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



I. Introduction [(*)]

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

There is no doubt that the introduction of the Civil Personal Status Law (CPSL) in

the United Arab Emirates marks a significant turning point in the region's legal landscape, particularly in areas traditionally governed by religious norms. The CPSL refers to the special law adopted at the federal level, which allows family law disputes involving non-Muslims (both foreigners and UAE citizens) to be resolved under a legal framework, that is intended to be modern, flexible, based on "rules of justice and fairness" and "the best international practices from comparative legal systems" (cf. article 19 of the Cabinet Resolution Concerning the Executive Regulation of Federal Decree-Law on the Civil Personal Status). However, the incorporation of the CPSL into the existing legal frameworks in the UAE has raised several issues. These include, among others, the articulation of the CPSL with the other applicable legal frameworks, and more importantly, the extent to which parties may opt out of this "modern" regime in favor of applying their own national laws (for a general overview, see Elbalti, *op. cit.*).

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

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

II. Facts

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

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

i) Before the first instance court

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

ii) Before the Court of Appeal

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

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

III. The Ruling

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

> *According to the established case law of this Court and pursuant to Article 1(1) of the CPSL, 'the provisions of this Decree-Law shall apply to non-Muslim citizens of the United Arab Emirates and to foreign non-Muslim residents in the UAE, unless one of them invokes the application of his own law […]'*
>
> *It is therefore well established that the burden of proving and submitting the foreign law lies with the party seeking its application. That party must submit a complete and unabridged copy of the foreign law, including all amendments, duly authenticated and officially certified. If the foreign law is not in Arabic, it must be translated by an officially certified translator. This is because foreign law is considered a matter of fact, and it lies with the party relying on it to prove its content and that it remains in force in its country of origin.*
>
> *If none of the parties invokes or submits the foreign law, or if the law is invoked but not properly submitted, or is incomplete, irrelevant to the dispute, or lacks the applicable provisions, then domestic law must be applied. This remains the case even if the foreign law is submitted for the first time on appeal, as introducing it at that stage would undermine the principle of double-degree jurisdiction and deprive the opposing party of one level of litigation, which is a fundamental rule of judicial organization and part of public order.*
>
> *It is also well established that the assessment of whether the provisions of the foreign law submitted are sufficiently relevant and complete for resolving the dispute is a legal issue subject to the Supreme Court's control.*
>
> *Given the above, and since the judgment of the court of first instance, as upheld by the judgment under appeal, complied with the above legal principles and ruled in accordance with the provisions of UAE [civil] personal status law, rejecting the application of [the law of State A] ……, based on sound and well-supported reasoning ….. the ground of appeal is therefore without merit.*

IV. Comments

1. Foreign Law in the UAE

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

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

It is therefore not surprising to read that "[t]raditionally, the UAE courts have a reputation of applying foreign law only reluctantly." This reluctance stems from the general principle that "[f]oreign law is treated as a matter of fact, and a provision of foreign law must be proven in the proceedings by the party that intends to rely on it." Consequently, "[w]here the parties do not provide sufficient evidence, the Emirati court would apply Emirati law" (Kilian Bälz, "United Arab Emirates," in D. Girsberger et al. (eds), *Choice of Law in International Commercial Contracts* (OUP, 2021) 691). For this reason, invoking foreign law has proven largely unsuccessful, as UAE courts impose very strict requirements for its acceptance. These hurdles become even more significant when the foreign law is not in Arabic. In such cases, the party relying on the foreign law must submit a certified translation of the entire relevant legal instrument (e.g., the Swiss Civil Code in its entirety), authenticated by the official authorities of the state of origin. Courts have routinely refused to apply foreign law when only selected provisions are submitted or when the original text (in its foreign

language) is not provided. Any failure to meet these stringent requirements typically results in the exclusion of the foreign law and the application of the *lex fori* instead.

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

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

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

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

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

3. A Potential Recognition Problem Abroad?

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

There is, to be sure, no straightforward answer, as this would depend on the legal system concerned. However, precisely for such basic reasons, the UAE should exercise caution in its approach to family law disputes involving foreign parties. To return to the examples mentioned above: a divorce involving a Filipino couple or a Christian Lebanese couple is highly unlikely to be recognized in the Philippines or Lebanon. In the Philippines, foreign divorces between Filipino nationals are not recognized as valid (see Elizabeth H. Aguiling-Pangalangan, "Philippines," in A. Reyes et al. (eds.), *Choice of Law and Recognition in Asian Family Law* (Hart, 2023), pp. 273–274). Similarly, in Lebanon, civil divorce judgments rendered abroad have often been refused recognition on public policy grounds, particularly when the marriage was celebrated under religious law involving at least one Lebanese national (see Marie-Claude Najm Kobeh, "Lebanon," in J. Basedow et al. (eds.), *Encyclopedia of Private International Law*,

Vol. III (Edward Elgar, 2017), p. 2275).

