deny the foreign court's jurisdiction (unless it finds that the foreign court lacked proper connection with the dispute). This approach is also consistent with the legislative intent expressed by the NPC Constitution and Law Committee.

b) If the foreign court did not consider or address the validity of the arbitration

agreement (as may occur, g., in a default judgment like in the Sunvalley case), how should the Chinese court evaluate the agreement's validity during the recognition and enforcement stage? This raises a key unresolved issue: Should it assess the validity of the arbitration agreement according to the rules of Chinese private international law, or instead refer to the conflict-of-law rules in the State of origin? The 2023 Civil Procedure Law does not provide a clear answer to this question. As such the issue remains to be tested in future cases.

Related Posts:

- *China Issues Landmark Judicial Policy on Enforcement of Foreign Judgments – Breakthrough for Collecting Judgments in China Series (I)*
- *First Case of Reciprocal Commitment: China Requests Azerbaijan to Enforce its Judgment Based on Reciprocity*
- *US-China Judgments Recognition and Enforcement*

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[1] The Fourth Civil Division of China's Supreme People's Court, Understanding and Application of the Conference Summary of the Symposium on Foreign-related Commercial and Maritime Trials of Courts Nationwide [Quanguo Fayuan Shewai Shangshi Haishi Shenpan Gongzuo Zuotanhui Jiyao Lijie Yu Shiyong], People's Court Press, 2023, pp. 332-333.

[2] Cf. Art. 18, 2010 Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships (2010 Conflicts Act)

The Validity of the Utah Zoom

Wedding in Lebanon, or the Question of Locus Celebrationis in the Digital Age



Many thanks to Karim Hammami for the tip-off

I. Introduction

Once in the 20th century, the so-called "Nevada Divorces" captured the attention of private international law scholars around the world, particularly regarding their recognition abroad. Today, a similar phenomenon is emerging with the so-called "Utah Zoom Wedding." So, what exactly is this phenomenon?

This term refers to a legal and innovative practice, which gained prominence during the COVID-19 pandemic, whereby couples — *even if physically located outside the United States* — can legally marry under Utah law through a fully online ceremony, typically conducted via Zoom.

This type of marriage has become increasingly popular in countries like Israel and Lebanon (see *infra*), where only religious marriages governed by recognized personal status laws are permitted. In such systems, interfaith marriages are often not allowed or are significantly restricted, depending on the religious

communities involved. Traditionally, couples seeking a civil marriage had to travel abroad in order to conclude one that could later be recognized upon their return. The Utah Zoom Wedding offers a more accessible and convenient alternative, allowing couples to contract a civil marriage remotely without leaving their home country.

The inevitable question then becomes the validity of such a marriage abroad, particularly in the couple's home country. It is in this respect that the decision of the Beirut Civil Court dated 22 May 2025, commented below, provides a valuable case study from a comparative law perspective. It sheds light on the legal reasoning adopted by Lebanese courts when dealing with marriages concluded online under foreign law, and illustrates the broader challenges of transnational recognition of non-traditional marriage forms in plural legal systems.

II. The Case: *X v. The State of Lebanon*

1. Facts

The case concerns the registration in Lebanon of a marriage concluded online via Zoom in the State of Utah, United States. The concerned parties, X (the plaintiff) and A (his wife) appear to be Lebanese nationals domiciled in Lebanon (while parts of the factual background in the decision refer to X alone as being domiciled in Lebanon, the court's reasoning suggests that both X and A were domiciled there. Accordingly, the analysis that follows adopts the court's understanding). In March 2022, while both parties were physically present in Lebanon, they entered into a marriage remotely via videoconference, officiated by a legally authorized officiant under the laws of the State of Utah. The ceremony was conducted in the presence of two witnesses (X's brother and sister).

