AI in Arbitration: Will the EU AI Act Stand in the Way of Enforcement?

This guest post was written by Ezzatollah Pabakhsh, Master's Student at the University of Antwerp

The European Union has taken an unprecedented step by regulating artificial intelligence (AI) through the EU AI Act, which is the world's first comprehensive legal framework for AI governance. According to Recital 61, Article 6(2) and Annex III, 8(a), AI tools used in legal or administrative decision-making processes—including alternative dispute resolution (ADR), when used similarly to courts and producing legal effects—are considered high risk. These tools must comply with the strict requirements outlined in Articles 8 through 27.

These provisions are designed to ensure transparency, accountability, and respect for fundamental rights. This obligation will take effect on August 2, 2026, according to Article 113. Notably, the Act's extraterritorial scope, as outlined in Articles 2(1)(c) and (g), applies to any AI system that affects individuals within the European Union. This applies regardless of where the system is developed or used. It also applies to providers and deployers outside the EU whose output is used within the Union. This raises a critical question: can non?compliance with the EU AI Act serve as a basis for courts in EU Member States to refuse recognition or enforcement of an arbitral award on procedural or public?policy grounds?[1]

Consider the following scenario: Two EU-based technology companies, one Belgian and one German, agree to resolve their disputes through US-seated arbitration. Suppose the ADR center uses AI-powered tools that do not comply with the EU AI Act's high-risk system requirements. How would enforcement of the resulting award play out before national courts in the EU?

This scenario presents a direct legal conflict. If the winning party seeks to enforce the award in a national court of an EU Member State, two well-established legal grounds for refusing enforcement may arise.[2] First, the losing party may invoke Article V(1)(d) of the 1958 New York Convention, together with the applicable

national arbitration law. They could argue that reliance on AI systems that do not comply with the EU AI Act constitutes a procedural irregularity, as it departs from the parties' agreed arbitration procedure and undermines the integrity of the arbitral process.[3] Second, under Article V(2)(b) of the Convention, the enforcing court may refuse recognition on its own motion if it finds that using non-compliant AI violates the forum's public policy, especially when fundamental rights or procedural fairness are at stake.[4] The following section will examine these two scenarios in more detail.

Scenario 1: Procedural Irregularity under Article V(1)

Imagine that the ADR center uses an AI tool to assist the tribunal in drafting the award during the proceedings. This AI system uses complex algorithms that cannot produce transparent, human-readable explanations of how key conclusions were reached. The final award relies on these outputs, yet it offers no meaningful reasoning or justification for several significant findings. Furthermore, the tribunal does not disclose the extent to which it relies on the AI system, nor is there any clear evidence of human oversight in the deliberation process.

When the losing party in Belgium contests enforcement of the award, they invoke Article V(1)(d) of the New York Convention, arguing that the arbitral procedure did not align with the parties' expectations or the applicable law. This objection is also found in Article 1721 of the Belgian Judicial Code (BJC), inspired by Article 36 of the UNCITRAL Model Law and, to a large extent, mirroring the grounds of Article V of the New York Convention. Among these, two are especially relevant to the use of AI in the arbitral process and are central to the objection in this case.

First, under Article 1721(1)(d), a party may argue that the award lacks proper reasoning[5], which violates a core procedural guarantee under Belgian law.[6] This requirement ensures that parties can understand the legal and factual basis for the tribunal's decision and respond accordingly.[7] In this case, however, the award's reliance on opaque, AI-generated conclusions, particularly those produced by "black box" systems, renders the reasoning inaccessible and legally inadequate.[8] The EU AI Act further reinforces this objection. Articles 13, 16, and 17 require transparency, traceability, and documentation for high-risk AI systems. Meanwhile, Article 86 grants limited right to explanation for affected persons where a deployer's decision is based on Annex III systems and produces legal effects. If an award fails to meet these standards, it may not align with

Belgian procedural norms.

Second, under Article 1721(1)(e), a party may argue that the tribunal's composition or procedure deviated from the parties' agreement or the law of the seat. For example, if the arbitration agreement contemplated adjudication by human arbitrators and the tribunal instead relied on AI tools that materially influenced its reasoning without disclosure or consent, this could constitute a procedural irregularity. According to Article 14 of the EU AI Act, there must be effective human oversight of high-risk AI systems. Where such oversight is lacking or merely formal and AI outputs are adopted without critical human assessment, the legitimacy of the proceedings may be seriously undermined. Belgian courts have consistently held that procedural deviations capable of affecting the outcome may justify refusal of recognition and enforcement.[9]

Scenario 2: Public Policy under Article V(2)(b)

In this scenario, the court may refuse to enforce the award on its own initiative if it is found to be contrary to public policy[10] under Article V(2)(b) of the New York Convention, Article 34(2)(b)(ii) of the UNCITRAL Model Law, or Article 1721(3) of the Belgian Judicial Code (BJC). These provisions allow courts to deny recognition and enforcement if the underlying procedure or outcome conflicts with fundamental principles of justice in national and European legal systems.[11]

In comparative international practice, public policy has both substantive and procedural dimensions. When a breach of fundamental and widely recognized procedural principles renders an arbitral decision incompatible with the core values and legal order of a state governed by the rule of law, procedural public policy is engaged. Examples include violations of due process, lack of tribunal independence, breach of equality of arms, and other essential guarantees of fair adjudication.[12]

In this case, the use of non-transparent AI systems may fall within this category.[13] If a tribunal relies on these tools without disclosing their use or without providing understandable justifications, the process could violate Article 47 of the Charter of Fundamental Rights of the European Union. This article guarantees the right to a fair and public hearing before an independent and impartial tribunal. This issue, along with case law, could provide a reasonable basis for refusal based on public policy.[14] When applying EU-relevant norms,

Belgian courts are bound to interpret procedural guarantees in accordance with the Charter. [15]

Comparative case law provides additional support. In Dutco, for example, the French Cour de cassation annulled an arbitral award for violating the equality of arms in the tribunal's constitution, which is an archetypal breach of procedural public policy.[16] Similarly, in a 2016 decision under § 611(2)(5) ZPO, the Austrian Supreme Court annulled an award where the arbitral procedure was found to be incompatible[17] with Austria's fundamental legal values.[18] These rulings confirm that courts may deny enforcement when arbitral mechanisms, especially those that affect the outcome, compromise procedural integrity.

Belgian courts have consistently held that recognition and enforcement must be refused where the underlying proceedings are incompatible with ordre public international belge, particularly where fundamental principles such as transparency, reasoned decision-making, and party equality are undermined.[19] In this context, reliance on non-transparent AI—without adequate procedural safeguards—may constitute a violation of procedural public policy. As a result, enforcement may lawfully be denied ex officio under Article V(2)(b) of the New York Convention and Article 1721(3) of the Belgian Judicial Code, thereby preserving the integrity of both the Belgian and broader EU legal frameworks. Ultimately, courts retain wide discretion under public policy grounds to decide with real control whether or not to enforce AI-assisted awards.[20]

These potential refusals of enforcement within the EU highlight a broader trend, as domestic procedural safeguards are increasingly influenced by global regulatory developments, prompting questions about whether the EU's approach to AI in arbitration will remain a regional standard or evolve into an international benchmark.

