The Art. 2(b) CISG Conundrum: Are Tender Contracts Under the Ambit of an Auction?

By Harddit Bedi* and Akansha Tripathy**

Introduction

It is beyond dispute that *The Convention of International Sales of Goods, 1980* (CISG) has facilitated international trade disputes. However, Courts and tribunals continue to apply their minds in adjudicating the applicability of CISG before advancing into substantive issues. This exercise is not very prolific as it prolongs proceedings. Chapter 1 of the convention lays down the scope and extent of the CISG. Amongst other things, the CISG application *does not apply* to contracts formed by, inter-alia, auctions under Art. 2(b) of CISG. The word *auction* itself is nowhere defined in the convention.

This led to ambiguity. Courts of different jurisdictions had to adjudicate the definition of the word *auction,* Take, for instance, the *Electronic electricity meter case*. The Swiss Federal Supreme Court had to determine if the bidding process in a tender contract was the same as an auction. The similarities between a bidding process and an auction cannot be understated. However, unlike an auction, in a tender contract, it is the sellers that bid, not the buyers. Hence, a tender contract *may* be construed as a reverse auction, not an auction. This leads to the issue: *Are tender Contracts—by them being reverse auctions— barred by the CISG under Article 2(b)?*

The Exclusion of Auctions in CISG—but Why?

Article 2(b) explicitly reads that the CISG exempts sales by auction. In an auction, sellers invite buyers to bid on goods, with the highest bidder securing the purchase. The process ensures competition among buyers, with the help of the seller or an intermediary, and ends with the auctioneer declaring the winning bid. The reason for this exclusion in the convention is not well-founded but speculated.

First, it is excluded because auctions are often subject to special rules under the applicable national law, and it is best to not harmonize them. *Second*, there was no need to include an auction since auctions universally, at that time, did not take place across borders in any case. *Third*, in an auction, the seller may not know the details about the buyer, including but not limited to, domicile, nationality, and place of operations. That is why, the applicability of the CISG would be uncertain due to Article 2(b) of the CISG since the aforesaid information determines whether the contract is an international one. These reasons justify exclusion, however, defining the term *auction* would have abated vagueness and ambiguity. Since, in the present context, The exclusion of "sales by auction" can be narrowly interpreted to apply only to traditional auctions, where sellers solicit bids from buyers. However, alternatively, it can be broadly construed to include any competitive bidding process, including reverse auctions.

A Case for CISG Applicability vis-à-vis Tender Contracts

Tender contracts, despite being formed after an auction, do not come under the ambit of Art.2(b). ***First***, *just because tender contracts are formed through a bidding process does not make it an auction.* It is advanced that tender contracts differ from an auction but may be similar to reverse auctions. In a reverse auction, it is the buyer who invites multiple sellers to bid, to secure goods or services at the lowest possible price. This process is common in procurement, particularly in government tenders and large-scale corporate sourcing. Similarly, since *primarily*, a tender involves a buyer inviting potential sellers to submit bids for goods or services; the process can be closely equated with a reverse auction in its characteristics—not auctions. Also, the procurer can also consider several other factors and have the discretion to determine to award the contract. This is unlike how an auction functions. In an auction, the seller typically does not have the discretion to consider other factors besides the highest price quoted. Ulrich G. Schroeter, a member of the CISG advisory council, (2022 paper) advances that CISG is applicable in Tender contracts. He states, *"The CISG furthermore also applies to international sales contracts concluded with a seller which has been selected by way of a call for tender (invitation to tender, call for bids)."* The aforementioned arguments suggest that at the very least it would not be correct to construe tender contracts as auctions. The question that then follows is whether reverse auctions can also be presumed to be included in the ambit of *auction* mentioned in Art.2(b); which is answered in the subsequent point.

***Second**, the absence of explicit exclusion extends to implied inclusion.* The UNCITRAL Commentary of Art 2 of the convention advances that all international sale of goods contracts can be governed by CISG besides the following. Art 2 does not refer to contracts formed by bidding process or reverse auctions but just auctions. In addition to this, the World Bank standard tender rules also do not explicitly exclude the application of CISG. From these, there is a reasonable inference that reserving an auction or just contracts formed via bidding are not explicitly included. On the contrary, if anything, the CISG application was included in the New Zealand government as guidance for foreign bidders, although it was later changed to *"Common Law of contracts."* Such an inclusion is also present in an international purchase of equipment, by a Brazilian nuclear power state-owned entity. With this argument in mind, a counter-argument may be taken to advance that a court/tribunal can extend the interpretation of an auction to also include a reverse auction. However, that would be a way too broad interpretation and no coherent argument exists to make such a broad interpretation.

***Third**, precedents have historically not exempted CISG application in tender contracts*. In 2019, the Swiss Federal Supreme Court dealt with the issue of tender contracts in CISG. It established that contracts initiated through public tenders do not fall under the ambit of Art. 2(b). The test laid is whether or not one party is foreign or not to the tender contract. So long as that element is present in the transaction, tender contracts are just as valid as any other contract with respect to Art 2(b). In another Swiss precedent, while not directly addressing the issue at hand, the tribunal held that an invitation to a tender is a form of invitation to a contract. Hence, a contract formed through just a process of bidding, though not an auction, can be governed by CISG as it so was in the said precedent. Additionally, as stated above, government procurement is done through mostly reverse auctions/Tender contracts/bidding. Such government procurement when faced with an international element has invoked the application of CISG.

Conclusion

This question at hand is pertinent since CISG has proven to be a successful framework, hence, its scope and applicability should not be restricted. Especially

with relation to tender contracts since they form a substantial method of procurement of big entities and governments. Not to mention, no valid reason exists for the exclusion. The economic reasons are present and not even touched upon since the article strictly restricted itself to legal arguments. To summarize, the applicability of CISG to tender contracts is ambiguous due to Article 2(b), which excludes "sales by auction" from its ambit. Auctions are usually seller-driven competitive bidding. Whereas, Tender contracts are where buyers ask for bids from sellers. By virtue of this, Tender contracts are different from auctions in certain aspects such as control, procedural formalities, and evaluation criteria which are considered factors beyond price. Since it is a form of reverse auction, it would be incorrect to include reverse auctions as an *auction* under Art.2(b). More importantly, previously, courts and tribunals have not given the word *auction* such a broad interpretation. It has allowed CISG to govern the contract. Hence, in conclusion, tender contracts do not come under the ambit of "*auction*" of Art 2(b) CISG.