Following the marriage, X submitted an authenticated copy of a Utah-issued marriage certificate, along with other required documents, to the Lebanese Consulate General in Los Angeles. The Consulate registered the certificate and transmitted it through official channels to Lebanon for registration in the civil registry. However, the Lebanese authorities ultimately refused to register the marriage. The refusal was based on several grounds, including, *inter alia*, the fact that the spouses were physically present in Lebanon at the time of the ceremony, thus requiring the application of Lebanese law.

After unsuccessful attempts to have the decision reconsidered, X filed a claim before the Beirut Civil Court against the State of Lebanon, challenging the authorities' refusal to register his marriage.

2. Parties' Arguments

Before the Court, the main issue concerned the validity of the marriage. According to X, Article 25 of Legislative Decree No. 60 of 13 March 1936 provides that a civil marriage contracted abroad is valid in form if it is conducted in accordance with the legal procedures of the country in which it was concluded. X argued that the validity of a marriage concluded abroad in conformity with the formal requirements of the law of the place of celebration should be upheld, even if the spouses were residing in and physically present in Lebanon at the time of the marriage.

On the Lebanese State's side, it was argued, *inter alia*, that although, under the Lebanese law, the recognition of validity of marriages concluded abroad is permitted, such recognition remains subject to the essential formal and substantive requirements of marriage under Lebanese law. It was also contended that the principles of private international law cannot be invoked to bypass the formal requirements imposed by Lebanese law on marriage contracts, particularly when the purpose is to have the marriage registered in the Lebanese civil registry. Accordingly, since the parties were physically present in Lebanon at the time the marriage was concluded, Lebanon should be considered the place of celebration, and the marriage must therefore be governed exclusively by Lebanese law.

3. The Ruling (relevant parts only)

After giving a constitutional dimension to the issue and recalling the applicable legal texts, notably Legislative Decree No. 60 of 13 March 1936, the court ruled as follows:

> *"The Legislative Decree No. 60 mentioned above [……] recognizes the validity of marriages contracted abroad in any form, as Article 25 thereof provides that*

"a marriage contracted abroad is deemed valid in terms of form if it complies with the formal legal requirements in force in the country where it was concluded." This made it possible for Lebanese citizens to contract civil marriages abroad and to have all their legal effects recognized, provided that the marriage was celebrated in accordance with the legal formalities of the country where it was contracted and therefore subjected to civil law [……].

Based on the foregoing, it is necessary to examine the conditions set out in Article 25 and what it intended by "a marriage contracted abroad," particularly in light of the Lebanese State's claim that the Lebanese national must travel abroad and be physically present outside Lebanon and that the marriage must be celebrated in a foreign country [……].

In order to answer this question, several preliminary considerations must be addressed, which form the basis for determining the appropriate legal response in this context. These include:

- *The principle of party autonomy in contracts and the freedom to choose the applicable law is a cornerstone of international contracts. This principle stems from the right of individuals to govern their legal relationships under a law they freely and expressly choose. This equally applies to the possibility for the couple to choose the most appropriate law governing their marital relationship, when they choose to marry civilly under the laws of a country that recognizes civil marriage.*
- *Lebanese case law has consistently recognized the validity of civil marriages contracted abroad, subjecting such marriages, both as to form and substance, to the civil law of the country of celebration, regardless of the spouses' other connections to that country [……]. This implies an implicit recognition that Lebanese law leaves room for the spouses' autonomy in choosing the form of their marriage and the law governing their marriage.*
- *Legal provisions are general and abstract, and cannot be interpreted in a way that creates discrimination or inequality among citizens [……]. Therefore, adopting a literal interpretation of the term "abroad" to require the physical presence of the spouses outside Lebanese territory at the time of the marriage, as advocated by the State of Lebanon, would result in unequal treatment among Lebanese citizens. This is because, under such an interpretation, civil marriage would only be*

practically available to those with the financial means to travel abroad. Such a result would fail to provide a genuine solution to the issue of denying certain citizens the right to civil marriage.

