

# New Proposed Rules on International Jurisdiction and Foreign Judgments in Morocco

Last Thursday, November 9, Draft No. 02.23 proposing the adoption of a new Code of Civil Procedure (*al-musattara al-madaniyya*) was submitted to the Moroccan House of Representatives. One of the main innovations of this draft is the introduction, for the first time in Moroccan history, of a catalogue of rules on international jurisdiction. It also amends the existing rules on the enforcement of foreign judgments.

Despite the importance of this legislative initiative for the development of private international law in Morocco, the proposed provisions are unfortunately disappointing in many respects.

First, with regard to the rules of international jurisdiction, it is surprising that the drafters of the 2023 proposed Code have relied heavily on the rules of the Egyptian Code of Civil Procedure, which date back to the fifties of the last century. These rules are in many respects completely parochial and outdated. Other codifications from the MENA region (e.g., the Tunisian codification of PIL) or elsewhere (e.g., recent codifications of PIL in Europe and Asia) could have served as better models. Furthermore, the proposed rules seem to have overlooked developments at the regional or international level, in particular those in the European Union and the Hague Conference on Private International Law over the last two decades. The fact that the new proposed rules do not even take into account the solutions of the 1991 Ras Lanouf Convention, a double convention concluded between the Maghreb countries (but not yet ratified by Morocco), is difficult to explain.

Examples of questionable aspects of the new proposed rules include, among others:

- Adopting the nationality of the defendant as the basis for jurisdiction in all matters, including civil and commercial matters, even if the dispute has no other connection with Morocco.

- Failure to distinguish between concurrent and exclusive jurisdiction. This is problematic because the new proposed provision on the requirements for the enforcement of foreign judgments allows Moroccan courts to refuse enforcement if the judgments were rendered in matters within the exclusive jurisdiction of Moroccan courts, without providing a list of such matters.
- The adoption of questionable and outdated grounds of jurisdiction, such as the location of property without limitation and the place of the conclusion of the contract.
- Failure to introduce new rules that take into account the protection of weaker parties, especially employees and consumers.
- Failure to include a clear and coherent rule on choice of court agreements.
- Failure to include a rule on lis pendens.

Second, with regard to the enforcement of foreign judgments, the main surprise is the introduction of the reciprocity rule, which was not part of the law on foreign judgments in Morocco. Moreover, Moroccan courts have never invoked the principle of reciprocity when dealing with the enforcement of foreign judgments, either as a possible requirement or as ground for refusing to give effect to foreign judgments. It is not clear why the drafters felt the need to introduce reciprocity when there does not seem to be any particular problem with the enforcement of Moroccan judgments abroad.

The following is a loose translation of the relevant provisions. The text in brackets has been added by the author.

## **Part II - The Jurisdiction of the Courts**

### **Chapter IV - International Judicial Jurisdiction**

#### **Article 72 [(General) Jurisdiction over Moroccans]**

The courts of the Kingdom shall have jurisdiction to hear actions brought against Moroccans even if they are not domiciled or resident in Morocco, except when the action concerns immovables located abroad.

#### **Article 73 [(General) Jurisdiction over Foreigners Domiciled or Resident**

## **in Morocco]**

The courts of the Kingdom shall have jurisdiction to hear actions brought against foreigners who are domiciled or resident in Morocco, except where the dispute concerns immovables located abroad.

## **Article 74 [(Special) Jurisdiction over Foreigners not domiciled or resident in Morocco]**

**[1]** The courts of the Kingdom shall have jurisdiction to hear actions brought against foreigners who are not domiciled or resident in Morocco [in the following cases]:

1. **[Property and Obligations]** [if the action] concerns property located in Morocco, or an obligation formed, performed, or should have been performed in Morocco;
2. **[Tortious Liability]** [if the action] concerns tortious liability when the act giving rise to liability or the damage takes place in Morocco;
3. **[Intellectual Property]** [if the action] concerns the protection of intellectual property rights in Morocco;
4. **[Judicial Restructuring]** [if the action] concerns procedures for businesses in difficulty instituted in Morocco;
5. **[Joint Defendants]** [if the action] is brought against joint defendants, and one of them is domiciled in Morocco;
6. **[Maintenance]** [if the action] concerns a maintenance obligation and the maintenance creditor is resident in Morocco;
7. **[Filiation and Guardianship]** [if the action] concerns the filiation of a minor resident in Morocco or a matter of guardianship over a person or property;
8. **[Personal status]** [if the action] concerns other matters of personal status:
  - a) if the plaintiff is Moroccan;
  - b) if the plaintiff is a foreigner who has resident in Morocco and the defendant does not have a known domicile abroad,
9. **[Dissolution of marriage]** [if the action] concerns the dissolution of the

marital bond:

- a) if the marriage contract was concluded in Morocco;
- b) if the action is brought by a husband or a wife of Moroccan citizenship;
- c) if one of the spouses abandons the other spouse and fixes his/her domicile abroad or has been deported from Morocco

[2] **[Counterclaims and related claims]** The courts of the Kingdom that have jurisdiction over an original action shall also have jurisdiction to hear counterclaims and any related claims.

[3] **[Conservative and Provisional measures]** The courts of the Kingdom shall also have jurisdiction to take conservative and provisional measures to be executed in the Kingdom even if they do not have jurisdiction over the original action.

## **Article 75**

[1. **Consent and Submission]** The courts of the Kingdom shall also have jurisdiction to hear actions even if they do not fall within the jurisdiction of the defendant explicitly or implicitly accepting their jurisdiction unless the action concerns an immovable located abroad.

[2. **Declining jurisdiction]** If the defendant in question does not appear, the court shall [in its motion] rule that it has no jurisdiction.

## **Part IX - Methods of Execution**

### **Chapter III - General Provisions relating to Compulsory Execution of Judicial Judgments**

#### **Article 451 [Necessity of an Exequatur Declaration]**

Foreign judgments rendered by foreign courts shall not be enforced unless they are declared enforceable following the conditions laid down in the present Act.

#### **Article 452 [Procedure]**

[1] The request for exequatur shall be submitted to the First President of the court of the second instance with subject-matter jurisdiction.

[2] Jurisdiction shall lie with the court of the place of execution, and the executor shall have the authority to pursue the execution wherever the property of the person against whom the execution was issued is found.

[3] The first president or the person replacing him/her shall summon the

defendant when necessary.

### **Article 453 [Requirements]**

The foreign judgment shall not be declared enforceable except after verifying that the following requirements are satisfied:

- [a] The foreign court did not render a judgment that falls within the exclusive jurisdiction of Moroccan courts;
- [b] There exists a substantial connection between the dispute and the court of the state where the judgment was rendered;
- [c] There was no fraud in choosing the rendering court;
- [d] The parties to the dispute were duly summoned and properly represented;
- [e] The judgment became final and conclusive following the law of the rendering court;
- [f] The judgment does not contradict with a judgment already rendered by Moroccan courts;
- [g] The judgment does not violate Moroccan public policy.

### **Article 454 [Documents and Appeal]**

[1] Except otherwise stipulated in the international conventions ratified by Morocco and published in the Official Gazette, the request [for declarations of enforceability] shall be submitted by way of application accompanied by the following:

- [a] an official copy of the judicial judgment
  - [b] a certificate of non-opposition, appeal, or cassation
  - [c] a full translation into Arabic of the documents referred to above and certified as authentic by a sworn translator.
- [2] The judgment of granting exequatur can be subject to appeal before the Supreme Court.
- [3] The Supreme Court shall decide on the appeal within one month.
- [4] Judgments granting exequatur in cases relating to the dissolution of marriage shall not be subject to any appeal except by the public prosecutor.

### **Article 455 [Titles and Authentic Instruments]**

Titles and authentic instruments established abroad before competent public officers and public servants can be enforced in Morocco after being declared enforceable, and that after showing that the title or the authentic instrument has the quality of an enforceable title and that it is enforceable following the law of the State where it was drawn up and does not violate the Moroccan public policy.

## **Article 456 [International Conventions and Reciprocity]**

The rules laid down in the previous articles shall be applied, without prejudice to the provisions of the international conventions and treaties ratified by the Kingdom of Morocco and published in the Official Gazette. The rule of reciprocity shall also be considered.

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# **The Jurisdiction Puzzle: Dyson, Supply Chain Liability and Forum Non Conveniens**

*Written by Dr Ekaterina Aristova, Leverhulme Early Career Fellow, Bonavero Institute of Human Rights, University of Oxford*

On 19 October 2023, the English High Court declined to exercise jurisdiction in *Limbu v Dyson Technology Ltd*, a case concerning allegations of forced labour and dangerous conditions at Malaysian factories which manufactured Dyson-branded products. The lawsuit commenced by the migrant workers from Nepal and Bangladesh is an example of business and human rights litigation against British multinationals for the damage caused in their overseas operations. Individuals and local communities from foreign jurisdictions secured favourable outcomes and won jurisdictional battles in the English courts over the last years in several notable cases, including *Lungowe v Vedanta*, *Okpabi v Shell* and *Begum v Maran*.

The *Dyson* case is particularly interesting for at least two reasons. First, it advances a novel argument about negligence and unjust enrichment of the lead purchasing company in a supply chain relationship by analogy to the parent company liability for the acts of a subsidiary in a corporate group. Second, it is one of the few business and human rights cases filed after Brexit and the first to be dismissed on *forum non conveniens* grounds. Since the UK's EU referendum in 2016, the return of *forum non conveniens* in the jurisdictional inquiry has been

seen as a real concern for victims of business-related human rights and environmental abuses seeking justice in the English courts. With the first case falling on jurisdictional grounds in the first instance, the corporate defendants started to collect a 'Brexit dividend', as cleverly put by Uglješa Grušić in his case comment.

## **Facts**

The proceedings were commenced in May 2022. The claimants were subjected to forced labour and highly exploitative and abusive conditions while working at a factory in Malaysia run by a local company. The defendants are three companies in the Dyson corporate group, two domiciled in England and one in Malaysia. The factory where alleged abuses took place manufactured products and components for Dyson products. Claimants argued that Dyson defendants were liable for (i) negligence; (ii) joint liability with the primary tortfeasors (the Malaysian suppliers running the factory and local police) for the commission of the torts of false imprisonment, intimidation, assault and battery; and (iii) unjust enrichment. They further alleged that the Dyson group exercised a high degree of control over the manufacturing operations and working conditions at the factory facilities and promulgated mandatory ethical and employment policies and standards in Dyson's supply chain, including in Malaysian factories.

The English courts are already familiar with the attempts to establish direct liability of the English-based parent companies for the subsidiaries' harms relying on negligence and the breach of duty of care owed to the claimants. In *Vedanta* and *Okpabi*, the UK Supreme Court made it clear that the parent company's involvement and management of the subsidiary's operations in different ways can give rise to a duty of care.

Broadening the scope of the parent company liability in a corporate group beyond strict control opened paths to supply chain liability. While lead purchasing companies, like Dyson, are not bound by shareholding with their suppliers, they often exercise a certain level of managerial control over independent contractors. Such involvement with particular aspects of a supplier's activities leads to the argument that a lead company could also be liable in negligence for a breach of the duty of care. The unjust enrichment claim that Dyson group has been enriched at the claimant's expense is a relatively novel legal basis, although it has already been raised in similar cases. To the best of my knowledge, in addition to

the *Dyson* case, at least four legal actions focusing on supply chain liability are progressing in England: Malawian tobacco farmer claims against British American Tobacco and Imperial, Malawian tea farmer claims against PGI Group Ltd, Ghanaian children accusations against cocoa producer Olam and forced labour allegations by Burmese migrants against Tesco and Intertek.

## **Judgment**

The court had to resolve the jurisdictional question of whether the case would proceed to trial in England or Malaysia. The English common law rules are founded on service of the claim form on the defendant and are based on the defendant's presence in the jurisdiction. In general terms, jurisdiction over English-domiciled parent companies is effected within the jurisdiction as of right. Following Brexit, proceedings against an English parent company may be stayed on *forum non conveniens* grounds. Foreign subsidiaries are served outside the jurisdiction with the court's permission, usually on the basis of the 'necessary or proper party' gateway. In the *Dyson* case, the English defendants asked the court to stay the proceedings based on *forum non conveniens*, and the Malaysian defendant challenged the service of the claim form, arguing that Malaysia is a proper place to bring the claim.

The court agreed with the corporate defendants, having applied the two-stage test set out by the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd*. The first stage requires consideration of the connecting factors between the case and available jurisdictions to determine a natural forum to try the dispute. The court concluded that Malaysia was 'clearly and distinctly more appropriate' [122]. Some factors taken into account were regarded as neutral between the different fora (convenience for all of the parties and the witnesses [84], lack of a common language for each of the witnesses [96], location of the documents [105]). At least one factor was regarded as a significant one favouring England as the proper place to hear the claim (risk of a multiplicity of proceedings and or irreconcilable judgments [109]). However, several factors weighed heavily in favour of Malaysia (applicable law [97], place where the harm occurred [102]). As a result, Malaysia was considered to be the 'centre of gravity' in the case [122].