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Japanese Court Enforces a Singaporean Judgment Ordering the Payment of Child Living Expenses



I. Introduction

Foreign family law decisions can be recognized, and where necessary, enforced in Japan if they meet the prescribed requirements for this purpose. Prior to 2018, it was an establish practice to apply the same recognition and enforcement regime used for civil and commercial matters to foreign family law decisions. However, discussions existed in literature regarding whether constitutive family law judgments and decrees should be recognized following the choice of law approach, or whether the specific characteristics of foreign family law decisions might justify exceptions, such as the non-application of certain recognition requirements (see Mario Takeshita, "The Recognition of Foreign Judgments by Japanese Courts" 39 *Japanese Annual of International Law* (1996) 59-61).

Since 2018, the applicable regime has been significantly clarified, effectively putting an end to much of the prior academic debate on the subject. This development stems from the introduction of new provisions on the recognition and enforcement of foreign family law decisions in the Act No. 20 of 2018, which amends the procedural acts applicable to family law cases as it will be outline below (English translation can be found in 62 *Japanese Yearbook of International Law* (2019) 486. See also Prof. Yasuhiro Okuda's translation in 50 *ZJapanR/J. Japan.L* (2020) 235).

This Act, which came into force on 1 April 2019, also introduces new detailed rules on international jurisdictional in family law disputes (for details, see Yuko Nishitani, "New International Civil Procedure Law of Japan in Status and Family Matters" 62 *Japanese Yearbook of International Law* (2019) 141; Yasuhiro Okuda, New Rules on International Jurisdiction of Japanese Courts in Family Matters, 50 *ZJapanR/J. Japan.L* (2020) 217).

Nonetheless, it has to be acknowledged that, in the context of the recognition and enforcement of foreign family law decisions, several issues remain open. In addition, since the entry into force of the new law, there have been relatively few reported cases that provide clear guidance on the application of the legal framework. In this respect, the Chiba District Court's judgment of 19 July 2024 presented here, concerning the enforcement of a Singaporean divorce judgment component ordering the payment of child living expenses, offers valuable insights.

II. Facts

The case concerns X's (ex-wife, Plaintiff) request for an enforcement judgment under Article 24 of the Civil Enforcement Act (CEA) to enforce a portion of a Singaporean judgment rendered in November 2010, requiring the Y (ex-husband, the Defendant) to pay, *inter alia*, living expenses for two of their three children until they reached the age of majority, along with accrued interest. X initiated the enforcement action in 2019. By the time of the action, one child had already attained the age of majority under Singaporean law (21 years), while the other reached the age of majority during the pendency of the case.

The parties in the case married in Japan in the early 1990s, where they lived and had two sons. In 1997, the Y relocated to Singapore, followed by the rest of the family in 1998. While living in Singapore, they had their third child, a daughter. In March 2007, X initiated divorce proceedings before Singaporean courts, with Y participating by appointing legal counsel and responding to the proceedings.

In accordance with Singapore's two-step divorce process, the court issued a provisional judgment in October 2008 dissolving the marriage. The court then proceeded to address ancillary matters, including custody, guardianship, visitation, living expenses, and the division of joint assets. During these proceedings, Y permanently left Singapore and returned to Japan in June 2010. Following his departure, Y ceased to participate in the proceedings, and his legal counsel was subsequently granted permission to withdraw from representing him.

In November 2010, the Singaporean court issued a final judgment granting X sole custody and guardianship of the children, ordering the payment of living expenses, and dividing the couple's joint assets. Prior to the hearing, a notice was sent to Y's last known address, which he had provided during the proceedings. However, the judgment, as well as the summons for appeal, was not served on Y, leading to the expiration of the appeal period without the judgment being challenged.

In 2019, X sought enforcement of the Singaporean judgment as indicated above. Before the Court, the parties disputed most of the recognition requirements (article 118 of the Code of Civil Procedure [CCP]). Y also challenged enforcement by raising a defense based on the existence of a ground for an objection against civil execution, notably the fact that the limitation period for the claims related to the payment of living expenses under the foreign judgment had expired. Finally, Y argued that X's request to enforce the foreign judgment constituted an abuse of

right or a violation of the principle of good faith.

III. Ruling

In its judgment rendered on 19 July 2024, the Chiba District Court largely dismissed Y's arguments and granted X's application, with two exceptions: the court rejected X's claim for living expenses claim for the children beyond the age of 21. It did not also allow the enforcement of the portion of accrued interest on the living expenses, which the Court found to be extinguished under Singaporean statute of limitations.

Before addressing each of the issues raised, the court first outlined the general applicable principles, citing relevant Supreme Court cases where available. Although these parts are crucial, they will be omitted from the summary for brevity.

1. Whether the foreign judgment can be deemed final [Article 118, first sentence of the CCP]

According to the court, under Singaporean law, a judgment becomes effective on the date it is issued, and an appeal must be filed within 28 days from the judgment date, regardless of whether the judgment is served. The court observed that since no summons for an appeal was served within this period, the foreign judgment should be deemed final.

2. Whether the foreign court had jurisdiction [Article 118(1) of the CCP]

The court first noted that the foreign lawsuit involved X seeking divorce and addressing ancillary matters with Y. The court, then categorized the case as "personal status" case, and assessed the indirect jurisdiction of the foreign court by reference to the Japanese rules of direct jurisdiction in personal status cases as set out in the Personal Status Litigation Act (PSLA), article 3-2 *et seq*. For the court, article 3-2(i) of the PSLA allows that an action concerning personal status be filed with the Japanese courts when the defendant has domicile in Japan, and

that jurisdiction is determined at the time the lawsuit is filed (article 3-12 of the CCP). Applying this test to the case, the court found that, at the time the foreign proceeding was initiated, both parties were domiciled in Singapore, and concluded that the Singaporean court had jurisdiction over the matter. Furthermore, the court considered that there were no circumstances suggesting that it would be unreasonable, on the basis of the principle of *jori* (*naturalis ratio*), to recognize the foreign judgment issued by the foreign court.