- *Subjecting a civil marriage contract to a law chosen by the parties does not contravene Lebanese public policy in personal status matters. This is because, once the marriage is celebrated in accordance with the formalities admitted in the chosen country, it does not affect the laws and rights of Lebanon's religious communities or alter them. On the contrary, it constitutes recognition of a constitutionally protected right [right to marriage] that deserves safeguarding, and that the recognition of this right serves public policy. Furthermore, the multiplicity of personal status regimes in Lebanon due to the existence of various religious communities practically broadens the scope for accepting foreign laws chosen by the parties. However, Lebanese courts retain the power to review the chosen law to ensure that it does not contain provisions that violate Lebanese public policy, and this without considering the principle of party autonomy, in and of itself, to be contrary to public policy.[…]*

Based on the foregoing [……], the key issue is whether the marriage contract between X and A, which was entered into in accordance with the law of the State of Utah via online videoconference while both were actually and physically present in Lebanon, can be executed in Lebanon.

[……]

Utah law [……] expressly allows the celebration of marriage between two persons not physically present in the state. [……]

[U.S. law] clearly provides that the marriage is deemed to have taken place in Utah, even if both parties are physically located abroad, as long as the officiant is in Utah and the permission to conclude the marriage was issued there. Accordingly, under [Utah State's] law, de jure, the locus celebrationis of marriage is Utah. This means that the marriage's formal validity shall be governed by Utah law, not Lebanese law, in accordance with the principle locus regit actum. [……]

Therefore, based on all of the above, X and A concluded a civil marriage abroad

pursuant to Article 25 of the Legislative Decree No. 60. The fact that they were physically located in Lebanon at the time of celebration does not alter the fact that the locus celebrationis of the marriage was de jure the State of Utah, based on the spouses' clear, explicit and informed choice of the law of marriage in the State of Utah. Accordingly, the marriage contract at issue in this dispute satisfies the formal requirements of the jurisdiction in which it was concluded (Utah), and must therefore be deemed valid under Article 25 of the Legislative Decree No. 60. [.....]

Consequently, the administration's refusal to register the marriage contract at issue is legally unfounded, as the contract satisfies both the formal and substantive requirements of the law of the state in which it was concluded.

III. Comments

1. Implication of the Marriage Legal Framework on the Law applicable to marriage in Lebanon

In Lebanon, the only form of marriage currently available for couples is a religious marriage conducted before one of the officially recognized religious communities. However, couples who wish to avoid a religious marriage are allowed to travel abroad—typically to countries like Cyprus or Turkey—to have a civil marriage, and later have it recognized in Lebanon. This is a consequence of the judicial and administrative interpretation of the law applicable to marriage in Lebanon, according to which, a marriage concluded abroad is recognized in Lebanon if it had been concluded in any of the forms recognized by the foreign legal system (Art. 25 of the Legislative Decree No. 60 of 13 March 1936. See Marie-Claude Najm Kobeh, "Lebanon" in J Basedow et al. (eds.), *Encyclopedia of Private International Law – Vol. III* (Edward Elgar, 2017) 2271). The marriage thus concluded will be governed by the foreign civil law of the country of celebration, *irrespective of any connection between the spouses and the foreign country in question, such as domicile or residence*. In this sense, Lebanese citizens enjoy a real freedom to opt for a civil marriage recognized under foreign law. The only exception, however, is when both parties are Muslims, in which the

relevant rules of Islamic law apply (Najm, *op. cit.*, 2271-72).

2. "Remote Marriage" in Lebanon

According to one commentator (Nizar Saghia, "Hukm qada'i yuqirr bi-sihhat al-zawaj al-madani "'an bu'd" [A Judicial Ruling Recognizes the Validity of a "Remote" Civil Marriage]), the "remote marriage" issue began in 2021 when a couple took advantage of a provision in Utah law allowing online marriages—an option made attractive by COVID-19 travel restrictions, financial hardship, and passport renewal delays. Their success in registering the marriage in Lebanon inspired others, with around 70 such marriages recorded in 2022. In response, the Directorate General of Personal Status began refusing to register these marriages, citing public policy concerns. Faced with this, many couples opted for a second marriage, either abroad (e.g., Cyprus or Turkey) or through a religious ceremony before a recognized sect in Lebanon. Some couples, however, – like in the present case – decided to challenge the refusal of the Lebanese authorities in court, seeking recognition of their marriage.