Under the second limb of the *Spiliada* principle, the English courts consider whether they should exercise jurisdiction in cases where the claimant would be denied substantial justice in the foreign forum. The claimants advanced several



arguments to demonstrate that there is a real risk of them not obtaining substantial justice in Malaysia [125–168], including difficulties in obtaining justice for migrant workers, lack of experienced lawyers to handle the case, the risk of a split trial, the cost of the trial and financial risks for the claimants and their representatives, limited role of local NGOs to support the claimants. The court did not find cogent evidence that the claimants would not obtain substantial justice in Malaysia [169]. A stay of proceedings against English defendants was granted, and the service upon the Malaysian company was set aside [172]. Reaching this conclusion involved consideration of extensive evidence, including contradictory statements from Malaysian lawyers and civil society organisations. The Dyson defendants have given a number of undertakings to submit to the jurisdiction of the Malaysian courts and cover certain claimants' costs necessary to conduct the trial in Malaysia, which persuaded the court [16].

## **Comment**

The *Dyson* case marks a shift from the recent trend of allowing human rights and environmental cases involving British multinationals to proceed to trial in the UK courts. Three principal takeaways are worth highlighting. First, the claimants in the business and human rights cases can no longer be certain about the outcome of the jurisdictional inquiry in the English courts. The EU blocked the UK's accession to the Lugano Convention despite calls from NGOs and legal experts. The risk of dismissal on *forum non conveniens* grounds is no longer just a theoretical concern.

Second, the *Dyson* case demonstrates the difficulties of finding the natural forum under the doctrine of *forum non conveniens* in civil liability claims involving multinationals. These complex disputes have a significant nexus with both England, where the parent or lead company is alleged to have breached the duty of care, and the foreign jurisdiction where claimants sustained their injuries. The underlying nature of the liability issue in the case is how the parent or lead company shaped from England human rights or environmental performance of its overseas subsidiaries and suppliers. In this context, I agree with Geert van Calster, who criticises the court's finding about Malaysia being the 'centre of gravity' in the case. I have argued previously that the *forum non conveniens* analysis should properly acknowledge how the claimants frame the argument about liability allocation between the parent company and other entities in the group or supply chain.

Finally, the *Dyson* case is not the first one to be intensely litigated on the *forum (non) conveniens* grounds. In *Lubbe v Cape*, *Connelly v RTZ* and *Vedanta*, the English courts accepted jurisdiction, acknowledging that the absence of a means of funding or experienced lawyers to handle the case in a host state will lead to a real risk of the non-availability of substantial justice. The court in *Dyson* reached a different conclusion, but its analysis of the availability of substantial justice for claimants in Malaysia is not particularly persuasive, especially considering the claimants' 'fear of persecution, detention in inhumane conditions and deportation should they return to Malaysia' [71].

One aspect of the judgment is notably concerning. Claimants referred to the conduct of the *Dyson* defendants as being 'aggressive' and 'heavy-handed' [71], [73]. In concluding remarks, the court accepted there were deficiencies in *Dyson*'s responses to the claimants' requests for the documents [173]. Yet despite this acceptance, the court has on multiple occasions relied on the defendants' undertakings to cooperate with the claimants to ensure the trial can proceed in Malaysia [136], [147], [151], [152], [166], [169]. Undoubtedly, the ruling will be appealed, and it remains to be seen if the English courts will be willing to try cases involving British multinationals in the post-Brexit landscape.

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# **The 2019 Hague Judgments Convention Applied by Analogy in the Dutch Supreme Court**

*Written by Birgit van Houtert, Assistant Professor of Private International Law at Maastricht University*

On 1 September 2023, the 2019 Hague Judgments Convention (HJC) entered into force. Currently, this Convention only applies in the relationship between EU-Member States and Ukraine. Uruguay has also ratified the HJC on 1 September 2023 (see status table). The value of the HJC has been criticised by Haimo Schack

inter alia, for its limited scope of application. However, the HJC can be valuable even beyond its scope as this blog will illustrate by the ruling of the Dutch Supreme Court on 29 September 2023, ECLI:NL:HR:2023:1265.

## **Facts**

In 2019, a couple with Moroccan and Dutch nationality living in the Netherlands separated. They have two children over whom they have joint custody. On 5 June 2020, the wife filed for divorce and ancillary relief, inter alia division of the matrimonial property, with the Dutch court. On 29 December 2020, the husband requested this court to also determine the contribution for child maintenance to be paid by the wife. However, the wife raised the objection of *lis pendens* with reference to Article 12 Dutch Civil Code of Procedure (DCCP), arguing that the Dutch court does not have jurisdiction regarding child maintenance, since she filed a similar application with the Moroccan court on 9 December 2020, and the judgment to be rendered by the latter court could be recognised in the Netherlands.

## ***Lis pendens***

On 26 March 2021, the Dutch district court pronounced the divorce and ruled that the wife must pay child maintenance. This court rejected the objection of *lis pendens* because the Moroccan and Dutch proceedings did not concern the same subject matter as in Morocco a husband cannot request child support to be paid by the wife. Furthermore, there has been no Convention to enforce the Moroccan judgment in the Netherlands, as required by Article 12 DCCP. However, the Court of Appeal held that the district court should have declined jurisdiction regarding child maintenance, because both proceedings concerned the same subject matter, i.e. the determination of child maintenance. Subsequently, the Court of Appeal declined jurisdiction over this matter by pointing out that the Moroccan judgment, which in the meantime had been rendered, could – in the absence of a Convention – be recognised in accordance with the Dutch requirements for recognition of non-EU judgments, the *Gazprombank*-requirements (see Hoge Raad 26 September 2014, ECLI:NL:HR:2014:2838, 3.6.4).

The case brought before the Supreme Court initially concerned the interpretation of *lis pendens* under Article 12 DCCP. In accordance with this provision, the Supreme Court states that the civil action should be brought to a foreign court

first, and subsequently the Dutch court to consider the same cause of action between the same parties. If it is expected that the foreign proceedings will result in a judgement that can be recognised, and if necessary enforced, in the Netherlands either on the basis of a Convention or *Gazprombank*-requirements (see Hoge Raad 29 September 2023, ECLI:NL:HR:2023:1266, 3.2.3), the Dutch court may stay its proceedings but is not obliged to do so. The court may, for example, decide not to stay the case because it is expected to take too long for the foreign court to render the final judgment (3.3.5). However, the court must declare itself incompetent if the foreign judgment has become final and this judgment could be recognised and, if necessary enforced, in the Netherlands. To define the concept of finality of the foreign judgement, the Supreme Court drew inspiration from the HJC and the Explanatory Report by Garcimartín and Saumier (paras. 127-132) by applying the definition in Article 4(4) HJC by analogy; i.e the judgment is not the subject to review in the State of origin and the time limit for seeking ordinary review has been expired. According to the Supreme Court, this prevents that the dispute cannot be settled anywhere in court (3.3.6).

In the case at hand, the Dutch district court did thus not have to decline jurisdiction as the Moroccan judgment had not been final yet. The Supreme Court has also specified the conditions under which the court at first instance's decision on the application of Article 12 DCCP can be challenged on appeal (3.4.2-3.4.6), which is outside the scope of this blog.

### **Finality of the foreign judgment in the context of recognition**

Moreover, the Supreme Court clarifies that in proceedings involving *lis pendens*, an action may be brought for recognition of the foreign decision, including a claim to rule in accordance with the condemnation in the foreign decision (on the basis of Article 431(2) DCCP) (3.5.1). After reiterating the known *Gazprombank*-requirements for recognition, the Supreme Court addresses for the first time the issue whether the foreign judgment should be final (which has frequently been debated by scholars). According to the Supreme Court, the court may, postpone or refuse the recognition on the basis of the *Gazprombank*-requirements if the foreign judgement is not final, i.e. the judgment is the subject of review in the State of origin or the time limit for seeking ordinary review has not expired (3.6.2). The Supreme Court therefore copies Article 4(4) HJC, and refers to the Explanatory Report by Garcimartín and Saumier (paras. 127-132). Similar to the latter provision, a refusal on this ground does not prevent a renewed application

for recognition of the judgment. Furthermore, the court may, on application or of its own motion, impose the condition that the party seeking recognition of a non-final foreign judgment provides security for damages for which she could be ordered to pay in case the judgement is eventually annulled or amended. The Supreme Court therefore follows the suggestion in the Explanatory Report by Garcimartín and Saumier (para. 133).

## **Comment**

The application by analogy of the autonomous definition of finality in Article 4(4) HJC yields legal certainty in the Netherlands regarding both the *lis pendens*-conditions under Article 12 DCCP, and the recognition of non-EU judgments in civil matters to which no Convention applies. Because of the generally uncoded nature of Dutch law for recognition of latter judgements, legal certainty has been advocated. In this regard, the Dutch Government Committee on Private International Law submitted its advice in February 2023 to revise Article 431 DCCP which inter alia includes the application by analogy of the jurisdictional filters in Article 5(1) HJC (see advice, p. 6). Thus, despite its limited scope of application, the HJC has value because of its possible application by analogy by courts and legislators (see also B. van Houtert, ‘Het 2019 Haags Vonnissenverdrag: een *gamechanger* in Nederland? Een rechtsvergelijkende analyse tussen het verdrag en het Nederlandse commune IPR’, forthcoming *Nederlands Internationaal Privaatrecht* 4, 2023). Furthermore, the Dutch Supreme Court’s application by analogy of Article 4(4) HJC contributes to the Hague Conference on Private International Law’s aim to unify Private International Law.

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# **Which Law Governs Subject Matter Arbitrability in**

# International Disputes?

# Commercial

*Written by Kamakshi Puri[1]*

Arbitrability is a manifestation of public policy of a state. Each state under its national laws is empowered to restrict or limit the matters that can be referred to and resolved by arbitration. There is no international consensus on the matters that are arbitrable. Arbitrability is therefore one of the issues where contractual and jurisdictional natures of international commercial arbitration meet head on.

When contracting parties choose arbitration as their dispute resolution mechanism, they freely choose several different laws that would apply in case of disputes arising under the contract. This includes (i) the law that is applicable to the merits of the dispute, (ii) the institutional rules that govern the conduct of the arbitration, (iii) law that governs the arbitration agreement, including its interpretation, generally referred to as the 'proper law of the arbitration agreement'. Similarly, contracting parties are free to choose the court that would exercise supervisory jurisdiction over such arbitration, such forum being the 'seat' of arbitration.

Since there is no global consensus on the matters that are arbitrable, and laws of multiple states simultaneously apply to an arbitration, in recent years, interesting questions surrounding arbitrability have presented themselves before courts adjudicating cross-border disputes. One such issue came up before the Singapore High Court in the *Westbridge Ventures II v Anupam Mittal*, succinctly articulated by the General Court as follows:

*“which system of law governs the issue of determining subject matter arbitrability at the pre-award stage? Is it the law of the seat or the proper law of the arbitration agreement?”*

In this piece, I will analyze the varied views taken by the General Court at

Singapore (“**SGHC**”), Singapore Court of Appeal (“**SGCA**”) and the Bombay High Court (“**BHC**”) on the issue of the law(s) that would govern the arbitrability of the disputes in international commercial disputes.

The Westbridge Ventures-Anupam Mittal dispute began in 2021 when Mittal approached the National Company Law Tribunal in Mumbai (“**NCLT Mumbai**”) alleging acts of minority oppression and mismanagement of the company, People Interactive (India) Private Limited, by the majority shareholder, Westbridge Ventures. In response to the NCLT proceedings, Westbridge Ventures approached the Singapore High Court for grant of permanent anti-suit injunction against Mittal, relying on the arbitration agreement forming part of the Shareholders’ Agreement between the suit parties. Since 2021, the parties have successfully proceeded against one another before various courts in Singapore and India for grant of extraordinary remedies available to international commercial litigants viz anti-suit injunctions, anti-enforcement injunctions and anti-arbitration injunctions.

### **Singapore General Court Decision on Pre-award Arbitrability**

Oppression and mismanagement claims are arbitrable under Singapore law but expressly beyond the scope of arbitration under Indian law. To determine whether proceedings before the NCLT were in teeth of the arbitration agreement, the court had to determine if the disputes raised in the NCLT proceedings were arbitrable under the *applicable* law. Thus, the question arose as to the law which the court ought to apply to determine arbitrability.

At the outset, the SGHC noted that the issue of arbitrability was relevant at both initial and terminal stages. While at the initial stage, non-arbitrable subject matter rendered arbitration agreements *inoperative* or *incapable of being performed*, at the terminal stage, non-arbitrability rendered the award liable to be set aside or refused enforcement. Since at the post-award stage, arbitrability would be determined by the enforcing court applying their own public policy, the lacuna in the law was limited to the issue of subject matter arbitrability at the pre-award stage.

Upon detailed consideration, the SGHC concluded that it was the *law of the seat*

that would determine the issue of subject matter arbitrability at the pre-award. The court reasoned its decision broadly on the following grounds:

- Contracts are a manifestation of the party autonomy principle. States being asked to give effect to a contract ought to respect party autonomy but for very limited grounds, such as public policy considerations. Power of the seat court to limit the arbitral tribunal's jurisdiction, and consequently affect party autonomy, ought to be limited to necessary constraints posed by such seat State's public policy;
- Since seat courts their own law at the post-award stage (in setting-aside and enforcement proceedings), it would be a legal anomaly for the same court to rely on different systems of law to determine subject-matter arbitrability at pre and post-award stages. This could also result in a situation where a subject matter, being arbitrable under the law of the arbitration agreement despite being non-arbitrable under the law of the seat, is first referred to arbitration however later the resulting award is set aside;
- Courts should, as a general position, apply their own law unless specifically directed by law to another legal system. Public interest and state policy favoured the promotion of International Commercial Arbitration. It was neither necessary nor desirable for a court to give effect to a foreign non-arbitrability rule to limit an otherwise valid arbitration agreement. Arbitrability was therefore a matter to be governed by national courts by applying domestic law.

