New Zealand Court of Appeal allows appeal against anti-enforcement injunction

Introduction

The New Zealand Court of Appeal has allowed an appeal against a permanent anti-suit and anti-enforcement injunction in relation to a default judgment from Kentucky, which the plaintiff alleged had been obtained by fraud: *Wikeley v Kea Investments Ltd* [2024] NZCA 609. The Court upheld the findings of fraud. It also did not rule out the possibility of an injunction being an appropriate remedy in the future. However, the Court concluded that an injunction could only be granted as a step of last resort, which required the plaintiff to pursue its right of appeal against the Kentucky judgment.

The background to the case is set out in a previous post on this blog (see also here). In summary, the case involved allegations of "a massive worldwide fraud" perpetrated by the defendants — a New Zealand company (Wikeley Family Trustee Ltd), an Australian resident with a long business history in New Zealand (Mr Kenneth Wikeley), and a New Zealand citizen (Mr Eric Watson) — against the plaintiff, Kea Investments Ltd (Kea), a British Virgin Islands company owned by a New Zealand businessman. Kea alleged that the US default judgment obtained by WFTL was based on fabricated claims intended to defraud Kea. Kea claimed tortious conspiracy and sought a world-wide anti-enforcement injunction, which was granted by the High Court, first on an interim and then on a permanent basis. Wikeley, the sole director and shareholder of WFTL, appealed to the Court of Appeal.

The Court of Appeal allowed the appeal against the grant of the injunction. At the same time, it upheld the High Court's declarations that the Kentucky default judgment was obtained by fraud and that it was not entitled to recognition or enforcement in New Zealand. It also upheld the High Court's damages award (for legal costs incurred in overseas proceedings in defence of the tortious conspiracy).

The judgment

There are two points from the judgment that I want to focus on here: the Court's emphasis on comity, and the relevance of fraud as a basis for an anti-enforcement injunction.

Comity

An entire section of the judgment is dedicated to the concept of comity, which the Court relied on as a guiding principle. The Court said that it was necessary "to confront, head on, the appropriateness, in comity terms, of an order which … in substance, is addressed to United States courts and which could, at least in theory, provoke countermeasures, with the result that no legal system will be able to administer justice" (at [167]). Drawing on work by Professor Andrew Dickinson, the Court confirmed that comity was not simply "a matter of judicial collegiality" (at [164]). In the international system, comity was like "the mortar which cements together a brick house" (citing Judge Wilkey in *Laker Airways Ltd v Sabena Belgian World Airlines* 731 F 2d 909 (DC Cir 1984) at 937).

Anti-suit and anti-enforcement injunctions had the effect of interfering with comity, because they interfered with "the interests of a foreign legal system in administering justice within its own territory" (at [164]). Drawing again on Dickinson's work, the Court said that anti-suit/enforcement injunctions "push[ed] at the boundaries of … the global system of justice" (at [166]). The Court disagreed (at [189]) with the High Court's observation that the injunction "may even be seen as consistent with the requirements of comity", insofar as the injunction had the effect of restraining a New Zealand company from abusing the process of the Kentucky court to perpetuate a fraud. The United States courts were "unlikely to look for or need the protection of New Zealand courts" and were "well capable of identifying fraud and ensuring no reward flows from it" (at [189]).

Extreme caution was necessary, therefore, before exercising the power to grant an anti-suit/enforcement injunction (at [176]). Comity required "the court to recognise that, in deciding questions of weight to be attached to different factors, different judges operating under different legal systems with different legal policies may legitimately arrive at different answers" (at [177]). Anti-enforcement injunctions were especially rare and were "characterised by particularly careful

assessments of whether the relief sought is truly necessary and consistent with comity" (at [180]).

Because of these concerns, an anti-enforcement injunction should be "a measure of last resort" (referring again to Dickinson, at [185]). This meant that the Court in this case had to "at least await the outcome of the appeal process [in Kentucky] before considering whether to issue an anti-suit or anti-enforcement judgment" (at [186]).

Fraud as a distinct category?

In the anti-enforcement context, some scholars have treated fraud as a distinct category of case that may justify the grant of an injunction: see, most recently, Hannah L Buxbaum and Ralf Michaels "Anti-enforcement injunctions" [2024] 56 NYU Journal of International Law and Politics 101 at 110-111, citing *Ellerman Lines Ltd v Read* [1928] 2 KB 144 (CA) in support. The Queensland Supreme Court also relied on *Ellerman Lines* when granting relief in aid of the New Zealand interim orders (*Kea Investments Ltd v Wikeley (No 2)* [2023] QSC 215 at [178]–[188], with the Queensland Court of Appeal upholding the reasoning in *Wikeley v Kea Investments Ltd* [2024] QSC 201).

The Court of Appeal's reasoning casts doubt on the existence of fraud as a distinct category. In [176], the Court adopted Dickinson's "convenient collection" of the following four categories that may justify anti-suit relief (see fn 157): that "the foreign court has acted or is likely to act in excess of its jurisdiction under international law, in violation of the requirements of natural justice, otherwise in a manner manifestly incompatible with New Zealand's fundamental policies, or that its proceedings are likely significantly and irreversibly to interfere with the administration of justice in New Zealand".

On the facts of the present case, the Court thought that the category of natural justice was most relevant. The Court considered it "almost inevitable" that, had the New Zealand court been in the Kentucky court's position, it would have set aside the default judgment, on the basis that the proceeding had not been drawn to Kea's attention and sufficiently substantial grounds of defence had been made out (at [182]). The Court said that, in these circumstances, "[a]t least if the judgment were final, with all appeal rights exhausted and against a New Zealand entity … a New Zealand court might well consider that, despite its respect for the

United States courts, a sufficiently fundamental policy issue was engaged – *one ultimately based in principles of natural justice and fair hearing rights* – that an anti-suit or anti-enforcement order should issue" (at [183], emphasis added).

What is more, the Court distinguished the case from *Ellerman Lines Ltd v Read* [1928] 2 KB 144 (CA) on the basis "there was no contractual jurisdiction clause that the New Zealand Court was seeking to enforce" (at [187]). It expressed "caution" about the proposition that the pursuit of the Kentucky proceedings should be injuncted because the proceeding was fraudulent and therefore "inherently unconscionable", referring to criticism by Dickinson that the language of unconscionability is "a vestige of an earlier monotheistic society [which] no longer performs any useful role and obscures the real reasons for granting injunctions" (at [190]). A conclusion by the New Zealand court that the Kentucky proceeding was vexatious or oppressive had "the capacity to look patronising from the perspective of the United States – something which in comity terms should be avoided" (at [191]). The issue of fraud could be addressed by the United States court, "with all of the advanced legislative and common law apparatus available to it to do justice between the parties" (at [191]).

On the other hand, the Court clarified that it was not suggesting that "it would *never* be appropriate for a New Zealand court to issue a worldwide anti-enforcement order" (at [188], emphasis in original).

Comments

The Court's detailed engagement with comity is heartening for anyone who is concerned about the destabilising effects of anti-suit/enforcement injunctions on the international system. Yet the reasoning is also underpinned by tension.

First, the Court seemed to eschew fraud as a distinct basis for the award of an anti-enforcement injunction, while accepting the appropriateness of determining whether the foreign proceeding was fraudulent (and granting declaratory relief to that effect). If the Court is willing to entertain a claim that the pursuit of a foreign proceeding forms part of a tortious conspiracy, why should this not provide a potential basis for an injunction (as opposed to, say, natural justice)?

This potential contradiction had flow-on effects for the scope of the Court's

orders, because the Court refused to discharge the appointment of interim liquidators of WFTL. Interim liquidators had been appointed after attempts by the defendant to assign the benefit of the Kentucky default judgment from WFTL to a United States entity, to "insulate" WFTL from "any New Zealand judgment" (at [43]). The Court considered that the appointment of interim liquidators was "for valid domestic reasons by ensuring assets available to satisfy any New Zealand judgment remained under the control of New Zealand parties" and that it was "unaffected by discharge of the anti-suit and anti-enforcement injunctions" (at [196], [211](e)). The Court acknowledged that the interim liquidators could face pressure to enforce the Kentucky default judgment "in order to meet the New Zealand judgment debt and costs awards against WFTL – this despite the judgments of the High Court and this Court finding claims under the Coal Agreement to be fraudulent and made pursuant to conspiracy" (at [201]). The Court did not "at this stage express any view about how the principles of international comity might respond to that particular scenario" (at [201]). Why is it a "valid domestic reason" to protect the satisfaction of a New Zealand judgment for damages that were incurred in defending the foreign fraudulent proceeding, but it is not a "valid domestic reason" to prevent enforcement of a judgment that is the result of such a fraudulent proceeding?

Second, while the injunction had the potential to interfere with comity, it was also, arguably, a tool for dialogue. The Court of Appeal was clear that the injunction could not be understood as "an act of comity"; and it thought it was unlikely that the Kentucky court would want or would need the help of the New Zealand Court. At the same time, it would be strange if the Kentucky court did not take account of the finding of fraud, or the concerns about natural justice. In this way, the Court of Appeal's decision to treat the injunction as a last resort, and to require the plaintiff to pursue an appeal in Kentucky, may be seen as part of an unfolding dialogue between the courts that would not have happened – and would not have been possible – without the potential of anti-enforcement relief. At the very least, the decision will serve as a pointer to the Kentucky court that the default judgment has cross-border implications and gives rise to a risk of conflicting orders.

Third, the Court seemed to characterise the plaintiff's decision to bring proceedings in New Zealand as a strategic move, noting that "WFTL's New Zealand registration and its status as a trustee of a New Zealand trust provided a

jurisdictional leg up with which to challenge enforcement [of the Kentucky default judgment]" (at [194]). This characterisation sits uncomfortably with the Court's acceptance that the Kentucky proceeding – including the defendants' choice of Kentucky as a forum – was itself based on fraudulent fabrications. It is one thing to conclude that the plaintiffs should have persevered in Kentucky by pursuing their appeal there, on the basis that a foreign court must be left to control its own proceedings. It is another to say that the plaintiff, by turning to the New Zealand court for help, was using WFTL's registration in New Zealand as a "jurisdictional leg up" (cf also the Court's discussion in [183] that there would be a potential case for an anti-enforcement injunction if the default judgment was in breach of a New Zealand entity's rights to natural justice – that is, if *the plaintiff* was a New Zealand entity). Where a New Zealand entity is used as a vehicle for fraud, the New Zealand court may have a legitimate interest – or even a responsibility – to stop the fraud, albeit that an injunction is a measure of last resort.

Fourth, the Court of Appeal distinguished *Ellerman Lines* on the basis that the latter case involved an English jurisdiction clause. This reasoning suggests that anti-suit/enforcement relief may be an appropriate response to foreign proceedings brought in breach of a New Zealand jurisdiction clause, but that it may not be an appropriate response to foreign fraudulent proceedings between strangers. Why is it worse to suffer a breach of a jurisdiction clause, than to be dragged into a random foreign court on the basis of a fraudulent claim (including a forged jurisdiction clause in favour of the foreign court)? The Court did not address this question. The Court also did not address – but noted, in a different part of the judgment – the question whether a breach of a jurisdiction clause should justify injunctive relief as a matter of course (see footnote 158). Clearly, the Court did not think that this question was relevant to its decision to distinguish *Ellerman Lines,* but a more detailed discussion would have been helpful, to ensure the coherent development of the court's power to grant anti-suit/enforcement injunctions.

Abu Dhabi Court of Cassation on Civil Family Law and Muslim Foreigners: Has the Tide Turned?

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The recent introduction of a civil family law regime in the United Arab Emirates – the first of its kind in the region – has attracted considerable attention, both on this blog and beyond.[1] A key unresolved issue has been the law's applicability in Abu Dhabi, particularly regarding access for Muslim foreigners to the emirate's newly established Civil Family Court. Scholars and legal practitioners navigating this new framework have long observed a surprising discrepancy, if not an ideological tension, between the law's drafters and those interpreting it, especially at the higher court level. Central to this divergence has been whether Abu Dhabi's *Law on Civil Marriage and Its Effects* (Law No. 14/2021 of 7 November 2021, as subsequently amended) and its *Procedural Regulation* (Chairman Resolution No. 8/2022 of 1 February 2022) apply exclusively to non-Muslims or extend also to Muslim foreigners who are citizens of non-Muslim jurisdictions. A recent judgment by the Abu Dhabi Court of Cassation in late October affirmed jurisdiction over Muslim foreigners with dual French-Moroccan nationality, marking a potential shift in personal jurisdiction. This ruling may expand access to a legal framework devoid of religious underpinnings for many Muslim expatriates in the UAE.

The Legal Framework

The civil family law regime in the UAE comprises three main legislative components. With the exception of Abu Dhabi, which pioneered a separate non-religious legal framework in late 2021, the *Federal Civil Personal Status Code* (Law No. 41/2022 of 3 October 2022) governs matters of marriage, divorce, child custody, and inheritance exclusively for non-Muslim citizens and non-Muslim

foreigners. The law's scope is explicitly outlined in Article 1, which clearly differentiates based on religious affiliation rather than nationality.

The earlier local legislation in Abu Dhabi, Law No. 14/2021 of 7 November 2021, initially applied only to non-Muslim foreigners but was soon amended, by Law No. 15/2021 of 15 December 2021, to significantly broaden its scope. Most notably, the terms 'foreigner' and 'non-Muslim foreigner' were replaced by 'persons covered by the provisions of this law,' a concept further clarified in Article 5 of the Procedural Regulations. Under these provisions, the law applies to civil marriage, its effects, and all civil family matters for:

1. Non-Muslim UAE citizens, and
2. Foreign nationals from countries 'that do not primarily apply Islamic Sharia in personal status matters,' as determined by the Instruction Guide issued by the Chairman of the Abu Dhabi Judicial Department. For dual citizens, the nationality associated with their UAE residency prevails.

Additionally, the law also applies to marriages concluded in countries that do not primarily apply Islamic Sharia in personal status matters, as outlined in the Instruction Guide (which has yet to be issued), as well as to all marriages conducted under the provisions on civil marriage.

The latter two cases are particularly broad, potentially also covering Muslim citizens who married abroad, yet they are rarely cited by the courts. Judicial discussions tend to focus on paragraph 2 of Article 5, which addresses foreigners from specific non-Muslim jurisdictions. The situation is further complicated by the fact that Law No. 14/2021 also includes jurisdictional provisions and scope-of-application rules, which remain equally ambiguous.[2]

Article 1 of Law No. 14/2021 defines 'persons covered by the law' as 'the foreigner or non-Muslim citizen, whether male or female.' Unfortunately, the Arabic version of this definition is open to multiple interpretations. This ambiguity arises because the adjective 'non-Muslim,' placed after the word 'citizen' and set off by commas, could be read as referring either solely to citizens or to both foreigners and citizens. As a result, debates over the phrasing of this definition are a frequent element in pleadings before the Abu Dhabi Civil Family Court.