3. Significance of the Decision

The significance of this decision lies in the court's readiness to broaden the already wide freedom couples have to choose the law governing their marriage. Already under the established legal practice in Lebanon, it was admitted that Lebanese private international law adopts a broad subjectivist view of party autonomy in civil marriage, allowing spouses to choose a foreign law without any requirement of connection to it (Pierre Gannagé, "La pénétration de l'autonomie de la volonté dans le droit international privé de la famille" *Rev. crit.* 1992, 439). The decision commented on here pushes that principle further: the court goes beyond the literal reading of Article 25 and applies it to remote marriages conducted under foreign law before foreign officials, even when the spouses remain physically in Lebanon.

This extension is striking. First, it should be noted that, under Lebanese private international law, it is generally admitted that "[t]he *locus regis actum* rule governing the formal conditions of marriage is ……extended to cover the

consequences of marriage", including filiation, parental authority, maintenance, custody and even divorce and separation (Najm, *op. cit.*, 2272). Now, it suffices for a simple click online, and the payment of minimal fees to have the marital relationship of the spouses governed by the law of foreign State, despite the absence of any connection, whatsoever, with the foreign legal system in question (except for internet connection).

Second, and more interesting, such an excessively broad view of party autonomy does not seem to be always accepted, particularly, in the field of contracts (Gannagé, *op. cit.*). For instance, it is not clear whether a genuine choice of law in purely domestic civil or commercial contracts would be permitted at all (see, however, Marie-Claude Najm Kobeh, "Lebanon", in D. Girsberger et al. (eds.), *Choice of Law in International Commercial Contracts* (OUP 2021) 579, referring to the possibility of incorporation by way of reference).

The classical justification of such a "liberalism" is often explained by the Lebanese state's failure to introduce even an optional civil marriage law. As a result, Lebanese citizens are effectively granted a genuine right to choose a foreign civil status of their choice (Gannagé, *op. cit.*, 438), and, now this choice can be exercised without ever leaving the comfort of their own homes.

Finally, it worth indicating that the court's decision has been widely welcomed by proponents of civil marriage in Lebanon, as well as by human rights and individual freedom advocates (see e.g., the position of EuroMed Rights, describing the decision as opening up "an unprecedented space for individuals not affiliated with any religion"). However, it remains to be seen how this decision will affect the general principles of private international law, both in Lebanon and beyond, particularly when the validity of such Zoom Weddings, concluded without any connection to the place of celebration, is challenged abroad.

Rethinking Private International

Law Through the Lens of Colonialism



Last week (7 June 2025), I had this extraordinary opportunity to give a presentation at the 138th Annual Conference of the Japanese Association of Private International Law, which took place at Seinan Gakuin Daigaku, Fukuoka – Japan. The theme of my presentation was "Private International Law and Colonialism." In this talk, I shared some preliminary thoughts on a topic that is both extraordinarily rich and complex. The following note offers some initial reflections based on that presentation (with a few adjustments) with the aim of contributing to ongoing discussion and encouraging deeper reflection.

Introduction

The relationship between colonialism and law has been the subject of active debate across various fields, including legal anthropology and comparative law. Key themes include the impact of colonial rule on legal systems in colonized regions, the inherently violent nature of colonialism, and the possibilities for decolonization. This relationship has also received particular attention in the field

of international law. Numerous studies have examined how colonialism shaped the very structure of the international legal order, as well as the theoretical justifications for its expansion into regions regarded as "non-Western" or "uncivilized." In contrast, the field of private international law (PIL) has, until now, rarely engaged directly with the theme of colonialism (see however the various previous posts on this blog). To be sure, some studies on the development of PIL in the 19th century or on the asymmetrical treatment of cross-border legal relationships do touch upon issues linked to colonialism. However, these works do not place the relationship between PIL and colonialism at the center of their analysis.