3. Whether the procedure leading to the foreign judgment violates public policy (the lack of service of the foreign judgment on Y) [Article 118(3) of the CCP]

The court admitted that the foreign judgment was not served on Y, and that he was not aware of it within the appeal period. However, the court determined that, based on Y's conduct during the proceedings, he had voluntarily waived his right to be informed of the judgment's issuance. According to the court, Y knew a judgment on ancillary matters would be delivered and had the opportunity to receive it through proper procedures. The court also found that, while Y was not aware of the judgment within the appeal period, he had been given procedural safeguards and ample opportunity to become informed. Therefore, the court concluded that the lack of service of the foreign judgment did not violate the fundamental principles of Japanese procedural public policy.

4. Whether the content of the foreign judgment violates [substantive] public policy (the amount of living expenses for the children) [Article 118(3) of the CCP]

The court held that the foreign judgment's calculation of the children's living expenses was based on a reasonable evaluation of the parties' financial capacity, rejecting Y's argument that the calculation was unrelated to his financial situation or had punitive elements. The court further stated that the amount stipulated in the foreign judgment was not excessive or inconsistent with Japanese public policy, given the actual living expenses of the children. Moreover, the court emphasized that Y's challenge, based on his decreased or absent income was not accepted by the foreign court, would constitute a prohibited review of the merits under Article 24(4) of the CEA.

5. Whether reciprocity is established (Art. 1118(4) of the CCP)

For the court, the requirements for recognizing a foreign judgment in Singapore are based on English common law, which broadly aligns with the conditions outlined in Article 118 of the CCP. Thus, the court determined that reciprocity exists between Singapore and Japan.

6. The applicability of the statute of limitations on the claim for living expenses under the foreign judgment

The court confirmed that the party opposing enforcement of a foreign judgment could raise in the exequatur proceedings defenses based on the extinction or modification of claims that occurred after the judgment was rendered. The court then determined that Singaporean law was applicable to the defense of extinctive prescription. Thereafter, the court compared the Singaporean limitation periods (12 years for claims based on the judgment and 6 years for interest) with Japan's shorter periods (5 years or 10 years for claims confirmed by a final judgment). The court found that applying Singapore's longer limitation periods did not manifestly violate Japan's public policy, upholding the validity of living expense claims filed within the 12-year period. However, it ruled that interest claims accrued before October 2013 had been extinguished due to the expiration of the 6-year limitation period.

7. Abuse of Rights or Violation of the Principle of Good Faith

The court addressed Y's argument that X's attempt to enforce the foreign judgment constitutes an abuse of rights or a violation of good faith. The court rejected this claim, stating that enforcing a judgment in accordance with the law does not breach the principle of good faith or constitute an abuse of rights. In addition, the court found no evidence to support Y's argument.

IV. Comments

1. Significance of the Case

The Chiba District Court judgment of 19 July 2024 is significant for its treatment of various issues concerning the recognition and enforcement of foreign family law decisions under the new legal framework. The court addressed key issues such as indirect jurisdiction, procedural and substantive public policy, reciprocity, and the ability to raise defenses during the exequatur process, including objections based on the expiration of limitation periods and the consistency of foreign law with Japanese public policy. Most of these issues are subject of ongoing academic discussion in Japan (for an overview, see Manabu Iwamoto, "Recognition and Enforcement of Foreign Decisions on Personal Status Litigation and Family Relations Cases" 62 *Japanese Yearbook of International Law* (2019) 226).

2. Personal Status Cases v. Domestic Relations Cases

Japan's legal framework for recognizing foreign judgments in general is governed primarily by domestic law. As far as foreign family law decisions are concerned, it is generally admitted that their recognition and enforcement depend on whether the family law relationship is classified as a "personal status case" or a "domestic relations cases."

"Personal status cases" generally encompass "contentious" family law disputes concerning marital or parental relationships, such as divorce, which is a quintessential example of a "personal status case". Family law matters in this category, as determined by article 2 of the Personal Status Litigation Act (PSLA), are governed by its provisions. Given the constitutive nature, foreign judgments on personal status cases typically do not require enforcement.

On the other hand, "domestic relations cases" groups family matters that are generally "non-contentious", although certain cases, such as claims for custody or maintenance, can be highly adversarial. These matters are governed Domestic Relations Case Procedure Act (DRCPA), which includes appended tables listing cases classified as domestic relations cases. Unlike personal status cases, some types of domestic relations cases may involve elements that require enforcement, such as the payment of maintenance or the return of a child.

From the perspective of Japanese law, maintenance cases typically fall under this category (see Manabu Iwamoto, "International Recovery of Maintenance in Japan" 65 *Japanese Yearbook of International Law* (2022) 254).

3. Applicable legal regime

In this regard, the 2018 reform brought some significant changes. Indeed, a new provision was introduced in the DRCPA (new article 79-2) and article 24 of the CEA on the enforcement of foreign judgments was modified to accommodate these changes. However, no similar provision was introduced in the PSLA, since it was considered that contentious judgments in family law matters are not different from contentious judgments in civil and commercial matters, therefore, they should be subject to the same legal regime.

Accordingly, depending on the type of case involved, foreign family law decisions can be recognized either (i) by direct application of article 118 of the CCP, when the foreign judgment in question pertains to "personal status cases", or (ii) by *mutatis mutandis* application of article 118 of the CCP pursuant to article 79-2 of the DRCPA, when the foreign decision is rendered in a matter relating to "domestic relations cases". The main difference between these two approaches is that, unlike foreign personal status judgments, the requirements of article 118 of the CCP would fully apply *mutatis mutandis* to foreign domestic relations decisions, provided that doing so "is not contrary to the nature" of the decision in question (article 79-2 of the DRCPA). In other words, for foreign domestic relations decisions, the requirements of article 118 of the CCP may apply *partially,* depending on the nature of the case.