The EU AI Act as a Global Regulatory Model?

The EU has a proven history of establishing global legal benchmarks—rules that, while originating in Europe, shape laws and practices far beyond its borders.[21] The GDPR is the clearest example of this. Its extraterritorial scope, strict compliance obligations, and enforcement mechanisms have prompted countries ranging from Brazil to Japan to adopt similar data protection frameworks.[22]

In arbitration, a comparable pattern could emerge. If EU courts apply the EU AI

Act's high-risk requirements when deciding on the recognition and enforcement of arbitral awards, other jurisdictions may adopt comparable standards, encouraging convergence in AI governance across dispute resolution systems. Conversely, inconsistent enforcement approaches could foster fragmentation rather than harmonisation. In any case, the Act's influence is already being felt beyond Europe, prompting arbitration stakeholders to address new questions regarding procedural legitimacy, technological oversight, and cross-border enforceability.

Conclusion

The interplay between the EU AI Act and the enforcement of arbitral awards highlights how technological regulation is shaping the concept of procedural fairness in cross-border dispute resolution. Whether the Act becomes a catalyst for global standards or a source of jurisdictional friction, parties and institutions cannot ignore its requirements. As AI tools move deeper into arbitral practice, compliance will become not just a regulatory obligation but a strategic necessity for ensuring the enforceability of awards in key jurisdictions.

[1] Tariq K Alhasan, 'Integrating AI Into Arbitration: Balancing Efficiency With Fairness and Legal Compliance' (2025) 42 Conflict Resolution Quarterly 523, 524.

[2] ibid 525.

[3] Jordan Bakst and others, 'Artificial Intelligence and Arbitration: A US Perspective' (2022) 16 Dispute Resolution International 7, 23; Sanjana Reddy Jeeri and Vinita Singh, 'Soft Law, Hard Justice: Regulating Artificial Intelligence in Arbitration' (2024) 17 Contemporary Asia Arbitration Journal 191, 222.

[4] Sean Shih and Eric Chin-Ru Chang, 'The Application of AI in Arbitration: How Far Away Are We from AI Arbitrators?' (2024) 17 Contemporary Asia Arbitration Journal 69, 81.

[5] Horst Eidenmuller and Faidon Varesis, 'What Is an Arbitration? Artificial Intelligence and the Vanishing Human Arbitrator' (2020) 17 New York University Journal of Law and Business 49, 72.

[6] Dilyara Nigmatullina and Beatrix Vanlerberghe, 'Arbitration Related Lessons: Insights from the Supreme Courts around the World' (2020) 2020 b-Arbitra | Belgian Review of Arbitration 307, 354.

[7] Gizem Kasap, 'Can Artificial Intelligence ("AI") Replace Human Arbitrators? Technological Concerns and Legal Implications' (2021) 2021 Journal of Dispute Resolution 209, 230, 249.

[8] Shih and Chang (n 4) 79.

[9] Koen De Winter and Michaël De Vroey, 'Belgium' in *Baker McKenzie International Arbitration Yearbook: 10th Anniversary Edition 2016–2017* (Baker McKenzie 2017), 81, 82, 85.

[10] Eidenmuller and Varesis (n 5) 80–81; Bernard Hanotiau, 'Arbitrability; Due Process; and Public Policy Under Article V of the New York Convention Belgian and French Perspectives' (2008) 25 Journal of International Arbitration 721, 729–730.

[11] Kasap (n 7) 252; Annabelle O Onyefulu, 'Artificial Intelligence in International Arbitration: A Step Too Far?' (2023) 89 Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 56, 63.

[12] Nigmatullina and Vanlerberghe (n 6) 351–352.

[13] Shih and Chang (n 4) 86.

[14] Nigmatullina and Vanlerberghe (n 6) 353.

[15] A de Zitter, 'The Impact of EU Public Policy on Annulment, Recognition and Enforcement of Arbitral Awards in International Commercial Arbitration' (University of Oxford 2019) 5, 251–253.

[16] Stefan Kröll, 'Siemens – Dutco Revisited? Balancing Party Autonomy and Equality of the Parties in the Appointment Process in Multiparty Cases | Kluwer Arbitration Blog' <https://legalblogs.wolterskluwer.com/arbitration-blog/siemens-dutco-revisited-balancing-party-autonomy-and-equality-of-the-parties-in-the-appointment-process-in-multiparty-cases/> accessed 18 August 2025; Nigmatullina and Vanlerberghe (n 6) 351.

[17] Alexander Zollner, ‘Austrian Supreme Court Set aside an Arbitral Award Due to a Violation of the Procedural Ordre Public’ (*Global Arbitration News*, 21 June 2017) <https://www.globalarbitrationnews.com/2017/06/21/austrian-supreme-court-set-aside-arbitral-award-for-violation-of-public-policy/> accessed 18 August 2025. ; Franz Schwarz and Helmut Ortner, ‘Austria’ in Giacomo Rojas Elgueta, James Hosking and Yasmine Lahlou (eds), *Does a Right to a Physical Hearing Exist in International Arbitration?* (ICCA Reports, 2020) 26, https://www.arbitration-icca.org/right-to-a-physical-hearing-international-arbitration accessed 5 August 2025

[18] Nigmatullina and Vanlerberghe (n 6) 351.

[19] Alhasan (n 1) 5–6.

[20] Shih and Chang (n 4) 87; Hanotiau (n 10) 737.

[21] Arturo J Carrillo and Matías Jackson, ‘Follow the Leader? A Comparative Law Study of the EU’s General Data Protection Regulation’s Impact in Latin America’ (2022) 16 ICL Journal 177, 178; Michelle Goddard, ‘The EU General Data Protection Regulation (GDPR): European Regulation That Has a Global Impact’ (2017) 59 International Journal of Market Research 703, 703–704.

[22] Carrillo and Jackson (n 21) 242–245.

Clearly Inappropriate Down Under: Isaacman v King [No 2] and the Outer Limits of Long-Arm Jurisdiction

By Dr Sarah McKibbin, University of Southern Queensland

The Supreme Court of New South Wales' decision in *Isaacman v King [No 2]*[1] is the kind of case that tempts one to say 'nothing to see here', and yet it richly rewards a closer look. On a conventional application of *Voth v Manildra Flour Mills*[2] — the leading Australian authority on *forum non conveniens* — Garling J stayed proceedings that attempted to litigate a New York relationship dispute in Sydney, being 'well satisfied' that the NSW Supreme Court was a clearly inappropriate forum.[3] The reasons, though brief by design,[4] illuminate the transaction costs of jurisdictional overreach,[5] show how the *Voth* framework handles an *extreme* set of facts, and offer a careful case study for empirical debates about Australian 'parochialism' in jurisdictional decision-making.