This note proposes to revisit PIL in light of its historical relationship with colonialism. It aims to explore the ways in which PIL was developed in a context shaped by deep legal and political inequalities, and to consider how this context informed both the theory and practice of the field. It also aims to highlight the complex role that PIL has played historically, not only as a framework that contributed to the stabilization of unequal relations, but also as an instrument that certain states used to affirm their legal and political autonomy.

I. Why Colonialism Matters to PIL

To begin with, it is important to understand why examining PIL in light of colonialism is both relevant and necessary.

1. Explanatory Value

First, studying the historical links between PIL and colonialism allows us to better understand how the field developed. As is commonly known, PIL claims to rest on the principles of equal sovereignty and neutral legal reasoning. However, this conventional understanding of PIL is incomplete. In reality, PIL particularly developed during a period when global relations were anything but equal. The nineteenth century, which saw the rapid expansion of colonial powers across Asia, Africa, and the Middle East, was also the period during which many of the foundational premises and principles of PIL took shape. Accordingly, while PIL may appear neutral and universal in theory, its development was deeply

embedded in a historical context shaped by colonial expansion and domination. This context was characterized, both in law and in practice, by profound asymmetries in power that underpinned the very structures of colonial rule. Understanding this historical backdrop sheds light on how PIL has developed to become the discipline that we know today.

2. Inclusiveness and Diversity in Legal Scholarship

Second, analyzing PIL through the lens of colonial history encourages a broader and more inclusive understanding of the field. Traditional narratives have privileged European (Western) legal thought, focusing on figures such as Huber, Story, Savigny, and many others. However, other regions also experienced legal developments that shaped their approaches to cross-border legal issues. It must be admitted that these developments have been often largely overlooked or simply dismissed. Paying attention to these neglected histories can open the way for a richer and more diverse understanding of what PIL is and can be.

3. Relevance for Contemporary Practice

Third, reflecting on these issues helps illuminate the traces of these historical patterns that may persist in current legal practices often in a hidden form under "universal" and/or "neutral" approaches. Even today, some assumptions embedded in PIL may reflect older hierarchies. For example, recent tendencies towards lex forism to the detriment of the law that is most closely connected to the case, or the expansive use of public policy or overriding mandatory rules may reproduce asymmetries that have long histories. In some areas, such as the regulation of transnational business and human rights, rules that appear neutral may obscure power relations rooted in earlier eras or based on old-fashioned conceptions. Rather than undermining PIL's relevance, recognizing the background of such dynamics enables a better adaptation of this field to present realities.

II. Scope of Analyses

The focus here is on the traditional form of conflict-of-law issues that arise between "sovereign" states, even though these relations were often marked by legal inequality, as reflected in the structure of colonial domination. It does not deal with the classical question of "colonial conflict of laws" in the strict sense, that is, legal conflicts arising from the coexistence of multiple legal orders within a single political entity composed of the metropole and its colonized territories. Such a "conflict" arose as a result of annexation (such as the annexation of Algeria by France or the acquisition of Taiwan and Korea by Japan) or direct occupation (such as the French occupation of Indochina, or the Dutch occupation of Indonesia). This type of conflicts, despite the similarity they may have with the classical conflict of laws, are more appropriately understood as belonging to the domain of "interpersonal law" or "internal (quasi-)private international law", or what was sometimes referred to as "inter-racial conflict of laws".

III. The Paradox: Legal Equality vs. Colonial Hierarchy

To understand the relationship between PIL and colonialism, we need to briefly consider their respective characteristics and foundational premises.