In this context, since maintenance judgments is typically classified under "domestic relations cases", their recognition is, as a matter of principle, governed by article 79-2 of the DRCPA, along with the *mutatis mutandis* application of the requirements of article 118 of the CCP. Whether recognition and enforcement of foreign maintenance judgments is subject to full or partial application of the recognition requirements under article 118 of the CCP is subject to discussion in literature. However, the general tendency among courts, as confirmed by the case presented here, is to apply all the recognition requirements.

4. Conjunction between personal status cases and domestic relations cases

A key challenge arises, however, when a foreign family law judgment combines elements of personal status (e.g., divorce) with issues categorized under domestic relations (e.g., child custody or maintenance). In this regard, while the Chiba District Court treated the foreign judgment as a single "personal status case" and applied article 118 of the CCP, without reference to Article 79-2 of the DRCPA, prevailing literature and case law suggest that each aspect should be treated separately.

Following this approach, the court should have proceeded as follows: first, it should have categorized the court order to pay child living expenses as pertaining to "domestic relations cases". Under this categorization, the court would then have needed to assess, pursuant to article 79-2 of the DRCPA, whether all the recognition requirements of article 118 of the CCP should apply *mutatis mutandis*, or only partially, depending on the nature of the case. Finally, the court should have reviewed the indirect jurisdiction of the foreign court by reference to the jurisdictional rules set out in the DRCPA (specifically, article 3-10, which governs cases relating to maintenance obligation), rather than those set out in the PSLA.

That said, it has to be acknowledged, that the court's ultimate conclusion would likely not have changed since the jurisdiction of the foreign court would also have been justified by the jurisdictional rules included in the PSLA, which allow actions for ancillary measures, including child custody and support, to be decided by the court exercising divorce jurisdiction (article 3-4 of the PSLA).

The Development of forum non conveniens in the Chinese Law and

Practice

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The doctrine of *forum non conveniens* is an important principle in civil procedure laws and frequently applied by courts in many legal systems, especially those of common law countries. According to this principle, when courts exercise their discretionary power to determine whether to exercise jurisdiction over the factual circumstances of a case, they primarily consider issues of efficiency and fairness to find the most appropriate forum to settle the dispute. If the acceptance of a case would lead to inefficient outcomes and consequences that are contrary to justice, the court may refuse to exercise jurisdiction on the grounds that it is not the appropriate forum.

Unrealized by many international scholars and practitioners,[1] China has been adopting (formally or informally) the doctrine of *forum non conveniens* for more than 30 years, first through a few court judgments, then provided in judicial interpretations issued by the Supreme People's Court of PRC ("SPC"), which is binding for all Chinese courts, and finalized in the 2024 *Civil Procedure Law of PRC*. This article introduces the history of Chinese law adopting the doctrine of *forum non conveniens* in the past years, and the development of China's law revision in 2023.

I. Judicial Practice Before Legislation or Judicial Interpretation

Chinese courts first applied the doctrine of *forum non conveniens* in a series of cases in the 1990s. For instance, in *Jiahua International Limited, Ruixiang Limited v. Yongqiao Enterprise Limited, Zhongqiao National Goods Investment* in 1995,[2] the SPC deemed it inappropriate for the original trial court to accept the case, though the connection factors are sufficient to establish jurisdiction, solely based on the appellants having representative offices and attachable property in the court's location, thus dismissing the two plaintiffs' lawsuits against the two defendants. Furthermore, in the case of *Sumitomo Bank v. Xinhua Real Estate Limited* in 1999,[3] the Supreme People's Court explicitly applied the doctrine of *forum non conveniens* as a stand rule for the first time, though lacking any provision in Chinese laws back then: since both parties to the case were legal

persons registered in Hong Kong, the place of signing and performance of the involved agreement was in Hong Kong, and the parties chose Hong Kong law as the governing law for the agreement, the Supreme People's Court, considering the convenience of litigation, ruled that it was more appropriate for the Hong Kong court to have jurisdiction, and the Guangdong Provincial Higher People's Court should not accept the case.

From these two early judicial practices, it can be seen that the courts correctly focused on whether the court was "appropriate" or suitable to accept the case, just as many foreign courts did, and seeing the "convenience" requirement in the doctrine of *forum non conveniens* as only one side of the coin. However, later legislation and academics misunderstood *forum non conveniens*, many Chinese scholars and practitioners did not realize the point is to determine whether the court is "appropriate" for the case mainly because of its name contains "conveniens", but saw it as a tool to find whether other courts will be more "convenient" or economically efficient for the courts, ignored the fairness and justice requirements in this doctrine.[4]

II. Judicial Interpretations issued by the Supreme People's Court of PRC

In Article 11 of the 2005 *Minutes of the Second National Foreign-related Commercial and Maritime Trial Work Conference*,[5] SPC provided seven conditions for applying *forum non conveniens*, focusing on whether the Chinese court would face "significant difficulties in determining facts and applying laws" and whether a foreign court would be more "convenient" for the trial. In 2014, the SPC issued the *Interpretations of the Supreme People's Court on the Application of the Civil Procedure Law of the PRC*,[6] which outlined six conditions for applying *forum non conveniens* in Article 532,[7] essentially consistent with Article 11 of the *2005 Minutes*, still focusing on the convenience of the court in hearing the case rather than its appropriateness.

Such a provision on *forum non conveniens* caused four problems in practice.

First, based on the provisions of Article 532(4) of the *2014 Interpretations*, once a case involves the interests of the Chinese state, citizens, legal persons, or other organizations, the court will rule to exercise jurisdiction over the case. The court over-applies this clause to justify its jurisdiction, without comparing the appropriateness (sometimes even nor the convenience) of Chinese courts with

foreign courts, and even if the parties to the case are Chinese nationals or the facts are connected to China, the court tends to rule that it has jurisdiction over the case.