The Factual Background

The facts almost read like a hypothetical designed to test the outer limits of exorbitant, or long-arm, jurisdiction. A US biotech executive residing in New York sued his former partner, an Australian marketing consultant, in the NSW Supreme Court for alleged negligent transmission of herpes simplex virus during their relationship in New York. The relationship began and ended in New York; the alleged transmission occurred there; the plaintiff's diagnosis and treatment took place there; and the defendant, though Australian, lived overseas and was only ordinarily resident in Victoria when in Australia. The plaintiff had a four-month period in 2022 split between Sydney, New South Wales, and Melbourne, Victoria, with visits to Queensland, while exploring business opportunities for skincare ventures. He pointed to social friendships in Sydney and his one-off membership of the North Bondi Returned Services League Club.[6]

None of this impressed Garling J as a meaningful link to New South Wales. As Garling J readily observed in the case's earlier procedural judgment, there was 'no connection whatsoever between either of the parties, and the pleaded cause of action and the State of New South Wales.'[7] The RSL membership did not establish 'any connection at all with the forum'.[8] The pleading itself underscored the foreignness of the dispute: by notice under New South Wales' court rules,[9] the plaintiff relied on New York law, in particular New York Public Health Law § 2307, alongside common law claims available under New York law.[10]

The decision

The stay analysis proceeded squarely under *Voth*. Garling J recited the familiar principles: the onus lies on the defendant; the question is whether the local court is a clearly inappropriate forum, not whether an alternative is more convenient; it is relevant that another forum can provide justice; and the need to determine foreign law is not conclusive but is a significant factor.[11] The only explicit nod to the English test in *Spiliada Maritime Corporation v Cansulex Ltd*[12] came through the High Court's own endorsement in *Voth* of Lord Templeman's aspiration for brevity in such applications. [13] Yet Garling J noted that an issue arising in oral submissions required further written submissions, precluding an ex tempore disposition, but nonetheless kept the reasons concise.[14]

On the facts, the connecting factors all pointed away from New South Wales. The conduct giving rise to the claim, the governing law, and the evidentiary base were in New York. Neither party had assets in NSW, so any judgment, whether for damages or for costs, would have to be enforced elsewhere, compounding expense.[15] Garling J accepted, and the parties did not dispute, that New York courts could exercise *in personam* jurisdiction over the defendant; that acceptance underpinned the conclusion that there was another forum where the plaintiff could 'obtain justice'.[16] The upshot was decisive but orthodox: the Supreme Court of New South Wales was a clearly inappropriate forum, and the proceedings would be stayed.[17]

The conditional order deserves to be recorded with some precision. The stay was to take effect seven days after publication of the judgment. Within that same seven-day period, the defendant was to file and serve a written undertaking that, if the plaintiff brought civil proceedings in the State of New York concerning the subject matter of the NSW suit, she would not plead any New York limitations defence, provided the plaintiff commenced in New York within three months of the stay taking effect and provided the claims were not statute-barred when the NSW proceeding was commenced.[18] Framed this way, the undertaking did not expand the analysis beyond *Voth*. It neutralised limitation prejudice, as long as the plaintiff did not delay commencing proceedings, and ensured practical access to the natural forum. Garling J also ordered the plaintiff to pay the costs of the *forum non conveniens* application.[19]

Two ancillary applications were left untouched. A motion seeking transfer to the Supreme Court of Victoria and a late-filed non-publication motion were not determined.[20] Given the stay, it was not appropriate to go on to decide further issues between the parties. Garling J added that ordering a transfer could impinge on the plaintiff's own choices about where to proceed next; and with the matter stayed, non-publication orders served no useful purpose.[21]

Comments

Situating *Isaacman v King [No 2]* in the post-*Voth* jurisprudence helps explain both the ease and the limits of the result. *Voth*'s 'clearly inappropriate forum' test was announced as only a slight departure from the English *Spiliada* test,[22] but, as Richard Garnett's early survey of the doctrine shows,[23] its operation had been variegated.[24] In the years immediately after *Voth*, Australian courts often refused stays where there were meaningful Australian connections — even if the governing law or much of the evidence was foreign — and sometimes gave generous weight to local juridical advantages.[25] Mary Keyes' analysis in the Australian family law context underscores why this felt unpredictable: a forum-centric test with broad judicial discretion risks certainty, predictability and cost.[26] Understandably then, Keyes argues for an explicitly comparative, *Spiliada*-style inquiry that focuses on effective, complete and efficient resolution, the parties' ability to participate, costs and enforceability.[27]

At the same time, the High Court tempered *Voth* in specific contexts. In *Henry v Henry*,[28] the majority effectively created a presumption in favour of a stay where truly parallel foreign proceedings between the same parties on the same controversy were already on foot, explicitly invoking comity and the risks of inconsistent outcomes.[29] In *CSR Ltd v Cigna Insurance Australia Ltd*,[30] the High Court went further. Even without identity of issues, the 'controversy as a whole' analysis could render local proceedings oppressive where their dominant purpose was to frustrate access to relief available only abroad.[31] These qualifications that, outside the special case of parallel litigation, *Voth* directs attention to the suitability of the local forum in its own terms; but where duplication looms in the form of parallel proceedings, the analysis necessarily broadens. That broader, comparative posture is also what Ardavan Arzandeh shows Australian courts actually do in practice, despite *Voth*'s formal

language.[32]

Isaacman v King [No 2] belongs to a different, more straightforward strand in that story: the 'little or no connection with Australia' cases in which stays have been ordered because the action and the parties' controversy are overwhelmingly foreign.[33] Unlike the contested margins Garnett identifies, there was no pleaded Australian statutory right of a kind sometimes relied on as a juridical advantage; no contest about the availability of a competent foreign forum; and no tactical race between parallel proceedings. Garling J canvassed the classic connecting factors, noted the New York law pleaded, recorded the practical burdens of proof and enforcement, and concluded that New South Wales was clearly an inappropriate forum. That emphasis on concrete, case-specific connections and on consequences for the conduct and enforcement of the litigation fits both Keyes' call for structured, predictable decision-making and Arzandeh's demonstration that Australian courts, in substance, weigh the same considerations as *Spiliada*.[34]

Two implications follow. First, the decision is a neat instance of *Voth* doing exactly what it was designed to do when the forum is only nominally engaged. It offers little purchase for testing the harder comparative question whether, at the margins, *Voth*'s rhetoric yields different outcomes from *Spiliada*'s 'more appropriate forum' inquiry. That is consistent with Arzandeh's view that the supposed gap is, in practice, vanishingly small.[35] Secondly, it gives texture to the practical burdens that inappropriate forum choices impose. Expert evidence on New York law would have been required; witnesses and records are in the United States; neither party's assets are in New South Wales; and the court itself, even in this 'easy' case, could not resolve the application wholly on the basis of oral submissions because an issue warranted further written argument. Those are precisely the private and public costs Keyes highlights as reasons to favour a clearer, more comparative framework ex ante, rather than leaving calibration to ex post discretion.[36]

There is, then, a narrow lesson and a broader one. Narrowly, *Isaacman v King [No 2]* confirms that Australian courts will not entertain a claim whose only local anchors are social relationships and what amounts to a meal-discount club card. Broadly, it supplies one more controlled observation for comparative and empirical work: an extreme outlier that aligns with 'no connection' line of authority.[37] It also leaves open — indeed, usefully highlights — the need for

data drawn from genuinely contested cases, where juridical advantage and practical adequacy are engaged on the evidence, if we are to assess how far *Voth* diverges, in practice, from its common law counterparts.[38]

Conclusion

Isaacman v King [No 2] therefore earns its place not because it breaks doctrinal ground, but because it shows the doctrine working as intended. The plaintiff's Sydney friendships and RSL membership could not anchor a transatlantic dispute in a NSW court; New York law, evidence and enforcement pointed inexorably elsewhere; and a conditional stay ensured that the plaintiff would not be procedurally disadvantaged by being sent to the forum where the dispute belongs. If some *forum non conveniens* applications can be resolved quickly,[39] this was not one of them. But it was, in the end, a straightforward exercise of judicial discipline about where litigation should be done.