PIL, as a legal discipline, is concerned with cross-border private legal relations. It deals with matters such as the jurisdiction of courts, the applicable law in transnational disputes, and the recognition and enforcement of foreign judgments. Its theoretical foundation lies in the idea of sovereign equality and legal neutrality. In this respect, PIL has long been regarded as a technical and neutral discipline providing the rules and mechanisms for resolving private legal disputes involving foreign elements. For much of its development, PIL has maintained an image of formal objectivity and universality, seemingly detached from the political considerations and ideological battles that have shaped other areas of legal thought, although contemporary developments show that this has not always been the case.

Colonialism, on the other hand, rests on the very denial of sovereign equality. Colonialism, broadly defined, refers to systemic domination by one power over another, encompassing political, legal, economic, and cultural dimensions. It creates and institutionalizes structural inequalities between dominating and dominated societies. Colonialism comes in many forms: annexation (e.g., Algeria

by France), protectorates (e.g., Tunisia), or semi-colonial arrangements (e.g., Japan, Thailand, Ottman Empire or China under unequal treaties). In this sense, at its core, colonialism was a system of unilateral domination through discourses of civilizational superiority in which one power imposed its authority over another.

Therefore, the fact that PIL, which rests on the idea of sovereign equality, was particularly developed in a colonial context marked inequality and domination, gives rise to a key question: How did PIL, which is premised on equality, coexist with, and arguably help sustain, a global colonial world order defined by legal inequality?

IV. The Pre-Colonial Period – From Personality of Law to Legal Hierarchy:

As mentioned above, PIL was shaped and disseminated during the height of colonial expansion in the 19th century. However, before this colonial period, it is worth noting that, in societies with limited external legal interaction (e.g., Tokugawa Japan), PIL was largely absent. In contrast, regions like China or the Ottoman Empire, and even in Europe had systems based on personality of law, where legal norms were tied to an individual's religion or ethnicity, and disputes involving foreign subjects (usually foreign merchants) administered through forms of consular jurisdiction.

Later, while European countries succeeded in replacing this system with one based on PIL mechanism, the dynamics were quite different under colonial conditions. In places like Japan, the old system of personality of law based on the idea of "extraterritoriality" and "consular jurisdiction" was introduced under foreign pressure, when Japan was effectively forced to abandon its policy of isolation and open up to international commerce within the framework or unequal treaties imposed by Western powers. In regions like the Ottoman Empire and China, this system was not only preserved but exacerbated leading to serious encroachments on legal sovereignty and increasing the dominance of foreign powers over domestic legal and commercial affairs. In all regions, this system was institutionalized by the conclusion of the so-called "capitulations" or "unequal treaties" giving extraterritorial legal and jurisdictional privileges to Western colonial powers, which in some countries has developed to the introduction of

foreign courts (e.g. French courts in Tunisia) or mixed courts (e.g. Egypt).

Such an evolution raises an important question: why did European countries, having replaced the system of consular jurisdiction with a PIL-based system among themselves, choose not to apply the same model in their legal dealings with “non-European” countries?

V. The “Civilized vs. Uncivilized” Divide

1. The Role of PIL in the Formation of the Modern International Order – Asymmetrical treatment based on the notion of “civilization”

In the 19th century, as colonial powers expanded their reach, they also laid the foundations of what became the modern system of international law. Within this framework, the concept of the “family of civilized nations” was used to determine which states could participate in international legal relations on an equal footing, including the application of “private” international law. Legal systems that were seen as having met the standard of “civilization” were granted full recognition under the newly emerged international system. Other states were either excluded or subjected to hierarchical arrangements.

This legal stratification had practical effects. Among “civilized” nations, the principles of PIL (including the applicability of foreign law) applied. But with regard to other nations, these principles were either weakened or suspended. Courts in Europe often refused to recognize laws from countries deemed “non-civilized,” sometimes on grounds such as the rules applicable in the “non-civilized” country could not be categorized as “law” for the purpose of PIL, or its incompatibility with public policy. In this way, PIL developed a dual structure: one that applied fully among recognized sovereigns, and another – if any at all – that applied toward others.