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

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

4. Epilogue

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

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

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



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

With the fourth instalment in their ongoing webinar series on “**Cross-Border Commercial Dispute Resolution**”, the Asian Business Law Institute (ABLI) and

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

As always, formats like this have to manage the balancing act of providing both an introduction to the topic for an unfamiliar audience and in-depth details for experienced practitioners. In this respect, a **survey carried out at the beginning of the webinar** was revealing. While 10 % of participants had already worked with both Conventions and 29 % had at least heard of them, this event marked the first contact with the topic for 18 % of the audience. Among those who had worked with either Convention, a majority of 18 % had practical experience only with the HCCH 1965 Service Convention, and a minority of 2 % had so far dealt exclusively with the HCCH 1970 Evidence Convention. Although this last result is anecdotal in nature, it still seems to reflect the gap between the two Conventions in terms of their prevalence, with 84 vs. 68 Contracting Parties respectively…

I. Welcome Remarks (*Christophe Bernasconi*)

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

Noteworthy, in his address, Bernasconi explicitly mentions *Sharia law* as the third major legal tradition next to common and civil law, instead of using a more general term like "religious law" or "Islamic law". With due caution, this parlance could be a nod to the increased – and long overdue – commitment to the MENA region and sub-Saharan Africa, as shown by the continuation of the Malta Process

and the establishment of a HCCH Regional Office for Africa (ROA). Further semantic observations concern the designation of the HCCH 2019 Judgments Convention as “our famous game changer”, as well as the recently introduced terminology that more elegantly refers to the interplay of the Hague Conventions on transnational litigation, instead of a “package”, as a “comprehensive suite” that forms a robust framework designed to enhance the effective access to justice and attract foreign investment. Finally, the Secretary General recalled that the **digital transformation of the operation of the HCCH Conventions**, which is necessary to further the goals of justice at the heart of each instrument, is primarily “**incumbent on the [state] parties**”, who must embrace technology.

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

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

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

The former acknowledges the notion of **technological neutrality of the HCCH Conventions** (C&R No. 13). In particular, the Special Commission confirms that Article 10 lit. a) of the HCCH 1965 Service Convention, originally addressing

postal channels, also includes the "transmission and service by e-mail, insofar as such method is provided by the law of the State of origin and permitted under the law of the State of destination" (C&R No. 105). However, e-mail domains alone are still not considered a substitute for the address of the person to be served. Hence, the Convention may not apply in such a case according to Article 1 (2). Similarly, the Special Commission recalled for the HCCH 1970 that Article 17 allows that a member of the judicial personnel of the court of origin, if duly appointed as commissioner for the purpose, directly examines a witness located in another Contracting State by video-link (C&R No. 50). In both instances, however, the major caveat remains that these provisions can be made subject to reservations by the Contracting States, which unfortunately a significant number of Contracting States still has opted for to this day (see C&R No. 17 and No. 107).

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

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

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

Overall, the **use of electronic means for service and taking of evidence** is **fairly advanced** in the People's Republic of China (PRC). In addition to becoming party to the HCCH 1965 Service Convention in 1992, and the HCCH 1970 Service Convention in 1998, which are impliedly neutral towards technological changes, the topic is also explicitly addressed in domestic law. Following the civil law legal tradition, the relevant provisions are codified within the PRC Law on Civil

Procedure (as amended in 2024). For example, according to Article 283 (9) service may be affected by electronic means capable of confirming the receipt of the documents by the recipient, unless prohibited by the law of the country where the party is domiciled. Furthermore, Article 283 (2) allows the remote taking of evidence abroad via instant messaging tools with the consent of both parties, if this procedure is not prohibited by the laws of that country.

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

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

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

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

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

Regarding **service of documents**, the relevant procedure is set out in Part 6 Section V (Rules 6.48-52) of the English Civil Procedure Rules (CPR), which authorise the Senior Master to determine the method of service (R. 6.51). As a rule, service is usually effectuated by means of process server and takes several months. Moreover, the United Kingdom has paved the way for direct service through solicitors as "other competent persons" under Article 10 lit. b) of the HCCH 1965 Service Convention, which allows for a much smoother process. Besides the above encouragement of personal service, English law is generally very generous in relation to the use of electronic means of service where agreed upon between the parties (R. 6.23 (6) CPR in conj. with PD 6A) or authorised by the court (R. 6.15 CPR), which has recently been ordered more frequently in favour of service via email and social media platforms (e.g. Instagram; Facebook) and even via Non Fungible Token (NFT) when the defendant shows evasive behaviour (see e.g. *NPV v. QEL, ZED* [2018] EWHC 703 (QB); *D'Aloia v. Persons Unknown* [2022] 6 WLUK 545). However, pursuant to the responses to the HCCH 2022 Questionnaire, para. 31, the UK had not, at least at that time, permitted the execution via such method within the framework of the HCCH 1965 Service Convention. However, this may again be due to the fact that in such situations the address of the person concerned is typically unknown and the Convention therefore does not apply at all.