Moreover, in its amended form, Article 3 of Law No. 14/2021 stipulates that if a marriage has been concluded in accordance with this law, it shall apply with

respect to the effects of the marriage and its dissolution. A narrow interpretation of this clause would deny jurisdiction whenever the parties did not marry before the Abu Dhabi Civil Family Court, even if they are non-Muslim foreigners married in a civil ceremony elsewhere. However, it seems clear that the drafters did not intend to exclude this core target group from the law's jurisdiction. Similarly, it is difficult to imagine that jurisdiction would be automatically assumed in cases involving Arab Muslims – even GCC citizens – who married in a civil ceremony in Abu Dhabi, where the Civil Family Court currently allows civil marriages for all but Muslim citizens of the UAE.

The ambiguity of these clauses grants considerable discretion to the courts, and current case law on personal jurisdiction for Muslim foreigners does not yet indicate a consistent approach or prevailing interpretation. For this reason, the recent judgment by the Abu Dhabi Court of Cassation may indeed mark a turning point in the application of civil family law in Abu Dhabi.

Previous Case Law

To date, the most significant ruling by the Abu Dhabi Court of Cassation regarding personal jurisdiction over Muslim foreigners was issued in late April 2024. As discussed on this blog, the judgment denied a French-Lebanese husband and his estranged Mexican-Egyptian wife access to the Abu Dhabi Civil Family Court due to their shared Muslim faith. Initially, the Civil Family Court accepted jurisdiction and, at the husband's request, dissolved the couple's brief marriage, a decision that was upheld on appeal. However, the Court of Cassation overturned this ruling, determining that the Civil Family Court lacked jurisdiction based on the parties' religious affiliation.

This case also highlights the inconsistent, and at times contradictory, approach of the Abu Dhabi Court of Appeal on this issue. The same panel of judges has sometimes upheld jurisdiction in cases involving foreign Muslims, while in other instances, it has denied the application of Law No. 14/2021. The available case law suggests that factors such as whether the individuals are Muslim by birth or by conversion, hold dual citizenship – including that of an Arab country – or have disputed religious affiliations do not consistently influence the court's jurisdictional decisions.

The Abu Dhabi Civil Family Court generally takes the broadest view of jurisdictional rules, generally affirming that Muslim foreigners may access the court. This stance persists despite frequent jurisdictional challenges by opposing parties in cases involving Muslims, who typically argue that the Muslim Personal Status Court is the proper forum for such disputes. Recently, such arguments have increasingly referenced the Federal Civil Personal Status Code and its exclusive jurisdiction over non-Muslims, a claim likely bolstered by the Court of Cassation's April 2024 ruling, which disregarded the widely accepted view that the Federal Civil Personal Status Code does not apply in Abu Dhabi.

The Abu Dhabi Court of Cassation Judgment of 30 October 2024

The case decided by the Abu Dhabi Court of Cassation in late October involved a French-Moroccan Muslim couple who had married in a civil ceremony in France. Their marriage was dissolved by the Abu Dhabi Civil Family Court in June 2023 at the husband's request. The wife contested this ruling, arguing that the court lacked both territorial jurisdiction – since their last shared residence was in Dubai – and personal jurisdiction, given their shared Muslim faith. She further contended that ongoing proceedings before the Dubai Personal Status Court, along with a pending divorce case in France, should have precluded the Abu Dhabi Civil Family Court from issuing a ruling. The Abu Dhabi Court of Appeal upheld the divorce decision, leading her to appeal to the emirate's highest court.

From a personal jurisdiction perspective, the Court of Cassation's judgment is notable for its textbook-like analysis of what constitutes the effective citizenship of dual nationals. Unlike previous cases before both the Court of Cassation and the Court of Appeal, which largely overlooked this aspect of Article 5(2) of Law No. 14/2021, this ruling explicitly concludes that the parties' French citizenship takes precedence, as it is the nationality tied to their residency in the UAE. The judgment also addresses the fact that the parties married in a civil ceremony in France, invoking Article 5(3) of Law No. 14/2021. The court explains that, since France does not 'primarily apply Islamic Sharia in personal status matters,' the conditions of Article 5(3) are also met.

By confirming personal jurisdiction over the parties based on both Article 5(2) and Article 5(3) of Law No. 14/2021, the judgment marks a turning point in two

key respects. First, it establishes the requirement to determine the effective nationality of dual citizens, affirming that no nationality, including that of an Arab-Muslim country, takes precedence unless it is linked to UAE residency. Second, by considering the type and location of the marriage, the court asserts that, from the moment a marriage is concluded, couples effectively select a legal framework – religious or civil/secular – that will govern the marriage's effects and potential dissolution, and that this choice must be honored in any subsequent legal proceedings. Although this perspective may be open to challenge, it provides greater clarity and legal certainty for foreigners of all faiths residing in the UAE.

Outlook

For the sake of legal certainty, it is to be hoped that the Abu Dhabi Court of Cassation will maintain its newly established position. The latest interpretation appears the most plausible, particularly in light of Article 5(2) of the Procedural Regulations. Nevertheless, the current provisions on jurisdiction still leave room for ambiguity regarding the law's exact scope of application, warranting clarification through reform, given the contradictory case law to date.

First, Article 5 should be revised, including paragraph (3), to specify the court's jurisdiction over anyone who has entered into a civil marriage. For instance, a rule is needed for cases where a couple has married in both a religious and a civil ceremony. Additionally, the Chairman's Instruction Guide, or at least a clear list of Muslim jurisdictions whose citizens are excluded from the law's scope, is urgently needed. It is essential to clarify whether the provision applies equally to Arab Muslims or GCC nationals without dual citizenship who have concluded a civil marriage in a non-Muslim jurisdiction. Second, refining the Arabic versions of Law No. 14/2021 and the Procedural Regulations is crucial to avoid multiple interpretations, such as whether the law applies to 'non-Muslim foreigners and citizens' versus 'foreigners and non-Muslim citizens.' Finally, with recent legislative changes allowing foreign, non-Arabic-speaking lawyers to appear before the Abu Dhabi Civil Family Court, consistent and official English translations of all relevant statutes are absolutely necessary. Current translations available through various official channels are fragmented and occasionally ambiguous.

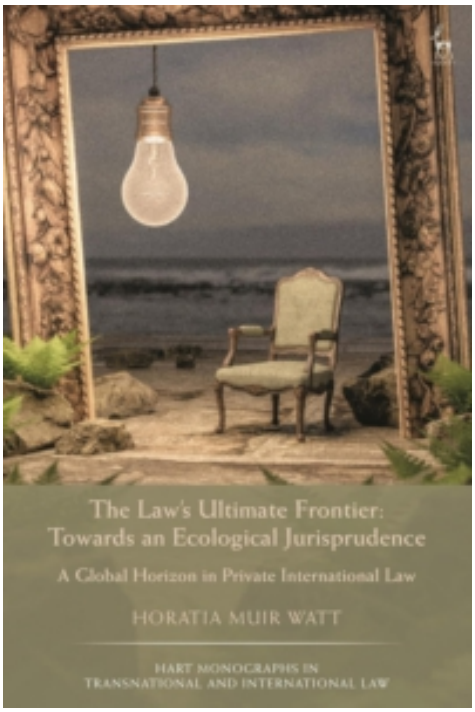
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[1] See on this blog, Béligh Elbalti, Abu Dhabi Supreme Court on the Applicability of Law on Civil Marriage to Foreign Muslims, idem, The Abu Dhabi Civil Family Court on the Law on Civil Marriage – Applicability to Foreign Muslims and the Complex Issue of International Jurisdiction, and Lena-Maria Möller, Abu Dhabi Introduces Personal Status for non-Muslim Foreigners, Shakes up Domestic and International Family Law. See also, idem, One Year of Civil Family Law in the United Arab Emirates: A Preliminary Assessment, 38 Arab Law Quarterly (2024), 219-234.

[2] It should be noted here that with the introduction of Law No. 14/2021, a dedicated Civil Family Court was established in Abu Dhabi. Family matters falling within the scope of Law No. 14/2021 are exclusively adjudicated in this court, which applies only the civil family law statutes and no other domestic or foreign legislation. Consequently, questions of the court's jurisdiction and the law's scope of application are closely intertwined, if not mutually dependent.

Book review: H. Muir Watt's The Law's Ultimate Frontier: Towards an Ecological Jurisprudence – A Global Horizon in Private International Law (Hart)

(*Written by E. Farnoux and S. Fulli-Lemaire, Professors at the University of Strasbourg)*



Horatia Muir Watt (Sciences Po) hardly needs an introduction to the readers of this blog. The book published last year and reviewed here constitutes the latest installment in her critical epistemological exploration of the field of private international law. More specifically, the book builds upon previously published fundamental reflections on the methods of private international law already initiated (or developed) in her previous general course (in French) at the Hague Academy of International Law (*Discours sur les méthodes du droit international privé (des formes juridiques de l'inter-altérité)*), as well as on the contemporary relevance of private international law ("Private International Law Beyond the Schism"). Numerous other works, naturally, also come to mind when reading this book (see among many others, ed. with L. Bíziková, A. Brandão de Oliveira, D. Fernandez Arroyo*, Global Private International Law : adjudication without frontiers*; *Private International Law and Public law*).

The publication of a book on the field that this blog deals with would be enough to justify it being flagged for the readers' attention. We feel, however, that its relevance to our academic pursuits warrants more than a mere heads-up and, while it would be unreasonable (and risky) to try to summarize the content of this engrossing and complex book in a blog friendly format, we would like to make a few remarks intended to encourage the readers of this blog to engage with this innovative and surprising work.

The book's program

It should be made clear from the outset that, maybe contrary to what the title "Towards an Ecological Jurisprudence" may suggest *prima facie*, the book does not engage primarily with the emergence and evolution of positive environmental law, even in a private international law perspective (although the double-entendre may be deliberate, because, as we will see, the book is animated by a deeply-rooted, and understandable, environmental angst). First, because the book is not

particularly concerned with *positive law* (what is also referred to as *lex* or "Law I" in the book) as such but, in a more theoretical thrust, with the idea of the law (our "normative universe", *nomos*, also called *ius* or "Law II"). Second, because the word "ecological" is used here in a much deeper and broader sense, that immediately encapsulates the ambition of the book: it refers to the ability to make room and accept "alterity" in all its shapes: humanity, foreign cultures and other life (and non-life) forms or "ecosphere", i.e. all the ecosystems and their interactions. It conveys a sense of connection of the self with others and its surroundings, philosophically as well as environmentally. Consequently, the "Ecological Jurisprudence" that the author wishes to help bring about is not a particular development in environmental law but a much more thorough modification of our understanding of law and legality.

The book rests on the premise that European or Western modernity (in all its aspects, philosophical, social, and scientific) has created (or aggravated) a series of severances between humankind and the surrounding world (as well as, it seems, within humankind). Law (as all things cultural) has not been immune from this divorce (quite the contrary), and modern legality has shaped our relationship to alterity, both human and natural. In short, Law has become an exercise in alienation (alienation from the self to the other, from the self to nature or Gaia, the earth itself). The book constitutes an attempt to propose (more precisely, uncover) an alternative conception of legality, one that connects (with the other(s): human beings among themselves as well as with their environment) rather than alienates (an "*Ecological* Jurisprudence").

The phrase "The Ultimate Frontier" is also a (multiple) play on words. To the readers of this blog, versed as they are in conflict of laws, it will evoke the outer limit of a given legal system, the line that marks where it ends (where its laws cease to be applicable) but also where it comes into contact with other legal systems. In a sense, this is the traditional object of private international law (which, as the author point out performs a type of "boundary labour") but, again, the ambition of the book is much greater: the "Ultimate Frontier" at stake is that of modern legality, where it comes into contact with, and maybe gives way to, non-modern types of normativity. The book thus presents itself as a quest for the (re)discovery of such an alternative normativity. There seems to be, however, a darker meaning of the "Ultimate Frontier", which refers to the end of human time or a "horizon of extinction", alluding, among other jeopardies, to climate and

environmental distress and giving a sense of urgency to the book. The question at its core is not only that of "law's own survival" but also of finding a way for humans to (co-)exist on the planet in a less catastrophic way. The author's strongly held belief is that law has a role to play in this endeavor, provided that a fundamental reconfiguration is allowed to take place. The general idea is that while alterity in the legal world usually takes the form of a foreign norm or an alien cultural practice, the attitude of a legal tradition towards alterity is usually coherent irrespective of whether that alterity comes in legal form or in the form of nature or of other life forms. At the risk of oversimplification, it could be said that while, looking back, law is part of the problem, it could also become, looking forward, part of the solution.

The subtitle of the book, "A Global Horizon in Private International Law", emphasizes that its objective is to outline this reconfiguration in the particular field of private international law, or rather by building on some of the less obvious insights offered by private international law. This inquiry takes place at the "Global Turn", that is at a moment when Western legality has spread far and wide while at the same time losing the stato-centric quality that underpinned it. Why private international law? The reason is twofold. First of all, private international law, like comparative law or public international law, is well-suited to dealing with alterity, in the legal form. By contrast with these other areas of the law, however, the majoritarian (Savignian) approach to private international law is very much inscribed at the heart of modern legal thought. Methodologically, its engagement with alterity is asymmetrical: the forum (the self) and the foreign norm (the other) are not placed on an equal footing; the forum, while purporting to make room for foreign norms, actually very carefully selects and reshapes those of them that can be accepted. In terms of epistemology, the fundamental involvement of private international law (its complicity?) with byproducts of Modernity, notably capitalism (or neoliberalism) and coloniality, reveals this modern bias. Here, readers familiar with H. Muir Watt's previous works (see for instance "Private International Law Beyond the Schism") will recognize a familiar theme, that of private international law's (voluntary ?) obliviousness to the many challenges facing humanity, and consequently to its own role in enabling some of them (PIL disembedded). This obliviousness is so deeply rooted that it has had the incidental advantage of sheltering the discipline from the critical contemporary approaches (decoloniality for instance) that have flourished in public international law and comparative law, stigmatizing the biases at play. In this perspective,

private international law is very much (the best?) representative of the broader category of private law, self-perceived and described as too technical or formal to be political, even as it plays a crucial role in the fundamental separation within the *Oiko* (the separation of the economy from the ecology).

The quest for an Ecological Jurisprudence hence implies an awareness to both the challenges of the era, as well as un understanding of the role of private international law in paving the road to today's (dire) state of affairs. Such an awareness makes it possible to take a hard, critical look at the methods and shortcomings of contemporary private international law. This is not, however, the only or even the main reason why the book is grounded in private international law.

That second reason for this choice lies in the dual nature (or dual scenography) of private international law, which the book seeks to reveal. Behind or underneath the technical, "modern" and capitalism-enabling private international law, a "minor jurisprudence or shadow avatar" can be observed, that is committed to a truly pluralist approach, making room for alterity. Interestingly, according to the author, such a shadow account can be found in the (pre-modern) statutist and neo-statutist theories, supposedly made redundant by the Savignian, multilateralist approach. It is by highlighting the flickering, intermittent yet enduring influence of this secondary view of the field that Horatia Muir Watt sketches the outline of a private international law truly pluralist and open to alterity, a private international law that belongs to the world and from which, perhaps, our understanding of *ius* stands to profit.