Interestingly, despite noting that arbitrability was an issue of jurisdiction and that non-arbitrability made an agreement *incapable of being performed*, the SGHC distinguished the scenarios where a party's challenge was based on arbitrability and where parties challenged the formation, existence, and validity of an agreement. The court held that for the former, the law of seat would apply, however, for the latter, the proper law of arbitration agreement could apply.

Accordingly, the SGHC held that oppression and mismanagement disputes were arbitrable under the law of the seat, *i.e.*, in Singapore law, the arbitral tribunal had exclusive jurisdiction to try the disputes raised by the parties. An anti-suit injunction was granted against the NCLT proceedings relying on the arbitration agreement between the parties.



## Appeal before the Singapore Court of Appeal

Mittal appealed the SGHC judgment before the Singapore Court of Appeal. The first question of law before the SGCA was whether the SGHC was correct in their holding that to determine subject matter arbitrability, *lex fori* (i.e., the law of the court hearing the matter) would apply over the proper law of the arbitration agreement. Considering the significance of the issue, Professor Darius Chan was appointed as *amicus curie* to assist the court.

Professor Chan retained the view that *lex fori* ought to be the law applicable to the question of arbitrability. This was for reasons of *predictability* and *certainty*, which weighed on the minds of the drafters of the UNCITRAL Model Law. Although the Model Law was silent on the question of pre-award arbitrability since it was clear on the law to be applied post-award, a harmonious reading of the law was preferable. The courts ought to generally apply *lex fori* at both, pre and post-award stages.

The SGCA disagreed. It held that the *essence* of the principle of arbitrability was public policy. In discussing issues of *predictability*, *certainty*, and congruence between law to be applied at pre and post-arbitral stages, the parties had lost sight of the core issue of public policy in considering the question of arbitrability. Public policy of which state? – it unequivocally held that it was public policy derived from the law governing the arbitration agreement. Where a dispute could not proceed to arbitration under the foreign law that governed the arbitration agreement for being contrary to the foreign public policy, the seat court ought to give effect to such non-arbitrability.

The SGCA relied on the same concepts as the General Court albeit to come to the opposite conclusion:

- Arbitration agreements are the manifestation of party consensus. When parties expressly adopt a system of law to govern their arbitration agreement, public policy enshrined under such law ought to be given effect. Further, if arbitrability is a question of jurisdiction, then it necessarily follows that the law of the agreement from which jurisdiction

of the tribunal is derived be considered first.

- As regards the potential anomaly with the seat court applying different laws pre and post-award, SGCA held that non-arbitrability under the law of the seat would be an *additional* obstacle to the enforcement of the arbitration agreement. This could, however, not go to say that the law of the seat would be the *only* law to govern arbitrability. Accordingly, the SGCA upheld a *composite approach*:

*“55. Accordingly, it is our view that the arbitrability of a dispute is, in the first instance, determined by the law that governs the arbitration agreement. ... where a dispute may be arbitrable under the law of the arbitration agreement but Singapore law as the law of the seat considers that dispute to be non-arbitrable, the arbitration would not be able to proceed. In both cases, it would be contrary to public policy to permit such an arbitration to take place. Prof Chan refers to this as the “composite” approach.”*

- On the state policy to encourage International Commercial Arbitration, the court noted that principles of comity, requiring the court to respect public policy under foreign undoubtedly outweighed the policy to encourage arbitration. This was despite Prof. Chan’s concerns that expanding the grounds for refusal of reference of arbitration was *“unnecessarily restrictive and not in line with the general tendency to favor arbitration”*.

On facts, however, the court noted that the law of the arbitration agreement was in fact Singapore law itself, and Indian law was but the law of the substantive contract. Accordingly, arbitrability had to be determined under Singapore law and the appeal was dismissed.

## **Anti-Enforcement Injunction by the Bombay High Court**

Mittal approached the Bombay High Court seeking an anti-enforcement injunction against the SGHC decision, and for a declaration that NCLT Mumbai was the only

forum competent to hear oppression and mismanagement claims raised by him.

The BHC did not directly consider the issue of the law governing arbitrability, however, the indirect effect of the anti-enforcement injunction was the court determining the same. The BHC's decision reasoned as follows – the NCLT had the exclusive jurisdiction to try oppression and mismanagement disputes in India, such disputes were thus non-arbitrable under Indian law. The enforcement of any ensuing arbitral award would be subject to the Indian Arbitration Act. An award on oppression and mismanagement disputes would be contrary to the public policy of India. Enforcement of an arbitral award in India on such issues would be an impossibility – *“What good was an award that could never be enforced?”*. The court noted that allowing arbitration in a case where the resulting award would be a nullity would leave the plaintiff remediless, and deny him access to justice. An anti-enforcement injunction was granted.

The BHC's decision can be read in two ways. The decision has either added subject matter arbitrability under a third law for determining jurisdiction of the tribunal, *i.e.*, the law of the court where the award would inevitably have to be enforced or the decision is an isolated, fact-specific order, not so much a comment on the law governing subject matter arbitrability but based on specific wording of the arbitration clause which required the arbitral award to be enforceable in India, although clearly the intent for the clause was to ensure that neither parties resist enforcement of the award in India and not to import India law at the pre-award stage.

## **Concluding Thoughts**

The SGHC is guided by principles of party autonomy and Singapore policy to encourage International Commercial Arbitration, on the other hand, the Court of Appeal was driven by comity considerations and the role of courts applying foreign law to be bound by foreign public policy. Finally, the Indian court was occupied with ensuring “access to justice” to the litigant before it, which according to the court overrode both party autonomy and comity considerations. Whether we consider the BHC decision in its broader or limited form, the grounds for refusing reference to arbitration stand invariably widened. Courts prioritizing

different concerns as the most significant could potentially open doors for forum shopping.

[1] Kamakshi Puri is an LLM graduate from the University of Cambridge. She is currently an Associate in the Dispute Resolution Practice at Cyril Amarchand Mangaldas. Views and opinions expressed in the text are the author's and not attributable to any organization.

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# Choice of law rules and statutory interpretation in the Ruby Princess Case in Australia

**Written by Seung Chan Rhee and Alan Zheng**

Suppose a company sells tickets for cruises to/from Australia. The passengers hail from Australia, and other countries. The contracts contain an exclusive foreign jurisdiction clause nominating a non-Australian jurisdiction. The company is incorporated in Bermuda. Cruises are only temporarily in Australian territorial waters.

A cruise goes wrong. Passengers, Australian and non-Australian, want relief under the *Australian Consumer Law (ACL)*. They commence representative proceedings alleging breaches of consumer law, and negligence in the Federal Court of Australia. The Australian court must first resolve the conflict of laws problems posed – problems as sustained as they have been complex in the history of private international law.

These are the facts at the heart of the Ruby Princess cruise, and her 2,600

passengers. The story was reported widely. A COVID-19 outbreak prematurely terminated the cruise. Many passengers contracted COVID-19; some died. Unsurprisingly, the cruise then spawned an inquiry and a class action against Carnival plc (Carnival) as charterer and operator of the Ruby Princess, and Princess Cruise Lines Ltd, the Bermuda-registered subsidiary and vessel owner.

Statute has left little of the common law untouched. This short note analyses the interaction between a mandatory law and an exclusive jurisdiction clause in the context of the case. The note observes the tension between the selection of the statist approach or conventional choice of law rules as an analytical starting point, in difficult consumer protection cases.

## **Background**

The Ruby Princess' passengers contracted on different sets of terms and conditions (US, UK and AU). The US and UK terms and conditions contained exclusive foreign jurisdiction clauses favouring the US and English courts respectively (PJ, [26], [29]). US customers also waived their rights to litigate in representative proceedings against Carnival (the 'class action waiver') (PJ, [27]). In aid of these clauses, Carnival sought a stay of the proceedings vis-à-vis the UK and US passenger subgroups.

Whether a stay is granted under Australian law turns on whether the Australian court is 'a clearly inappropriate forum' (See *Oceanic Sun Line Special Shipping Co Inc v Fay* at 247-8) (***Oceanic Sun Line***). In *Regie Nationale des Usines Renault SA v Zhang* (***Renault v Zhang***), the High Court (at [78]) described the test as requiring the applicant to show the Australian proceeding:

*would be productive of injustice, because it would be oppressive in the sense of seriously and unfairly burdensome, prejudicial or damaging, or vexatious ...*

In *Voth v Manildra Flour Mills Pty Ltd* (***Voth***), a majority observed (at 566):

*the extent to which the law of the forum is applicable in resolving the rights and liabilities of the parties is a material consideration ... the selected forum should not be seen as an inappropriate forum if it is fairly arguable that the substantive law of the forum is applicable in the determination of the rights and liabilities of the parties.*

Through these cases the High Court elected not to follow the English approach (see *Spiliada Maritime Corporation v Cansulex Ltd*) which requires that another forum is clearly or distinctly *more* appropriate. The Australian test, after *Voth* poses a negative test and a more difficult bar.

### ***First Instance***

Stewart J found the Federal Court was not a clearly inappropriate forum and declined to stay the proceedings. A critical plank of this conclusion was the finding that the exclusive foreign jurisdiction and class action waiver clauses were not incorporated into the contracts (PJ, [74]). Even if the clauses were incorporated, Stewart J reasoned in obiter that the class action waiver was void as an unfair contract term under s 23 of the *ACL* (PJ, [145]) and the Federal Court was not a clearly inappropriate forum.

As noted in *Voth* and *Oceanic Sun Line*, simply because the contract selected the US or UK as the particular *lex causae* did not end the analysis (PJ, [207]) — the US and UK subgroups were not guaranteed to take the benefit of the *ACL* in the US and English courts, notwithstanding Carnival's undertaking that it would not oppose the passengers' application to rely on the *ACL* in overseas forums (PJ, [297], [363]). Ultimately, there remained a real juridical advantage for the passengers to pursue representative proceedings *together* in Australia.

Carnival appealed.

### ***Full Court***

The majority (Derrington J, Allsop CJ agreeing) allowed Carnival's appeal, staying the US subgroup's proceedings. Unlike the primary judge, the majority reasoned the clauses were incorporated into the US subgroup contracts. Further, a stay should be refused because the US and English courts had similar legislative analogues to the *ACL* (FCAFC, [383]-[387]). Although the US passengers would lose the benefit of the class action, that was a mere procedural advantage and the question of forum is informed by questions of substantive rights (FCAFC, [388]).

Rares J dissented, upholding the primary judge's refusal of a stay (FCAFC, [96]).

The passengers appealed to the High Court.

### ***The Interaction between a Mandatory Law and an Exclusive Jurisdiction***

## Clause

Statutes generally fall into one of three categories (see Maria Hook, 'The "Statutist Trap" and Subject-Matter Jurisdiction' (2017) 13(2) *Journal of Private International Law* 435). The categories move in degrees of deference towards choice of law rules. First, a statute may impose a choice of law rule directing the application of the *lex fori* where a connecting factor is established. Second, a statute may contain, on its proper construction, a 'self-limiting' provision triggered if the applicable law is the *lex fori*. Third, a statute may override a specified *lex causae* as a mandatory law of the forum. An oft-repeated refrain is that all local Australian statutes are mandatory in nature ([2023] HCATrans 99).

In the High Court, Carnival contended that if contracting parties select a *lex causae* other than the forum law, the forum statute will not apply unless Parliament has expressly overridden the *lex causae*.

The passengers (supported by the Commonwealth Attorney-General and ACCC, as interveners) took a different starting point — the threshold question is whether the forum law, *as a matter of interpretation*, applies to the contract irrespective of the parties' usage of an exclusive jurisdiction clause. In this case, several factors supported the *ACL*'s application including s 5(1)(g) of the CCA, and the need to preserve the *ACL*'s consumer protection purpose by preventing evasion through the insertion of choice of law clauses.

The parties adopted unsurprising positions. The passengers' case was conventionally fortified by the statutist approach, prioritising interpretation in determining the forum statute's scope of application. Carnival relied on the orthodox approach, prioritising choice of law rules in controlling when and to what extent forum statutes will apply, and more aligned with comity norms and party autonomy the selection of the governing law of private agreements. The orthodox approach was exemplified in Carnival's submission that '[i]t was not the legislature's purpose to appoint Australian courts as the global arbiter ... of class actions concerning consumer contracts across the world' (See Respondent's Outline of Oral Argument, p. 3).

Against that view, it was said that party autonomy should be de-emphasised where contracts are not fully negotiated, involve unequal bargaining power and standard terms (contracts of 'adhesion' as here provide a good example): see

[2023] HCATrans 99 and the exchange between Gordon J and J Gleeson SC.

As scholars have noted, differences between the two approaches can be almost imperceptible. Characterisation is a 'species of interpretation' (Michael Douglas, 'Does Choice of Law Matter?' (2021) 28 *Australian International Law Journal* 1). However, the approach taken can lead to different outcomes in hard cases.

The key obstacle to the statist approach is uncertainty. If interpretation of a statute's extraterritorial scope controls the choice of law, then how do contracting parties ensure their selection of law prevails and that they are complying?