The procedures applicable to the **taking of evidence** can be found in the Evidence (Proceedings in Other Jurisdictions) Act 1975 as well as in Part 34 (R. 34.1-21) of the CPR. In 2023, 5,955 letters of request under Chapter I, and 1,439 letters of request under Chapter II of the HCCH 1970 Evidence Convention were received in England & Wales. Since the powers of the court are limited to the scope of evidence admissible in English civil proceedings under Section 2 (3) of the 1975 Act, these requests must be carefully drafted as English law does not allow for "fishing expeditions". Again, the **requests may be made by foreign courts or private parties**. As foreign courts do not usually instruct local solicitors, their specific questions are dealt with by the Government Legal Department – GLD (formerly known as the "Treasury Solicitor's Department") which will, for example, examine the witnesses in the presence of a Court Examiner and stenographer and return the signed transcript – but no video recording – via the official channels. Whilst most of these depositions or examinations in Greater London are conducted using video-link technology, depositions in other regions are still generally executed in person by agent

solicitors. Similarly, applications by private parties to the Senior Master under R. 34.17 CPR are usually made *ex parte*. Therefore, a duty of full and frank disclosure applies. In contrast to the procedure of the GDL, the deposition or examination is also accompanied by a videographer so that the proceedings can be followed or streamed remotely. Although the parties also receive a video recording, this data file is only made available to them in a laborious manner via a USB flash drive.

Drawing on her personal experience, Lucinda Orr, also shared the **general observations** that letters or requests transmitted by the Contracting States are very popular in South-East European Countries (SEE), in particular Romania, Poland and Bulgaria as well as in Turkish divorce cases, while requests directly from parties are more common in the United States (USA), Canada and Brazil. Furthermore, she also stressed that private parties should definitely engage a local solicitor *before* their request has been reviewed and sealed by the Senior Master.

IV. Outlook (*Anselmo Reyes*)

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

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

centralised role for HCCH…

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

Case Citation:

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

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

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

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

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

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

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

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

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

It is worth noting that South African courts may also be inaccessible where the

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

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

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

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



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

ABSTRACT

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

Key takeaways:

- In around 2019, a Chinese court in Hebei Province refused to enforce a US default monetary judgment issued by a California court, on the grounds of the existence of a valid arbitration agreement between the parties (*Sunvalley Solar Inc. v Baoding Tianwei Solarfilms Co. Ltd.* (2019) Ji 01 Xie Wai Ren No. 3).

- The Hebei Court held that the arbitration agreement was valid under Chinese law (the law of the seat of arbitration), since the parties did not specify the law governing the arbitration agreement.
- The Chinese company's failure to appear in the California court did not constitute a waiver of the arbitration agreement, as the Hebei Court ruled that silence does not imply an intention to abandon arbitration.
- The proposed inclusion of "arbitration agreements" as one of the indirect jurisdictional filters in China's Civil Procedure Law (2023 Amendment) was ultimately not adopted, following legislative review which deemed it inappropriate to override foreign courts' determinations regarding the validity of such agreements.

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

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

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

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

I. Case background

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

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

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

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

II. Court's Reasoning

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

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

First, the Hebei Court examined the validity of the arbitration clause. In this case, the parties had only agreed on the governing law of the main contract, which was the laws of California, under Art. 15, Paragraph 1 of the "Procurement Contract"., The parties, however, had not specified the law governing the arbitration agreement. Accordingly, the Court deemed the arbitration clause to be governed by the law of the seat of arbitration, which in this case Chinese law.[2] Under Art. 15, Paragraph 2 of the "Procurement Contract", the parties had clearly expressed their intention to resolve their disputes through arbitration. According to the said provision, disputes arising out of the contract shall be submitted to the China

International Economic and Trade Arbitration Commission (CIETAC). As such, the Hubei Court held that the arbitration clause met the requirements of Art. 16 of China's Arbitration Law and was therefore valid.