The book's outline

The book is structured in three main parts. The first is dedicated to an exploration of private international law's methodological and epistemological duality. The two competing schemes (the classic, dominant, Savignian multilateralist approach and the minority statutist approach) each provide a set of tools (methods) by which law organizes its own interaction with "exogenous forms of legality". To quote a particularly telling sentence : "this duality [between the two modes of reasoning in respect to foreign law] can be correlated to two underlying models of legality: a modern, or monist, scheme, embodied during the nineteenth century, that seeks closure, order, decisiveness, objectivity and predictability from a purportedly

neutral (Archimedean) standpoint; and a further pluralist version, geared to diplomatic negotiation, reflexivity, the perpetual oscillation between poles and the refusal of separation between the observer and the observed, or between application and interpretation".

This part starts with a refreshing preliminary section presenting the core concepts of the discipline, ostensibly for the benefit of non-specialists but specialists will find the presentation to be quite creative. Horatia Muir Watt then offers, in a first chapter, a "story of origin" in which she revisits the traditional historical account of the advent of multilateralism, insisting on tensions and inconsistencies. Indeed, since the reception of foreign law generally comes at the price of a denial of difference, the suppressed otherness makes itself felt down the line, causing all kinds of trouble with which multilateralism deals in a piecemeal way.

The second chapter is dedicated to picking up those traces of alternative pluralist methodology, where alterity takes place *on the terms of the other*, thus forming a "shadow account". By the end of the first part, private international law has served its purpose as a revealer of two different ways of dealing with alterity, one of which, in the eyes of the author, may be "harnessed to the ecological needs of our planet". This part is particularly interesting to readers with past experience of private international law, as it provides an innovative and critical approach to the field, one that often challenges their assumptions and may renew the way they think about it and, maybe, teach it.

The second part may prove to be a more challenging read for (private international) lawyers because it presents a perspective on the law seen here mainly through the works and thoughts of non-lawyers. The idea here is to compare further (and more systematically) the two alternative conceptions of legality, with a focus on form and substance, or "aesthetics" and "ontology". The legality produced by Modernity, called "jurisdictional jurisprudence", systematically reduces alterity to a set of spare parts or raw material recognizable and useable. The form, the aesthetics, of Modern legality is a "rage for order", an all-encompassing love for division, classification, hierarchization and structuration, which singularly for (private) international law has taken the form of a particular insistence on the geographical division of space, and on the drawing of frontiers. To quote again a particularly telling sentence, "such a particular, obsessional form of legal ordering – in the name of science, nature or

reason – reinforced the severance of humanity from its surrounding". That is the ontology of Modern law: anthropocentric, "devastating life in its path and devouring the very resources it needs to survive". Fortunately, this majoritarian destructive force is haunted by its shadow opposite, the "minor jurisprudence", "made of (ontological) hybridity or interstitiality and (aesthetic) entwinement and oscillation". This form of legality is willing and able to take up the "labour of connection" that is necessary to an ecological jurisprudence. Here, the analysis relies heavily on Bruno Latour's work on the "passage of law" where law, by virtue of its operation, produces a connecting experience in a pluralist environment. Each time, conflict of laws acts as a revealer ("the heuristic") to support the argument, following the overall program of the book. Each type of legality accounts for some (often contradictory) features or element of our paradoxical discipline.

Conflicts specialists may finish this part of book with some ruffled feathers: the indictment of the multilateralist method they practice and indeed sometimes advocate for is quite relentless, and the relief provided by the idea that their shadow statutism may eventually redeem them might not always feel entirely sufficient. However, they (at least the undersigned) will also be grateful to have been initiated to some fascinating anthropological insights (including Philippe Descola's work), and generally for the benefits that such outside perspective inevitably provides.

In a somewhat more classical fashion, Part III explores the political-economic and ethical dimensions of the conflict of laws. With regards to economy, the contribution of private international law to what the author calls the neoliberal world order is not a surprise. Instrumental in this is the idea of individual autonomy, which provides a foundation for a market rationality seen as both unavoidable and inescapable. On the ethical plane, the book explores the possibility for conflict of laws methods to express radical hospitality in legal form. Taking seriously the teachings of phenomenology, it suggests transforming the separation between self and other into an understanding of the other as part of ourselves.

The last chapter, titled "An Ethic of Responsiveness: The Demands of Interalterity" will be particularly interesting for conflicts lawyers. It is not unusual for us, particularly when we teach the subject, to insist, often with some sense of pride, that private international law is a place of openness to otherness. The first

two parts of the book have made quite plain that there are limits, at the very least, to the extent of that openness, but also maybe how hollow this claim may become if all we do is insert some element of a foreign legal system into our own. This last chapter explores what it actually means to take alterity seriously. Some pages, again, may be unsettling to read because making room for the Other is a radical experience for the Self, one in which the difference between the two disappears. In the course of the chapter, Horatia Muir Watt distinguishes value pluralism, an equivalent to political liberalism where a rights-based approach (privacy, freedom of expression) provides some space for diversity within a unitary form and source of legality, from a proper legal pluralism that accepts multiple legal norms which coexist on an equal footing. In conflicts terms, value pluralism coincides with multilateralism (the forum controls the reception of foreign law) while legal pluralism requires changing the location of legal authority (something the alternative method does willingly).

Highlights

The book's general orientation (its driving force perhaps) owes a lot to recent or contemporary developments in human sciences outside of the law, notably in sociology, anthropology and history of sciences. The influence of the late Bruno Latour, *inclassable* philosopher, anthropologist, sociologist and science epistemologist runs particularly strong in the book, as well as that of philosophers Emmanuel Levinas and Jacques Derrida, or anthropologist Levi-Strauss. More generally the references, within or without the law, are innumerable and very diverse. In this sense, the book stands out as a rare example of a truly transdisciplinary attempt at relocating (private international) law within the human sciences (and their contemporary debates and concerns), as well as an equally important effort to force the discipline to face up to the pressing challenges of our times (climate change, collapse in biodiversity, extreme inequalities, crises of late capitalism. As a result, the depth and expressiveness of the book (but also, it should be acknowledged, its density) are somewhat unusual for an academic work in the otherwise often technical field of private international law. It is also a testament to its author's commitment to openness to alterity (here in scientific fields and concepts). Also very striking is the avowed freedom of discourse that the author grants herself, not only in the interdisciplinary approach (which the author describes as *bricolage*, to make

apparent the choices and selection that she has had to make) but also, more generally, in the construction of the discourse itself which sometimes verges on free association, giving the book a palimpsestic quality, not unsuited for its stated purpose: the forecasting of an ecological jurisprudence.

The regular readers of Conflict of Laws.net may not have been Horatia Muir Watt's target audience, or at least her primary target audience, when writing this book. In itself, this willingness to engage with readers beyond the admittedly small circle of private international lawyers should be applauded, because few among them/us have managed, or even attempted, to offer (useable) insights to the legal community at large. This, however, should absolutely not be taken to mean that private international lawyers will gain nothing from *The Law's Ultimate Frontier*; quite the opposite, in fact. This book challenges one's understanding of private international law, and is an invitation to rethink the purpose of our involvement in its practice or scholarship. Many a time, the critique of a foundational myth – internationality, extraterritoriality, party autonomy, even tolerance… – or a novel way of (re)framing well-known doctrinal debates or cases, hallowed or recent – *Caraslanis*, *Chevron*, *Vedanta*… – produces a jolt, a "I did find it strange when first reading about it, but I could not quite put my finger on it" moment of illumination. This is no small feat.

Transforming legal borders: international judicial cooperation and technology in private international law – Part II

*Written by Yasmín Aguada*** [1]– *Laura Martina Jeifetz* ***[2]. Part I is available here

Abstract: Part II aims to delve deeper into the aspects addressed in the

previously published Part I. International Judicial Cooperation (IJC) and advanced technologies redefine Private International Law (PIL) in a globalized world. The convergences between legal collaboration among countries and technological innovations have revolutionized how cross-border legal issues are approached and resolved. These tools streamline international legal processes, overcoming old obstacles and generating new challenges. This paper explores how this intersection reshapes the global legal landscape, analyzing its advantages, challenges, and prospects.

Keywords: private international law, international judicial cooperation, new technologies, videoconferencing, direct judicial communications, Smart contracts, and Blockchain.

II.III. Videoconferences and virtual hearings

Videoconferencing and video-links are familiar today after the widespread use they acquired during the COVID-19 pandemic. These resources perform various functions in judicial processes, ranging from facilitating communications with the parties involved, experts and witnesses, to holding hearings and training activities. These are just examples that illustrate the wide range of uses they offer.[3]

Despite its long presence both nationally and internationally, videoconferencing has seen a notable increase in its application, particularly in the context of criminal cases, as can be seen in inmates' statements.[4] However, its growing expansion into areas such as international abduction cases and civil and commercial matters is also evident.[5]

Regarding the concept, Tirado Estrada states that videoconferencing constitutes *"an interactive communication system that simultaneously transmits and "in real time" the image, sound and data at a distance (in point-to-point connection), allowing relationships and interaction, visually, auditorily and verbally, to a group of people located in two or more different places as if the meeting and dialogue were held in the same place."* [6] It allows communication between people in different places and simultaneously through equipment reproducing images and sound.

Among the advantages that should be highlighted is its notable contribution to the agility in the processing of legal processes, which affects the quality and effectiveness of judicial procedures. These technologies enable a direct link without intermediaries between those involved in the judicial process, the administration of justice, and the relevant authorities.

Likewise, it is pertinent to point out the significant reduction in costs associated with transportation to the judicial headquarters while facilitating the recording and, therefore, the exhaustive record of the events in the hearings. Furthermore, it must be emphasized that videoconferencing ensures security conditions by applying robust encryption protocols.

Ultimately, videoconferences guarantee the observance of essential principles within the framework of due process, such as the publicity of the acts, the practical possibility of contradiction of the parties involved, and the immediacy in the perception of evidence.[7]

II.III.I. Regulatory instruments regarding the use of videoconferencing

In April 2020, The Hague Conference on Private International Law (HCCH) published a document within the March 18, 1970 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters[8]. The publication of this work, called *Guide to Good Practice on the Use of Video-Link under the Evidence Convention*, was drafted by the Permanent Bureau, with a Group of Experts contributing their insights and comments. Although the project started in 2015, its publication occurred during the pandemic. This soft law instrument provides a series of guidelines regarding platforms intended to enable the simultaneous interaction of two or more people through bidirectional audio and video transmission[9].

It is worth mentioning the Ibero-American Convention on the Use of Videoconferencing in International Cooperation between Justice Systems (Ibero-American Convention) and its Additional Protocol[10], signed in 2010. Both instances were approved by law 27. 162, dated August 3, 2015.

This Ibero-American Convention conceives videoconferencing as a resource that enhances and expedites cooperation between the competent authorities of the

signatory States. The treaty's scope covers the civil, commercial, and criminal matters. However, it is possible to extend its application to other fields in which the parties involved expressly agree (article 1).

The Convention recognizes the relevance of new technologies as fundamental tools for achieving swift, efficient, and effective justice. The primary objective is to promote the use of videoconferencing among the competent authorities of the States Parties, considering this medium as a concrete mechanism to strengthen and expedite cooperation in various areas of law, including civil, commercial, and criminal matters, as well as any other agreed upon by the parties. The Convention defines videoconferencing as an *"interactive communication system that allows the simultaneous and real-time transmission of image, sound, and data over a distance, with the aim of taking statements from one or more persons located in a place different from that of the competent authority, within the framework of a judicial process, and under the terms of the applicable law of the involved States."* (art. 2). This definition underscores the importance of immediacy and direct interaction, critical aspects ensuring the validity and effectiveness of the statements obtained through this medium.

Among the most relevant provisions of the Convention is the regulation of hearings via videoconference. The Convention establishes that if the competent authority of a State Party needs to examine a person within the framework of a judicial process, whether as a party, witness, or expert, or during preliminary investigative proceedings, and this person is in another State, their statement can be requested via videoconference, provided that this tool is deemed appropriate for the case. Additionally, the Convention details the requirements that must be met for the request to use videoconferencing and the rules governing its conduct, thus ensuring a standardized and efficient procedure.

The Additional Protocol to the Convention adds significant value by regulating practical aspects that enhance the efficiency of the judicial process. In particular, it addresses issues related to videoconferencing costs, establishing clear criteria on who should bear the expenses. It also regulates the linguistic regime, determining the language or languages used during the videoconferences, which is crucial to ensuring all parties' understanding and effective participation. Moreover, the Protocol sets precise rules for transmitting videoconference requests, simplifying and streamlining the procedure, which contributes to incredible speed and effectiveness in international judicial cooperation.

The ASADIP Principles on Transnational Access to Justice (TRANSJUS), approved on November 12, 2016, are again relevant. In article 4.6, using video conferences or any other suitable means to hold joint hearings is included[11]. Next, as already mentioned, it proposes that legal operators favour the use of new technologies, such as telephone and video conferencing, among other available means, as long as the security of communications is guaranteed.[12]

Within the scope of cooperation in civil matters, it is relevant to point out the Convention in force in Argentina since 7-VII-1987, which addresses the Obtaining of Evidence Abroad in Civil or Commercial Matters[13]. Regarding the integration of video conferences in this context, we underscore that in July 2024, a Special Commission was held to review the implementation of various Conventions, including the taking of evidence. During these deliberations, it was stressed that video links are in line with the provisions of the 1970 Convention.

The role of videoconferencing as an increasingly relevant means for taking evidence under Chapter I of the Convention was discussed. However, a marked division of opinion was identified among the Contracting States regarding the possibility of using videoconferencing to directly take evidence, highlighting a significant challenge for the Convention. Another issue addressed was the update of the Guide to Good Practices on the Use of Videoconferencing, published in 2020, which has been largely incorporated into the Evidence Handbook. This reflects the growing importance of videoconferencing in international proceedings and the recognition that new technologies must be integrated into conventional practices.

Furthermore, regarding compatibility with the modern technological environment, the Commission noted that, although the 1970 Convention continues to function well in a paper-based environment, it faces challenges adapting to technological developments, such as videoconferencing. This issue raises doubts about the Convention's ability to remain relevant in the future without greater acceptance of the "functional equivalence" approach by the Contracting States. Finally, a proposal was discussed to develop an international system to facilitate the electronic transmission of requests or create a decentralized system of platforms for such transmission. This proposal aims to improve the efficiency and modernize obtaining international evidence[14]. These

discussions underscore the importance of updating and adapting the 1970 Convention to new technological realities to ensure its effectiveness and relevance.

Moreover, it was established that Article 17[15] of the said Convention does not constitute an obstacle for a judicial officer of the court requesting a party located in a State Party to conduct virtual interrogations of a person in another Contracting State. In this sense, the use of technologies such as videoconferencing is adequately adapted to the principles and provisions of the Convention mentioned above, facilitating international cooperation in judicial matters.

Article 17 of the 1970 Hague Convention regulates the possibility of a duly appointed commissioner obtaining evidence in the territory of a contracting State about a judicial proceeding initiated in another contracting State. This article establishes a mechanism for obtaining evidence that does not involve coercion and is subject to two essential requirements: authorization by a competent authority and compliance with established conditions. Additionally, the article allows for a contracting State to declare that obtaining evidence under this article can be carried out without prior authorization.