Secondly, due to the lack of clear explanation of the term "convenience" in the *2014 Interpretations*, the court's standards were vague when interpreting and applying *forum non conveniens*. There are cases where the court arbitrarily determines that it is "inconvenient" to hear the case because the applicable law is foreign law and the facts of the case occurred abroad, thus rejecting jurisdiction.[8] This approach not only fails to argue the appropriateness of foreign court jurisdiction but also unduly restricts one's own jurisdiction. Different courts may apply this provision with a scope of discretion either too broad or way too narrow , hence failing to achieve the legislative purpose of "having the most appropriate court exercise jurisdiction".

Thirdly, no matter whether in common law jurisdictions or civil law jurisdictions, when applying the doctrines of *forum non conveniens* or *lis pendens*, the foreign courts upholding the jurisdiction is an important consideration for domestic courts to reject the exercise of one's own jurisdiction. However, Chinese courts have repeatedly exercised jurisdiction over cases even when foreign courts have already taken the cases or even delivered judgments, causing parallel litigation and multiple judgments.[9]

Finally, when the legal requirements in Article 532 of the *2014 Interpretations* is met, the absolute rejection of the lawsuit is too rigid and inflexible , leaving no room for the court's discretion in different cases. If the foreign court refuses to exercise jurisdiction, the parties who were rejected by Chinese courts must re-file the lawsuits, which may lead to an increase in costs and a significantly delay of justice.

III. The Development in the 2024 Civil Procedure Law of PRC

In response to the problems in practice, the *Civil Procedure Law of the PRC* which came into effect on 1 January 2024, introduced *forum non conveniens* in Articles 281 and 282.[10] Article 281 is about to find the more convenient court to hear the case, and Article 282 proposes five conditions for the application of *forum non conveniens*, which to some extent resolves the previous practical dilemmas and responds to the criticisms from the academia.

First, Article 282(1) of the 2024 *Civil Procedure Law of PRC* restricts the determination of "convenience" to cases where "*it is evidently inconvenient for a people's court to try the case and for a party to participate in legal proceedings since basic facts of disputes in the case do not occur within the territory of the People's Republic of China*", avoiding the situation where courts determine that the doctrine of *forum non conveniens* should be applied merely because the parties agree to apply foreign law or there is evidence situated or disputes occurred abroad, thereby excessively narrowing jurisdiction.

Secondly, the new law deleted the over-broad exclusion standard in Article 532 (4) of the *2014 Interpretations* by stating that "*the national interest, or the interest of any citizen, legal person or any other organization of the People's Republic of China*", instead, Article 282 (4) provides that "*not involving the sovereignty, security, or public interest of the People's Republic of China*", avoiding the situation where Chinese courts exercise jurisdiction merely because the parties are of Chinese nationality or the case facts are connected with China, and narrowing the exclusion from vague "national interest" to clearer "national sovereignty, security, or public interest", thus better balancing the "fairness" requirements within the doctrine of *forum non conveniens*.

Lastly, Article 282 paragraph 2 adds that after the Chinese court applied the *forum non conveniens* exception to dismiss the action, if the foreign court refuses to exercise jurisdiction or does not take necessary measures to hear the case or does not conclude the case within a reasonable period, the Chinese court shall accept the case, safeguarding the procedural rights of the parties. This new provision resolves the problem reflected in Article 532 of the *2014 Interpretations* and relevant practice where the party can only start over the action before the people's court.

IV. Conclusion

Generally speaking, the 2024 *Civil Procedure Law of PRC* represents a successful improvement, it shows the balance of fairness and convenience in the new rules and serves the requirements of *forum non conveniens*. However, it still has room for further refinement to align more closely with the original intent of *forum non conveniens*.

On the one hand, in most common law jurisdictions, the fairness requirement of

finding the most appropriate forum also includes the potential for oppressive or vexatious litigation, abuse of judicial process, or "real injustice" to the parties if the case is heard by the domestic court, rather than public interest provided in Article 282(4). A better approach seeks to identify the most appropriate forum for achieving justice in every single case.

On the other hand, due to the misunderstanding of finding the most "convenient" forum, even though Articles 281 and 282 consider both convenience and fairness requirements, they fail to synthesize these aspects into a single requirement of "appropriateness". This leads to a fragmented consideration of "convenience" and "fairness" by the courts when applying the provisions, rather than understanding them as two sides of the same coin in the service of finding the most appropriate forum.

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[1] The latest article regarding the *forum non conveniens* in Chinese law is published in 2024, gave a description of the development from judicial practice to legal provisions, but lacked theoretical analysis and comment on the reasons and consequences of the transformation of such development. Before that, only 2 articles were devoted to the practice of *forum non conveniens* in China until 2014. See Liang Zhao, *Forum Non Conveniens in China: From Judicial Practice to Law*, 11 The Chinese Journal of Comparative Law 1 (2024); Chenglin Liu, *Escaping Liability via Forum Non Conveniens: ConocoPhillips's Oil Spill in China*, 17 U. PA. J.L. & Soc. CHANGE 137 (2014); Courtney L. Gould, *China as a Suitable Alternative Forum in a Forum Non Conveniens Motion*,

3 TSINGHUA CHINA L. REV. 59 (Fall 2010).

[2] Supreme People's Court (1995) Jing Zhong Zi No. 138 Civil Ruling.

[3] Supreme People's Court (1999) Jing Zhong Zi No. 194 Civil Ruling.

[4] Chinese theories and laws translated *forum non conveniens* as "Bu Fang Bian Fa Yuan", which means "a court that is not convenient to settle the dispute". Prof. Dr. Dr. CHEN Weizuo insists that it should be named as "Fei Shi Dang Fa Yuan", which means "a court that is not appropriate to settle the dispute".

[5] Fa Fa [2025] No. 26.

[6] Fa Shi [2015] No. 5.