Interpretation (*both* in the choice of law sense and statutory interpretation) invites reasonable arguments that cut in both directions requiring judicial adjudication. Take, for example, Carnival's response to the passengers' argument that the ACL's consumer protection policy weighs against the use of choice of law clauses to evade liability. Carnival contended any evasion can be controlled by a two-step approach: firstly, applying the ACL's unfair contract provisions to the choice of law clause itself and, if it the clause is void, *only then* secondly applying the provisions to the contract as a whole. However, this only shifts the application of statutory interpretation to an anterior stage, namely how and when a given choice of law clause, on its face, might be considered unfair. To the extent any determination of unfairness could be made, this turns on the consequences of the clause *per se* than any particular manner of wording. Such an outcome equally produces unpredictability as to the anticipated effect and application of the forum law.

There is another example on point. Section 5(1)(g) extends the ACL to the 'engaging in conduct outside Australia' by bodies corporate carrying on business in Australia. Carnival's *expressio unius*-style argument that s 5(1)(g) does not support the passengers' case because the unfair contracts prohibition is not predicated on 'engaging in' any conduct, whereas ACL prohibitions apply to 'conduct'. Accordingly, taking up a point made by the Full Court majority (FCAFC, [301]), Carnival contended a limitation should be read into s 5(1)(g) else it capriciously apply to companies like Carnival whose business were entirely engaged outside of Australia's territorial limits.

Nevertheless, as the appellants pointed out (relying on drafting history), 'when the unfair contract terms legislation was first introduced ... s 5(1) was specifically



amended to apply to those provisions' (See Appellant's Written Submissions, p. 6).

It is therefore apparent how the statist approach invites a certain level of textual skirmishing.

Choices are available to judges under both the statist approach and in the application of choice of law rules (see Michael Douglas, 'Choice of Law in the Age of Statutes' in Michael Douglas, Vivienne Bath, Mary Keyes and Andrew Dickinson, *Commercial Issues in Private International Law: A Common Law Perspective* (Hart Publishing, 2019) ch 9). However, it does not follow that there are comparable levels of certainty in the two approaches. Characterisation of a case as contract or tort (to take a very general example) invites a narrower range of choices than the entire arsenal of statutory interpretation techniques deployable analysing words in a statutory provision. That is so because characterisation is controlled by matters external to submissions, namely pleadings and the facts as objectively found (e.g. where was the defective product manufactured, or where was the injury sustained). Interpretation, particularly through the modern focus on text, context and purpose, is not disciplined by facts or pleadings. Instead, it is shaped by submissions and argumentation actuated by the connotative ambiguity found in statute.

That has led the High Court to observe that choice of law rules uphold certainty. In *Renault v Zhang*, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ stated ([66]-[67]):

*The selection of the lex loci delicti as the source of substantive law meets one of the objectives of any choice of law rule, the promotion of certainty in the law. Uncertainty as to the choice of the lex causae engenders doubt as to liability and impedes settlement.*

Against the aim of certainty (and deference to choice of law clauses) are the countervailing considerations arising from legislative policy and the higher-order status of statute over choice of law rules sourced from the common law (see Douglas, 'Choice of law in the Age of Statutes'). The interveners put it as an 'unattractive prospect' if the 'beneficial' aspects of the ACL regime could be defeated by expedient foreign jurisdiction clauses.

Insofar as the legislature evinces an intent to confer the benefit of legislation beyond Australia's territorial bounds, courts bound by an interpretive obligation

to give effect to that legislative intention will not be able to defer to choice of law rules. In the case of the *CCA* and the *ACL*, s 15AA of the *Acts Interpretation Act 1901* (Cth) enjoins courts to prefer the interpretation 'that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act)'. Douglas and Loadsman (see 'The Impact of the Hague Principles on Choice of Law in International Commercial Contracts' (2018) 19(1) *Melbourne Journal of International Law* 1) observe that:

*It is consistent with this purposive approach to statutory interpretation that Australian courts take a broad approach to the geographical scope of Australian statutes. In an environment where Australian lives and businesses increasingly cross borders on a regular basis, it would defeat the purposes of many pieces of Australian legislation if courts were to take a territorially-limited approach to statutes' scope of operation.*

No doubt there is some truth to Carnival's submission that Parliament did not intend to render Australian courts the global arbiters of consumer contracts. However, subject to a pronouncement to the contrary from the High Court, the judgments to date in *Karpik v Carnival plc* suggest a statist analysis, however uncertain, difficult or comity-abating, will be a necessary precondition to determining the weight given to the wording of a choice of law clause. This is ultimately a consequence of the premium placed on a purposive construction to mandatory laws arising out of the home forum. For better or worse (and a strong case has been made for worse – see Maria Hook, 'The "Statutist Trap" and Subject-Matter Jurisdiction' (2017) 13(2) *Journal of Private International Law* 435), '[i]f the purposive approach to statutory interpretation gives rise to forum shopping in favour of Australian courts, so be it' (see Douglas and Loadsman, 20).

Notwithstanding this, another difficulty with Carnival's submissions in favour of the choice of law approach is that it functionally revives the common law *presumption* of non-extraterritorial application of laws and elevates the rebuttability threshold of that presumption to something made 'manifest' by parliament (which has been keenly disputed in the High Court: see Respondent's Submissions, [10]).

It is important to recall that the presumption was always couched in the language of construction. In *Wanganui-Rangitiei Electric Power Board v Australian Mutual Provident Society*, Dixon J stated (at 601):

*The rule is one of construction only, and it may have little or no place where some other restriction is supplied by context or subject matter.*

Rebuttability does not arise at all if the context or subject matter of the forum statute, as a matter of interpretation, supplies a relevant territorial connection. If it so supplies, that territorial connection operates as a restriction.

Dixon J also went on to state (at 601):

*But, in the absence of any countervailing consideration, the principle is that general words should not be understood as extending to cases which, according to the rules of private international law administered in our courts, are governed by foreign law.*

Most recently in *BHP Group Ltd v Impiombato*, Kiefel CJ and Gageler J (at [23]) considered the common law presumption resembled a ‘presumption *in favour of* international comity’ rather than one *against* extraterritorial operation – although it is worth noting that three other judges recognised (at [71]) the common law presumption was ultimately a statutory construction rule which did not always require reference to comity. Nevertheless, an important factor for Kiefel CJ and Gageler J in finding the class action provisions of Part IVA of the *Federal Court of Australia Act 1976* (Cth) were not restricted to Australian residents by the presumption was the fact no principle of international law or comity would be infringed by a non-consenting and non-resident group member being bound by a judgment of the Federal Court in relation to a matter over which that court had jurisdiction.

Conversely, as Derrington J noted on appeal (FCAFC, [300]), the extension of s 23 to the transactions of companies operating in overseas markets as a result of their ancillary dealings in Australia would have been an ‘anomalous result’. Such a result would not have promoted comity between Australia and other national bodies politic, where the ACL would have had the result of potentially subjecting foreign companies to obligations additional to those imposed by the laws of their home country. As Carnival put it in the High Court:

*if a company happens to carry on business in Australia, all of its contracts with consumers (as defined) all over the world are then subject to Part 2-3 of the ACL. It would mean, for example, that contractual terms between a foreign corporation and consumers in Romania under standard form contracts can be deemed void*

*under s 23 (Respondent's Submissions, [36]).*

Without an expressed intention to the contrary, it was unlikely that Parliament had intended to 'legislate beyond the bounds of international comity' - into an area that would ordinarily be expected to be governed by foreign law.

To some extent, the judgments to date, despite their differing conclusions, suggest in common that an entirely non-statutist outcome (insofar as the CCA and ACL is concerned) is something of a will-o'-the-wisp. If it is accepted that matters of high forum public policy can supervene the contractual arrangements of the parties, expressed in no uncertain terms, then a court must always evaluate legislation in a statutist manner to determine how contractual arrangements interact with that policy. This is so even if, as in Derrington J's view in *Carnival plc v Karpik*, the conclusion would be that the policy would not be advanced by applying the mandatory law.

The High Court's decision will not only clarify the ambit of the CCA regime; it will materially bear upon the desirability of Australian courts as a forum for future transnational consumer law class actions. Coextensively, companies with Australian operations liable to be on the respondent end of such class actions will be watching the developments closely before drafting further exclusive foreign jurisdiction clauses.

Judgment is reserved in the High Court.

*Seung Chan Rhee is a solicitor at Herbert Smith Freehills. Alan Zheng is an Australian-qualified lawyer at Linklaters LLP. The views in this note are the views of the authors alone. The usual disclaimers apply.*

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# German Federal Court of Justice: Article 26 Brussels Ia Regulation Applies to Non-EU Defendants

*By Moses Wiepen, Legal Trainee at the Higher Regional Court of Hamm, Germany*

In its decision of 21 July 2023 (V ZR 112/22), the German Federal Court of Justice confirmed that Art. 26 Brussels Ia Regulation applies regardless of the defendant's domicile. The case in question involved an art collector filing suit against a Canadian trust that manages the estate of a Jew who was persecuted by the German Nazi regime. The defendant published a wanted notice in an online Lost Art database for a painting that the plaintiff bought in 1999. The plaintiff considers this as a violation of his property right.

In general, following the procedural law principle of *actor sequitur forum rei*, the Canadian trust should be brought to court in Canadian courts. Special rules are required for jurisdictions that deviate from this principle. The lower German court confirmed its authority based on national rules on jurisdiction. Under sec. 32 German Civil Procedure Code, tort claims can be brought to the court where the harmful act happened regardless of the defendant's domicile. The German Federal Court of Justice established its jurisdiction on Art. 26 Brussels Ia Regulation as the *lex specialis*.

This may appear surprising as the scope of the Brussels Ia Regulations is generally limited to defendants domiciled in a member state of the EU, Artt. 4, 6 Brussels Ia Regulation. Exceptions to this rule are stated in Art. 6 Brussels Ia Regulation and - relying on its wording - limited to the Artt. 18 I, 21 II, 24 and 25 Brussels Ia Regulation. Nevertheless, due to the common element of party autonomy in Art. 25 and Art. 26 Brussels Ia Regulation, some parts of the

literature – and now the German Federal Court of Justice – apply Art. 26 Brussels Ia Regulation to non-EU-domiciled defendants as well. The German Federal Court of Justice even considers this interpretation of Art. 26 Brussels Ia Regulation as *acte clair* and thus, it sees no need for a preliminary ruling of the CJEU under Art. 267 TFEU.

However, the Court's argumentation is not completely persuasive. Firstly, the wording of Art. 26 Brussels Ia Regulation is open to other – even opposing – interpretations. Secondly, although it contains a party-autonomous element, Art. 26 Brussels Ia Regulation does not depend on the defendant's choice of court. In fact, courts are not required to verify defendant's awareness of jurisdictional risks in order to proceed in a court lacking jurisdiction. And unlike Art. 25 Brussels Ia Regulation, Art. 26 Brussels Ia Regulation can be part of a litigation strategy detrimental to the defendant

A detailed analysis on the court's ruling in German is available [here](#).

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# **This week begins the Special Commission on the 1980 Child Abduction Convention and the 1996 Child Protection Convention**

*Written by Mayela Celis*

The eighth meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention will be held from 10 to 17 October 2023 in The Hague, the Netherlands. For more information, [click here](#).

One of the key documents prepared for the meeting is the Global Report – Statistical study of applications made in 2021 under the 1980 Child Abduction

Convention, where crucial information has been gathered about the application of this Convention during the year 2021. However, these figures were perhaps affected by the Covid-19 pandemic as indicated in the Addendum of the document (see paragraphs 157-167, pp. 33-34). Because it refers to a time period in the midst of lockdowns and travel restrictions, it is not unrealistic to say that the figures of the year 2021 should be taken with a grain of salt. For example, the overall return rate was the lowest ever recorded at 39% (it was 45% in 2015). The percentage of the combined sole and multiple reasons for judicial refusals in 2021 was 46% as regards the grave risk exception (it was 25% in 2015). The overall average time taken to reach a final outcome from the receipt of the application by the Central Authority in 2021 was 207 days (it was 164 days in 2015). While statistics are always useful to understand a social phenomenon, one may only wonder why a statistical study was conducted with regard to applications during such an unusual year - apart from the fact that a Special Commission meeting is taking place and needs recent statistics -, as it will unlikely reflect realistic trends (but it can certainly satisfy a curious mind).

Other documents that are also worth noting are the following (both Preliminary Documents and Information Documents):

### **Child abduction and asylum claims**

- Prel. Doc. No 16 of August 2023 - Discussion paper on international child abduction return applications where the taking parent lodged a parallel asylum claim. This document submits the following for discussion and includes a useful annex with decisions rendered in the UK, Canada and USA about this issue (SC stands for Special Commission):

*43. The SC may wish to discuss how the issue of delays in processing the asylum claims could be addressed when a return application is presented, and what the solutions could be to avoid such delays ultimately pre-empting a return application under the 1980 Child Abduction Convention, in particular:*

*a. Bearing in mind the confidentiality rules that apply to asylum proceedings, consideration can be given to whether general information can be shared, where possible and appropriate, (between authorities of the requested State/country of asylum only) for example, regarding timeframes and average*

*duration periods, steps or stages of such proceedings.*

*b. Where possible and appropriate, consideration can be given to whether asylum claims can be treated and assessed on a priority basis when a return application is presented under the 1980 Child Abduction Convention.*

*c. Consideration can be given to whether stays of return proceedings can be avoided in order to prevent that allegations are made concerning the settlement of the child in the new environment, and whether an eventual stay can only be considered regarding the implementation and enforcement of the return order.*

*44. The SC may wish to discuss to what extent it is possible to have some level of coordination or basic exchange of information between the different spheres of the government and competent authorities that process the different proceedings, when/if allowed by the relevant domestic laws and procedures and respectful of confidentiality and judicial independence principles. Where possible and appropriate, such coordination could:*

*a. Encompass, for example, that the competent authority responsible for the return application informs the competent authority responsible for the asylum claim of the return application.*

*b. Include establishing procedures, guidelines or protocols to ensure that both proceedings are dealt with expeditiously.*

This is a sensitive topic that deserves attention, as disclosing that a child is present in a specific State can have a great impact on the safety of the person seeking asylum (usually, the parent).