[1] [2025] NSWSC 381.

[2] (1990) 171 CLR 538 ('*Voth*').

[3] *Isaacman v King [No 2]* (n 1) [50].

[4] *Voth* (n 2) 565.

[5] See Andrew Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press, 2003; J J Spigelman, 'Transaction Costs and International Litigation' (2006) 80(7) *Australian Law Journal* 438, 441–3.

[6] Ibid [22].

[7] *Isaacman v King* [2024] NSWSC 1291, [85]. The earlier judgment dealt with preliminary procedural matters including the plaintiff's failed attempt to proceed pseudonymously.

[8] *Isaacman v King [No 2]* (n 1) [41]–[42].

[9] *Uniform Civil Procedure Rules 2005* (NSW).

[10] *Isaacman v King [No 2]* (n 1) [14], [45]–[46].

[11] Ibid [35]–[36].

[12] [1987] AC 460.

[13] *Isaacman v King [No 2]* (n 1) [37], quoting *Voth* (n 2) 565. One wonders how often Lord Templeman's aspiration is realised.

[14] *Isaacman v King [No 2]* (n 1) [37]–[38].

[15] Ibid [43], [46]–[49].

[16] Ibid [47].

[17] Ibid [39]–[51].

[18] Ibid [4], [56].

[19] Ibid [56].

[20] Ibid [7], [52]–[53].

[21] Ibid [8], [52]–[55].

[22] *Voth* (n 2) 558.

[23] Richard Garnett, 'Stay of Proceedings in Australia: A "Clearly Inappropriate" Test?' (1999) 23(1) *Melbourne University Law Review* 30.

[24] Cf Ardavan Arzandeh, 'Reconsidering the Australian *Forum (Non) Conveniens* Doctrine' (2016) 65 *International and Comparative Law Quarterly* 475.

[25] Garnett (n 22) 39–48.

[26] Mary Keyes, 'Jurisdiction in International Family Litigation: A Critical Analysis' (2004) 27 *UNSW Law Journal* 42, 63–4.

[27] Ibid.

[28] (1995) 185 CLR 571.

[29] Ibid 590–1; Garnett (n 22) 52–4.

[30] (1997) 189 CLR 345.

[31] Ibid 400–1; Garnett (n 22) 57–9.

[32] Arzandeh (n 23) 485, 486.

[33] Garnett (n 22) 45–6.

[34] Keyes (n 26) 63–4; Arzandeh (n 23).

[35] Arzandeh (n 23) 491.

[36] Keyes (n 26) 59–60.

[37] Garnett (n 22) 45–6.

[38] On the need for empirical research in this area, see Christopher A Whytock, 'Sticky Beliefs about Transnational Litigation' (2022) 28(2) *Southwestern Journal of International Law* 284.

[39] *Spiliada* (n 12) 465.

Indonesian Constitutional Court on International Child Abduction

THE INDONESIAN CONSTITUTIONAL COURT DECISION REAFFIRMED PARENTAL CHILD ABDUCTION IS A CRIMINAL OFFENCE

By: Priskila Pratita Penasthika[1]

INTRODUCTION

The Indonesian Constitutional Court Decision Number 140/PUU-XXI/2023, issued on 3 September 2024, confirms that parental child abduction is a criminal offence

under Article 330(1) of the Indonesian Criminal Code. Prior to this Decision, Article 330(1) of the Criminal Code was understood as a provision that could not criminalise someone for child abduction if the abduction was committed by one of the biological parents.

After 3 September 2024, through this Constitutional Court Decision, the abduction of a child by one of the biological parents, when the parent does not have custody based on a final court decision, is reaffirmed as a criminal offence.

CONSTITUTIONAL COURT DECISION

Facts

On 15 November 2023, five single mothers (Petitioners) whose children have been abducted by their ex-husbands submitted a petition to the Constitutional Court on 11 October 2023, challenging Article 330 (1) of the Indonesian Criminal Code, which states, "*Anyone who, with deliberate intent, removes a minor from the authority which in accordance with the laws is assigned to him, or from the supervision of a person authorised to do so, shall be punished by a maximum imprisonment of seven years.*"

The Petitioners shared a common experience: after divorcing their husbands, they were granted custody of their children through a court ruling. However, they have been deprived of this right because their ex-husband abducted their child.

The Petitioners also asserted that they had reported the ex-husband's actions to the police under Article 330 (1) of the Criminal Code. However, in practice, the report was either dismissed or considered invalid because the police were of the view that the person who abducted the child was the biological father himself and, therefore, could not be prosecuted.

Given this background, the Petitioners believe that the phrase "anyone" ("*barang siapa*" in Indonesian) in Article 330(1) of the Criminal Code could be interpreted to mean that the biological father or mother of a child cannot be held accountable for the accusation of abducting their own child. Therefore, they submitted a petition to the Constitutional Court requesting a judicial review of Article 330(1) of the Criminal Code.

The Petitioners argue that the phrase "anyone" in Article 330(1) of the Criminal

Code should encompass all individuals, including the child's biological father or mother, as a legal subject. There should be no exceptions that grant absolute authority to the father or mother and exclude him or her from any legal action if he or she violates the child's rights. Protecting children's rights is a fundamental aspect of human rights, and the state has a responsibility to provide protection, oversight, and law enforcement to promote children's welfare. Consequently, the state has the authority to act against parents who violate children's rights.

Furthermore, the Petitioners request the Constitutional Court to declare that the phrase "anyone" in Article 330(1) of the Criminal Code, which was derived from the Wetboek van Strafrecht voor Nederlandsch-Indië (Staatsblad 1915 Number 732), and later enacted under Law Number 1 of 1946 on the Criminal Code in conjunction with Law Number 73 of 1958 on the Entry into Force of Law No. 1 of 1946 on the Criminal Code for the Entire Territory of the Republic of Indonesia, is unconstitutional, insofar as it is not interpreted to mean "*anyone, without exception the biological father or mother of the child*."

The Decision

The Decision of the Constitutional Court Number 140/PUU-XXI/2023, which consists of nine Constitutional Judges, rejected the Petitioners' request in its entirety.