Second, the Hebei Court considered whether BTS's default constituted a waiver of the arbitration agreement. According to Art. II, Para. 1 of the New York Convention, Contracting States are required to respect valid arbitration agreements. Such agreements are not only legally binding on the parties but also have the legal effect of excluding the jurisdiction of national courts. This principle is fully consistent with Art. 5 of China's Arbitration Law and Art. 278 of China's Civil Procedure Law (CPL), both of which clearly provide that a valid arbitration agreement excludes court jurisdiction. If the parties intend to waive the arbitration agreement afterward, such waiver must be clear, explicit and mutually agreed upon, in accordance with the general principle of contract modification. Mere non-appearance in court proceedings does not constitute a waiver of arbitration or submission to the jurisdiction of the California Court. In this case, the existence of a valid arbitration agreement remained unaffected by BTS's failure to respond to the California Court's summons. Accordingly, BTS's silence could not be construed as an intention to waive the arbitration agreement. Thus, the California Court was deemed to lack jurisdiction over the case.

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

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

III. Comments

Clearly, the existence of a valid arbitration agreement was the decisive reason why the Hebei Court found that the California court lacked proper indirect

jurisdiction and thus refused to recognize the judgment it rendered.

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

1. The jurisdiction filter once in the draft

Interestingly, the existence of a valid arbitration agreement was initially included as one of the filters for assessing the indirect jurisdiction of foreign courts in the 2023 CPL Draft Amendment (see Art. 303, Para. 4 of the 2022 CPL Draft Amendment on indirect jurisdiction). Similar judicial views pre-dating the Draft can also be found in Art. 47 of the "Conference Summary of the Symposium on Foreign-related Commercial and Maritime Trials of Courts Nationwide", as well as in the commentary on that Article authored by the Fourth Civil Division of the SPC in the Understanding and Application.

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

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

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

2. What now?

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

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

Related Posts:

- *What's New for China's Rules on Foreign Judgments Recognition and Enforcement? – Pocket Guide to 2023 China's Civil Procedure Law (1)*
- *Thus Spoke Chinese Judges on Foreign Judgments Recognition and Enforcement: Insights from Chinese Supreme Court Justices on 2023 Civil Procedure Law Amendment (4)*

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

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

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

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

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

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

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

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

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

Related Posts:

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- *First Case of Reciprocal Commitment: China Requests Azerbaijan to Enforce its Judgment Based on Reciprocity*
- *US-China Judgments Recognition and Enforcement*

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

Court Press, 2023, pp. 332-333.

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

The Validity of the Utah Zoom Wedding in Lebanon, or the Question of Locus Celebrationis in the Digital Age



Many thanks to Karim Hammami for the tip-off

I. Introduction

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

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

This type of marriage has become increasingly popular in countries like Israel and Lebanon (see *infra*), where only religious marriages governed by recognized personal status laws are permitted. In such systems, interfaith marriages are often not allowed or are significantly restricted, depending on the religious communities involved. Traditionally, couples seeking a civil marriage had to travel abroad in order to conclude one that could later be recognized upon their return. The Utah Zoom Wedding offers a more accessible and convenient alternative, allowing couples to contract a civil marriage remotely without leaving their home country.

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

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

1. Facts

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

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

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

2. Parties' Arguments

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

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

3. The Ruling (relevant parts only)

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

> *"The Legislative Decree No. 60 mentioned above [……] recognizes the validity of marriages contracted abroad in any form, as Article 25 thereof provides that "a marriage contracted abroad is deemed valid in terms of form if it complies with the formal legal requirements in force in the country where it was concluded." This made it possible for Lebanese citizens to contract civil marriages abroad and to have all their legal effects recognized, provided that the marriage was celebrated in accordance with the legal formalities of the country where it was contracted and therefore subjected to civil law [……].*
>
> *Based on the foregoing, it is necessary to examine the conditions set out in Article 25 and what it intended by "a marriage contracted abroad," particularly in light of the Lebanese State's claim that the Lebanese national must travel abroad and be physically present outside Lebanon and that the marriage must be celebrated in a foreign country [……].*
>
> *In order to answer this question, several preliminary considerations must be addressed, which form the basis for determining the appropriate legal response in this context. These include:*
>
> - *The principle of party autonomy in contracts and the freedom to choose the applicable law is a cornerstone of international contracts. This principle stems from the right of individuals to govern their legal relationships under a law they freely and expressly choose. This equally applies to the possibility for the couple to choose the most appropriate law governing their marital relationship, when they choose to marry civilly under the laws of a country that recognizes civil marriage.*
> - *Lebanese case law has consistently recognized the validity of civil marriages contracted abroad, subjecting such marriages, both as to form and substance, to the civil law of the country of celebration, regardless of the spouses' other connections to that country [……]. This implies an implicit recognition that Lebanese law leaves room for the spouses' autonomy in choosing the form of their marriage and the law*

governing their marriage.