### **Transfer of jurisdiction under 1996 Child Protection Convention**

- Prel. Doc. No 17 of August 2023 – Transfer of jurisdiction under the 1996 Child Protection Convention (Arts 8 and 9). It is submitted the following:

*55. The SC may wish to consider adopting the following Conclusions and Recommendations:*

*a. The SC invited Contracting States, which have not done so already, to consider designating, in accordance with the Emerging Guidance regarding the*



*Development of the IHNJ, one or more members of the judiciary for the purpose of direct judicial communications within the context of the IHNJ.*

*b. Recalling Article 44 of the 1996 Convention, the SC encouraged Contracting States to designate the authorities to which requests under Articles 8 and 9 are to be addressed, as such a designation could greatly assist in improving the processing times of requests for a transfer of jurisdiction. Depending on domestic policies and requirements relating to the judiciary, Contracting States may choose to designate a member of the IHNJ (if applicable) and / or the Central Authority to receive requests for transfers of jurisdiction.*

*c. The SC encouraged authorities requesting a transfer of jurisdiction to, in the first place, informally consult their counterparts in the requested State, to ensure that their requests are as complete as possible and that all necessary information and documentation is furnished from outset to meet the requirements of the requested State.*

*d. Recalling Principle 9 of the Emerging Guidance regarding the Development of the IHNJ,<sup>139</sup> the SC encouraged Central Authorities that are involved in a transfer of jurisdiction request and judges engaging in direct judicial communications pertaining to a request for a transfer of jurisdiction to keep one another informed regarding the progress and outcome of such a request. Doing so could further assist in addressing delays and enhance the efficiency of processing requests under Article 8 or 9 of the 1996 Convention.*

*e. The SC invited the PB to circulate the questionnaire annexed to Prel. Doc. No 17 of August 2023 to all Contracting States to the 1996 Convention, with a view collecting information from judges and Central Authorities regarding requests under Article 8 or 9. The SC further invited the PB to review Prel. Doc. No 17, in the light of the responses from Contracting States, and to submit the revised version of Prel. Doc. No 17 to the Council on General Affairs and Policy (CGAP). The SC noted that it will be for CGAP to determine the next steps in this area (e.g., whether there is a need to form a Working Group consisting of judges and representatives from Central Authorities to identify good practices pertaining to requests for a transfer of jurisdiction under the 1996 Convention).*

The transfer of jurisdiction (as foreseen in those articles) is sometimes little known in some civil law States (in particular, Latin America) so these suggestions

are very much welcome.

## **Placement or provision of care of a child (incl. kafala) under the 1996 Child Protection Convention**

- Prel. Doc. No 20 of September 2023 – Placement or provision of care of the child in another Contracting State under the 1996 Child Protection Convention (Art. 33). Interestingly, this document includes as annex Working Document No 10 Proposal from the delegation of Morocco about “The Kafala procedure as established by the law of 10 September 1993 on abandoned children” of 30 September 1996. This Prel. Doc. suggests the following:

*64. The SC may want to discuss what clearly falls within the scope of application of Article 33 of the 1996 Convention and what clearly falls out of the scope of application of Article 33.*

*65. The SC may want to consider discussing the use of the term “approved” in C&R No 42 of the 2017 SC as it does not appear in Article 33 of the 1996 Convention.*

*66. The SC may want to consider whether additional information should be provided in the Country Profile for the 1996 Convention in addition to what appears under Sections 16 to 19 and 36 of the draft Country Profile to assist with the implementation of Article 33.*

*67. The SC may want to consider developing a Guide, illustrated by examples, to assist Contracting States with the implementation and operation of Article 33. In addition to covering issues relating to the scope of application of Article 33, the Guide could cover the different issues of procedure relating to Article 33 as presented in this Prel. Doc. Such a Guide would raise awareness as to the mandatory nature of Article 33. The SC may wish to recommend that such a Guide be developed by a Working Group.*

*68. The SC may want to consider the need to develop a model recommended form for the purpose of requests under Article 33.*

The conclusions suggested in this document are very much needed, in particular given that the operation of Article 33 of the 1996 Convention in the Contracting

States is far from ideal (the FAMIMOVE project is studying this Article in the context of kafala).

### **The Guide to Good Practice on the grave risk exception (art. 13(1)(b)) under the Child Abduction Convention - pointing to a mistake in the Guide**

- Info. Doc. No 6 of October 2023 - “A mistake waiting to happen: the failure to correct the Guide to Good Practice on Article 13(1)(b)” - Article by Professor Rhona Schuz and Professor Merle Weiner. I fully endorse the position adopted by Professors Schuz and Weiner and have included my views on this issue in a previous post [see here](#) and have discussed this at length in my recent book on international child abduction.

### **The Note of the International Social Service (ISS) where it highlights (perhaps rightfully), among other things, that the Malta Process and the Central Contact Points are underutilized**

- Info. Doc. No 1 of February 2023 - ISS - General information & Response to Prel. Doc. No 2 of October 2022

**The Note of the International Association of Child Law Researchers showcases the new publication *Research Handbook on International Child Abduction: The 1980 Hague Convention* (Cheltenham: Edward Elgar Publishing, 2023) - We will be preparing a book review, which will be posted on CoL - stay tuned!**

- Info. Doc. No 4 of September 2023 - International Association of Child Law Researchers (IACLaR) - Observer Note
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# Judicial Application of the 1980 HCCH Convention in Morocco

The question of the accession (or reluctance to accede) of Muslim countries to the 1980 HCCH Convention has attracted the interest of scholars from Muslim countries and abroad. Scholars who have addressed this issue have come to different (sometimes contradictory) conclusions, especially when it comes to the influence of classical Islamic rules and principles on the attitudes and policies of Muslim states. Unfortunately, it is not uncommon that the available studies on this subject do not take into account the actual judicial practice of Muslim jurisdictions and focus more on the (theoretical) compatibility (or not) of Islamic rules and principles underlying the 1980 HCCH Convention. This post briefly presents some decisions dealing with the issue of cross-border child abduction under the 1980 HCCH Convention in a Muslim state, **Morocco**, but without going into too much into details or assessment, as this deserves to be done properly in a dedicated article.

Morocco became a member state of the HCCH in 1993 and a party to the 1980 HCCH Convention in 2010. It is often presented in literature as the first Islamic country to ratify the 1980 HCCH Convention. The Convention effectively entered into force in Morocco on March 1, 2012, with the publication of the text of the Convention in the Official Gazette (No. 6026). Since then, and for more than a decade, Moroccan courts have been dealing with cross-border abduction cases under the Convention. To my knowledge, there are so far **seven** Supreme Court decisions on the application of the 1980 HCCH Convention. Surprisingly, these cases have not been included in the database maintained by the HCCH (INCADAT), nor (apparently) have they been reported or commented on elsewhere, although they provide extremely valuable material for the study of the operation of the 1980 HCCH Convention in an Islamic context.

The seven cases are summarized in the following tables:

<b>Case 1</b>	<b>Ruling No. 283 of 2 June 2015 (Case No. 443/2/1/2014)</b>
Taking Parent	Mother (M), Moroccan national
Left behind Parent	Father (F), Moroccan national, domiciled in France
Child(ren)	1 (son) Moroccan national born in France
Age (at the time of the return order application as deduced from the facts)	4
Return requested to	France
Cited Articles	Art. 3, Art. 12, Art. 13
Legal Issue(s)	Whether there was a wrongful removal of the child and whether the 1980 HCCH Convention should apply
Ruling (loose summary)	<p>M and F had their habitual residence in France with their child before M returned to Morocco with the child. According to French law (Art. 371-1 and 2 Civil Code), which is the law of the child's place of habitual residence prior to its removal to Morocco, custody (<i>hadhana</i>) is a right jointly shared by the parents during their marriage</p> <p>Morocco has ratified the 1980 HCCH Convention, thus its application should take precedence over national law upon its publication. The court of the appealed decision which failed to apply the HCCH Convention violated the Constitution and the provisions of the Convention</p>
Outcome	Appeal admitted. The appealed decision rejecting the return of the child overturned

<b>Case 2</b>	<b>Ruling No. 90 of 26 January 2016 (Case No. 286/2/1/2015)</b>
Taking Parent	Father (F), Moroccan national, domiciled in Morocco
Left behind Parent	Mother (M), German national, domiciled in Germany
Child(ren)	4 (3 sons and 1 daughter). All Moroccan nationals
Age (At the time of the return order application as deduced from the facts)	13, 11, 9, and 6
Return requested to	Germany
Cited Articles	Art. 2, art. 3
Legal Issue(s)	Whether there was child abduction in the meaning of the 1980 HCCH Convention
Ruling (loose summary)	The children's habitual residence is in Morocco (as they have been living there with their father since M decided to return to Germany). Therefore, the conditions for the application of the Convention are not met.
Outcome	Appeal admitted. The appealed decision ordering the return of the children overturned

<b>Case 3</b>	<b>Ruling No. 196 of 27 March 2018 (Case No. 660/2/1/2016)</b>
Taking Parent	Mother (M), Muslim Moroccan
Left behind Parent	Father (F), non-Muslim Italian

Child(ren)	2 (sons) born out of wedlock in Italy
Age (at the time of the return order application as deduced from the facts)	One has 7, the age of the other is not unclear due to confusing details in the judgment
Return requested to	Italy
Cited Articles	Art. 3, Art. 12, Art. 14
Legal Issue(s)	Whether the application of the 1980 HCCH Convention depends on the existent of a legitimate filiation between the children and their father
Ruling (loose summary)	It was established that the two children had been removed from their habitual residence in Italy to Morocco in violation of the provisions of the 1980 HCCH Convention, which does not require the existence of legitimate bond (filiation) between the parents and the child.
Outcome	Appeal rejected. The appealed decision ordering the return of the children affirmed

<b>Case 4</b>	<b>Ruling No. 303 of 28 July 2020 (Case No. 629/2/2/2018)</b>
Taking Parent	Mother (M), Moroccan
Left behind Parent	Father (F), Moroccan, domiciled in Belgium
Child(ren)	1 (daughter)
Age (at the time of the return order application as deduced from the facts)	unclear

Return requested to	Belgium
Cited Articles	Art. 3, Art. 5, Art. 16
Legal Issue(s)	Whether the mother's action for custody can be admitted despite the ongoing proceedings for the return of the child return under the 1980 HCCH Convention
Ruling (loose summary)	By rendering a decision on the custody despite the ongoing proceedings to order the return of the child, the court of the appealed decision violated the provisions of the Convention
Outcome	Appeal admitted. The appealed decision conferring custody to the mother overturned

<b>Case 5</b>	<b>Ruling No. 38 of 2 February 2021 (Case No. 1226/2/1/2019)</b>
Taking Parent	Father (seems to be Moroccan)
Left behind Parent	Mother (seems to be Canadian)
Child(ren)	2 (daughters)
Age (at the time of the return order application as deduced from the facts)	11, 5
Return requested to	Canada (Ontario)
Cited Articles	Art. 13(4)
Legal Issue	Whether the opinion of the children who refused to return with their mother should be heard and taken into account



Ruling (loose summary)	The court of the appealed decision which disregarded the father's arguments according to which his daughters refuse to return to Canada and that they suffer from their mother's mistreatment and refused to accept his request to initiate an investigation in order to find the truth violated the provisions the Convention
Outcome	Appeal admitted. The appealed decision ordering the return of the children overturned with remand

<b>Case 6</b>	<b>Case 6: Ruling No. 297 of 8 June 2021 (Case No. 61/2/1/2020)</b>
Taking Parent	Mother (M) (nationality unclear, but seems to be Moroccan)
Left behind Parent	Father (F) (nationality unclear, but seems to be Moroccan) domiciled in Belgium
Child(ren)	1 (son). The child in this case had a brother
Age (at the time of the return order application as deduced from the facts)	8
Return requested to	Belgium
Cited Articles	Art. 3, Art. 17
Legal Issue	Whether the judgment conferring custody to the taking parent in the State where the child was wrongfully retained could justify the refusal to order the return of the child to the State of its habitual residence

Ruling (loose summary)	The judgment rendered in the State where the child was retained attributing custody of the child should not be taken into account. The court of the appealed decision which considered that the M's refusal to return the child constituted a wrongful retention within the meaning of article 3, overturned the first instance decision of the CFI and ordered the return of the child to Belgium, exercised its discretion in assessing the facts and correctly took into account the best interests of the child
Outcome	Appeal dismissed. The appealed decision ordering the return of the child affirmed

<b>Case 7</b>	<b>Ruling No. 421 of 26 July 2022 (Case No. 200/2/1/2019)</b>
Taking Parent	Father (F) (nationality unclear but seems to be Moroccan)
Left behind Parent	Mother (M) (nationality unclear but seems to be Moroccan) domiciled in Belgium
Child(ren)	3 (1 daughter and 2 sons)
Age (at the time of the return order application as deduced from the facts)	10 and 8 for the sons, 3 for the daughter
Return requested to	Belgium
Cited Articles	Art. 13 [(1)(b)]
Legal Issue	Whether there was grave risk that could justify the refusal to return the children to their place of habitual residence

Ruling (loose summary)	The evidence and testimony presented to the court show that the mother, who was prosecuted for adultery, verbally and physically abused the children and lacked moral integrity and rectitude (as she used to invite a stranger into the home and cheated on the father in front of the children); therefore, returning the children to their mother would expose the children to grave risks.
Outcome	Appeal admitted. The appealed decision which ordered the return of the children overturned

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# Overview of the 2023 Amendments to Chinese Civil Procedure Law

Written by NIE Yuxin, Wuhan University Institute of International Law

## 1. Background

China's Civil Procedure Law was enacted in April 1991 by the Fourth Session of the Seventh National People's Congress. Since then, it had undergone four revisions in 2007, 2012, 2017, and 2021. However, no substantial revisions were

made to the provisions concerning foreign-related civil litigation. The latest amendments to the Civil Procedure Law in 2023, referred to as the new CPL, involve 26 amendments, including 14 modified articles and 15 new additions. Notably, 19 changes deal with the special provisions on cross-border procedures.