The Constitutional Court Judges believe that Article 330(1) of the Criminal Code is an explicit and well-defined provision (*expressive verbis*), so there is no need to interpret it or add any supplementary meaning to it. The Judges asserted that the phrase "anyone" encompasses every individual without exception, including the biological father or mother of the child. The Court also noted that adding a new meaning to Article 330(1) of the Criminal Code, as requested by the Petitioners, could potentially restrict the scope of the legal subjects covered by that provision and other provisions in the Criminal Code that use the phrase "anyone". This could result in legal uncertainty, according to the Judges.

In its legal deliberation, the Constitutional Court Judges referred to the United Nations Convention on the Rights of the Child (UNCRC), to which Indonesia is a state party, and its provisions are incorporated into Law Number 23 of 2002 on Child Protection, as amended by Law Number 35 of 2014 (Law on Child Protection). Furthermore, the Law on Child Protection recognises that the best

interests of the child, as stipulated in the UNCRC, are a fundamental principle for child protection. According to the Official Elucidation of Law on Child Protection, the best interests of the child mean that, in all actions concerning children undertaken by the government, society, legislative bodies, and judiciary, the child's best interest must be the primary consideration.

In cases of parental child abduction, aside from the child being the victim, the Constitutional Court recognises that the parent, who is forcibly separated from their child by the other parent, can also become a victim, particularly on a psychological level. This indicates that the psychological bond between parents and their biological children should not be severed, emphasising that the child's best interests must take precedence. In this context, the Constitutional Court Judges emphasise that criminalising one of the child's biological parents who breaches the provisions of Article 330(1) of the Criminal Code should only be considered as a last resort (*ultimum remedium*).

In another part of its Decision, the Constitutional Court addressed the issue of the Petitioners whose reports were rejected by the police. The Constitutional Court Judges stated that they had no authority to assess this matter. However, they affirmed in the Decision that law enforcement officers, especially police investigators, should have no hesitation in accepting any report concerning the application of Article 330(1) of the Criminal Code, even if it involves the child's biological parents. This is because the term "anyone" includes every individual without exception, including, in this case, the child's biological father and mother.

The Constitutional Court concluded that Article 330(1) of the Criminal Code provides legal protection for children and ensures fair legal certainty as outlined in the 1945 Constitution of the Republic of Indonesia. Therefore, the Court states that the Petitioners' request is rejected in its entirety.

Dissenting Opinion

The nine Constitutional Judges did not reach a unanimous decision. Judge Guntur Hamzah expressed his dissenting opinion, arguing that the Constitutional Court should have partially granted the Petitioners' request.

Judge Hamzah views the Petitioners' case as also involving the enforcement of a norm that breaches the principles of justice, the constitution, and human rights. Due to numerous cases of parental child abduction, often committed by biological

fathers, Judge Hamzah believes it is appropriate for the Constitutional Court to act as the defender of citizens' constitutional rights in this matter. This aims to safeguard the constitutional rights of biological mothers who hold custody, whether naturally or legally granted by the court, from acts of child abduction or forced removal by biological fathers. It not only ensures legal certainty but also offers reassurance to both the child and the parent who holds the legal custody rights.

Judge Hamzah is of the opinion that the Constitutional Court should have partially granted the Petitioners' request by inserting the phrase "including the biological father/mother" into Article 330(1) of the Criminal Code. This would have made Article 330(1) of the Criminal Code to read, "*Anyone who, with deliberate intent, removes a minor from the authority which in accordance with the laws is assigned to him, **including his biological father/mother**, or from the supervision of a person authorised to do so, shall be punished by a maximum imprisonment of seven years.*"

REMARKS

It is worth noting that Law Number 1 of 2023 on the Criminal Code (New Criminal Code) was approved by the Indonesian House of Representatives on 2 January 2023. The New Criminal Code will come into effect on 2 January 2026. There are no significant changes regarding the concept of child abduction in the New Criminal Code. Article 452(1) of the New Criminal Code is equivalent to Article 330(1) of the current Criminal Code. Article 452(1) of the New Criminal Code states: "*Every person who removes a Child from the authority which in accordance with the statutory regulations is assigned to him or from the supervision of a person authorised to do so, shall be punished by a maximum imprisonment of 6 (six) years or a maximum fine of category IV*."

It is quite unfortunate that there has been no shift in the perspective towards parental child abduction cases in Indonesia. In early 2023, Indonesian lawmakers, as indicated in Article 452(1) of the New Criminal Code, still regard parental child abduction cases primarily from a criminal perspective. This stance is later reaffirmed in 2024 by the Court, as stated in the Constitutional Court Decision Number 140/PUU-XXI/2023.

Although the Constitutional Court Judges, in their Decision, recognise the

psychological bond between parents and the child as part of the child's best interests and acknowledge that criminalising a parent over child abduction is a last resort, parental child abduction is still viewed from a criminal perspective. Consequently, this Constitutional Court Decision does not provide an effective solution. The five petitioners remain unable to access their abducted children because they do not know their children's whereabouts or how to contact them.

The Constitutional Court Judges also hold conflicting views in their deliberations. On one hand, they acknowledge that the psychological bond between parents and a child must be prioritised as part of the child's best interests. On the other hand, they affirm the provision of Article 330(1) of the Criminal Code, which permits the criminalisation and imprisonment of the parent who commits child abduction, albeit as a last resort. It seems that the judges overlooked the possibility that criminalising and imprisoning the parent involved in child abduction could also harm the child's best interests, as it would deprive the child of access to that parent.

It is also regrettable that none of the Judges or the expert witnesses involved in the proceedings mentioned the HCCH 1980 Convention on the Civil Aspects of International Child Abduction (HCCH 1980 Child Abduction Convention), which provides a perspective on parental child abduction from its civil aspects. Consequently, the procedures for returning the wrongfully removed child to their habitual residence—while safeguarding access rights and prioritising the child's best interests as stipulated by the Convention—remain unfamiliar and unexplored in Indonesia.

The Constitutional Court Decision Number 140/PUU-XXI/2023, which considers parental child abduction from its criminal aspect, reveals a legal gap in Indonesian law that can only be filled in by the HCCH 1980 Child Abduction Convention. The Convention could serve as an instrument providing civil measures in cases of parental child abduction in Indonesia and promote a more effective resolution by ensuring the child's prompt return without depriving access to either parent. In other words, Indonesia's accession to the Convention has become more urgent to ensure that the child's best interests, as recognised by Indonesian Law on Child Protection, are adequately protected.

Recognising that many adjustments within Indonesian laws and regulations will still be necessary, the Author of this article has long hoped that Indonesia will

eventually accede to the HCCH 1980 Child Abduction Convention, hopefully sooner rather than later.

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The 2025 International Arbitration Survey: The Path Forward

“The 2025 International Arbitration Survey: The Path Forward”

Luke Nottage (University of Sydney)

The 14th Queen Mary University of London Survey, again in collaboration with international law firm White & Case, was dissected at an Australian launch seminar (expertly moderated by partner Lee Carroll) at their Melbourne office on 22 July 2025. Some “early insights” had been provided during Paris Arbitration Weeks, when the Survey report was not yet public. This analysis delves deeper into the report and key findings, drawing also on the discussion with our co-panellists, including some suggestions for future research.