- *Legal provisions are general and abstract, and cannot be interpreted in a way that creates discrimination or inequality among citizens [……]. Therefore, adopting a literal interpretation of the term "abroad" to require the physical presence of the spouses outside Lebanese territory at the time of the marriage, as advocated by the State of Lebanon, would result in unequal treatment among Lebanese citizens. This is because, under such an interpretation, civil marriage would only be practically available to those with the financial means to travel abroad. Such a result would fail to provide a genuine solution to the issue of denying certain citizens the right to civil marriage.*
- *Subjecting a civil marriage contract to a law chosen by the parties does not contravene Lebanese public policy in personal status matters. This is because, once the marriage is celebrated in accordance with the formalities admitted in the chosen country, it does not affect the laws and rights of Lebanon's religious communities or alter them. On the contrary, it constitutes recognition of a constitutionally protected right [right to marriage] that deserves safeguarding, and that the recognition of this right serves public policy. Furthermore, the multiplicity of personal status regimes in Lebanon due to the existence of various religious communities practically broadens the scope for accepting foreign laws chosen by the parties. However, Lebanese courts retain the power to review the chosen law to ensure that it does not contain provisions that violate Lebanese public policy, and this without considering the principle of party autonomy, in and of itself, to be contrary to public policy.[…]*

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

[……]

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

[U.S. law] clearly provides that the marriage is deemed to have taken place in

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

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

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

III. Comments

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

In Lebanon, the only form of marriage currently available for couples is a religious marriage conducted before one of the officially recognized religious communities. However, couples who wish to avoid a religious marriage are allowed to travel abroad—typically to countries like Cyprus or Turkey—to have a civil marriage, and later have it recognized in Lebanon. This is a consequence of the judicial and administrative interpretation of the law applicable to marriage in Lebanon, according to which, a marriage concluded abroad is recognized in Lebanon if it had been concluded in any of the forms recognized by the foreign

legal system (Art. 25 of the Legislative Decree No. 60 of 13 March 1936. See Marie-Claude Najm Kobeh, "Lebanon" in J Basedow et al. (eds.), *Encyclopedia of Private International Law – Vol. III* (Edward Elgar, 2017) 2271). The marriage thus concluded will be governed by the foreign civil law of the country of celebration, *irrespective of any connection between the spouses and the foreign country in question, such as domicile or residence*. In this sense, Lebanese citizens enjoy a real freedom to opt for a civil marriage recognized under foreign law. The only exception, however, is when both parties are Muslims, in which the relevant rules of Islamic law apply (Najm, *op. cit.*, 2271-72).

2. "Remote Marriage" in Lebanon

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

3. Significance of the Decision

The significance of this decision lies in the court's readiness to broaden the already wide freedom couples have to choose the law governing their marriage. Already under the established legal practice in Lebanon, it was admitted that Lebanese private international law adopts a broad subjectivist view of party autonomy in civil marriage, allowing spouses to choose a foreign law without any requirement of connection to it (Pierre Gannagé, "La pénétration de l'autonomie de la volonté dans le droit international privé de la famille" *Rev. crit.* 1992, 439).

The decision commented on here pushes that principle further: the court goes beyond the literal reading of Article 25 and applies it to remote marriages conducted under foreign law before foreign officials, even when the spouses remain physically in Lebanon.

This extension is striking. First, it should be noted that, under Lebanese private international law, it is generally admitted that "[t]he *locus regis actum* rule governing the formal conditions of marriage is ……extended to cover the consequences of marriage", including filiation, parental authority, maintenance, custody and even divorce and separation (Najm, *op. cit.*, 2272). Now, it suffices for a simple click online, and the payment of minimal fees to have the marital relationship of the spouses governed by the law of foreign State, despite the absence of any connection, whatsoever, with the foreign legal system in question (except for internet connection).

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

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

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

Rethinking Private International Law Through the Lens of Colonialism



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

Introduction

The relationship between colonialism and law has been the subject of active

debate across various fields, including legal anthropology and comparative law. Key themes include the impact of colonial rule on legal systems in colonized regions, the inherently violent nature of colonialism, and the possibilities for decolonization. This relationship has also received particular attention in the field of international law. Numerous studies have examined how colonialism shaped the very structure of the international legal order, as well as the theoretical justifications for its expansion into regions regarded as "non-Western" or "uncivilized." In contrast, the field of private international law (PIL) has, until now, rarely engaged directly with the theme of colonialism (see however the various previous posts on this blog). To be sure, some studies on the development of PIL in the 19th century or on the asymmetrical treatment of cross-border legal relationships do touch upon issues linked to colonialism. However, these works do not place the relationship between PIL and colonialism at the center of their analysis.