## 2. Jurisdiction

### 2.1 Jurisdiction grounds

**Special jurisdiction:** The new CPL expands the scope of jurisdiction by introducing additional connecting factors and fall-back provisions. The new law widens the category of disputes previously covered from “contractual disputes or other property rights disputes” to “litigation other than disputes involving personal relationships” (Art. 276, para. 1). Compared to the previous CPL, this expansion encompasses non-property rights disputes involving personal relationships, such as foreign-related marriage, adoption, maintenance, and guardianship disputes, thereby addressing the previous omission of non-property rights disputes. Further, the new CPL introduces “the place of torts committed within the territory of China” as a new connecting factor for jurisdiction. Additionally, a new fall-back provision of “other appropriate connections” is included, granting Chinese courts greater flexibility over foreign-related cases. Article 276 stipulates that the Chinese court may have jurisdiction if the dispute is of other appropriate connections with China (Art. 276, para. 2).

It is worth noting that the “other appropriate connections” provision has a certain degree of openness. What constitutes an appropriate connection is ambiguous. Previously, the Supreme People’s Court established judicial guidance on this issue regarding standard-essential patents cases. For instance, in *Godo Kaisha IP Bridge 1 v. Huawei*, the Supreme People’s Court found an appropriate connection between the city of Dongguan and the dispute, citing evidence that Huawei Terminal Co., Ltd. – being primarily responsible for manufacturing and selling Huawei’s smart terminal products – was domiciled there. Dongguan would also be a key location for implementing the essential patents at issue following any agreement between the parties. On this basis, the Supreme People’s Court deemed Dongguan to have an appropriate connection to the case. By incorporating the principle of appropriate connection into the new CPL, its application scope expands beyond intellectual property cases to other foreign-related cases. However, determining the standards for appropriate connection in

practice will undoubtedly pose a significant challenge going forward.

To some extent, this provision allows Chinese courts the flexibility to exercise jurisdiction in appropriate circumstances, providing a channel for Chinese enterprises and citizens to seek remedies from domestic courts when their interests are harmed abroad. In practice, courts should take caution when assessing jurisdiction based on the appropriate connection. From a systematic perspective, the appropriate connection should bear some resemblance to the jurisdictional connecting factors listed in this article, such as the place of contract, place of performance, location of the subject matter of the litigation, location of attachable assets, place of the tort, and the domicile of the defendant's representative. In addition, China could consider deriving insights from the indirect jurisdiction grounds established in the Hague Judgement Convention 2019. These grounds represent a consensus and are accepted by the majority of countries. If China were to refer to the Convention's standards when considering appropriate connection, it would gain greater predictability and reciprocity. This could facilitate the recognition and enforcement of Chinese judgments abroad, especially among Convention contracting states.

Choice of court agreement: Prior to this amendment, except for disputes related to foreign maritime matters, choice of court agreements designating Chinese court were subject to the prerequisite that the case has a practical connection with China. While China established two international commercial courts to specially hear international commercial cases, the cases they can accept are still limited by the requirement of actual connection under the legal framework of previous CPL. This overly conservative jurisdiction regime hampered the international commercial courts from taking jurisdiction over offshore cases without connection to China.

The newly introduced Article 277 of the CPL breaks this constraint. It allows the parties to choose Chinese courts by writing even if Chinese courts do not have any connection with the dispute. This legislative change provides a clear legal basis for Chinese courts to exercise jurisdiction over offshore cases, expands both the types of cases they can accept and their geographical reach. Moving forward, this change will benefit Chinese courts by enabling them to actively exercise jurisdiction and provide judicial support for the Belt and Road Initiative, positioning China as a preferred location for international litigation. Ultimately, it will enhance the international competitiveness and influence of Chinese judiciary. However, the amendment does not specify whether parties can choose foreign

courts without any connections with the dispute. To align with international common practice and promote reciprocity, it is recommended to clearly state that parties have the freedom to choose any courts, Chinese or foreign, to hear cross-border disputes even if the courts lack practical connections with the dispute.

The amendment does not address some matters that remain unclear in Chinese law. For example, which law applies to determine the substantive validity of jurisdiction agreements? In practice, courts may apply either the law of the forum or the law governing the main contract to this matter, leading to uncertainty.

**Responding jurisdiction:** Article 278 of the new CPL introduces the rule of responding jurisdiction. It stipulates that if a party does not raise an objection to the jurisdiction and participates in the proceedings by submitting a defence or filing a counterclaim, the Chinese court shall be deemed to have jurisdiction (Art. 278). Further, in contrast to the previous draft amendment, the new CPL expands the scope of jurisdiction by appearance from the defendant to all parties involved.

**Exclusive jurisdiction:** Under the previous CPL, exclusive jurisdiction covered 1 disputes related to immovable property, port operations, succession, and contracts involving Sino-foreign joint ventures, Sino-foreign cooperative business enterprises, and Sino-foreign cooperative exploration and development of natural resources. The new CPL adds two additional categories of cases under exclusive jurisdiction: disputes arising from the establishment, dissolution, liquidation of legal persons or other organizations established within China's territory, and disputes related to the validity of intellectual property rights granted through examination within China's territory (Art. 279). These amendments are consistent with international common practice.

## 2.2 Conflict of jurisdiction, *Lis pendens* and *Forum Non Conveniens*

**Parallel proceedings:** The new CPL formally adopts the rule for parallel proceedings. First of all, the law accepts parallel proceedings. Article 280 explicitly provides that: "For the same dispute arises between the parties involved, if one party initiates a lawsuit in a foreign court and the other party initiates a lawsuit in a Chinese court, or if one party files lawsuits in both a foreign court and a Chinese court, the Chinese court may accept the case if it has jurisdiction according to this law." However, if the parties have entered into an exclusive jurisdiction agreement selecting a foreign court, provided it does not violate the provisions of the CPL regarding exclusive jurisdiction and does not involve China's sovereignty, security, or public interests, the Chinese court may

decide not to accept the case; if the case has already been accepted, the court shall dismiss the lawsuit (Art. 280). This amendment reflects the respect for the parties' autonomy in cases where it does not violate the principle of exclusive jurisdiction and demonstrates China's active implementation of international judicial cooperation through legislation.

**First-in-time rule:** Article 281 of the new CPL adopts the first-in-time rule to address jurisdictional conflicts arising from international parallel litigation. After a Chinese court accepts a case under Article 280, Article 281 then permits the Chinese court to suspend its proceedings if a party applies in writing on the grounds that proceedings involving the same parties and subject matter have already commenced earlier before a foreign court. However, if the first-seized court fails to exercise jurisdiction, the Chinese court may resume the proceedings to protect the parties' legitimate right to litigation. According to this provision, the parties have significant discretion in requesting the suspension or resumption of litigation.

The first-in-time rule includes two exceptions: (1) when the parties agree to the jurisdiction of the Chinese courts, or the dispute falls under the exclusive jurisdiction of the Chinese courts, and (2) when it is clearly more convenient for the case to be heard by the Chinese courts. The issue here is that it is not clear whether the choice of Chinese courts by the parties includes non-exclusive selection. In addition, the determination of whether the Chinese courts are clearly more convenient requires the court to exercise discretionary judgment, which introduces uncertainty.

**Forum Non Conveniens:** The 2023 amendments formally accept forum non conveniens and relaxed the conditions for its application in compared to previous judicial interpretation. In order to apply forum non conveniens the defendant must raise an objection to jurisdiction, and the court will not assess forum non conveniens by its own motion. Article 282 listed five factors for the court to exercise discretion: (1) The underlying facts of the dispute did not occur within China's territory, and it is significantly inconvenient for the Chinese court to hear the case and for the parties to participate in the proceedings; (2) There is no agreement between the parties to submit to the jurisdiction of the Chinese court; (3) The case does not fall under the exclusive jurisdiction of the Chinese court; (4) The case does not involve China's sovereignty, security, or public interests; (5) It is more convenient for a foreign court to hear the case. The standard to apply

forum non conveniens is thus more relaxed than China’s previous practice. The difference between the CPL 2023 and the Judicial Interpretation of CPL 2022 can be found in this table.

Article 530 of the Judicial Interpretation of CPL 2022	Article 282(1) of the CPL 2023
When a foreign-related civil case meets the following conditions simultaneously, the Chinese court may render a ruling to dismiss the plaintiff’s lawsuit and inform them to file a lawsuit with a more convenient foreign court:	For foreign-related civil case accepted by the Chinese court, <b>where the defendant raises an objection to jurisdiction</b> , and simultaneously meets the following conditions, the court may render a ruling to dismiss the lawsuit and inform the plaintiff to file a lawsuit with a more convenient foreign court:
	(1) The underlying facts of the dispute did not occur within China’s territory, and it is significantly inconvenient for the Chinese court to hear the case and for the parties to participate in the proceedings; <i>(“added”)</i>
(1) The defendant requests that a more convenient foreign court has jurisdiction over the case or raises an objection to jurisdiction;	<i>“deleted”</i>
(2) There is no agreement between the parties to submit to the jurisdiction of the Chinese court;	(2) There is no agreement between the parties to submit to the jurisdiction of the Chinese court;



(3) The case does not fall under the exclusive jurisdiction of the Chinese court;	(3) The case does not fall under the exclusive jurisdiction of the Chinese court;
(4) The case does not involve the interests of China, its citizens, legal persons or other organizations;	(4) The case does not involve <b>China's sovereignty, security, or public interests;</b>
(5) The main facts in dispute did not occur within China's territory and Chinese law does not apply to the case, creating significant difficulties for the Chinese court in ascertaining facts and applying the law;	<i>"deleted"</i>
(6) The foreign court has jurisdiction over the case and it is more convenient for it to hear the case.	(5) It is more convenient for a foreign court to hear the case.

In practice, Chinese courts often refuse to apply the doctrine of forum non conveniens due to the criterion that the case does not involve the interests of China, its citizens, legal persons, or other organizations. Courts often assess whether a case involves Chinese interests or parties based on nationality or habitual residence. The removal of this criterion reduces the obstacles to the judicial application of the forum non conveniens doctrine.

Finally, to better safeguard parties' interests, Art. 282 (2) provides: if the foreign court refuses jurisdiction after the plaintiff's claim is dismissed, or fails to take necessary actions or render judgement within a reasonable period, and the plaintiff sues again in China, the Chinese court shall accept it. It aims to protect the claimant's effective access to justice.

### 3. Judicial assistance

Service of process abroad: Compared to domestic service of process, the process

of serving documents in cross-border cases involves more complex procedures, longer duration and lower efficiency. This significantly affects the progress of cross-border judicial procedures. The new CPL enriches the means of cross-border service of process. While retaining the existing methods of service through treaties, diplomatic channels, and embassy channels, the CPL 2023 improves other methods of services and add additional modes of services. See the table below.