[7] The number of which later changed to Article 530 after the judicial interpretation was revised in 2022, but the content remained unchanged. Article 532 stipulated that: "*Where a foreign-related civil case falls under all the following circumstances, the people's court may render a ruling to dismiss the plaintiff's action, and inform the plaintiff to institute an action in a more convenient foreign court. (1) The defendant raises a claim that the case shall be subject to the jurisdiction of a more convenient foreign court, or raises an objection to jurisdiction. (2) The parties do not have an agreement specifying the jurisdiction of a court of the People's Republic of China. (3) The case does not fall under the exclusive jurisdiction of a court of the People's Republic of China. (4) The case does not involve the national interest, or the interest of any citizen, legal person or any other organization of the People's Republic of China. (5) The people's court has great difficulties in the determination of facts and the application of laws since major facts of disputes in a case do not occur within the territory of the People's Republic of China, and the laws of the People's Republic of China do not apply to the case. (6) The foreign court has jurisdiction over the case and it is more convenient for it to try the case.*"

[8] *Schott Solar Holdings Ltd. v. Schott Solar Investment Ltd.*, Shanghai No. 1 Intermediate People's Court Civil (Commercial) First Instance No. S17, 2014.

[9] See e.g. *Chen Huanbin et al. v. Chen Weibin et al.*, Beijing Second Intermediate People's Court (2015) Civil (Commercial) Final No. 6718; *Value Financial Services Ltd. v. Century Venture Ltd.& Beijing De Shi Law Firm*,

Supreme People' Court (2014) Civil Final No. 29.

[10] Article 281 provides that: *"After a people's court accepts a case in accordance with the provisions of the preceding article, if a party applies to the people's court in writing for suspending the proceedings on the ground that the foreign court has accepted the case prior to the people's court, the people's court may render a ruling to suspend the proceedings, except under any of the following circumstances: (1) The parties, by an agreement, choose a people's court to exercise jurisdiction, or the dispute is subject to the exclusive jurisdiction of a people's court. (2) It is evidently more convenient for a people's court to try the case.*

If a foreign court fails to take necessary measures to try the case or fails to conclude the case within a reasonable time limit, the people's court shall resume proceedings upon the written application of the party.

If an effective judgment or ruling rendered by a foreign court has been recognized, in whole or in part, by a people's court, and the party institutes an action against the recognized part in the people's court, the people's court shall rule not to accept the action, or render a ruling to dismiss the action if the action has been accepted."

Article 282 provides that: "*Where the defendant raises any objection to jurisdiction concerning a foreign-related civil case accepted by a people's court under all the following circumstances, the people's court may rule to dismiss the action and inform the plaintiff to institute an action in a more convenient foreign court: (1) It is evidently inconvenient for a people's court to try the case and for a party to participate in legal proceedings since basic facts of disputes in the case do not occur within the territory of the People's Republic of China. (2) The parties do not have an agreement choosing a people's court to exercise jurisdiction. (3) The case does not fall under the exclusive jurisdiction of a people's court. (4) The case does not involve the sovereignty, security, or public interest of the People's Republic of China. (5) It is more convenient for a foreign court to try the case.*

If a party institutes a new action in a people's court since the foreign court refuses to exercise jurisdiction over the dispute, fails to take necessary measures to try the case, or fails to conclude the case within a reasonable period after a

people's court renders a ruling to dismiss the action, the people's court shall accept the action."

Moroccan Supreme Court Confirms Child Return Order to Switzerland under the HCCH 1980 Child Abduction Convention

I. Introduction

It is not uncommon for scholars examining the interplay between the HCCH 1980 Child Abduction Convention and the legal systems of countries based on or influenced by Islamic Sharia to raise concerns about the compatibility of the values underlying both systems. While such concerns are not entirely unfounded and merit careful consideration, actual court practice can present a very different reality.

Morocco's engagement with the Hague Conventions, notably the HCCH 1980 Child Abduction Convention and the HCCH 1996 Child Protection Convention, provides a particularly illustrative example. As previously reported on this blog (see here, here and here), Moroccan courts have thus far demonstrated a clear willingness to engage constructively with the HCCH instruments, effectively dispelling – at least to a significant extent – concerns about the existence of a so-called "Islamic exceptionalism" as an obstacle to resolving parental child abduction cases. The case presented here provides yet another compelling example of how Moroccan courts interpret and apply the HCCH 1980 Child Abduction Convention in a manner consistent with Morocco's international obligations. This is particularly noteworthy given the presence of elements often cited as indicative of "Islamic exceptionalism."

Although the Supreme Court's ruling was issued over a year ago (*Ruling No. 198*

of 25 April 2023), it has only recently been made available, bringing the total number of Hague Convention cases to ***eight*** (based on my own count and the available information. For an outline of the other Hague Convention cases, see here). Its legal significance and broader implications therefore warrant special attention.

II. The facts

The case concerned a petition for a return order to Switzerland for a child (a girl, *in casu*) who had been wrongfully retained in Morocco by her father. Although the text of the decision lacks sufficient detail to fully clarify the circumstances of the case, it can be inferred from the Court's summary of facts that the child was approximately 8 years old at the time Moroccan courts were seized and that the father is likely a Moroccan national. However, the ruling does not provide details regarding the nationality (or religion) of the left-behind mother nor does it specify the time frame within which the application was made.

As previously noted, the legal proceedings were initiated by the public prosecutor, who petitioned for the return of the child to her habitual residence in Switzerland under the HCCH 1980 Child Abduction Convention. The petition followed an official communication from the Ministry of Justice to the Office of the Public Prosecutor.

In response, the father contested the petition on two main grounds. First, he challenged the standing of the public prosecutor to initiate the proceedings, arguing that the petition should have been filed by the Ministry of Justice in its role of Central Authority under the Convention. Second, he invoked the child's refusal to return to Switzerland, attributing her reluctance to emotional distress and physical abuse allegedly suffered while living with her mother. The father further asserted that the child had now settled into her new environment in Morocco, where she was continuing her education.

The Court of First Instance accepted the petition and ordered the return of the child to her habitual residence, a decision that was upheld on appeal. The father subsequently appealed to the Supreme Court.