Survey Methodology

This latest Survey shows how the responses have become more expansive and therefore reliable over time. Although not a random survey, 2402 responses were received for the written questionnaire (the response rate is unspecified). This is significantly greater than “more than 900” respondents for the 2022 Survey focused on energy disputes, 1218 for the general 2021 Survey, and just 103 for the inaugural Survey in 2006. This study was again mixed-method, adding qualitative research through 117 follow-up interviews.

This increase in Survey participation arguably indicates the growing awareness of the research and interest in its results, as well as the proliferation and diversification of international arbitration (IA) over the last two decades. Overall respondents in 2025 (Chart 26) primarily practiced or operated in the Asia-Pacific (47%), illustrating arbitration's shift (along with economic activity) into Asia; separately in North America (a further 10% of respondents), Central and Latin America (7%); plus Europe (10%) and Africa (6%).

Respondents' primary roles (Chart 23) were counsel (35%), arbitrators (17%), both (14%), arbitral institution staff (9%), academics (8%) and tribunal secretaries (2%). Surprisingly, there were few in-house counsel (3%), who historically and anecdotally tend to be more concerned eg about costs and delays. Few respondents were primarily experts (1%), which may reflect the declining professional diversity within IA.

Arbitration with or without ADR

The 2025 Survey asked again about respondents' preferred method of resolving cross-border disputes (Chart 1). IA together with ADR was most popular (48%), compared to standalone IA (39%). The Survey contrasts this with 59% versus 31% in 2021 (p5). That shift could indicate that IA has been working effectively to address eg persistent complaints about its costs and delays.

However, more work needs to be done by IA stakeholders, as in the 2015 Survey only 34% of respondents had preferred IA with ADR, versus 56% preferring just IA. This indicates that the trend over the last decade remains towards combining IA with ADR. Additionally, future research could usefully ask what is meant by IA "together with ADR". As co-panellist Leah Ratcliff remarked from her experience (now as in-house counsel in Australia), parties are more comfortable with clauses providing for (structured) negotiations rather than (potentially still quite expensive) mediation before IA. It would also be interesting to check respondents' preferences regarding Arb-Med (arbitrators actively promoting settlement, or engaging an Arb-Med-Arb process as in Singapore – arguably showing up in the 2022 SIDRA Survey, Exhibit 8.1).

The 2025 Survey commentary also suggests that ADR preference may be partly "influenced by cultural factors" (p6), noting European respondents favoured more standalone IA (51%) compared Asia-Pacific respondents (37%). However, recall

that overall 39% favoured IA anyway.

There also remains great diversity within Asia regarding legal culture – let alone general culture. For example, first there are common law jurisdictions (eg Singapore, Hong Kong, Australia) with strong traditions now of domestic mediation for commercial disputes, due to high costs and delays in litigation initially (and sometimes still). This carries over into more willingness to agree to multi-tiered clauses mandating even mediation before arbitration. Secondly, however, there are some common law jurisdictions in Asia (notably India, despite extensive court delays) with no such tradition of privately-supplied mediation services. Relatedly, their legal advisors and parties are more reluctant to propose Med-Arb clauses in international contracts (although they may agree to them if proposed, if obtaining other benefits through negotiations). Thirdly, civil law jurisdictions (like Japan, with more efficient courts plus some Court-annexed mediation, but also mainland China) also seem less amenable to Med-Arb clauses, although long comfortable with clauses providing for good faith negotiations prior to IA. In addition, there is even greater diversity across Asia regarding Arb-Med (basically only practiced intensively in China, partly in Japan).

Preferred Seats and Rules

Earlier surveys had started to identify Singapore, Hong Kong and mainland Chinese cities within top preferred seats, along with traditional venues like London and Paris. Yet it was unclear whether this reflected the growing proportion of Asia-Pacific (essentially Asian) respondents. The 2025 Survey helpfully helps to address this question. Globally, ie among all respondents (Chart 3), the most preferred seat is London (chosen, among up to five seats, by 34%), then Singapore and Hong Kong (31% each), then Beijing and Paris (19% each). However, London and Singapore were ranked in the top four for all regional respondents, and Paris too except for Asia-Pacific respondents (Chart 2). Otherwise, the European and Asia-Pacific respondents "show strong preferences for seats in their respective regions" (2025 Survey, p7).

Quite similarly, LCIA Rules (nominated globally by 25% of all respondents, again with up to five preferences) were preferred in all regions except the Asia-Pacific, while SIAC Rules (chosen by 25%) and UNCITRAL Rules (15%) were preferred for all regions except Central and Latin America (Charts 4 and 5). By contrast, HKIAC Rules (25%) were most preferred by Asia-Pacific respondents (36%), but not

selected among top 5 preferences from respondents from other regions. As co-panelist (and experienced arbitrator) Michael Pryles noted at the launch seminar, Hong Kong and HKIAC Rules still benefit as a compromise for transactions and disputes involving mainland China. He also rightly suggested, as did an audience member, that asking about "preferences" may not give the full picture. This could be usefully compared with evolving actual practice, including arbitration case filings. Over 2024, for example, HKIAC handled 352 new arbitration cases (77% international) whereas SIAC handled 625 (91% international).

Co-panellist Diana Bowman, new Secretary-General of the ACICA, remarked that the ACICA Rules did not quite make Chart 5, despite the Australian Centre's increased case filings in recent years. As a former Rules committee member (2004-2024), I added that arbitral institutions should not just be judged by case filing statistics. Those depend for example on geography, although there may be scope for Australia to focus on niches, such as the South America – Southeast Asia or South Asia trades, or (as Pryles also observed) specialist fields such as disputes over resources. In addition, improving Rules (and seats more generally) can allow local parties more credibly to propose them but then compromise in negotiations to obtain other contractual benefits.

Pryles also shared experiences and views about the growing impact on IA from sanctions on parties or participants. Notably, 30% of respondents noted that sanctions led to a different seat being chosen (Chart 6).

The 2025 Survey also found that 39% thought awards set aside at the seat should be enforceable in other jurisdictions (Chart 8), whereas 61% thought not. The 39% proportion is surprisingly high, as only French courts uniformly adopt this approach. Courts elsewhere will usually not enforce, unless there is some particularly egregious flaw regarding the seat court (such as proven corruption) or seat jurisdiction (such as legislation retrospectively impacting arbitration agreements or awards). Perhaps the 39% of respondents agreed with enforcement but only in such exceptional circumstances, which might then be separated out as a third possibility in future research. Meanwhile, this trend (and growing deference towards decision of seat courts instead upholding challenged awards) should reinforce the importance of carefully choosing the seat.