Article 274 of the CPL 2022	Article 283 of the CPL 2023
A court may serve process on a party which has no domicile within China's territory in the following manners:	A court may serve process on a party which has no domicile within China's territory in the following manners:
(1) in accordance with the provisions of an international treaty concluded or acceded to by the home country of the party to be served and China;	(1) in accordance with the provisions of an international treaty concluded or acceded to by the home country of the party to be served and China;
(2) through diplomatic channels;	(2) through diplomatic channels;
(3) by entrusting the service to Chinese embassy or consulate in the country where the party is domiciled, if the party is a Chinese national;	(3) by entrusting the service to Chinese embassy or consulate in the country where the party is domiciled, if the party is a Chinese national;
(4) by entrusting the service to the litigation agent authorized by the party to be served to receive service of process;	(4) by entrusting the service to the litigation agent <b>appointed by the party in this case;</b>

<p>(5) by delivering the document to the representative office or a branch office or business agent authorized to receive service of process established by the party to be served within China's territory;</p>	<p>(5) by delivering the documents to the <b>solely funded enterprise</b>, representative office, branch office or authorized business agent established by the party to be served within China's territory;</p>
	<p>(6) where the party is a foreigner or stateless person who acts as the legal representative or main person in charge of a legal person or any other organization established within China's territory, and is a co-defendant with such legal person or other organization, by delivering the documents to such legal person or other organization; (<i>"added"</i>)</p>
	<p>(7) where the legal representative or main person in charge of a foreign legal person or any other organization is within China's territory, by delivering the documents to such legal representative or main person in charge; (<i>"added"</i>)</p>

(6) by mail, if the law of the country where the party is domiciled permits service of process by mail and a receipt showing the date of delivery has not been returned within three months after the date of mailing, provided that other circumstances sufficiently show the document has been served;	(8) by mail, if the law of the country where the party is domiciled permits service of process by mail and a receipt showing the date of delivery has not been returned within three months after the date of mailing, provided that other circumstances sufficiently show the document has been served;
(7) by fax, email or any other means capable of confirming receipt by the party to be served;	(9) by <b>electronic means</b> capable of confirming the receipt of the documents by the recipient, <b>unless prohibited by the law of the country where the party is domiciled;</b>
	(10) by any other means agreed by the party, unless prohibited by the law of the country where the party is domiciled. ( <i>"added"</i> )
(8) by public announcement if none of the above means is feasible, in which case the document shall be deemed to have been served after six months from the date of the public announcement.	If none of the above means is feasible, public announcement shall be made, and the documents shall be deemed to have been served after <b>60 days</b> from the date of announcement.

Obtaining evidence abroad: Article 284 of the new CPL introduces provisions for obtaining evidence from abroad. In addition to the traditional methods of obtaining evidence through treaties or bilateral agreements with the country where the evidence is located, as well as through diplomatic channels, the new provision authorises other means to take evidence abroad, including entrusting Chinese embassy or consulate in the country where the party or witness is located to obtain evidence, obtaining evidence through real-time communication tools with the consent of both parties, and by other means agreed upon by both parties.

#### 4. Recognition and enforcement of foreign judgments and arbitral awards

Requirement for the recognition and enforcement of foreign judgments: Articles 297 and 298 of the new CPL retain the principle of reciprocity as a prerequisite of recognition and enforcement of foreign judgement. They state that foreign judgments should be recognized and enforced in accordance with international treaties that China has concluded or based on the principle of reciprocity. However, the reciprocity principle raises the following issues.

Firstly, the term “reciprocity” is ambiguous, and China’s judicial practice of using the de facto reciprocity has made it difficult for many foreign court judgments to be recognized and enforced in Chinese courts. Secondly, although the “presumed reciprocity” standard has been suggested in the “Opinions of the Supreme People’s Court on Providing Judicial Services and Safeguards for the Belt and Road Initiative” and the “Nanning Declaration” adopted at the Second China-ASEAN Chief Justices’ Roundtable, these documents are not binding and this new standard has limited impact on judicial practice. Further, even if presumed reciprocity is adopted, there may still be arbitrary situations. For example, a foreign court may refuse to recognize a Chinese judgment because that the domestic judgment has already become *res judicata*, but this does not mean that the foreign court will not recognize the Chinese judgment. Nevertheless, the existence of negative precedence may be enough to deny presumed reciprocity.

Notably, Article 49 of the Minutes of the National Symposium on the Foreign-related Commercial and Maritime Trials 2021 establishes a reporting and notification mechanism for recognizing and enforcing foreign court judgments. It requires that in cases where the court needs to examine the application of the reciprocity principle, it should submit the proposed decision to the higher court in its jurisdiction for review. If the higher court agrees with the proposed handling, it should submit its review opinion to the Supreme People’s Court for verification. Only after receiving a response from the Supreme People’s Court can a ruling be made. In March 2022, the Shanghai Maritime Court, after seeking instructions from the Supreme People’s Court, applied the standard of de jure reciprocity to determine the existence of reciprocity between China and the United Kingdom in the recognition and enforcement of civil and commercial judgments in the case of SPAR Shipping Co., Ltd. v. Dalian Xin Hua Logistics Holdings (Group) Co., Ltd. (2018) Hu 72 Xie Wai Ren 1. This was the first precedent case of reciprocity

recognition by Chinese courts. Subsequently, on December 19, 2022, the High Court of England and Wales issued a summary judgment in the case of Hangzhou J Asset Management Co Ltd & Anor v Kei [2022] EWHC 3265 (Comm), recognizing and enforcing two Chinese judgments. This was the first time that Chinese court judgments were recognized and enforced in the UK. It opens up new possibilities for mutual recognition and enforcement of civil and commercial judgments between China and the UK.

Grounds for refusing to recognize and enforce foreign court judgments: Article 300 of the new CPL stipulates five grounds for refusing to recognize and enforce foreign court judgments. These include: (1) When the foreign court lacks jurisdiction over the case pursuant to Article 301 of the CPL; (2) When the defendant has not been properly served or, even if properly served, has not had a reasonable opportunity to present its case, or when a party lacking litigation capacity has not been adequately represented; (3) When the judgment or ruling was obtained through fraudulent means; (4) When a Chinese court has already rendered a judgment or ruling on the same dispute, or has recognized a judgment or ruling on the same dispute rendered by a court of a third country; (5) When it violates the basic principles of Chinese laws or undermines China's national sovereignty, security, or public interests. The prerequisite for recognizing and enforcing foreign court judgments is that the court rendering the judgment must have jurisdiction over the case.

Article 301 clarifies the three circumstances for determining foreign courts' lack of jurisdiction over a case, namely: (1) the foreign court has no jurisdiction over the case according to its laws, or has jurisdiction according to its laws but lacks an appropriate connection to the dispute; (2) violation of the provisions of the CPL on exclusive jurisdiction; (3) violation of the parties' exclusive choice of court agreement. Among them, the "appropriate connection" requirement in the first provision also echoes the rules for determining special jurisdiction over foreign-related cases under Article 276. Determining appropriate connection will likely be a focus in future foreign civil and commercial litigation disputes.

Article 302 further elucidates the fourth ground for refusing to recognize and enforce judgments. This ground mainly applies to parallel proceedings. According to this provision, the court should review the previously rendered effective foreign court judgment and suspend domestic proceedings. If the foreign judgment meets the requirements for recognition and enforcement, it should be recognized and enforced, and the domestic proceedings should be dismissed. If it does not meet

the requirements for recognition and enforcement, the domestic proceedings should resume. This provision aligns with Article 7(1)(5) and (6) of the HCCH Judgment Convention 2019, which China signed and joined on 2019, but has not yet ratified.

Recognition and enforcement of foreign arbitral awards: A significant change pertaining to arbitration decisions in the new law is that it clearly establishes the “place of arbitration” as the standard for determining the nationality of an arbitration decision. See the table below.

Article 287(2) of the CPL 2022	Article 297(2) of the CPL 2023
Where a party applies for enforcement of an effective arbitration award of an international arbitral institution of China, if the party against whom enforcement is sought or the property thereof is not within China’s territory, the applicant shall apply directly to the foreign court having jurisdiction for recognition and enforcement.	Where a party applies for enforcement of an effective arbitration award <b>which is made within China’s territory</b> , if the party against whom enforcement is requested or its property is not within China’s territory, the applicant may apply directly to the foreign court having jurisdiction for recognition and enforcement.
Article 290 of the CPL 2022	Article 304 of the CPL 2023

<p>Where an arbitration award of a foreign arbitral institution requires recognition and enforcement by a Chinese court, a party shall apply directly to China's intermediate court at the place of domicile of the party against whom enforcement is sought or at the place where the property thereof is located, and the Chinese court shall process the application in accordance with an international treaty concluded or acceded to by China or under the principle of reciprocity.</p>	<p>Where <b>a legally effective arbitral award which is made outside China's territory</b> requires recognition and enforcement by a Chinese court, a party may apply directly to China's intermediate court at the place of domicile of the party against whom enforcement is sought or at the place where the property thereof is located.</p>
	<p>If the domicile of the party against whom the application is made or its property is not within China's territory, the party may apply to the intermediate court of the place where the applicant is domiciled or that has appropriate connection with the dispute adjudicated in the award. (<i>"added"</i>)</p>
	<p>The Chinese court shall process the application in accordance with an international treaty concluded or acceded to by China or under the principle of reciprocity.</p>



Chinese judicial practice on the nationality of arbitral awards has shifted from the “the location of the arbitral institution” standard to the “place of arbitration” standard. Several landmark cases reflect this change. The new CPL further cements the seat of arbitration standard, aligning with international practices. When parties apply to Chinese courts for recognition and enforcement of arbitration rulings made by foreign arbitration institutions within China, it facilitates their recognition and enforcement. This change not only encourages foreign arbitration institutions to conduct arbitration within China, but is also better enables Chinese courts to exercise judicial supervision.

## 5. Foreign immunity

In this revision of the CPL, a specific provision is added to clarify that in civil litigation involving foreign states, the relevant laws on immunity of foreign states in China shall apply; if no provisions are specified, the CPL shall apply (Art. 305). It is worth noting that the Law on Immunity of Foreign States was promulgated on September 1, 2023, and will be implemented from January 1, 2024. The Law on Immunity of Foreign States primarily stipulates the conditions under which a foreign state can become a defendant in a legal proceeding in China, hence providing a legal basis for when a foreign state cannot claim immunity from the jurisdiction of Chinese courts. On the other hand, the CPL provides the general procedural framework for all civil cases, and determines jurisdictional rules. This includes when and which court in China has the power to hear a case. So, essentially, the CPL determines which specific court has jurisdiction over the case, while the Law on Immunity of Foreign States regulates the separate substantive issue of whether the foreign state defendant is immune from such jurisdiction.

## 6. Conclusion

The 2023 amendments to the CPL have brought about significant improvements to the special provisions governing procedures for foreign-related civil litigation. The new amendment not only takes into account China’s domestic situations but also keeps up with the latest international legislative developments in the field, drawing on the latest achievements in international legislation. Some provisions

have learnt from the latest international framework, such as the HCCH Choice of Court Convention 2005 and HCCH Judgment Convention 2019.

Of course, some new challenges emerge. First, how to define the concept of appropriate connection as a new jurisdiction ground. Second, the asymmetric approach that allows the parties to choose unrelated Chinese courts but requires the chosen foreign court to have practical connection is controversial. Thirdly, the principle of reciprocity as a prerequisite remains a barrier to enforce foreign judgments in China. When the refusal grounds are adopted, which are enough to protect Chinese interests, the requirement of reciprocity becomes unnecessary and redundant. Nonetheless, more clarification will be introduced in practice which hopefully will address some of the above problems.

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# China Adopts Restrictive Theory of Foreign State Immunity

*Written by Bill Dodge, the John D. Ayer Chair in Business Law and Martin Luther King Jr. Professor of Law at UC Davis School of Law.*

On September 1, 2023, the Standing Committee of the National People's Congress promulgated the Foreign State Immunity Law of the People's Republic of China (FSIL) ([English translation here](#)). When the law enters into force on January 1, 2024, China will join those countries—a clear majority—that have adopted the restrictive theory of foreign state immunity. For the law of state immunity, this move is particularly significant because China had been the most important adherent to the rival, absolute theory of foreign state immunity.

In two prior posts ([here](#) and [here](#)), I discussed a draft of the FSIL ([English translation here](#)). In this post I analyze the final version of the law, noting some of its key provision and identifying changes from the draft, some of which address issues that I had identified. I also explain why analysts who see China's new law as a form of "Wolf Warrior Diplomacy" are mistaken. Contrary to some suggestions, the FSIL will not allow China to sue the United States over U.S.

export controls on computer chips or potential restrictions on Tiktok. Rather, the FSIL is properly viewed as a step towards joining the international community on an important question of international law.

## The Restrictive Theory of Foreign State Immunity

Under the restrictive theory of foreign state immunity, foreign states are immune from suits based on their governmental acts (*acta jure imperii*) but not from suits based on their non-governmental acts (*acta jure gestionis*). During the twentieth century many countries moved from an absolute theory of foreign state immunity, under which countries could never be sued in another country's courts, to the restrictive theory. Russia and China long adhered to the absolute theory. But Russia joined the restrictive immunity camp in 2016, when its law on the jurisdictional immunity of foreign states went into effect.

In 2005, China signed the U.N. Convention on Jurisdictional Immunities of States and Their Property, which follows the restrictive theory. But China has not ratified the U.N. Convention, and the Convention has not gained enough signatories to enter into force. As I noted in a prior post, China stated in 2009 that, despite signing the U.N. Convention, its position on foreign state immunity had not changed and that it still followed the absolute theory.

China's new FSIL therefore marks a significant shift in China's position on an important question of international law. As I explained in my earlier posts and discuss further below, the FSIL follows the U.N. Convention in many respects. By adopting this law, however, China has extended these rules not only to other countries that may join the Convention but to all countries, even those like the United States that are unlikely ever to sign this treaty.

## Significant Provisions of the State Immunity Law

China's FSIL begins, as most such laws do, with a general presumption that foreign states and their property are immune from jurisdiction. Article 3 says: "Foreign states and their property enjoy immunity from the jurisdiction of PRC

courts, except as otherwise provided by this Law.” Article 2 defines “foreign states” to include “foreign sovereign states,” “state organs or constituent parts of foreign sovereign states,” and “organizations or individuals who are authorized by foreign sovereign states to exercise sovereign authority and who engage in activities on the basis of such authorization.” These provisions generally track Articles 1 and 2(1)(b) of the U.N. Convention.