Before the Supreme Court, the father reiterated his earlier arguments,

particularly challenging the public prosecutor's standing to initiate such proceedings. He further invoked Article 12 of the HCCH 1980 Child Abduction Convention, arguing that the child was now settled in her new familial and educational environment. In addition, he asserted that the child suffered from emotional distress and anxiety due to alleged domestic violence she experienced while living with her mother. The father referred to reports and certificates issued by Moroccan medical and psychological institutions which were submitted as evidence of the child's state of mind and her strong resistance to being returned to Switzerland. The father also argued that the mother had not effectively exercised custody rights at the time the child came to live with him, and contended that the mother had consented to the child's relocation.

III. The Ruling

In its *Ruling No. 198 of 25 April 2023*, the Moroccan Supreme Court rejected all the father's arguments and upheld the order for the child's return, providing the following reasoning:

Regarding the first argument, the Supreme Court referred to Article 11 of the HCCH 1980 Child Abduction Convention, which mandates contracting states to take urgent measures to secure the return of abducted children. The Court also cited Law No. 33.17, which transferred the Minister of Justice's responsibilities to the Public Prosecutor at the Supreme Court, in its capacity as Head Public Prosecutor Office. This transfer enables the public prosecutor to replace the Ministry of Justice in overseeing judicial proceedings and exercising appeals related to the cases falling under their competence.

As for the second argument, the Supreme Court emphasized that determining whether the exception in Article 12 of the HCCH 1980 Child Abduction Convention applies is a matter for the trial court to investigate based on the evidence presented. Based on the lower courts' finding, the Supreme Court concluded that the father's retention of the child, who had been living with her mother in Switzerland, where the mother had been granted sole custody, constituted wrongful retention and a violation of the mother's custody rights as stipulated by Swiss law. The Court also noted that the medical reports submitted did not provide evidence of mistreatment.

Finally, the Supreme Court found that the mother was actively exercising custody of her daughter, as confirmed by the Swiss court decision granting the appellant only visitation rights. The Court also dismissed the father's claims, particularly those regarding the risk of physical or psychological harm to the child, finding them unconvincing and unsupported by sufficient evidence.

IV. Comments

The Supreme Court's ruling is remarkable in many respects. It directly challenges the notion of "Islamic exceptionalism" in matters of custody and parental authority under the HCCH 1980 Child Abduction Convention. Under traditional interpretation of Islamic law, which underpins the Moroccan Family Code of 2004 – known as the *Mudawwana* – (notably article 163 to 186 on custody), the father's right to exercise legal guardianship (*wilaya*) over the child is often seen as prevailing over the mother's right to custody (*hadanah*). For instance, a mother may lose her custody rights if she relocates to a distant place, especially a forign country. Similarly, the environment in which the child is to be raised is considered a critical factor, with particular emphasis on whether the child will grow up in an *Islamic environment*. This concern is even more pronounced when the custodial mother is not Muslim and resides in a non-Muslim country (Cf. M. Loukili, "L'ordre public en droit international privé marocain de la famille" in N. Bernard-Maugiron and B. Dupret, *Ordre public et droit musulman de la famille* (Bruylant, 2012) 137, 155-157).

What is striking in this case is that the Supreme Court did not consider these "traditional" concerns at all. Instead, it focused solely on the legal framework established under the Hague Convention. The Court simply observed that the mother had been granted sole custody of the child and concluded that the wrongful retention of the child in Morocco constituted a violation of those rights. This finding justified the return order under the HCCH 1980 Child Abduction Convention.

Another noteworthy aspect of the ruling, which can also be observed in other Hague Convention cases, is that the Moroccan Supreme Court does not adhere rigidly to its traditional approach in assessing the admissibility of return orders requests or the revocation of the mother's custody rights. Under Moroccan

private international law, family law issues in general, including matters of parental authority and custody, are generally governed by Moroccan law whenever one of the parties is Moroccan (Article 2(3) of the 2004 Family Code). Traditionally, Moroccan courts have often concluded that public policy is violated when Moroccan law is not applied or a foreign judgment diverges from Moroccan domestic family law regulation (Loukili, *op. cit.*, 150).

In the present case, however, the Supreme Court not only accepted that sole custody was granted to the mother under Swiss law, but also it did so although the application of Moroccan law would have led to a different outcome. Indeed, the Supreme Court has consistently ruled that the mother's refusal to return with the children to Morocco deprived the father of his right to supervise and control the children under his legal guardianship (*wilaya*), thus justifying the father's claim to have the mother's custody rights revoked (Supreme Court, *Ruling of 21 June 2011*; *Ruling of 23 August 2011*). The Supreme Court took the same stance in a case involving child abduction, where the request for the return order, based on the French-Moroccan bilateral Convention of 1981 (article 25), was rejected on the ground that the issuing of such an order would contradict with Moroccan law on custody (Supreme Court, *Ruling of 15 October 2003*).

The Supreme Court's approach in Hague Convention cases, including the one commented on here, marks a notable departure from this traditional stance. Not only has the Court repeatedly affirmed the primacy of international conventions over domestic law—though this issue was not explicitly raised before the Court *in casu*, it can be inferred from the absence of references to Moroccan law on custody—but it also approvingly referred to the law of the child's habitual residence rather than Moroccan law, despite a literal reading of Article 2(3) of the *Mudawwana* suggesting otherwise.

The Supreme Court stance in dealing with the Hague Child Abduction cases reflects a growing willingness on the part of the Court to align its reasoning with international obligations and to prioritize the principles enshrined in the Hague Conventions over more restrictive domestic norms. In this sense, this approach challenges the perception of "Islamic exceptionalism" and highlights a progressive interpretation of Moroccan law within the framework of international child abduction cases.

Brazil's New Law on Forum Selection Clauses: Throwing the Baby out with the Bathwater?

This post was written by Luana Matoso, a PhD candidate and research associate at Max Planck Institute for Comparative and International Private Law in Hamburg, Germany.

Brazil has changed its law on international forum selection clauses. In June this year, a new statutory provision came into force, adding, unexpectedly, new requirements for their enforceability. In this attempt to redistribute *domestic* litigation, the Brazilian legislator may well have thrown out the baby, *international* forum selection clauses, with the bathwater.