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

I. Why Colonialism Matters to PIL

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

1. Explanatory Value

First, studying the historical links between PIL and colonialism allows us to better understand how the field developed. As is commonly known, PIL claims to rest on the principles of equal sovereignty and neutral legal reasoning. However, this conventional understanding of PIL is incomplete. In reality, PIL particularly developed during a period when global relations were anything but equal. The

nineteenth century, which saw the rapid expansion of colonial powers across Asia, Africa, and the Middle East, was also the period during which many of the foundational premises and principles of PIL took shape. Accordingly, while PIL may appear neutral and universal in theory, its development was deeply embedded in a historical context shaped by colonial expansion and domination. This context was characterized, both in law and in practice, by profound asymmetries in power that underpinned the very structures of colonial rule. Understanding this historical backdrop sheds light on how PIL has developed to become the discipline that we know today.

2. Inclusiveness and Diversity in Legal Scholarship

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

3. Relevance for Contemporary Practice

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

II. Scope of Analyses

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

III. The Paradox: Legal Equality vs. Colonial Hierarchy

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

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

Colonialism, on the other hand, rests on the very denial of sovereign equality. Colonialism, broadly defined, refers to systemic domination by one power over

another, encompassing political, legal, economic, and cultural dimensions. It creates and institutionalizes structural inequalities between dominating and dominated societies. Colonialism comes in many forms: annexation (e.g., Algeria by France), protectorates (e.g., Tunisia), or semi-colonial arrangements (e.g., Japan, Thailand, Ottman Empire or China under unequal treaties). In this sense, at its core, colonialism was a system of unilateral domination through discourses of civilizational superiority in which one power imposed its authority over another.

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

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

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

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

institutionalized by the conclusion of the so-called “capitulations” or “unequal treaties” giving extraterritorial legal and jurisdictional privileges to Western colonial powers, which in some countries has developed to the introduction of foreign courts (e.g. French courts in Tunisia) or mixed courts (e.g. Egypt).

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

V. The “Civilized vs. Uncivilized” Divide

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

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

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

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

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

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

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

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

VI. PIL as a tool for emancipation from colonial chains

Interestingly, in the 20th century, as formerly colonized countries sought to assert their sovereignty, PIL became a means to achieve legal and political recognition.

To be accepted as equal members of the international community, these states had to show that their legal systems conformed to the standards expected of "civilized" nations. This included establishing reliable legal institutions, codifying laws, and—crucially—adopting PIL statutes.

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

Conclusion: A Dual Legacy

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

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

Understanding this past is not about assigning blame, but about gaining clarity. By exploring how PIL has operated across different times and contexts, we equip

ourselves to improve its capacity to serve all legal systems and individuals fairly. That, in the end, is what will make PIL truly universal.

Under the Omnibus: Corporate Sustainability Due Diligence Directive's rules on civil liability no longer overriding mandatory

The European Commission's recent Omnibus proposes a significant change to the Corporate Sustainability Due Diligence Directive (CSDDD). Article 29(7) of the original CSDDD requires Member States to implement its rules on civil liability rules so that these rules apply as overriding mandatory provisions, if the law applicable to the claim is not a law of a Member State. The Omnibus package proposes to delete art. 29(7) CSDDD. As a result, Member States will no longer be obliged to implement CSDDD's rules on liability as overriding mandatory provisions.

The Omnibus

On 26 February 2025 the European Commission presented the so-called Omnibus. It is a proposal to simplify reporting and compliance in the fields of ESG and corporate societal responsibility (COM(2025) 81 final). Subject to approval by the European Parliament and the Council, Member States will have to implement the changes introduced by the Omnibus by 31 December 2025. The updated instruments will be effective from 1 January 2026.

The Omnibus amends several existing instruments, including the Corporate Sustainability Due Diligence Directive (CSDDD), which entered into force on 25 July 2024. The Omnibus postpones the deadline for the CSDDD's implementation to 26 July 2027; and the deadline for companies covered by the directive's scope to be compliant is postponed to 26 July 2028.

CSDDD: civil liability by overriding mandatory provisions

Art. 29 CSDDD provides a harmonised EU uniform liability regime for breaches of due diligence in (cross-border) supply chains. While the CSDDD contains no rules on international jurisdiction (see the blogpost by Ralf Michaels on this matter here), the directive explicitly positions its provisions on civil liability within the conflict of laws. The current text of art. 29(7) CSDDD provides:

Member States shall ensure that the provisions of national law transposing this Article are of overriding mandatory application in cases where the law applicable to claims to that effect is not the national law of a Member State.