This article is particularly relevant for international judicial cooperation in the region, as it facilitates evidence collection abroad without resorting to coercive mechanisms. However, countries like Argentina have objected to the application of Article 17. The reasons are related to the protection of national sovereignty, as the appointment of foreign commissioners to act in a State's territory to obtain evidence may be seen as an intrusion into that State's sovereignty. Some countries in the region consider that allowing commissioners appointed by foreign courts to operate could compromise their jurisdictional autonomy.

On the other hand, concerning legal security and process control, the States that have objected to Article 17 value maintaining rigorous control over the procedures for obtaining evidence within their territory. Authorizing the actions of foreign commissioners without strict supervision could raise concerns about legal security and fairness in the process. Finally, differences between the legal systems of the countries in the region and those from which the appointed commissioners come could create difficulties in the uniform application of the article.

In summary, while Article 17 of the 1970 Hague Convention offers a valuable mechanism for obtaining evidence abroad, its implementation has generated tensions in the region due to concerns about sovereignty, process control, and differences in legal systems. These objections reflect the need to balance international cooperation and respect for each state's jurisdictional autonomy.

The regulation in Argentina

In Argentina, the Order of the Supreme Court of Justice of the Nation (CSJN) 20/2013 is relevant. It establishes a set of Practical Guidelines for implementing video conferences in cases in process before the courts, oral tribunals, and appeals chambers, both national and federal, belonging to the Judicial Branch of the Nation.

This Order contemplates the possibility of resorting to videoconferencing when the accused, witnesses, or experts are outside the jurisdiction of the competent court. Consequently, it is essential to have adequate technical resources and a secure connection, which will be submitted to the evaluation of the General Directorate of Technology of the General Administration of the Judiciary. In this context, the regulations explicitly state that the application of these Guidelines must ensure full observance of the adversarial principles and effective defense.[16]

On the other hand, it should be noted that in February 2014, the Federal Board of Cortes and Superior Courts of Justice of the Argentine Provinces and the Autonomous City of Buenos Aires (JUFEJUS) gave its approval to the Protocol for the Use of the Videoconferencing System. This initiative aims to promote the adoption of hearings through video media as a resource aimed at reinforcing reciprocal collaboration, optimizing the effectiveness of jurisdictional processes, and simplifying the conduct of training and coordination meetings, among other relevant purposes.[17]

II.IV. Direct judicial communications.

Another of the IJC's essential tools is direct judicial communications (DJC), intended to facilitate communication between two judges involved in a specific case[18]. In the autonomous source, DJC finds legal reception in Art. 2612 of the Civil and Commercial Code of the Nation.[19]

Direct judicial communications *"are communications between two judicial authorities from different countries that are developed without the intervention of an administrative authority (intermediary authorities), as is the usual case of international warrants that are processed through Chanceries and/or Central Authorities designated by the country itself (generally administrative)."* [20]

DJC can be implemented in all areas of the IJC. The HCCH has indicated that direct judicial communications can be used to obtain information about specific cases or to request information. Initially, DJC has shown notable success in two main fields: international return proceedings for children and adolescents and cross-border insolvency processes. Over time, it has been acknowledged that various international instruments, both regional and multilateral—such as the 1996 Child Protection Convention—benefit from the use of direct judicial communications. As of March 2023, the International Hague Network of Judges (IHNJ)'s scope has expanded to include the 2000 Protection of Adults Convention[21].

Regarding international child abduction, since 2001, the Special Commission of the 1980 Hague Convention has explored the possibility and feasibility, as well as the limits, safeguards, and guarantees of direct judicial communications, initially linked to the development of the IHNJ to obtain the quick and safe return of the child. Shortly after the IHNJ of Specialists in Family Matters was created in 2002, a Preliminary Report was presented, and the DJC was identified as an ideal mechanism to facilitate the IJC. In 2013, the Permanent Bureau, in collaboration with a Special Commission, published the Emerging Guidance Regarding the Development of the International Hague Network of Judges[22].

In this context, direct judicial communications have evolved to incorporate updated safeguards and protocols. According to the "Emerging Guidance regarding the development of the International Hague Network of Judges," all communications must respect the legal frameworks of the countries involved, and judges should maintain their independence when reaching decisions. The guidance also outlines procedural safeguards, such as notifying the parties before the communication, keeping a record of the communications, and ensuring that conclusions are documented in writing. These practices help ensure transparency and preserve the rights of the parties involved.

In this framework, the HCCH has identified at least two types of communications: those of a general nature not related to a specific case and consisting, for example, of sharing general information from the IHNJ or coming from the Permanent Bureau of the Hague Conference, with his colleagues, or in keeping the Hague Conference informed of national developments affecting the work of the Conference; and those that consist of direct judicial communications related to specific cases, the objective of these communications being very varied, but on many occasions aimed at mitigating the lack of information that the competent judge may have about the situation and legal implications in the State of habitual residence of the child. These types of direct judicial communications are complemented by the safeguards incorporated in the 2013 Guidance, ensuring that the parties' rights are respected and transparency is maintained throughout the process.

Additionally, technological advancements are recognized as essential for improving direct judicial communications. The document highlights the importance of using the most appropriate technological facilities, such as telephone or videoconference, to ensure communications are carried out efficiently and securely. These technological tools are crucial in safeguarding the confidentiality of sensitive information, particularly in cases where confidential data is involved.

Direct judicial communications, which represent an essential advance in the field of the IJC, are widely influenced by the implementation of new information and communication technologies. Members of the International Hague Network of Judges emphasized the importance of the Hague Conference implementing, as soon as possible, secure internet-based communication, such as secure email and video conferencing systems, to facilitate networking and reduce costs derived from telephone communications.[23] In 2018, on the 20th Anniversary of the IHNJ, the participants reiterated the need to develop a Secure Platform for the IHNJ[24]. Currently, the secure platform for the IHJN is available.

Since its initial implementation, a secure communications system has been established to facilitate efficient and protected exchanges between judges from different jurisdictions within the IHNJ. This system strengthens judicial cooperation in cross-border child protection, allowing judges to share relevant information directly under security standards that ensure confidentiality and

procedural efficiency. During the 25th anniversary celebration of the IHNJ on October 14, 2023, representatives from over 30 jurisdictions gathered in The Hague, highlighting the value of this network and discussing its expansion, which -as was mentioned- now includes the 2000 Protection of Adults Convention in addition to the 1980 Child Abduction and 1996 Child Protection Conventions?[25].

III. FUTURE PERSPECTIVES. SMART CONTRACTS AND BLOCKCHAIN?

In analyzing possible future evolution in the interaction between international judicial cooperation and new technologies, it is essential to consider how blockchain technology and its derivatives, such as smart contracts, could significantly impact this area.

Blockchain technology, known for its ability to create immutable and transparent records, has the potential to revolutionize international judicial cooperation by providing a secure and trusted platform for the exchange and management of legal information between jurisdictions. Records on the blockchain could be used to ensure the authenticity and integrity of court documents, which in turn would strengthen trust between the parties involved.[26]

Smart contracts are autonomous and self-executing protocols that could simplify and speed up the execution of agreements between international judicial systems. These contracts may be designed to execute automatically when certain predefined conditions are met, which could be helpful in legal cooperation involving the transfer of information or evidence between jurisdictions.

However, successfully implementing blockchain technologies in international judicial cooperation would require overcoming significant challenges. Critical considerations include the standardization of protocols and data formats, interoperability between judicial systems, and the question of the legal sovereignty of records on the blockchain.

Blockchain technology and smart contracts could offer innovative solutions for international judicial cooperation by improving reliability, transparency, and process automation. Although the challenges are significant, their proper adoption could transform how jurisdictions interact and collaborate globally on legal matters.

Concerning automated contracting, it is noteworthy that during its fifty-seventh session in 2024, the United Nations Commission on International Trade Law (UNCITRAL) finalized and adopted the Model Law on Automated Contracting (MLAC)[27] and gave in principle approval to a draft guide for its enactment. In November, Working Group IV (Electronic Commerce) is expected to review this guide to enacting the UNCITRAL Model Law on Automated Contracting to finalize and publish it.

IV. BENEFITS AND CHALLENGES.

The convergence between international judicial cooperation and new technologies presents several substantial benefits that can profoundly transform how jurisdictions worldwide collaborate on legal matters. Certain advantages can be identified by explicitly analyzing electronic requests, direct judicial communications, videoconferences, and future projections related to blockchain technology and smart contracts. Between them:

Efficiency: New technologies allow for streamlining judicial cooperation processes, eliminating unnecessary delays. Electronic requests and direct judicial communications reduce document processing and sending times, significantly reducing shipping times by traditional mail.

Cost savings: Technologies reduce the need for physical resources, such as paper, transportation, and additional personnel for administrative procedures. Video conferencing also reduces travel costs for witnesses, experts, and attorneys as they can participate from their respective locations.

Transparency and authenticity: Document digitization and electronic system implementation ensure a transparent and reliable record of communications. Additionally, electronic signature and authentication technologies guarantee the integrity and legitimacy of shared documents.

Greater access to justice: Technologies can democratize access to justice, allowing involved parties, especially those in remote locations or with limited resources, to participate in judicial proceedings and collaborate more effectively. These promises to avoid the long delays that traditional processing channels suffer, ultimately undermining the basic principles of access to justice and making adequate judicial protection difficult.

New technologies are transforming international judicial cooperation by eliminating time, distance, and resource barriers while improving the efficiency and effectiveness of transnational judicial processes. These technologies could raise the quality and speed of justice globally.

V. FINAL CONSIDERATIONS

Throughout this journey, we have explored how the intersection between international judicial cooperation and new technologies is transforming the legal landscape internationally. We have observed the growing impact of these new technologies in the IJC field and in the collaborative efforts between States to seek legal and administrative solutions to improve access to justice in cross-border proceedings. In this context, we have analyzed several technological tools, such as electronic requests and videoconference. At the same time, we have observed how facilitating instruments such as Apostilles and direct judicial communications have also incorporated, or are incorporating, technological components to improve their results.

Contemplating the possible future directions of this complex network of connections between the IJC and new technologies immerses us in searching for answers and alternatives and deep reflection on the numerous challenges that arise. Indeed, the rapid integration of new technologies is fundamentally changing various aspects of the legal field, which requires careful contemplation.

In conclusion, it is appropriate to emphasize the benefits that the implementation of new technologies can bring to the field of the IJC: reduction of costs and delays that lead to greater efficiency and agility while guaranteeing the fundamental rights of due process, defense, and security, always guided by the basic principle of ensuring access to justice.

In essence, this contribution highlights the crucial role that the symbiotic relationship between international judicial cooperation and evolving technologies will play in shaping the future of global legal practices.

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[3] HARRINGTON, CAROLINA. "Justicia, aislamiento y videoconferencia la experiencia del derecho internacional privado en desandar barreras: guía de buenas prácticas de la conferencia de la haya 2019", in Guillermo Barrera Buteler (Dir.), *El derecho argentino frente a la pandemia y post-pandemia covid-19*. Córdoba, Universidad Nacional de Córdoba, 2020.

[4]In the field of criminal cooperation, various legal instruments recognize the viability of the technological use of videoconferencing. These include the Statute of the International Criminal Court, ratified at the Rome Conference on July 17, 1998; the European Convention on Legal Assistance in Criminal Matters, approved on May 29, 2000 by the Council of Ministers of Justice and Foreign Affairs of the European Union; the Second Additional Protocol of 2001 (Strasbourg, November 8, 2001) to the European Convention on Mutual Assistance in Criminal Matters, signed in Strasbourg on April 20, 1959 by the member states of the Council of Europe. Additionally, noteworthy are the influential 2000 Palermo Convention on Transnational Organized Crime and the 2003 Mérida United Nations Convention against Corruption, among other notable instruments. These treaties highlight the usefulness and effectiveness of videoconferencing as a technological resource in criminal cooperation at the international level.

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[7] GONZALEZ DE LA VEGA, CRISTINA, SEONE DE CHIODI, MARÍA Y TAGLE DE FERREYRA, GRACIELA. "Bases para el acceso a la justicia en la restitución internacional de NNA". Paper presented at the Argentine Congress of International Law, Córdoba, September 2019.

[8] Such Convention has been in force in Argentina since 07/07/1987. For more details: https://www.hcch.net/en/instruments/conventions/status-table/?cid=82. Consultation date: 10/11/2024.

[9] Video-link refers to the technology which allows two or more locations to interact simultaneously by two-way video and audio transmission, facilitating communication. – HCCH Guide to Good Practice on the Use of Video-Link under the Evidence Convention.

[10] For the Convention, videoconference is understood as an interactive communication system that reproduces, simultaneously and in real time, images, sound and data of people who are located in geographical locations other than that of the competent authority. This system allows the taking of statements in accordance with the applicable law of the intervening States. Available in: https://www.comjib.org/wp-content/uploads/imgDrupal/Convenio-Videoconferencia-ES-publicaciones_1.pdf

Consultation date: 06/13/2024.

In the following link you can check the status of signatures and ratifications of the treaties and agreements of the conference of ministers of justice of the Ibero-American countries. Available in: https://drive.google.com/drive/folders/1EzscrkCSThRo7gtjZJlt9LZphoMBtA0q. Consultation date: 04/09/2024.

[11] *"They are characterized by being framed in two (or more) processes for closely linked cases, heard before courts in different countries. The hearing is developed to "serve" more than one main process. Frequently, in family cases involving children, one can observe the existence of lawsuits initiated in different countries*

with various objects (restitution, parental responsibility, custody, communication regime, maintenance), which can benefit from the simultaneity implied in the joint celebration of the audience". HARRINGTON, CAROLINA. "Audiencias Multijurisdiccionales. Configuraciones y perspectivas para facilitar el acceso a justicia en litigios internacionales". Paper presented at the Argentine Congress of International Law, Córdoba, September 2019.

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[13] This Agreement, approved by Law No. 23,480, links us with 64 countries. HCCH. Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. Available in: https://www.hcch.net/en/instruments/conventions/status-table/?cid=82 . Consultation date: 10/11/2024.

[14] Consult Celis, Mayela, July 3, 2024 "This week at The Hague: A few thoughts on the Special Commission on the HCCH Service, Evidence and Access to Justice Conventions" Available in: https://conflictoflaws.net/2024/this-week-at-the-hague-a-few-thoughts-on-the-special-commission-on-the-hcch-service-evidence-and-access-to-justice-conventions/. Consultation date: /10/11/2024.

[15] *Article 17. In civil or commercial matters any person duly designated as a commissioner may, in the territory of a Contracting State, proceed, without compulsion, to obtain evidence relating to a proceeding instituted before a Court of another Contracting State. : a) if a competent authority designated by the State where the evidence is to be obtained has given its authorization, in general, or for each particular case; and b) if said person meets the conditions that the competent authority has established in the authorization. Any Contracting State may declare that the collection of evidence in the manner provided for in this article may be carried out without prior authorization.* Available in: https://www.hcch.net/es/instruments/conventions/full-text/?cid=82 . Consultation date: 05/20/2024.