## Waiver Exception

Articles 4-6 of the FSIL law provide that a foreign state is not immune from jurisdiction when it has consented to the jurisdiction of Chinese courts. Article 4 sets forth means by which a foreign state may expressly consent to jurisdiction. Article 5 provides that a foreign state is deemed to consent if it files suit as a plaintiff, participates as a defendant and files “an answer or a counterclaim on the merits of the case,” or participates as a third party in Chinese courts. Article 5 further provides that a foreign state participating as a plaintiff or third party waives immunity from counterclaims arising from the same legal relationship or facts. Article 6, on the other hand, says that a foreign state shall not be deemed to have consented to jurisdiction by appearing in Chinese court to assert immunity, by having its representatives testify, or by choosing Chinese law to govern a particular matter. These provisions track Articles 7-9 of the U.N. Convention.

## Commercial Activities Exception

The FSIL also contains a commercial activities exception. Article 7 provides that a foreign state shall not be immune from proceedings arising from commercial activities when those activities “took place in PRC territory, or have had a direct effect in PRC territory even though they took place outside PRC territory.” Article 7 defines “commercial activity” as “transactions of goods or services, investments, borrowing and lending, and other acts of a commercial nature that do not constitute an exercise of sovereign authority.” To determine whether an act is commercial, “a PRC court shall undertake an overall consideration of the act’s nature and purpose.” Like the U.N. Convention, the FSIL deals separately with employment contracts (Article 8) and intellectual property cases (Article 11).

Article 7’s reference to both “nature and purpose” is significant. U.N. Convention Article 2(2) allows consideration of both. But considering “purpose” is likely to result in a narrower exception—and thus in broader immunity for foreign

states—than considering “nature” alone. Under the U.S. Foreign Sovereign Immunities Act (FSIA), the commercial character of an act is determined only by reference to its nature and not by reference to its purpose. Applying this definition, the U.S. Supreme Court has held that issuing foreign government bonds is a commercial activity, even if done for a sovereign purpose. It is unclear if Chinese courts applying the FSIL will reach the same conclusion.

## Territorial Tort Exception

Article 9 of the FSIL creates an exception to immunity for claims “arising from personal injury or death or damage to movable or immovable property caused by the relevant act of the foreign state in PRC territory.” This generally tracks Article 12 of the U.N. Convention.

## Property Exception

Article 10 of the FSIL creates an exception to immunity for claims involving immovable property in China, interests in moveable or immovable property arising from gifts, bequests, or inheritance, and interests in trust property and bankruptcy estates. This provision closely follows Article 13 of the U.N. Convention.

## Arbitration Exception

Article 12 provides that a foreign state that has agreed to arbitrate disputes is not immune from jurisdiction with respect to certain matters requiring review by a court. These include “the validity of the arbitration agreement,” “the confirmation or enforcement of the arbitral award,” and “the setting aside of the arbitral award.” This provision corresponds to Article 17 of the U.N. Convention.

## Reciprocity Clause

China’s FSIL also contains a reciprocity clause. Article 21 provides: “Where foreign states accord the PRC and its property narrower immunity that is provided by this Law, the PRC will apply the principle of reciprocity.” This means, for example, that Chinese courts could hear claims against the United States for expropriations in violation of international law or for international terrorism, because the U.S. FSIA has exceptions for such claims, even though China’s FSIL

does not.

The U.N. Convention does not have a reciprocity provision. Nor do most other states that have codified the law of state immunity. But Russia's 2016 law on the jurisdictional immunities of foreign states does contain such a clause in Article 4(1), and Argentina's state immunity law contains a reciprocity clause specifically for the immunity of central bank assets, reportedly adopted at China's request.

The FSIL's reciprocity clause is consistent with the emphasis on reciprocity that one finds in other provisions of Chinese law. For example, Article 289 of China's Civil Procedure Law (numbered Article 282 in this translation, prior to the law's 2022 amendment of other provisions), provides for the recognition and enforcement of foreign judgments "pursuant to international treaties concluded or acceded to by the People's Republic of China or in accordance with the principle of reciprocity."

The example of foreign judgments also shows that reciprocity may be interpreted narrowly or broadly. China used to insist on "de facto" reciprocity for foreign judgments—proof that the foreign country had previously recognized Chinese judgments. Last year, however, China shifted to a more liberal "de jure" approach, under which reciprocity is satisfied if the foreign country *would* recognize Chinese judgments even if it has not already done so. Time will tell how Chinese courts interpret reciprocity under the FSIL.

## Service

Article 17 of the FSIL provides that Chinese courts may serve process on a foreign state as provided in treaties between China and the foreign state or by "other means accepted by the foreign state and not prohibited by PRC law." (The United States and China are both parties to the Hague Service Convention, which provides for service through the receiving state's Central Authority.) If neither of these means is possible, then service may be made by sending a diplomatic note. A foreign state may not object to improper service after it has made a pleading on the merits. This provision also follows the U.N. Convention closely, specifically Article 22.

## Default Judgments

If the foreign state does not appear, Article 18 of China's draft law requires a Chinese court to "sua sponte ascertain whether the foreign state enjoys immunity from its jurisdiction." The court may not enter a default judgment until at least six months after the foreign state has been served. The judgment must then be served on the foreign state, which will have six months to appeal. Article 23 of the U.N. Convention is similar but with four-month time periods.

## Immunity of Property from Execution

Under customary international law, the immunity of a foreign state's property from compulsory measures like execution of a judgment is separate from—and generally broader than—a foreign state's immunity from suit. Articles 13-15 of the FSIL address the immunity of a foreign state's property from compulsory measures.

Article 13 states the general rule that "[t]he property of a foreign state enjoys immunity from the judicial compulsory measures of PRC courts" and further provides that a foreign state's waiver of immunity from suit is not a waiver of immunity from compulsory measures. Article 14 creates three exceptions to immunity: (1) when the foreign state has expressly waived such immunity; (2) when the foreign state has specifically earmarked property for the enforcement of such measures; and (3) "to implement the effective judgments and rulings of PRC courts" when the property is used for commercial activities, relates to the proceedings, and is located in China. Article 15 goes on to identify types of property that shall *not* be regarded as used for commercial activities for the purpose of Article 14(3), including the bank accounts of diplomatic missions, property of a military character, central bank assets, and property of scientific, cultural, or historical value.

As discussed further below, the addition of "rulings" (??) to Article 14(3) is significant because Chinese court decisions that recognize foreign judgments are considered "rulings." This change means that the exception may be used to enforce *foreign* court judgments against the property of a foreign state located in China by obtaining a Chinese court ruling recognizing the foreign judgment. This change brings the FSIL into greater alignment with Articles 19-21 of the U.N. Convention, which similarly permit execution of domestic and foreign judgments

against the property of foreign states.

## Foreign Officials

As noted above, Article 2 of the FSIL defines “foreign state” to include “individuals who are authorized by foreign sovereign states to exercise sovereign authority and who engage in activities on the basis of such authorization.” The impact of the FSIL on foreign official immunity is limited by Article 20, which says that the FSIL shall not affect diplomatic immunity, consular immunity, special-missions immunity, or head of state immunity. But Article 20 makes no mention of conduct-based immunity—that is, the immunity that foreign officials enjoy under customary international law for acts taken in their official capacities.

Thus, foreign officials not mentioned in Article 20 will be subject to suit in Chinese courts, even for acts taken in their official capacities, if one of the exceptions discussed above applies. If, for example, a foreign official makes misrepresentations in connection with a foreign state’s issuance of bonds, the FSIL’s commercial activities exception would seem to allow claims for fraud not just against the foreign state but also against the foreign official.

The FSIL’s treatment of foreign officials generally tracks the U.N. Convention, both in defining “foreign state” to include foreign officials (Art. 2(1)(b)(iv)) and in exempting diplomats, consuls, and heads of state (Art. 3). But, as I noted in an earlier post, there is no reason China had to follow the U.N. Convention’s odd treatment of conduct-based immunity. Doing so in the absence of a treaty, moreover, appears to violate international law by affording some foreign officials less immunity than customary international law requires.

## Some Changes from the Draft Law

The NPC Standing Committee made small but potentially significant changes to the draft law in promulgating the FSIL. The NPC Observer has a helpful chart comparing the Chinese text of the final version to the draft law.

One change that others have noted is the explicit mention of “borrowing and lending” (??) in the commercial activities exception in Article 7. The enormous amounts that China has loaned to foreign states under the Belt and Road Initiative may explain this addition. But the practical effect of the change seems



limited for two reasons. First, “borrowing and lending” would have naturally fallen into the catch-all phrase “other acts of a commercial nature” in any event. Second, as noted above, Article 7 instructs Chinese courts to “undertake an overall consideration of the act’s nature and purpose.” Considering an act’s purpose may lead Chinese courts to conclude that some “borrowing and lending” involving foreign states is not commercial if it is done for governmental purposes.

The NPC Standing Committee also helpfully changed Article 9’s territorial tort exception to clarify when that exception applies. In an earlier post, I wrote that the draft law did “not make clear whether it is the tortious act, the injury, or both that must occur within the territory of China.” The final text of the FSIL now clearly states that the relevant conduct of the foreign state, though not the injury, must occur within China (????????????????????). This position is generally consistent with Article 12 of the U.N. Convention but, most importantly, it is simply clearer than the text of the draft law.

Another small but important change is the addition of “rulings” (??) to Article 14(3)’s exception for compulsory measures to enforce judgments. The corresponding provision in the draft law referred to Chinese “judgments” (??) but not to “rulings.” As I pointed out before, this omission was significant because Chinese decisions recognizing foreign court decisions are designated “rulings” rather than “judgments.” Under the draft law, the exception would have allowed execution against the property of a foreign state for Chinese court judgments but not for Chinese rulings recognizing foreign judgments. By adding “rulings” to the final text of the FSIL, the NPC Standing Committee has brought this exception more in line with Article 19(c) of the U.N. Convention and made it available to help enforce foreign judgments against foreign-state-owned property in China if the other requirements of the exception are met.

In another change from the draft law, the NPC Standing Committee has added “PRC Courts” (????????????) to the beginning of Article 17 on service of process. The general practice in China is that courts, rather than litigants, serve process. This is one reason why the practice of some U.S. courts to authorize alternative service on Chinese defendants by email is problematic. For present purposes, the change simply clarifies something that Chinese practitioners would take for granted but non-Chinese practitioners might not.

Article 20 provides that the FSIL does not affect the immunities of certain foreign

officials. In its second paragraph, dealing with head-of-state immunity, the NPC Standing Committee has added “international custom” (国际习惯) as well as “PRC laws” and “international agreements.” This makes sense. Although diplomatic immunity, consular immunity, and other immunities mentioned in the first paragraph of Article 20 are governed by treaties, head-of-state immunity is governed not by treaty but by customary international law.

Finally, in Article 21’s reciprocity provision, the NPC standing committee has eliminated the word “may” (可能). The effect of this change is to make the application of reciprocity mandatory when foreign states accord China and its property narrower immunity than is provided by the FSIL.

## The Impact on China-U.S. Relations

Recent media coverage has suggested that China views the FSIL as a legal tool in its struggle with the United States. A senior official in China’s Ministry of Foreign Affairs was quoted as saying that the law “provides a solid legal basis for China to take countermeasures” against discriminatory action by foreign courts and may have a “preventive, warning and deterrent” effect. One analyst has even suggested that the FSIL is “an important part of China’s Wolf Warrior diplomacy, and another step forward in its diplomatic bullying of other countries.” Such comments miss the mark. As Professor Donald Clarke aptly observes: “All China is doing is adopting a policy toward sovereign immunity that is the one already adopted by most other states.”

Professor Sophia Tang points out that, although suits against China in U.S. courts over Covid-19 pushed the issue of state immunity up on Chinese lawmakers’ agenda, the question had been under discussion for years. The Covid-19 lawsuits may explain why China included Article 21’s provision on reciprocity, but it bears emphasis that these suits against China were *dismissed* by U.S. courts on grounds of state immunity. If Congress were foolish enough to amend the FSIA to permit such suits, the FSIL’s reciprocity provision would allow China to respond in kind, but this scenario seems unlikely.

China’s FSIL will not permit suits against the United States for other actions that China has protested, such as U.S. export controls on selling semiconductors to China or potential restrictions on TikTok. These are governmental actions, and the restrictive theory adopted by the FSIL maintains state immunity for

governmental actions.

On the other hand, the FSIL clearly will permit suits in Chinese courts against foreign governments that breach commercial contracts. As Professor Congyan Cai points out, the FSIL may play a role in enforcing contracts with foreign governments under China's Belt and Road Initiative. More generally, Clarke notes, China's past adherence to the absolute theory meant that Chinese parties could not sue foreign states in Chinese courts even though foreign parties could sue China in foreign courts. "China finally decided," he continues, "that there was no point in maintaining the doctrine of absolute sovereignty, since other states weren't respecting it in their courts and the only people it was hurting were Chinese plaintiffs."

Ultimately, the FSIL is a step in what Professor Cai has called China's "progressive compliance" with international law, which helps legitimate China as a rising power. The FSIL brings Chinese law into alignment with the law on state immunity in most other countries, ending its status as an outlier in this area.

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