This provision requires that Member States implement the directive's rules on civil liability so that they apply as overriding mandatory provisions (of national substantive law) if the claim is not governed by the law of a Member State. This rationale is also reiterated in Recital 90. The current text of the CSDDD allows for differences within the EU (between Member States' regimes); these differences would not trigger the application of overriding mandatory provisions. The overriding mandatory character (of any Member State's national civil liability regime based on the CSDDD) would only manifest itself when the applicable is the law of a third state. It is in relation to the latter situations, that the CSDDD has elevated the civil liability regime to the level of semi-public provisions.

Omnibus: no uniform civil liability regime; not by overriding mandatory provisions

The Omnibus restrains this ambition. Firstly, it contains a proposal to abolish an EU-wide harmonised liability regime. Secondly, it removes Member States' obligation to implement the (remaining elements of the uniform) liability regime as overriding mandatory provisions. Under the Omnibus:

'paragraph (12) amends Article 29 of the CSDDD as regards civil liability by deleting paragraph (1), paragraph (3), point (d) and paragraph (7), and changing paragraphs (2), (4) and (5).

- *to remove the specific, EU-wide liability regime in the Directive*

(…)

- *in view of the different rules and traditions that exist at national level*

when it comes to allowing representative action, to delete the specific requirement set out in the CSDDD in this regard (…)'

- *for the same reason, by deleting the requirement for Member States to ensure that the liability rules are of overriding mandatory application in cases where the law applicable to claims to that effect is not the national law of the Member State (…)'.*

Motivation

The provisions that propose to abandon the EU-wide liability regime, quoted above, refers to the divergence in the regulation of representative actions across the EU Member States. The Explanatory Memorandum included in the Omnibus provides several other reasons of the proposal. One of the main reasons is the aim to reduce the 'administrative, regulatory and reporting burdens, in particular for SMEs' (small and medium size enterprises). Although the Omnibus package amends instruments that cover primarily large economic players, the simplification aims to prevent a de facto shift of the compliance costs to smaller players, because '[t]he ability of the Union to preserve and protect its values depends amongst other things on the capacity of its economy to adapt and compete in an unstable and sometimes hostile geopolitical context,' as stated in the document with reference to the reports on EU global competitiveness.

Implications

From the perspective of private international law, the original art. 29(7) CSDDD is certainly challenging. It is namely not entirely clear how the doctrine of overriding mandatory rules (based on art. 9 Rome I, and art. 16 Rome II Regulations) would apply to civil liability claims grounded in the rules implementing the directive. Nonetheless, the CSDDD approach might have the potential to open new avenues for further practical and conceptual development of this conflict-of-law doctrine in the future.

Currently, as the Omnibus explicitly rules out the overriding mandatory character of the (remaining parts of) the CSDDD civil liability regime, if the Omnibus is adopted, one would rather not expect from Member States' legislatives or courts to elevate the regular domestic civil liability rules to the semi-public level of overriding mandatory provisions.

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

Written by George Jacob, Incoming Associate, Bombay Law Chambers

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

Process of Overseas Service of Summons in India – the Methods

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

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

Route

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

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

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

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

serving a Chinese defendant through India's diplomatic/consular agents in China. Article 10 of HSC allows service via postal channels, subject to whether the receiving country has not objected. For example, an Indian court may send a summons directly by post to a defendant in France, which permits such service. But this route is unavailable for defendants in Germany, as it has formally opposed service through postal channels under Article 10.

Indian Code of Civil Procedure Routes

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

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

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

Dissecting Service – Three Connected Principles

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

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

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

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

Background of the *Mollykutty* Dispute

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

The coexistence of this diverging regimes came to a head in the *Mollykutty* case, a seminal decision of the Kerala High Court. The case concerned a suit in which

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

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

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

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

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

valid alternatives?

The *Charuvila Philippose* Case

Arguments Raised

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

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

Court's Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 2 and 3 HSC concerns the appointment of a Central Authority by each signatory state for enabling cross-border service. Under this route, service is sent

to the requisite authority of the originating state which then forwards the service to the Central Authority of the destination state.

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

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

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

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

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

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

states that permit such service under HSC.

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

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

Reference Questions and their Answers

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

Case Analysis

The Change in Jurisprudence

In addition to the factors identified by the court in *Charuvila Phillipose*, the

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

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

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

Potential Legal Challenges Following *Charuvila Phillipose*

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

Code (CPC).

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

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

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

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

In *Charuvila Phillipose*, the Kerala High Court endorses a narrow interpretation of Article 10 postal methods by stating *"…we take the call to limit the same…*" in

reference to postal channels. This allows litigants in India to send service abroad via email. However, this interpretation carries significant legal risks.