[16]SUPREME COURT OF JUSTICE OF THE NATION. Agreed on 20/2013. Available at: https://www.csjn.gov.ar/documentos/descargar/?ID=77906 . Consultation date: 10/11/2024.

[17] JU.FE.JU. "Protocol for the use of the Videoconferencing System", 2014. Art. 3 defines: *"Videoconferencing shall be understood as an interactive communication system that simultaneously and in real time transmits image, sound and data at a distance between one or more sites."* Available in: https://www.jufejus.org.ar/protocolo-de-videoconferencias/. Consultation date: 10/11/2024.

[18] For more information see: HARRINGTON, CAROLINA. "Comunicaciones judiciales directas. Un arma versátil para enfrentar desafíos procesales en el derecho internacional privado de familia" in *LLC2018* (October), 3, 2017. Online Citation: AR/DOC/3303/2017.

[19]Art. 2612.- International procedural assistance. Without prejudice to the obligations assumed by international conventions, communications addressed to foreign authorities must be made by means of a letter. When the situation requires it, Argentine judges are empowered to establish direct communications with foreign judges who accept the practice, as long as the guarantees of due process are respected (...) ."

[20] GOICOECHEA, IGNACIO. Nuevos desarrollos en la cooperación jurídica internacional en materia civil y comercial. *Revista de la Secretaria del Tribunal Permanente de Revisión (STPR)*, year 4, No 7 (pp. 127-151), 2016, p. 136.

[21] HCCH. Details. 25th Anniversary of the International Hague Network of Judges. Available in: https://www.hcch.net/en/news-archive/details/?varevent=944. Consultation date: 22/10/2024.

[22] Direct Judicial Communications. Emerging Guidance regarding the development of the International Hague Network of Judges and General Principles for Judicial Communications, including commonly accepted safeguards for Direct Judicial Communications in specific cases, within the context of the International Hague Network of Judges. Available in:

https://assets.hcch.net/docs/62d073ca-eda0-494e-af66-2ddd368b7379.pdf. Consultation date: 22/10/2024.

[23] Conclusions 7 and 41, Inter-American Meeting of Judges and Central Authorities of the Hague International Network on International Child Abduction, Mexico, February 23-25, 2011. Available in: https://www.hcch.net/es/%20news-archive/details/?varevent=217. Consultation date: 10/11/2024.

[24] Conference Of Hague Convention Network Judges Celebrating the 20th. Anniversary of The International Hague Network Of Judges. Conclusions And Recommendations. Available in: https://assets.hcch.net/docs/69f03498-8a72-4ffe-aa44-30fc70493859.pdf. Consultation date: 24/10/2024.

[25] https://www.hcch.net/en/news-archive/details/?varevent=944 Consultation date: 27/10/2024.

[26]AGUADA, YASMÍN and JEIFETZ, LAURA MARTINA. Nuevas oportunidades de la cooperación judicial internacional: exhorto electrónico y blockchain. Anuario *XIX* CIJS, 2019.

[27] The UNCITRAL Model Law on Automated Contracting introduces essential principles to legitimize contracts formed and executed by automated systems, even in the absence of human intervention. First, its focus on technological neutrality and legal recognition ensures that contracts are valid regardless of whether a person has directly reviewed them. This aspect is particularly valuable for smart contracts and blockchain applications, as it aligns with the requirements of coded and dynamic agreements, which may use information that updates periodically. Additionally, action attribution is clarified to hold users accountable for automated system actions, even in cases of unforeseen outcomes. These provisions are poised to enhance cross-border legal coherence and foster trust in automation within global legal frameworks. The document is available here: https://uncitral.un.org/sites/uncitral.un.org/files/mlac_en.pdf. Consultation date: 25/10/2024.

NUON-Claim v. Vattenfall: Pivotal or dud for collective actions in the Netherlands?

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On 9 October, the District Court of Amsterdam issued its final judgment in a collective action against energy supplier Vattenfall. This judgment was eagerly awaited as it is the very first judgment in a mass damage claim under the Dutch WAMCA procedure. The new framework for collective redress, which became applicable on 1 January 2020 (see also our earlier blogpost), has received a lot of attention in international scholarship and by European legislators and policy makers due to its many innovations and making it easier for consumers and small businesses to litigate against large companies. The most notable change in the Dutch act compared to the old collective action regime is the possibility to request an award for damages, making such proceedings attractive for commercial litigation funders. A recent report commissioned by the Dutch Ministry of Justice and Security (published in an English book here) found that most collective actions seeking damages brought under the WAMCA have an international dimension, and that all of these claims for damages are brought with the help of third party litigation funding (TPLF).

Since this judgment is the first of its kind under the Dutch WAMCA, with a claim value of 400 million euros, it has gained a lot of (media) attention. This blogpost provides an update on this most recent judgment and discusses its impact on the current mass claims landscape and TPLF in the Netherlands.

The Case

The claim of *Stichting NUON Claim*, the claim foundation ('the foundation') established to represent a group of SMEs who are or have been clients of energy company Vattenfall, relates to alleged excessive energy costs imposed on specific customers. The foundation alleged that energy supplier NUON, which has since been acquired by Vattenfall, illegitimately charged a compensation for electrical capacity to its business customers and that no actual service or product was provided in exchange for this so-called kW charge. Furthermore, many other similar customers did not have to pay the kW charge. The foundation alleged that this illegitimate charge resulted in bills that were on average 80% higher than those of competing energy suppliers, in some cases resulting in tens of thousands of euros in excessive annual fees.

In short, the main question in this case is whether Vattenfall (formerly NUON) was allowed to charge business customers a fee based on contracted capacity as an electricity supplier. Vattenfall had charged these costs to business customers with a 'small bulk consumer connection' (more than 3 × 80 Ampère) on the electricity grid since the liberalisation of the Dutch electricity market in 2002. These included medium-sized enterprises, small enterprises and non-profit institutions. According to the foundation, Vattenfall was not allowed to charge these costs because there was no service or product in return for the kilowatt (kW) fee charged. The foundation therefore initiated collective proceedings against Vattenfall. The foundation based its claim on Article 6:194 Dutch Civil Code (DCC), which contains a prohibition against acquisition fraud within Dutch private law.

The WAMCA and litigation finance

A first judgment in a mass damage case has been eagerly awaited as it could provide for a pivotal moment in which claimants would be awarded a multimillion euro claim and the commercial funder would reap the benefits of its investment. The WAMCA has sparked continuous debate due to the regime's perceived claimant-friendly design, its attractiveness for international commercial litigation funders and its alleged risk of fostering an 'American-style' claim culture. The opt-out system, few restrictions on third-party funding, and the supposed risk of litigation abuse were the target of criticism by, most notably, the US Chamber of Commerce (see report here). This criticism was met with calls for a more nuanced approach (see earlier blogpost here) and the fears of fostering a claim culture have been dampened by the modest numbers of cases that have been brought

under the WAMCA so far.

Among other discussions, the WAMCA has especially gotten attention due to the role played by commercial third party funders. (See our discussion on third party litigation funding and the WAMCA in this earlier blogpost.) In the case against Vattenfall too, there was some debate on the nature of the financing agreement between the claim foundation and international funder Bench Walk Guernsey PCC LTD. In an interim decision rendered in October 2023, the court reviewed such an agreement, which outlined the conditions under which the funder would receive a portion of any proceeds from the case. This included paying for legal costs and taking a share of any damages awarded to the claim foundation. It also detailed situations where additional funding might have been required and the rights of the claim foundation to manage the litigation and settlement discussions?.

The agreement also outlined the treatment of the litigation funder's fees for different groups of claimants. The claim foundation stated that it would withhold 25% of the compensation from the class members, but in cases where the litigation funder's agreed percentage (8-12%) was lower, it would not retain the difference. This meant, for example, that in case only 12% was due to the litigation funder, the additional 13% would not have been kept by the claim foundation. This 25% withholding would have only been relevant if the claim foundation could not claim compensation for all class members, limiting its representation to a smaller group. The court concluded that the explanation provided by the claim foundation on the reasonableness of the fees was sufficient. It emphasized that the uncertainty about the final amount of fees was acceptable because it depended on factors like the duration of the proceedings.

The Judgment

In its judgment the District Court of Amsterdam dismisses all claims of Stichting NUON-claim against Vattenfall. It rejects the foundation's claim that Vattenfall concealed essential information about the kW compensation, since the compensation was easy to calculate based on Vattenfall's offer. Furthermore, the explanation, which was included in the offer and the energy bills, made the price structure clear. According to the court, the customers were therefore not misled. Vattenfall also made it clear that the grid operator charges an amount for the transport of electricity and that this is not included in the price that Vattenfall charges these customers.

The foundation also stated that Vattenfall abused the inaction of some of its customers after a new annual offer. The court ruled that the kW customers in the liberalised market had the choice of which energy supplier they purchased energy from. They were therefore free to negotiate the contract terms and to switch to another supplier. In this situation, a kW customer cannot complain that they themselves did not do the comparative research, which other customers did do. Vattenfall has not exceeded any other standard of care and there is also no question of undue payment of the kW compensation.

The Amsterdam Court held that businesses ought to have exercised greater caution. It is reasonable to expect that 'average, observant businesses' will familiarize themselves with the energy prices on offer and will take the initiative to understand the information provided by suppliers. Additionally, the fact that a free market has been in place since 2002 implies that Vattenfall had no obligation whatsoever to inform its business customers about the existence of other customers with better contract terms and that contracts without the kW charge would probably be cheaper. The customers themselves were responsible for their choice of electricity supplier. The court also finds that it is incorrect to state that no product or service is provided in return for the kW fee. Electricity is provided, and including general cost components, such as personnel costs, in a tariff structure is permissible.

The Impact

For those expecting this judgment to be the very first case in which a multimillion-euro damage claim would be awarded, and thus opening the door to many more mass damage claims, the result may be somewhat of an anticlimax. Since the claimants have not been successful and no damages have been awarded, the case does not provide much to go on for funders, mass claim lawyers and others following these developments with interest. At the same time, the claim foundation lost the case on substantive grounds, and nothing in the decision suggests an impairment in the WAMCA's ability to provide access to justice for victims of mass harms.

From our perspective, there are two points that could be worthy of praise from a procedural point of view. The first is that, even after deeming 92% of the claims unfounded under Article 6:194 DCC, the court still refused Vattenfall's claim that the remaining 8% would be too small of group to justify a ruling in a collective

action, prioritizing the uniformity of the defendant's conduct instead. This favours procedural expediency and guarantees that a minority of class members wouldn't suffer from an eventual dismissing of the claim against the rest.

The second point is that the court took the perspective of the average user to rule on the sufficiency of the information provided by Vattenfall. This favours the groupability of class members in an abstract fashion, in contrast to the tendency other courts have shown to excessively scrutinize the similarity of the class members' situations to consider them a group with acceptably similar claims. In a ruling on EU consumer law earlier this year, the CJEU favoured this approach for collective actions in such area (see Case C-450/22 *Caixabank*).

That said, this judgment shows that the supposed claimant-friendly design of the WAMCA does not guarantee success and may come as a disappointment to claimants and funders alike. Notably as well is the fact that this case took about 2,5 years from summons to judgement, which is a relatively short time for complex class action cases, as illustrated by the timelines of other cases that were filed well before this case and that have still some ways to go before a judgment can be expected.

The question remains how funders will look at this result and if it has any impact on their willingness to keep funding Dutch class actions. Given the outcome of this case, with a negative result for the claimants and a dismissal of all claims on substantive grounds, it seems both funders and 'WAMCA-watchers' will have to wait a bit longer for that first pivotal judgment.

Children's rights, private law and criminal law perspectives of parental child abduction

Written by Fanni Murányi, who will defend her PhD on Children's rights, private law and criminological perspectives of parental child abduction at the Eötvös

Loránd University (expected in 2024).

In this short summary of her research, Fanni highlights her conclusions on the role of the child's views in abduction cases and the link between international child abduction and criminal law. She considered the legislative frameworks of the Hague Child Abduction Convention of 1980, the Brussels IIb Regulation (2019/1111) and the UN Convention on the Rights of the Child (UNCRC). She also investigated as well as the role of (domestic) criminal law.

The child's views

When a child is abducted by one of their parents, the child finds himself or herself in a very stressful situation. Even though the relevance of the child's views in these cases may be limited, listening to abducted children becomes increasingly important. As the Brussels IIb Regulation attaches even greater importance to the hearing of the child than the previous Regulation (2201/2003, Brussels IIa) did, more attention is needed. Children have the right to be given an opportunity to be heard (Art. 12 UNCRC, echoed by Arts 21 and 26 Brussels IIb). In the hope of presenting a nuanced picture of the European practice on child's involvement, Hungary and the Netherlands were compared. My empirical research is based on interviews with four Dutch and four Hungarian judges. Hungarian case law shows that – similarly to the European practice – the hearing of children by judges is typical in parental child abduction cases. This was also confirmed by the interviews. As there is no age barrier for hearing children in abduction cases, the Hungarian judges have multifaceted tasks. There is a demand for special training and for an assisting person, but the current form of *guardian ad litem* is not being used. In the Netherlands the court appoints a *bijzondere curator* for children three years of age or older. The *bijzondere curator* hears and accompanies the child and explains the court's decision if required. If supported by the *bijzondere curator*, children six years of age or older are heard by one of the judges of the full court as well. The interviews conducted with Dutch judges confirmed that the *bijzondere curator* greatly helps assessing the child's maturity and understanding the child. All judges expressed the difference between the hearing by a *bijzondere curator* and by a judge in the same way: time and expertise.

Although the involvement of children in mediation is improving, the way in which a child's voice can be included is also controversial. Neither the Hague Abduction Convention, nor the Brussels IIb refers to the hearing of the child in mediation,

but the latter clarifies the child's right to be provided with an opportunity to express his or her views in proceedings to which he or she is subject. In the Dutch model, the so-called *pressure cooker model*, integrates mediation into the schedule of the court proceeding. The mediation programme consists of three 3-hour sessions in the course of two days. The sessions are co-mediated by two mediators and on the first day of the mediation, the child is interviewed by a third mediator, a child psychologist. The child must be three years of age or older and both parents must consent to the hearing.

International child abduction and criminal law

If the court orders the return of the child to a country where parental child abduction is severely punished, the abducting parent has two potential routes permitted by law. The first is returning to that country with the child and being imprisoned for abducting. The second route is not returning with the child, avoiding these serious criminal consequences, but leaving the child alone with the left-behind parent. This shows that in countries where parental child abduction is severely punished, the return order might cause a separation between the parent (often the primary caretaker) and the child. Such separation might be a violation of Article 9 of the UNCRC (i.e. the right of the child not to be separated from the parents against their will).

Currently, there is no uniform criminal law definition of child abduction in the European Union. The types of punishment envisaged and the age of children involved in the offences vary widely. Thus, the act of the abducting parent may not be considered a crime in one country, while thousands of kilometers away it can lead to imprisonment for several years. The criminalization of abduction can be considered effective in searching for missing children, but the civil and criminal sanctions are unlikely to deter many potential abductors.