IA Enforcement and Efficiency

Past Surveys (and other research) typically identified enforceability of IA awards (and agreements), neutrality and expertise of arbitrators, flexibility in procedures, then privacy and confidentiality, as major advantages over cross-border litigation. The 2025 Survey innovated by focusing on the growing awareness and engagement in various public interest elements (eg environmental) even in commercial IA, including its perceived advantages instead of litigation. Arbitrator expertise (47%), avoiding local courts and laws (42%) and (broader?) neutrality (28%) were often chosen from among three options (Chart 15). Confidentiality was selected by 34% of respondents, which seems understandable given these are still commercial disputes (not ISDS arbitrations involving greater public interests and so already associated with more transparency). Enforceability of awards was only chosen by 32%, but this may reflect greater actual or anticipated problems with public policy or arbitrability exceptions to enforcement.

Then 2025 Survey also usefully drilled down into another commonly posed question: voluntary compliance with IA awards (Chart 7). Interestingly respondents said this happened similarly, almost always or often, for non-ICSID awards against states (33%) as for ICSID awards (34%), despite most of the latter involving the more delocalised ICSID Convention enforcement regime. Also surprisingly, good compliance for non-ICSID private awards was only reported by 40% of respondents. This may also indicate persistent question around "formalisation" and over-lawyering in IA, discussed more broadly under "efficiency and effectiveness" in the 2025 Survey (pp15-19).

Notably, respondents were asked to chose up to three options for processes that would most improve efficiency in IA (Chart 10). The most popular were expedited arbitration (50%, generating further questions) and early determination of unmeritorious claims or defences (49%). But there was also interest in non-binding pre-arbitral assessments by an expert (13%), mandatory settlement discussions (12%) or mediation (11%) in procedural timetables, and even "baseball arbitration" (11%). Interestingly, as this remains a hot topic for multi-tiered clauses, 7% chose "limiting grounds to challenge pre-arbitration ADR outcomes in arbitration proceedings" (rather than in court). Less surprisingly, as these impact on fees earned by counsel (the largest respondent group) and are rarely mentioned in arbitral Rules, only 1% picked "sealed offers" as a mechanism to improve efficiency.

The survey found "perhaps most surprisingly, given the respondents' generally

favourable view of combining arbitration with ADR, the option of multi-tiered dispute resolution clauses with mandatory ADR processes was included by fewer than 1% of respondents as one of their three picks. To some interviewees, ADR adds an unnecessary procedural layer. Others question the utility …" (p16). However, this low response rate arguably is due to the question's phrasing, which asked about measures to improve efficiency *in arbitration* (not the overall dispute resolution process).

A final hot topic canvassed in the 2025 Survey concerns AI in IA (pp27-33). Pryles was skeptical about arbitrators delegating too much to Artificial Intelligence for their reasoning. Surprisingly, however, although 71% of respondents had never used AI for "evaluating legal arguments" in the past 5 years, for the next 5 years this was expected to drop to 31% (Chart 18). Admittedly, some of this may be done by lawyers and so less problematic than for arbitrators.

Less controversial is the existing use of AI for "document review" (never used so far by only 41%, expected to drop to 10%). However, that raises the question of whether an even more efficient approach would be for arbitrators to more pro-actively help identify the issues to be determined, and hence relevant evidence. The 2012 Survey (Chart 9) had found that to be the best means experienced to expedite arbitral proceedings, even when phrased as arbitrators doing this "as soon as possible after constitution" of the tribunal (which is more controversial than as the arbitration progresses, eg under the JCAA Interactive Arbitration Rules).

Conclusion

The 2025 Survey, especially combined with the earlier ones, provides a rich resource to understand current practices and concerns in IA. It also helps identify future opportunities and challenges, as well as promising ongoing research into this always-evolving field.

Foreign illegality and English courts: Do the Ralli brothers now have a sister?



by Patrick Ostendorf (HTW Berlin)

In the recent and interesting case of *LLC Eurochem v Société Generale S.A. et al* [2025] EWHC 1938 (Comm), the English High Court (Commercial Court) considered the extent to which economic sanctions enacted by a foreign jurisdiction (EU law in this instance) can impact the enforcement of contractual payment claims (governed by English law) in English courts. More broadly, the decision also highlights the somewhat diminishing role of the Rome I Regulation (and its interpretation by the European Court of Justice) in the English legal system, and probably that of conflict of laws rules in general.

The underlying facts

A Russian company, respectively its Swiss parent (the assignee of the claimed proceeds of the drawdown), both of which are ultimately controlled by a Russian oligarch, claimed €212 million from two banks (one French and one Dutch, the latter operating through its Italian branch) out of six on-demand bonds governed by English law, based on corresponding exclusive jurisdiction agreements in favour of English courts. The performance bonds had been issued by the defendant banks to secure the proper performance of a contract for the construction of a fertiliser plant in Russia, which was terminated as a consequence of Russia's illegal invasion of Ukraine. When the Russian company called on the bonds to recover advance payments made under the construction contract, the banks refused to pay, arguing that doing so would violate applicable

EU sanctions.

The Commercial Court agreed with the banks that payment under the bonds would indeed breach both Art. 2 of Council Regulation (EU) No 269/2014 and Art. 11 of Regulation (EU) No 833/2014. However, even though the ultimate owner of the claimant was also subject to UK sanctions, UK sanctions did not apply in this case, as payment under the bonds would not have involved any acts in the UK or by UK companies or persons.

The key question

The key question was therefore this: Could the banks rely on the EU sanctions as a defence against the payment claim in an English court, given that their contractual performance would be illegal under foreign law? According to the Ralli Brothers principle (as established by the English Court of Appeal in *Ralli Brothers v Companie Naviera Sota y Aznar* [1920] 2 KB 287 and also serving as a blueprint for Art. 9(3) of the Rome I Regulation), the answer would be yes if the contractual performance required an act to be carried out in a place where it would be unlawful to do so. However, was the place of performance in the EU in this case, despite the fact that, under English common law, the place of payment is generally where the creditor (here, the claimant, as the beneficiary) is located, unless otherwise agreed by the parties?

The court's resolution

The resolution was straightforward in relation to the defendant Italian branch, as the corresponding bond incorporated the ICC Uniform Rules for Demand Guarantees (URDG) and Art. 20(c) of the URDG explicitly states that payment is to be made at the branch or office of the guarantor (para. 447). However, the Commercial Court also answered this question in the affirmative with regard to the payment claims against the French bank (the relevant five bonds had not incorporated the URDG). This was based on the general proposition that, in relation to on-demand instruments, the place of performance should generally be where the demand must be made — hence in this case in France rather than Russia or Switzerland (paras 449 ff.).

Public policy was the alternative reasoning offered by the Commercial Court

More interesting still is the alternative argument offered by the Commercial Court. The court explicitly agreed with the defendants that the bonds should not have been enforced, even if the place of performance were in Russia (in which case the Ralli Bros. principle could accordingly not apply). The court postulated that, even outside the Ralli Bros. rule, *'a sufficiently serious breach of foreign law reflecting important policies of foreign states may be such that it would be contrary to public policy to enforce a contract'* (paras 466 et seq). According to the defendants (and as confirmed by the court), the principle of comity was engaged particularly strongly here, given that the defendants would have faced prosecution, significant fines and the risk of imprisonment for individuals acting on behalf of the banks in France and Italy if they had paid.

Comments

The alternative reasoning given by the Commercial Court for the unenforceability of the bonds based on public policy seems to have two flaws.