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

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

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

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

The court however, sidestepped the issue, noting that this was not one of the questions referred for determination. Nevertheless, the court, recognizing the

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

- **Recognition of Problems with HSC Route**

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

One hurdle that prevents reliance on Rule 25 is the absence of an express mechanism to prove summons was served abroad. The court adopts a practical approach where service is deemed valid under Rule 25 – if the postal authorities of the destination state provide acknowledgement of successful service, or if the defendant voluntarily appears before the court. This is only a temporary fix to address a procedural lacuna in CPC. However, modern technology can prove to be an effective fix. While regular email offers speed, efficiency and accessibility compared to service by post, it is difficult to conclusively prove whether the email was received, opened or read by the defendant. To address these limitations, "certified email" platforms offer an alternative. Such platforms provide encryption, verifiable delivery tracking, time-stamped acknowledgements along

with confirmation of when and whether the recipient opened the message. It provides a comprehensive digital trail similar to postal service, while providing a higher evidentiary value. Incorporation of such tools could significantly improve reliability of international service under Order V Rule 25 of CPC.

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

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

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

[3] (1970) 3 SCC 400

[4] (2010) SCC OnLine Bom 23

[5] (2018) 6 SCC 287

[6] AIR 1955 SC 425

[7] (1984) 2 SCC 534

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

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

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

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

[11] Id.

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

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



I. Introduction:

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

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

II. The Case

1. Facts

The facts of the case can be summarized as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Comments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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The Recalibration of Enforcement Doctrine

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

To recall, the dispute arises from a contract entered in 2005 between Devas Multimedia Private Limited (**Devas**) and the Indian state-owned Antrix Corporation (**Antrix**), which was the commercial arm of the Indian Space Research Organisation. Antrix had agreed to lease S-band spectrum to Devas to broadcast its multimedia services in India. Antrix terminated this contract in 2011

citing national security concerns. In a nutshell, the dispute spawned three concluded arbitrations – a commercial ICC arbitration between Devas and Antrix and two investor-state arbitrations between Devas' shareholders and India under the India-Mauritius Bilateral Investment Treaty (**BIT**) 1998 and the India-Germany BIT 1995. In 2022, Devas' Mauritian shareholders commenced another investor-state arbitration against India under the India-Mauritius BIT in relation to India's efforts to thwart the award against Antrix in the ICC arbitration, which currently remains pending before the Permanent Court of Arbitration. An overview of the various proceedings arising from this dispute has been previously discussed on this blog here.

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

Early Presumption in Favour of Enforcement of Arbitral Awards

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

The observations of a US Court in 2024 while enforcing the award are illustrative of a presumption in favour of the enforcement of ISDS awards. The US Court rejected India's claim to sovereign immunity under the Foreign Sovereign Immunities Act 1976 (**FSIA**) on the basis of the "*arbitration exception*" in the FSIA. The court held that India could not claim immunity given that it had agreed

to arbitrate under the India-Germany BIT in accordance with the UNCITRAL Rules. Tellingly, the US Court proclaimed "*Enough is Enough!*". The approach of the US court, enforcing the award under the New York Convention, is reflective of the restrictive theory of sovereign immunity, which limits a state's immunity from lawsuits in foreign courts to acts of a private nature, such as commercial activities, while preserving immunity for acts performed in its sovereign capacity. This theory acknowledges that states often engage in commercial activities and should be held accountable like private entities in those contexts.

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

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

Australia: Treaty Reservations and Domestic Legal Classification

As discussed here, the Full Federal Court of Australia's decision in *Republic of India v. CCDM Holdings, LLC* [2025] FCAFC 2 illustrates the growing judicial circumspection in enforcement proceedings against sovereign states. The court reversed the prior decision in the first instance by the Federal Court, where the

court had enforced the award against India. The court of first instance had concluded that India was not immune under the Australian Foreign States Immunities Act 1985 (**Australian FSIA**) as it had waived its sovereign immunity by ratifying the NYC. The court had not been convinced of the impact of India's commercial reservation to the NYC, noting that enforcement was sought in Australia and Australia had not made any such commercial reservation.

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

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

United Kingdom: Consent to Arbitrate Is Not Consent to Enforce

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

The court was not convinced that India's ratification of the NYC was sufficient evidence of a "*prior written agreement*" under Section 2(2) of the SIA. The court observed that the drafters of the NYC had not intended to preclude the ability of

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

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

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

Comparative Analysis: Convergence and Doctrinal Resonance

The recent UK and Australian judgments represent a deference to domestic law

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

Historical Approach of Indian Courts

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

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

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

India's Recent Treaty Practice

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

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

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

Conclusion: Sovereignty as the Organising Principle of Enforcement

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