Allegations of domestic violence have often been raised as a defence in child abduction cases: the Hague Child Abduction Convention provides for a court to refuse to order the return a child if the return would pose a grave risk of exposing the child to physical or psychological harm or otherwise place the child in an intolerable situation (Art. 13(1)(b)). If the court rejects this exception and orders the return of the child to a country where parental child abduction is punished, the abducting parent as a *victim* of domestic violence may become a *perpetrator* of a crime. There is a real concern that primary caretakers are required to choose

between returning with the child to an environment where they would face a real risk of violence, and refusing to return so that the child would have to cope with a new situation. In either case there is a real risk of harm to the child.

The Bahraini Supreme Court on Choice of Court Agreements, Bases of Jurisdiction and… Forum non Conveniens!

I. Introduction:

In a previous post on this blog, I reported a decision rendered by the Bahrain High Court in which the court refused to enforce a choice of court agreement in favour of English courts. The refusal was based on the grounds that the case was brought against a Bahraini defendant and that rules of international jurisdiction are mandatory. The Bahraini Supreme Court's decision reported here is a subsequent development on the same case. The ruling is significant for many reasons. In a methodical manner, the Supreme Court identified the foundational justifications for the jurisdictional rules applied in Bahrain. Moreover, it clarified the role and effect of choice of court agreements, particularly their derogative effect. Finally, and somehow surprisingly, the Court supported its position by invoking to "the doctrine of *forum non conveniens*", explicitly mentioned in its decision.

The decision is particularly noteworthy, as it positively highlights the openness of Bahraini judges to adopting new legal doctrines previously unfamiliar within the country's legal framework. This openness likely signals an increasing acceptance of such jurisdictional adjustment mechanisms in legal systems outside the traditional common law or mixed jurisdictions. However, the decision also negatively highlights the challenges of importing foreign doctrines, particularly

when such doctrines are applied in contexts where they are not fully integrated or properly understood. These challenges are further exacerbated when the reliance on the foreign legal doctrine appears to be driven by judicial convenience rather than a genuine commitment to the principles underlying the imported legal doctrine.

II. Facts

The facts of the case have been previously reported (see here) and need not to be repeated. It suffices to recall that the dispute involved a breach of a pharmaceutical distribution sales agreements between an English company (the plaintiff) and a Bahraini company (the defendant). Relying on the choice of court agreement included in the contract, the defendant challenged the jurisdiction of Bahraini court.

The court of first instance rejected the challenge on the ground that the jurisdiction of Bahraini courts was justified by the "Bahraini nationality" of the defendant, and the mandatory nature of the Bahraini rules of international jurisdiction (see the summary of the case here).

On appeal, the Court of Appeal overturned the initial ruling on the grounds that Bahraini courts lacked jurisdiction.

Dissatisfied, the English company appealed to the Supreme Court, arguing that, as the defendant was a Bahraini company registered in Bahrain, jurisdiction could not be derogated by agreement due to the public policy nature of the Bahraini jurisdictional rules.

III. The Ruling

In its decision rendered in the *Appeal No. 5/00071/2024/27 of 19 August 2024*, the Bahraini Supreme Court admitted the appeal and overturned the appealed decision holding as follows:

"International jurisdiction of Bahraini courts, as regulated in the Civil and Commercial Procedure Act [CCCA] (The Legislative Decree No. 12/1971, Articles

14 to 20) and its amendments, is based on two fundamental principles: the principle of convenience (*al-mula'amah*) and the principle of party autonomy (*'iradat al-khusum*).

Concerning the principle of convenience, Article 14 of the CCCA states that Bahraini courts have jurisdiction over cases filed against non-Bahraini [defendants] who have domicile or residence in Bahrain, except for *in rem* actions concerning immovable properties located abroad. This is because it is more appropriate (*li-mula'amati*) for the courts where the immovable is located to hear the case. Similarly, Article 15(2) of the CCCA stipulates that Bahraini courts have jurisdiction over actions involving property located in Bahrain, obligations originated, performed or should have been performed in Bahrain, or bankruptcies opened in Bahrain. This means *a contrario* that, under the principle of convenience (*mabda' al-mula'amah*), the [said] provision excludes [from the jurisdiction of the Bahraini courts] cases where the property is located outside Bahrain, or where the obligations originated in and performed abroad, or was originated and should have been performed abroad, or concerns a bankruptcy opened abroad unless the case involves a cross-border bankruptcy as governed by Law No. 22 of 2018 on Restructuring and Bankruptcy.

Regarding the principle of party autonomy (*mabda' 'iradat al-khusum*), Article 17 of CCCA allows Bahraini courts to adjudicate cases, even when they do not fall within their jurisdiction, if the parties explicitly or implicitly accept their authority. While the law recognizes the parties' freedom (*iradat*) to submit (*qubul*) the jurisdiction of Bahraini courts to hear cases that otherwise do not fall under their jurisdiction, the legislator did not clarify the derogative effect of choice-of-court agreements when the parties agree to exclude the jurisdiction of Bahraini in favor of a foreign court, despite the Bahraini courts having jurisdiction over the case. In addition, the legislator remains silent on the rules for international jurisdiction in cases brought against Bahraini nationals. However, this cannot be interpreted as a refusal by the legislator [of the said rules] nor as an insistence on the jurisdiction of Bahraini court. In fact, the legislature has previously embraced the principle according to which Bahraini courts would decline jurisdiction over cases that otherwise fall under their jurisdiction when parties agree to arbitration, whether in Bahrain or abroad.

Based on the foregoing, nothing in principle prevents the parties from agreeing on the jurisdiction of a [foreign court]. However, if, one of the parties still brings

the case before Bahraini courts despite such an agreement, the issue extends beyond merely honoring the agreement to a broader issue dependent solely on how Bahraini courts assess their own jurisdiction. In this case, the parties' agreement [relied upon] before the Bahraini courts becomes just one factor that the court shall consider when deciding whether or not to decline jurisdiction. The court, in this context, must examine whether there are grounds to decline jurisdiction in favor of a more appropriate foreign [court] in the interest of justice, and the court shall decide accordingly when the said grounds are verified. This principle is known as "*The Doctrine of Forum Non Conveniens*" (*al-mahkamat al-mula'amat*).[1] Therefore, if all the conditions necessary for considering the taking of jurisdiction by a foreign court and the rendering justice is more appropriate (*al-'akthar mula'amah*) are met, Bahraini courts should decline jurisdiction. Otherwise, the general principles shall apply, i.e. that the taking of jurisdiction shall be upheld, and the courts will proceed with hearing the case.

Accordingly, the Bahraini courts' acceptance to decline jurisdiction in favor of a foreign court, based on the parties' agreement and in line with the principle of party autonomy, presupposes that [doing so] would lead to the realization of the principle of convenience (*mabda' al-mula'amah*). [This would be the case when] (1) the dispute shall have an international character; (2) there is a more appropriate forum to deal with the dispute [in the sense that] (a) the validity of the choice of court agreement conferring jurisdiction is recognized under the foreign law of the chosen forum; (b) evidence can be collected easily; (c) a genuine connection exists with the state of the chosen forum; and (d) the judgments rendered by the courts of the chosen forum can be enforced therein with ease.[2]

Furthermore, since the jurisdiction of Bahraini courts is based on the consideration that the adjudicatory jurisdiction (*al-qadha'*) is one of the manifestations of the State's sovereignty over its territory and that the exercise of this jurisdiction extends to the farthest reach of this sovereignty, it is incumbent [upon the courts] to ensure that declining jurisdiction by Bahraini courts does not infringe upon national sovereignty or public policy in Bahrain. The Assessment of whether all the abovementioned conditions are satisfied falls within the discretion of the courts of merits (*mahkamat al-mawdhu'*), subject to the control of the Supreme Court.

Given the above, and based on the facts of the case [.....], the appellant—an

English company—entered into an agreement of distribution and sale in Bahrain for pharmaceutical products [……], supplying the appellee—a Bahraini company—with said products. Seven invoices were issued for the total amount claimed; yet the appellee refused to make payment. [Considering that] Bahrain is the most appropriate forum for the administration of justice in this case – given the facts that appellee's domicile and its place of business, as well as the place of performance of the obligation are located in Bahrain – the parties' agreement to submit disputes arising from the contract in question to the jurisdiction of the English courts and to apply English law does not alter this conclusion. It is [therefore] not permissible to argue here in favor of prioritizing party autonomy to justify declining jurisdiction, as party autonomy alone is not sufficient to establish jurisdiction without the fulfillment of the other conditions required by the principle of *forum non conveniens* (*mabda' mahkamat al-mula'amah*).

Considering that the court of the appealed decision [unjustifiably] declined to hear the case on the grounds that it lacked jurisdiction, it violated the law and erred in its application. Therefore, its decision shall be overturned.

IV. Comments

Although the outcome of the case (i.e. the non-enforcement of a derogative choice-of-court agreement) might be somehow predictable given the practice of Bahraini courts as noted in the previous comment on the same case, the reasoning and justifications provided by the Supreme Court are – in many respects – surprising, or even … puzzling.

A comprehensive review of the court's ruling and its broader theoretical and practical context requires detailed (and lengthy) analyses, which may not be suitable for a blog note format. For this reason, only a brief comment will be provided here without delving too much into details.

1. International Jurisdiction and its Foundation in Bahrain

According to the Supreme Court, the international jurisdiction of Bahraini courts is grounded in two fundamental principles: convenience (*al-mula'amah*) and party

autonomy (*'iradat al-khusum*).

Convenience (*al-mula'amah*), as indicated in the decision, is understood in terms of "proximity", i.e. the connection between the dispute and Bahrain. This connection is essential for proper administration of justice, and efficiency of enforcing judgments. Considerations of "convenience" are reflected in the Bahraini rules of international jurisdiction as set out in the CCCA. Therefore, when the jurisdiction of Bahraini courts is justified based on these rules, the dispute can be heard in Bahrain; otherwise, the courts should dismiss the case for lack of jurisdiction.

However, Bahraini courts, although originally incompetent, can still assume jurisdiction based on party autonomy (*'iradat al-khusum*). Here, the parties' agreement – whether explicit or tacit – to submit to the authority of Bahraini courts establishes their jurisdiction.

At this level of the decision, it is surprising that the Court did not include the Bahraini nationality of the parties as an additional ground for the jurisdiction of Bahraini Court. While the Supreme Court rightly pointed out that the Bahraini regulation of international jurisdiction does not regulate dispute brought *against* Bahraini national, and that, unlike many codifications in the MENA region, nationality of the defendant is not *explicitly* used as a general ground for international jurisdiction, this does not imply that nationality has no role to play in Bahrain. In fact, as explained in the previous post on the same case, Bahraini courts have regularly assumed jurisdiction on the basis of the Bahraini nationality of the parties and have consistently affirmed that "*persons holding Bahraini nationality are subject to the jurisdiction of Bahraini courts as a manifestation of the state's sovereignty over its citizens*". Moreover, Article 16(6) of the CCCA allows for jurisdiction to be taken based on the *nationality* of the plaintiff in personal status matters, particularly when Bahraini law is applicable to the dispute.

Furthermore, one might question the inclusion of various aspects, such as the connection with Bahrain, administration of justice and efficiency, under the broad and somewhat vague label of "convenience". In a (more abstract) sense, *any* rule of international jurisdiction can be justified by considerations of "convenience". In any event, it worth mentioning here that modern literature offers a multitude of justifications for different rules of international jurisdiction, taking into account

various interests at stake, theories of jurisdictions, paradigms, and approaches (for a detailed account, see Ralf Michaels, "Jurisdiction, Foundations" *in* J. Basedow *et al.* (eds.) *Elgar Encyclopaedia of Private international Law – Vol. 1* (Edward Elgar, 2017) 1042).

2. The Unexpected Reference to *Forum Non Conveniens*

Once the Court identified the foundational bases of the Bahraini courts' jurisdiction, it engaged in a somewhat confusing discussion regarding the circumstances under which it might decline jurisdiction.

It is important to recall that the legal question before the court pertains to the effect of a choice-of-court agreement in favor of a foreign court. In other words, the issue at hand is whether such agreement can exert its derogative effect, allowing Bahraini courts to refrain from *exercising* jurisdiction.

Traditionally, Bahraini courts have addressed similar issues by asserting that the rules of international jurisdiction in Bahrain are mandatory and cannot be derogated from by agreement (as noted in the previous comment on the same case here). However, in this instance, the Court veered off in its analysis. Indeed, the Court (unexpectedly) shifted from the straightforward issue of admissibility of the derogative effect of choice-of-court agreements to the broader question of whether to decline jurisdiction, ultimately leading to a discussion of……*forum non conveniens*!

The Court's approach leaves an unsettling impression. This is because the ground of appeal was not framed in terms of *forum non conveniens*. Indeed, the appellant did not argue that the choice-of-court agreement should not be enforced because the chosen court was inappropriate or because Bahraini courts were *forum conveniens*. Instead, the appellant merely referred to the mandatory nature of the jurisdictional rules in Bahrain, which cannot be derogated from by agreement, irrespective of *any* consideration regarding which court *is clearly more appropriate to hear the case*.

This impression is further strengthened by the manner with which the Court addressed the issue it raised itself. Indeed, after setting out the test for declining jurisdiction on the basis of *forum non conveniens* (but, in fact, primarily concern

more the conditions for the validity of a choice-of-court agreement), the Court failed to examine and apply the very same tests it established. Instead, the Court concluded that Bahraini courts were *forum conveniens* simply because they *had* jurisdiction on the grounds that the defendant was a Bahraini company registered in Bahrain, had its domicile (principal place of business) there, and that Bahrain was the place of performance of the sale and distribution obligations.

However, upon a closer examination at the fact of the case, one can hardly agree with the Court's approach. On the contrary, all the reported facts indicate that the requirements set forth by the Court were met: (1) the international nature of the dispute is beyond any doubt; (2) English courts are clearly appropriate to hear the case as (a) the choice-of-court agreement in favor to English court is undoubtedly valid under English law; (b) it is unlikely that the case would raise any concerns regarding the collection of evidence (since one of the parties is an English company, one can expect that parts of the evidence regarding the transaction, payment, invoices etc. would be in English, and to be found in England); (c) there is no doubt about the genuine connection with England, as one of the parties is an English company established in England, and parts of the transactions are connected with England. Also, it is unclear how a choice-of-court agreement in this case would violate the sovereignty of Bahrain, as there is nothing in the case to suggest any public policy concerns.

The only potential issue might pertain to the enforceability of the future judgment in England (point (d) above) as there is a possibility that the appellee may have no assets to satisfy the future judgment in England. This might explain why the appellant decided to bring in Bahrain in violation of the choice-of-court. However, such concern can be mitigated by considering the likelihood of enforcing the English judgment in Bahrain, as it would meet the Bahraini enforcement requirements (articles 16-18 of Law on Execution in Civil and Commercial Matters [Legislative Decree No22/2021]).

V. Concluding Remarks

This is not the only case in which challenges to choice-of-court agreements in favor of a foreign court are framed in terms of *forum non conveniens* in Bahrain (see e.g., the *Bahrain Chamber of Dispute Resolution, Case No. 09/2022 of 17*

October 2022). However, to my knowledge, this is the first Supreme Court decision where explicit reference is made to "the doctrine of *forum non conveniens*" (with the terms cited in English).