Firstly, the view that enforcing a contract may be contrary to public policy due to a sufficiently serious breach of foreign law even outside the Ralli Bros. rule cannot be based on a clear line of precedent. The Commercial Court only refers to two High Court decisions, the more recent of which is *Haddad v Rostamani* (2021) EWHC 1892, para. 88. These decisions are difficult to reconcile with the Court of Appeal's finding in *Celestial Aviation Services Limited v Unicredit Bank GmbH* [2024] EWCA Civ 628, paras. 105 et seq and prior High Court precedents relied on in this judgment, in particular *Banco San Juan Internacional Inc v Petróleos De Venezuela S.A.* [2020] EWHC 2937 (Comm), para. 79, which states that, '*the doctrine therefore offers a narrow gateway: the performance of the contract must necessarily involve the performance of an act illegal at the place of performance. Subject to the Foster v. Driscoll principle, […] it is no use if the illegal act has to be performed elsewhere*'. In Banco San Juan, the High Court referred to the *Foster v Driscoll* principle as the only legitimate expansion of the Ralli Bros. rule. But this principle is not applicable in the present case: It is limited to contracts entered into by the parties with the intention of committing a criminal offence in a foreign state (*Foster v Driscoll* [1929] 1 KB 470, 519).

Secondly, it is somewhat ironic that, in order to give effect to EU sanctions law, the Commercial Court relies on English common law precedents that hardly align with Art. 9(3) of the Rome I Regulation. This is because the ECJ has expressly

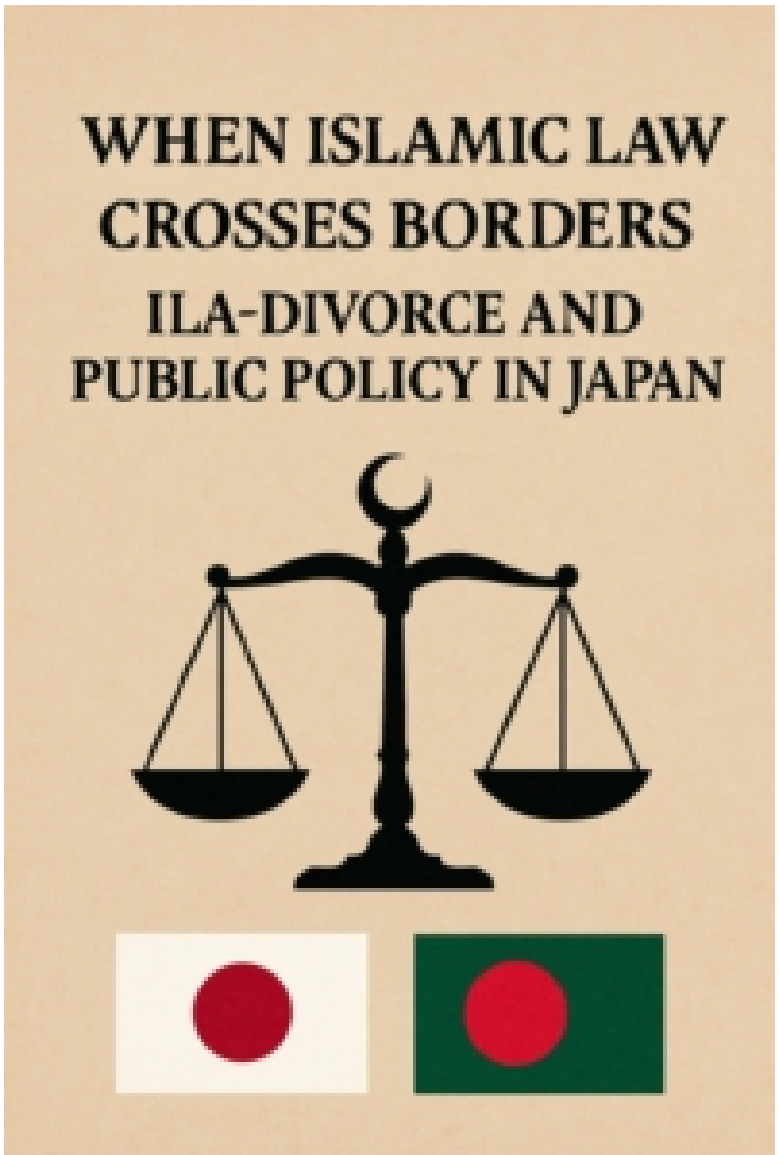
taken the view that Art. 9 contains an exhaustive list of situations in which a court may apply foreign overriding mandatory provisions not merely as a matter of fact (see ECJ, 18 Oct 2016, Case C-135/15, *Nikiforidis*: *'Article 9 of the Rome I Regulation must therefore be interpreted as precluding the court of the forum from applying,* ***as legal rules****, overriding mandatory provisions other than those of the State of the forum or of the State where the obligations arising out of the contract have to be or have been performed'*).

Although the Commercial Court does not mention the Rome I Regulation in this regard, it still forms part of English statutory law as 'assimilated law' (formerly 'retained EU law'). The justification for ignoring the Regulation is probably the prevailing, though (against the background of the general function of private international law and the fact that Art. 9 of the Rome I Regulation explicitly and exhaustively deals with this very problem) unconvincing, view in England that the Ralli Bros principle, and consequently its potential expansion in the present case, is not a conflict of laws rule in the first place: Instead, it is considered a principle of domestic English contract law, therefore unaffected by the exhaustive nature of Art. 9(3) of the Rome I Regulation (in favour of this view, for example, *Chitty on Contracts*, Vol. I General Principles, 35th edition (2023), para. 34-290, *Dicey, Morris & Collins*, The Conflict of Laws, Vol. 2, 16th edition (2022), para. 32-257 with further references. Contrary, *A. Briggs*, Private International Law in English Courts (2014) para. 7.251, who rightly notes that such a characterisation *'was only possible by being deaf to the language and tone in which the judgments were expressed, and it is a happy thing that the Rome I Regulation puts this seemly principle on a statutory footing'* and characterises the Ralli Bros principle accordingly as a '*rule of common law conflict of laws*' (*A. Briggs*, The Conflict of Laws, 4th edition, 2019, p. 239). For a full discussion of the history and characterisation of the Ralli Bros rule, see *W. Day* (2020) 79 CLJ 64 ff.)

The need to rely both on a questionable characterisation and expansion of the Ralli Bros principle in this case may be due to English contract law (at least in its substantive core) being ill-equipped to address factual impediments caused by foreign illegality for the parties. Unlike civil law jurisdictions, which can rely on the doctrine of (temporary) impossibility to address such cases — the recent decision of the Court of Arbitration in CAS 2023/A/9669, *West Ham United Football Club v PFC CSKA & FIFA* (applying Swiss law), is a case in point — the doctrine of frustration is apparently too limited in scope to recognise factual

impediments triggered by foreign illegality. Furthermore, the doctrine of frustration does not offer the necessary flexibility as it results in the termination of the contract rather than merely suspending it temporarily.

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

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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!



Written by Héloise Meur, Université Paris 8

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).