2. Extraterritoriality in Practice in “non-Civilized” Countries and the Exclusion of PIL

Outside Europe, one notable feature of legal practice in so-called “non-civilized” countries during the colonial period was the system of extraterritoriality. In these jurisdictions, Western powers maintained consular jurisdiction, which allowed their nationals to be governed not by local law but by their own national legal systems. This arrangement was grounded in the principle of the personality of law and institutionalized through the capitulations in the Middle East and North Africa (MENA) region, and through unequal treaties in Asia.

While the precise structure and operation of these regimes varied from one country to another, they shared a fundamental feature: legal disputes involving Western nationals were handled, entirely or partially, under Western laws. Rules of PIL were effectively bypassed.

Moreover, originally, consular jurisdiction was limited to citizens and nationals of Western countries. However, over time, it was extended to cover *protégés* (local individuals granted protection by foreign powers) as well as *assimilés* (non-European nationals who were treated as European for the purpose of legal protection). This extension further curtailed the jurisdiction of local courts, such as religious, customary, or national courts of the colonized states, which became confined to resolving disputes between locals with no international dimension. By contrast, cases involving Western nationals or their protégés were routinely referred to consular courts, or where existed, to foreign courts (e.g. French courts in Tunisia) and mixed courts (such as those in Egypt).

The inequality embedded in this system was particularly evident in the enforcement of judgments: rulings issued by local courts required exequatur in order to have effect before consular or foreign courts. Meanwhile, judgments rendered by foreign courts, notably those of the colonizing power, were typically recognized and enforced without the need for any such procedure.

VI. PIL as a tool for emancipation from colonial chains

Interestingly, in the 20th century, as formerly colonized countries sought to assert their sovereignty, PIL became a means to achieve legal and political recognition. To be accepted as equal members of the international community, these states had to show that their legal systems conformed to the standards expected of “civilized” nations. This included establishing reliable legal institutions, codifying

laws, and—crucially—adopting PIL statutes.

Japan's experience in the late nineteenth century is illustrative. Faced with unequal treaties that limited its sovereignty and imposed extraterritoriality, Japan undertook a sweeping legal reform. In 1898, it adopted a modern PIL statute (the *Horei*), which played a key role in demonstrating its legal capacity and led to the renegotiation of those treaties. A comparable process took place in Egypt, where the Treaty of Montreux (1937) marked the beginning of a twelve-year transitional period leading to the abolition of consular and mixed jurisdictions. During this time (1937–1949), Egypt undertook major legal reforms aimed at restoring full judicial sovereignty. It was in this context that both the Egyptian Civil Code and the Code of Civil and Commercial Procedure were drafted and promulgated in 1949. These codifications included not only substantive and procedural rules, but also incorporated provisions on choice of law, international jurisdiction, and the enforcement of foreign judgments.

Conclusion: A Dual Legacy

As the foregoing demonstrates, PIL played a complex and at times contradictory role. It was shaped in a context of inequality, and it often served to justify and perpetuate hierarchical legal relations. Yet it also provided a framework through which some states could engage with and eventually reshape the global legal order. In this dual capacity, PIL reflects both the challenges and possibilities of legal systems operating in a world marked by deep historical asymmetries.

Today, PIL is regarded as a universal framework, taught and applied in jurisdictions around the world. But its history reminds us that legal universality often rests on specific historical and political conditions. By examining how these conditions influenced the formation and application of PIL, we gain a clearer understanding of the discipline and can begin to identify paths toward a more genuinely inclusive and balanced legal system.

Understanding this past is not about assigning blame, but about gaining clarity. By exploring how PIL has operated across different times and contexts, we equip ourselves to improve its capacity to serve all legal systems and individuals fairly. That, in the end, is what will make PIL truly universal.