In the case under discussion, there is a concern that the Court seems to have conflated two related yet distinct matters: the power of the court to decline jurisdiction on the ground of *forum non conveniens*, and the court's authority to decline jurisdiction on the basis of the parties' agreement to confer jurisdiction to a particular court (*cf.*, R. Fentiman, "*Forum non conveniens*" in Basedaw *et al.*, *op. cit.* 799). In this regard, it is true that in common law jurisdictions the doctrine of *forum non conveniens* is generally recognized as a valid defense against the enforcement of choice-of-court agreements (see J.J. Fawcett, "General Report" *in* J.J. Fawcett (ed.), *Declining Jurisdiction in Private International Law* (Oxford University Press, 1995) 54). However, it also generally admitted that the respect of the parties' choice should not be easily disregarded, and courts should only intervene in exceptional circumstances where there is a clear and compelling reasons to do so (see, Fentiman, *op. cit.*, 799). Such compelling reasons, however, are clearly absent in the present case.

Moreover, the way with which the Supreme Court framed the issue of *foreign non conveniens* inevitably raises several intricate questions: would the doctrine apply with respect to the agreement's prorogative effect conferring jurisdiction to Bahraini courts? Would it operate in the absence of *any* choice-of-court agreement? Can it be raised in the context of parallel proceeding *(lis pendens)?* Would it operate in family law disputes, etc.?

In my opinion, the answers to such questions are very likely to be in the negative. This is primarily because Bahraini courts, including the Supreme Court, have traditionally and consistently regarded their jurisdiction as a matter of public policy, given the emphasis they usually place on *judicial jurisdiction as a manifestation of the sovereignty of the State* which, when established, cannot be set aside or diminished. Such conception of international jurisdiction leaves little room to discretionary assessment by the court to evaluate elements of *forum non conveniens*, ultimately leading them to decline jurisdiction even when their jurisdiction is justified.

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[1] English terms in the original text. The Arabic equivalent can be better translated as "*forum conveniens*" rather than "*forum non conveniens*".

[2] Numbers and letters added.

"Other Appropriate Connections": China's Newly Adopted Jurisdiction Ground

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1. **Background**

China's newly amended Civil Procedure Law ("CPL 2024"), which came into effect on 1 January 2024, introduces several distinct and innovative changes. Among the most notable is the incorporation of "other appropriate connections" as a jurisdiction ground. Article 276 of the CPL 2024 addresses the jurisdiction of Chinese courts over foreign-related disputes where the defendant lacks domicile in China. Paragraph 1 of Article 276 lists six jurisdiction grounds, including the place of contract formation, place of contract performance, place of the subject matter, place of distrainable property, place of tort, and place of representative offices. As a supplement, Paragraph 2 provides that "notwithstanding the preceding paragraph, foreign-related civil disputes that have other appropriate connections with the People's Republic of China may fall under the jurisdiction of the People's Courts." The term "other appropriate connections" represents a legal innovation not only within Chinese legislation but also on a global scale. Currently, there is no official interpretation or guidance on its precise meaning, making it essential to analyze and evaluate this jurisdiction ground and its potential implications for jurisdictional practices.

2. **Legislative Purposes**

Regarding the legislative purposes behind the incorporation of "other appropriate

connections", the then President of the Supreme People's Court explained at the 38th meeting of the Standing Committee of the 13th National People's Congress that the purpose is to "increase the types of foreign-related cases under China's jurisdiction, expand jurisdiction grounds, better protect the rights of both Chinese and foreign parties, and effectively safeguard China's sovereignty, security, and development interests."[1] Additionally, the head of the Civil Law Office of the Legal Affairs Commission of the Standing Committee of the National People's Congress, one of the principal figures involved in drafting the amendment, emphasized that the incorporation of "other appropriate connections" is intended to "expand the jurisdiction of Chinese courts over foreign-related cases."[2] From these official explanations, it can be concluded that the legislative purposes of incorporating "other appropriate connections" as a jurisdictional ground are threefold: (a) expanding jurisdiction over foreign-related cases, (b) protecting the rights of parties, and (c) safeguarding national and public interests.

3. **Potential Function**

The legislative purposes outlined in official statements are somewhat broad and indirect. However, scholarly works offer insights into the potential functions of this jurisdiction ground, which help achieve legislative purposes. These functions can be summarized as follows:

a) Filling Jurisdiction Gaps

First, "other appropriate connections" can help fill jurisdiction gaps. This is particularly relevant when the interests of Chinese individuals or companies are infringed upon in a cross-border context while none of the listed jurisdiction grounds apply.[3] Such situations are increasingly common due to rapid social developments that give rise to new types of disputes. In such cases, "other appropriate connections" can serve as a supplementary jurisdiction ground to fill the jurisdiction gaps and protect their interests.

b) Articulating Extraterritoriality Provisions

Second, "other appropriate connections" can strengthen the enforcement of extraterritoriality provisions in Chinese laws. China has introduced extraterritoriality provisions in several regulatory laws, including the Personal Information Protection Law, Anti-Trust Law, and Security Law. However, the previous Civil Procedure Law lacked corresponding provisions that granted

Chinese courts adjudicative jurisdiction over related disputes. The incorporation of “other appropriate connections” addresses this gap, allowing courts to assert jurisdiction in such cases.

c) Substituting Necessity Jurisdiction

Third, “other appropriate connections” may act as a substitute for necessity jurisdiction. The CPL 2024 does not formally establish the necessity jurisdiction, despite scholarly calls for its establishment.[4] Although the adoption of necessity jurisdiction in China remains a topic for further discussion, “other appropriate connections” may provide a mechanism for courts to exercise this type of jurisdiction when required.[5]

4. **Interpretation**

It is necessary to first establish the methodology for the interpretation of “other appropriate connections”. Some scholars argue that future judicial interpretations should continue to follow the enumerative approach—listing several typical jurisdiction grounds to provide a degree of legal certainty. In terms of content, it has been suggested that indirect jurisdiction grounds, as outlined in the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019, should be considered.[6] However, this approach may result in rigidity and a lack of flexibility, which have been the main criticisms of the earlier legislation. As a result, a more flexible and open approach should be adopted instead, one that provides general guidelines while allowing judges to conduct case-by-case analyses.[7]

This method is further illustrated by judicial practices involving “other appropriate connections”. In the first case to adopt “other appropriate connections” as the jurisdiction ground, the Supreme People’s Court addressed a jurisdictional issue arising from a dispute related to FRAND (Fair, Reasonable, and Non-Discriminatory) licensing.[8] The Court stated that whether the dispute has “appropriate connections” with China should be assessed by examining the characteristics of the case. Based on this analysis, the Supreme People’s Court identified several connecting factors that serve as additions to the jurisdiction grounds listed in the previous Civil Procedure Law. The Court concluded that if any of these connecting factors are situated within Chinese borders, the dispute will have “appropriate connections” with China.[9] This practice indicates that the

primary method for interpreting “appropriate connections” involves analyzing specific cases to define additional relevant connecting factors or jurisdictional grounds.

The next question regarding interpretation is the extent of connection required by “other appropriate connections”. To clarify this, the wording used must be considered. During the legislative process, the term “appropriate connections” was specifically chosen to distinguish it from terms like “real and substantial connections” and “minimum contacts”, which are commonly used in comparative law and academic literature. This suggests that “appropriate connections” do not necessitate a close connection to “substantial connection”, yet should not be overly broad like “minimum contacts”.[10] However, the precise extent required remains to be determined. It appears that the necessary extent may depend on the interests at stake since the primary purpose of incorporating “other appropriate connections” is to protect China’s private and public interests. Thus, a more vital interest may necessitate a lower threshold for connection, while less vital interests may demand higher.

5. **Concluding Remarks**

The incorporation of “other appropriate connections” as a jurisdiction ground reflects China’s determination and ongoing efforts to enhance its foreign-related legal framework. It also provides a solid foundation for Chinese courts to actively participate in transnational governance. From the perspective of international law, Chinese practices concerning “other appropriate connections” deserve further examination, since it also serves as a supplementary rule for indirect jurisdiction (Article 301, CPL 2024) and for the allocation of enforcement jurisdiction within borders (Article 304, CPL 2024). It is fair to submit that “appropriate connections” constitutes a fundamental jurisdiction rule of China, potentially contributing to the development of international laws in corresponding fields. However, current practices and guidelines regarding “other appropriate connections” remain insufficient, highlighting the need for continual and further observation.

[1] See Zhou Qiang, ‘Explanation on the Civil Procedure Law of the People’s Republic of China (Draft Amendment)’ (*National People’s Congress of the PRC Website*, (27 February 2021) <www.npc.gov.cn/npc/c2/c30834/202112/t20211227_315637.html> accessed 13

October 2024.

[2] See Wang Qiao, ‘China’s Civil Procedure Law Completes Revision, Will Better Safeguard Parties’ Litigation Rights and Legitimate Interests – Interpretation of the Newly Revised Civil Procedure Law *People’s Court Daily* (Beijing, 2 September 2023) 4.

[3] See Shen Hongyu & Guo Zaiyu, ‘Commentary on and Interpretation of the Revised Provisions of the Foreign-Related Part of the Civil Procedure Law’ (2023) 54 China Law Review 70, 73.

[4] See Huang Zhihui, ‘System Positioning and Normative Explanation of Necessary Jurisdiction System of Foreign-related Civil Litigation in China’ (2022) 39 Studies in Law and Business 48, 60-61.

[5] See Huang Zhihui, ‘Study on the International Civil Jurisdiction of Appropriate Connections in the Context of the Foreign-Related Rule of Law’ (2023) 505 Law Science 176, 185-186.

[6] See Liu Guiqiang, The Challenges and Responses Faced by China’s Counter-Sanctions Litigation Recovery System (2023) 45 Global Law Review 211, 219.

[7] See Guo Zhenyuan, Appropriate Connections Principle in Foreign-Related Civil Litigation Jurisdiction: Theoretical Explanation and Path of Application (2024) 127 Chinese Review of International Law 127, 137.

[8] Conversant Wireless Licensing S.A.R.L. v. ZTE Corporation Ltd., (2019) Zui Gao Fa Zhi Min Xia Zhong No. 157 (Supreme People’s Court).

[9] Similar reasoning can be seen in Guang Dong Oppo Mobile Telecommunications Corp., Ltd., et al. v. Sharp Corporation., et al., in Supreme People’s Court Gazette, Issue 2, 2022 (Total No. 306) p. 23-30.

[10] See Shen Hongyu & Guo Zaiyu, ‘Commentary on and Interpretation of the Revised Provisions of the Foreign-Related Part of the Civil Procedure Law’ (2023) 54 China Law Review 70, 73.

The Moroccan Supreme Court on the Authenticity of an Apostillised Certificate of Conversion to Islam

I. Introduction

As mentioned in a previous post, Morocco is not only the MENA Arab jurisdiction that has ratified the largest number of the HCCH Conventions (7 in total), but also a country where the HCCH conventions have been actively applied (see here on the application of the HCCH 1980 Child Abduction Convention, and here for a case involving the application of the HCCH 1996 Child Protection Convention). The application of the HCCH Conventions in Morocco offers valuable insights into how these HCCH instruments operate within an Islamic context, challenging the widely held assumption of the existence of an Islamic exceptionalism (though such exceptionalism does exist, but to a varying degree across the Muslim-majority countries. See e.g. Béligh Elbalti, "The Recognition and Enforcement of Foreign Filiation Judgments in Arab Countries" *in Nadjma Yassari et al. (ed.), Filiation and the Protection of Parentless Children (T.M.C. Asser Press, 2019), 373-402*).

In the case reported here, the authenticity certificate of conversion to Islam issued in Spain and to which an Apostille was attached was the crucial issue that the Supreme Court had to address. It must be admitted however from the outset that the case did not directly involve the interpretation and the application of the HCCH 1961 Apostille Convention – officially known as Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents. Nonetheless, the case does raise some interesting issues regarding the admissibility of apostillised documents (i.e. document for which an Apostille has been issued). The case also brings to light a significant concern regarding interfaith successions from a private international law perspective in the MENA Arab region, particularly in Morocco. However, while the latter issue is particularly important, for the sake of brevity, the focus here will be placed d on

the implication of the Apostille Convention in this case.

II. Facts

The case involves a dispute over inheritance of A (apparently a Moroccan national). After A's death, his heirs (collectively here referred to as "Y") issued a certificate of inheritance that excluded his wife, a Spanish national (here referred to as "X") from A's inheritance. X contested this in the Family Court, claiming her legal rights as A's widow. She argued that Y had unfairly excluded here on the grounds that she was not Muslim, despite having converted to Islam by declaring her faith in the presence of an imam in a mosque in Spain before A's death, and that she was handed over a certificate confirming her conversion. However, due to the emotional toll of A's sudden death she forgot to bring the certificate with her at the time of A's death, and to rectify this, she obtained an official notary document confirming her conversion. In support of her request to be included in the list of A's heirs, X submitted various legal documents as evidence, including the certificate of her conversion to Islam she obtained in Spain with an Apostille attached to it.

Y, however, requested to dismiss the claim arguing, *inter alia*, that X was still Christian at the time of A's death, that the conversion declaration that she made after A's death had no effect and could not make from a legal heir, therefore, she was not entitled to inheritance since there can be no inheritance between a Muslim and a non-Muslim. Y also argued that her certificate of conversion obtained in Spain was void and had no legal validity even if an Apostille is attached to it.

The Family Court, as the first instance court, ruled in X's favor and recognized her right to inherit. The decision was later appealed on the grounds, among others, X's conversion to Islam was fabricated as she was seen performing Christian rituals at the funeral. Y also filed a separate challenge to the authenticity of her foreign certificate of conversion to Islam on the grounds that the certificate was forged. The Court of Appeal, however, dismissed the appeal and upheld the Family Court's ruling in X's favor.

Dissatisfied, Y filed an appeal to the Supreme Court.

Before the Supreme Court Y argued, *inter alia*, that the Spanish conversion certificate was a mere piece of paper without any official administrative references with a signature attributed to a Mosque in Spain. Nonetheless, the court accepted this certificate without verifying its authenticity or the context in which it was issued, such as by consulting relevant records or conducting a judicial investigation with Spanish authorities under the judicial cooperation agreement between Morocco and Spain, and also failed to verify whether the widow was even in Spain on the date the certificate was issued.

III. The Ruling

In its ruling *No. 167 of 5 April 2022*, the Moroccan Supreme Court admitted the appeal and overturned the appealed decision with remand stating as following:

"[…] according to the last paragraph of Article 40 of the convention signed between Morocco and Spain on judicial cooperation in civil, commercial, and administrative matters of 30 May 1997, if there is a serious doubt regarding the authenticity of a document issued by the judicial authorities or other authorities of either country, this should be verified through the central authority of both countries.

[Although] the court of the appealed decision ordered an investigation as part of activating the procedure for alleged forgery against the certificate of conversion to Islam [……] issued by the head of the Islamic Center in Spain, and registered under number (…..) in the registry of Islamic associations at the Ministry of Justice there, [it] failed to observe the procedures stipulated in Article 89 of the Code of Civil Procedure, particularly, by hearing the testimony of the person who issued the certificate and examining its authenticity, regularity, the accuracy of the information it contained and its date; and that by way of a rogatory mission to the competent Spanish authorities in accordance with Article 12 of abovementioned Convention [of 1997], in order to base its decision on verified facts.

As a result, the court's decision lacked a legal basis and was deficient in its reasoning [……], and therefore, it must be overturned."

IV. Comments

1. About the HCCH 1961 Apostille Convention

The HCCH 1961 Apostille Convention is undoubtedly one of the most successful HCCH conventions, with its 127 contracting parties (as of the date of the writing). The Convention's status table shows that more than 15 countries are Muslim-majority jurisdictions or have legal systems influenced by or based on Islamic law. Among them are five Arab jurisdictions from the MENA region: Saudi Arabia, Tunisia, Morocco, Bahrain and Oman. Marocco ratified the Convention on 27 September 2015, and it entered into force on 14 August 2016.

As is widely known, the Convention aims at simplifying the process of authenticating public documents for use abroad. The Apostille Convention eliminates the need for a complex and time-consuming legalization process by introducing a standardized certificate called an Apostille. As such, the Apostille, issued by a designated authority in the State of origin, is a simplified certificate that confirms the authenticity of the document's origin by certifying the signature on the document is genuine, thus allowing it to be recognized in another Contracting States, the State of destination. (For details, see the HCCH Permanent Bureau, *Practical Handbook on the Operation of the Apostille Convention* (2nd ed. 2023) pp. 25-34 hereafter the "Apostille Handbook")

Several key principles that underpin the Apostille Convention. These include the following: First, the Convention applies mainly to "public documents" (the Apostille Handbook, p. 51, para. 102). Second, the Convention is based on the premise that the Apostille only verifies the authenticity of a public document's *origin* (and not the *content*) by certifying the signature, the signer's capacity, and, where applicable, the seal or stamp (see the Apostille Handbook, p. 31, para. 22-23).

The case commented here provides valuable insights concerning these two points. The first issue is whether a certificate of conversion to Islam, issued by a mosque or an Islamic center in Spain, qualifies as a "public document" under the Convention. Even if it does qualify, the second issue concerns the probative value of an apostillised document, particularly when the authenticity of the document itself is contested for forgery or fabrication.

As the ruling of the Supreme Court above indicates, the Court did not address the first question, arguably assuming the validity of the Apostille without further examination. However, a closer review of the first principle mentioned above suggests that this issue may not be as straightforward as the Court seemed to have presumed. This can be supported by the fact that the Court focused more on the allegation of forgery of the apostillised certificate, implying that the validity of the Apostille itself was not in question.

2. Certificate of Conversion to Islam as a "public document"

Can a certificate of conversion to Islam issued in Spain be qualified as a "public document" under the Apostille Convention? Answering this question first requires an understanding of what constitutes a "public document" under the Convention.

a) What is a public document under the Convention?

Although the Convention enumerates in a non-exhaustive list the documents deemed to be "public documents" (art.1(2)), and mainly relies on the national law of the State of origin (i.e. where the document was executed) to determine whether the document qualities as "public document" (the Apostille Handbook, p. 52, para. 105), it provides for a useful criterion to determine whether a document is a "public document". According to the Apostille Handbook, "the term "public document" extends to all documents other than those issued by persons in their private capacity. Therefore, any document executed by an authority or person in an official capacity (*i.e.* acting in the capacity of an officer authorized to execute the document) is a public document" (p. 51-52, para. 103). Documents that do not meet this criterion are generally not considered "public documents" under the Convention (the Apostille Handbook, p. 64, para. 182).

There are, however, exceptions. A document may still be apostollised if it is notarized or officially certified (art. 1(2)(c) and (d). See the Apostille Handbook, p. 54, paras. 116-122. On the example of educational documents, including diplomas, see p. 59, paras. 150-153). In addition, "[t]he law of the State of origin may consider religious documents, as well as documents executed by official religious courts, to be of public nature and therefore a public document under the Convention" (See the Apostille Handbook, p. 65, para. 185).

b) The Public nature of Certificates of Conversion to Islam

In certain countries, certificates of conversion to Islam are clearly recognized as public documents. For example, in many Muslim-majority jurisdictions such certificates are issued by public organs or institutions affiliated with the state, such as the Ministry of Religious Affairs, or the Ministry of Justice (e.g., in the UAE) or by authorized persons (such as the Adouls in Morocco). In such cases, the conversion certificate possesses the requisite "public" nature under the Apostille Convention.

However, in many non-Muslim countries, no specific public administrative authority is responsible for overseeing religious conversions or issuing certificates to that effect. Instead, individuals wishing to convert to Islam typically approach a local mosque or Islamic center. There, the person publicly professes their declaration of faith in front of an imam and witnesses. While a certificate is often provided for various purposes (e.g., marriage or pilgrimage), these documents lack the "public" character necessary for apostillasation under the Apostille Convention.

In the case commented here, the summary of facts indicates that the Spanish widow had embraced Islam before an imam at a mosque. The Supreme Court's ruling, however, refers to her conversion in front of the head of an Islamic Center in Spain registered with the Spanish Ministry of Justice (although it is possible that the mosque was part of the Islamic center, and the head of the Islamic center serves also served as the imam). In any event, it doubtful that either the Imam or the head of the Islamic center acted "in the capacity of an officer" to issue the conversion-to-Islam certificate. Indeed, even when registered as non-profit or religious organization or association, mosques and Islamic centers generally do not possess the authority to issue "public documents" within the meaning of the Apostille Convention. This applies to other types of certificates these centers or mosques may issue such as marriage or divorce certificates. Such certificates are generally not recognized by the states unless duly registered with civil authorities. Where registration is not possible, these documents primarily serve religious purposes within the community.

There is also no indication in the Supreme Court's decision that the certificate in question falls under the exceptions outlined above (see IV(2)(a)). Therefore, it remains unclear on which grounds the certificate of conversion was apostillised,

as “[t]he Convention does not authorize the issuance of an Apostille for a document that is not a public document under the law of the State of origin [Spain *in casu*], even if the document is a public document in the State of destination [Morocco *in casu*]” (the Apostille Handbook, p. 52, para. 107).

3. Contestation for forgery of an apostillised document

It is worth recalling here that the case reported here concerned the invalidation of a certificate of inheritance that excluded a Spanish widow, who claimed to have converted to Islam, from her deceased husband’s estate. To support her claim, the widow submitted, among other documents, an apostillised certificate of conversion to Islam issued in Spain. Before the Supreme Court, the appellants argued that the certificate of conversion had no legal value because it was forged and lacked sufficient elements to establish its authenticity. The Supreme Court admitted the appeal on the grounds that the authenticity of the certificate had to be examine pursuant to the relevant provisions of the 1997 Moroccan-Spanish Convention on Legal Assistance in Civil, Commercial and Administrative Matters.

The position of the court should be approved on this particular point. the Apostille Handbook makes it clear that the Apostille has no effect on the admissibility or probative value of a foreign public document (the Apostille Handbook, p. 32, para. 25). Indeed, since the Apostille does not relate to or certify the content of the underlying public document, issues concerning the authenticity of the foreign public document and the extent to which it may be used to establish the existence of a fact are left to be dealt with under the law of the State of destination. In this case, the applicable provisions are found the Moroccan code of civil procedure and the Hispano-Moroccan bilateral convention on judicial assistance, as indicated in the Court’s decision.

An anti-suit injunction in support of an arbitration agreement in light of the EU Sanction against Russia

By Poomintr Sooksripaisarnkit, Lecturer in Maritime Law, Australian Maritime College, College of Sciences and Engineering, University of Tasmania

On 24th September 2024, Mimmie Chan J handed down the judgment of the Court of First Instance of the High Court of the Hong Kong Special Administrative Region in *Bank A v Bank B* [2024] HKCFI 2529. In this case, the Plaintiff (*Bank A*) with its base of operation in Germany was under the supervision of the German Federal Financial Supervisory Authority (BaFin). Its majority shareholder was the Defendant (*Bank B*) who held 99.39% shares. In turn, the Defendant was a Russian bank whose majority shareholder was the Government of the Russian Federation.

Between the predecessor of Plaintiff (as, at the time before the court in Hong Kong, the Plaintiff bank was already in voluntary liquidation) and Defendant, there existed an ISDA agreement dated 23 July 2023. Following the war between Russia and Ukraine which broke out in February 2022, Germany followed the "Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty, and independence of Ukraine" which Article 2 provides:

> "1. All funds and economic resources belonging to, owned, held or controlled by any natural persons or natural or legal persons, entities or bodies associated with them as listed in Annex I shall be frozen.
>
> 2. No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural persons or natural or legal persons, entities or bodies associated with them listed in Annex I."

As a result, BaFin barred Plaintiff from making payments or other transfers of

assets to companies, including Defendant. Moreover, it also barred Plaintiff from accepting new deposits, granting loans, or making payments to Russian borrowers. The defendant was subsequently listed in the Annex I of the EU Regulation. On that same day, Plaintiff and Defendant entered into a Termination and Settlement Agreement (TSA) under which Plaintiff was to pay Defendant EUR 112, 634, 610. The TSA contained a choice of the English law clause and an arbitration clause for any dispute to be resolved by the Hong Kong International Arbitration Centre (HKIAC) arbitration.

After the defendant was added to Annex I, BaFin denied the defendant's right to vote in the plaintiff's meetings and also barred the plaintiff from taking any instructions from the defendant. Defendant tried to demand payment from Plaintiff according to the TSA but Plaintiff denied that, citing the infeasibility due to the EU Regulation.

The defendant hence commenced proceedings before the courts in Russia. Among other things, the Russian Court granted a 'Freezing Order' prohibiting any transfer of securities that Plaintiff had in its account with Defendant's bank. The plaintiff's attempt to challenge the jurisdiction of the Russian Court based on the arbitration clause contained in the TSA was unsuccessful. Hence, on 27 October 2023, the plaintiff sought an interim anti-suit junction from the court in Hong Kong.

Regardless of the interim anti-suit injunction, the defendant commenced again the proceedings in Russia where the Russian Court issued an anti-suit injunction prohibiting the plaintiff from continuing any proceedings in Hong Kong, and subsequently the defendant obtained another injunction prohibiting the plaintiff from initiating arbitration proceedings at the HKIAC.

In late 2023, the Russian Court gave judgment in favor of the defendant to seek the settlement payment under the TSA and granted the final injunction restraining the plaintiff from pursuing the HKIAC arbitration.

The plaintiff hence came to the court in Hong Kong seeking a final injunction to restrain the defendant from pursuing or continuing any proceedings in Russia. The defendant resisted that by raising the arguments based on Article 19 and Article 13 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted at the Third Session of the Seventh National

People's Congress on 4 April 1990 Promulgated by Order No. 26 of the President of the People's Republic of China on 4 April 1990 Effective as of 1 July 1997) (hereinafter the "Basic Law") (*which is effectively a mini-constitution for Hong Kong) SAR):*

"Article 13

> *The Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region.
>
> The Ministry of Foreign Affairs of the People's Republic of China shall establish an office in Hong Kong to deal with foreign affairs.
>
> The Central People's Government authorizes the Hong Kong Special Administrative Region to conduct relevant external affairs on its own in accordance with this Law.

Article 19

> The Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication.
>
> The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained.
>
> *The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. The certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government."

Mimmie Chan J summarised the rule concerning the anti-suit injunction which has been established through authorities in Hong Kong at [34]:

> "Foreign proceedings initiatied in breach of an arbitration agreement will ultimately be restrained by the grant of an injunction, unless there are strong reasons shown to the contrary … For contractual anti-suit injunctions, the courts have emphasized that there is no need to prove that the arbitral tribunal is the most convenient forum … Nor is there need for the Court to feel diffidence in granting the injunction, or to exercise the jurisdiction sparingly and with great caution, for fear of giving an appearance of undue interference with proceedings of a foreign court. The restraint is directed against the party which has promised not to bring the proceedings otherwise than in accordance with the arbitration agreement, and effect should ordinarily be given to the agreement in the absence of strong reasons for departing from it…"

> So far as the argument based on the act of state in Article 19 of the Basic Law is concerned, the judge found there was no proof that the defendant was a state entity despite its majority shareholder being the Government of the Russian Federation. Neither the defendant's argument that Germany was somehow involved in the plaintiff convinced the judge because, as she found in [50], Bafin was a regulatory authority. Its act was not that of the state. Since there is no doubt about neither party in the case, there is no basis to obtain the certificate from the Chief Executive according to the third paragraph of Article 19 of the Basic Law (citing the Court of Final Appeal in *Democratic Republic of Congo v FG Hemisphere Associates LLC (No 1)* (2011) 14 HKCFAR 95).

The judge then came to conclude in her *ratio decidendi* at [59] and [60]:

> "In my judgment, what is pertinent is that the question for determination by the Court in this case is simply whether there is a valid and binding arbitration agreement between the Plaintiff and the Defendant, which covers the scope of the dispute between the two parties and the claims made by them in these proceedings and in the two sets of Russian proceedings, and whether to grant the injunctions on the Plaintiff's application. It is trite, that the arbitration agreement contained in the Arbitration Clause is severable from and separate to the underlying TSA between the parties. Any illegality of the TSA, and any alleged impossbility to perform the TSA, cannot affect

> the validity and operation of the arbitration agreement. Nor does the impossibility of performance of any award obtained in the HK Arbitration affect the validity and enforceability of either the arbitration agreement, the HK Arbitration itself, or the award obtained …
>
> … It is simply not necessary for the Court to decide whether the issue and application of the EU Sanction confers a good answer to the Defendant's claim for payment under the TSA, whether the Plaintiff can be excused from payment, and the effect of the EU Sanction on the TSA are all matters which go to the merits of the claim in the HK Arbitration, and it should not be forgotten that the Court does not consider the merits of the underlying dispute when it decides the Plaintiff's claim for the injunctions – which are made solely on the basis of a valid arbitration agreement. This is also a reason to reject the Defendant's assertion that by granting the injunctions to the Plaintiff, the Court is implementing or facilitating the EU Sanction. Any injunction which the Court grants in this case is to facilitate the arbitration agreement between the parties, and nothing else".

The judge also denied that the EU Regulation is in any way contradictory to the public policy of Hong Kong or that of the People's Republic of China since it does not affect the rights or property of any Chinese entity or Hong Kong entity.

Overall, this is a fair case that the judge chose to uphold the effect of the arbitration agreement. It was somewhat curious that the parties agreed to the English law in the TSA agreement, knowing that, under the English law, the EU Regulation is likely to be effective. It is not known for what reason the Court in Russia found for the defendant regarding its entitlement to the payment under the TSA. For sure, a hard burden falls on arbitrators at the HKIAC (as per the TSA, the tribunal should consist of 3 arbitrators). There has been much discussion on the impact of any unilateral sanction upon arbitrators in recent years. Arbitrators will continue facing this challenge so long as the conflict remains, being that between Russia and Ukraine or that in the Middle East.