The Recognition of International Forum Selection Clauses Under Brazilian Law

International forum selection clauses are among the most controverted topics in Brazilian Private International Law. Although the positive effect of such clauses has been generally accepted in Brazil since 1942, their negative effects have been in center of the legal debate ever since. Until very recently, Brazilian courts would not enforce a clause that selected a foreign forum, arguing that parties could not, by agreement, oust the jurisdiction of Brazilian courts established by law — an approach quite similar to that adopted by U.S. courts prior to the landmark U.S. Supreme Court decision in *Bremen v Zapata Off-Shore Co.* (1972).

Brazilian courts seemed to follow suit in 2015, when — as a result of serious efforts by legal scholars — a provision explicitly recognizing the derogatory effect of forum selection clauses was included in the latest reform of the Brazilian Code of Civil Procedure (CCP). According to Art. 25 CCP, Brazilian courts do not have jurisdiction over claims in which the parties have agreed to the exclusive

jurisdiction of a foreign forum. The provision references Art. 63 §§1-4 CCP, which sets out the requirements for national forum selection clauses. Thus, national and international forum selection clauses are subject to similar requirements for validity, including that the agreement must be in writing and relate to a particular transaction.

The New Amendment of June 2024: A Setback for Party Autonomy

What seemed settled since 2015 is now back in the center of debate. On June 4, 2024, the Brazilian National Congress passed a law amending Art. 63 CCP and creating additional requirements for forum selection clauses. According to the new wording of Art. 63 §1 CCP, a forum selection clause is valid only if the chosen court is "connected with the domicile or residence of one of the parties or with the place of the obligation."

Essentially, this new law significantly limits the autonomy of the parties in selecting a forum of their choice. Before the amendment there were no restrictions on the forum to be selected; now Brazilian courts will only enforce clauses in which the chosen forum is related to the dispute. In practice, the choice of a "neutral" forum in a third State will not be enforceable in Brazilian courts.

International Forum Selection Clauses: The Wrong Target?

The application of the new requirements also to international clauses may have resulted from an oversight on the part of the legislator. The explanatory memorandum accompanying the draft bill indicates that the main objective of the reform was to address a problem of domestic, not international, forum shopping. The document specifically cites the current congestion of the courts of the Federal District, the federal unit in which Brazil's capital, Brasília, is located. It is known for its efficient courts, which have increasingly received disputes that have no connection to the court other than a forum selection clause. Unlike common law jurisdictions, Brazilian courts may not decline jurisdiction based on *forum non conveniens*. Rather, forum selection clauses, if valid, will bind the jurisdiction of the chosen court. Describing this practice as "abusive" and "contrary to the public interest," the legislator sought to address this (domestic) issue.

The memorandum makes no mention of international forum selection clauses. Nevertheless, it seems clear that the amendment also applies to international forum selection clauses. The explicit reference of Art. 25 CCP to Art. 63 §1 leaves little room for an argument to the contrary.

The circumstances of this apparent oversight have led to strong criticism. Scholars have argued that the legislative process lacked publicity and public participation, especially from legal experts. The process was indeed fast-paced. Less than 14 months elapsed between the introduction of the draft bill and its enactment. After less than 10 months in the Chamber of Deputies, the bill was approved in the Senate under an emergency procedure and entered into force immediately after its publication on June 4, 2024.

And Now? First Clues in Recent Case Law

The implications of the new amendment for courts and parties remain unclear. First, is the new amendment applicable only to forum selection agreements concluded after its entry into force, on June 4, 2024, or for court proceedings commenced after that date? Second, what is a sufficient connection of the chosen court to "the domicile or residence of one of the parties or with the place of the obligation" under Art 63 §1 CCP?

Three recent decisions provide a few clues. A district court in the county of Santos, São Paulo, addressed the temporal application of the rule in a decision of November 7, 2024, holding that the new amendment applies only to contracts concluded after June 4, 2024, since the selected forum and the enforceability of the clause have a significant impact on the parties' risk calculation when entering into the contract. Applying the law as of before the amendment, the court enforced a forum selection clause in a bill of lading that selected New York courts to hear the dispute, even though both parties to the contract were seated in Brazil.

On June 24, 2024, another decision, this time by a district court in the state of Ceará, enforced a jurisdiction clause in which the chosen forum had no direct connection with the dispute or the domicile of the parties. The dispute arose between a Brazilian seafood retailer and the Brazilian subsidiary of the global shipping company Maersk. Without even mentioning the new amendment, the court stayed proceedings on the basis of the forum selection clause contained in

the bill of lading, which selected the courts of Hamburg, the German headquarters of Maersk's parent company, Hamburg Süd, as having jurisdiction over the dispute. This leaves open the question of whether, in the future, the choice of the seat of the parent company of one of the parties as the place of jurisdiction will constitute a sufficient connection as required by the new amendment.

Another interesting decision was rendered on September 4, 2024, in the county of Guarulhos, also in the state of São Paulo, concerning a forum selection clause in a publishing contract between an author and a publisher, both domiciled in Brazil. The clause selected Lisbon, Portugal, as the forum for hearing the dispute. In enforcing the clause, the court stayed proceedings brought by the author in Brazil. Although the new amendment was not explicitly mentioned in the decision, the court's reasoning included the justification that the clause was enforceable since the contract provided that the title, which was the subject of the publishing contract, was also to be marketed in Portugal. This could be an indication that the place of performance of the contract establishes a sufficient connection with the "place of the obligation" pursuant to Art. 63 §1 CCP. Referring to Article 9 of the Law of Introduction to the Brazilian Civil Code, scholars argue that the place of conclusion of the contract may also satisfy this requirement.

Conclusion

Ultimately, the broader or narrower approach taken by the courts in interpreting the new requirements will determine the extent to which the amendment will restrict the parties' ability to choose where to litigate their disputes. Equally important for parties, as a factor of predictability, is the question of how consistent this interpretation will be among the various courts in Brazil. To date, I am not aware of any decision in which a Brazilian court has expressly refused to enforce a forum selection clause on the basis of the new wording of the law. How this will play out in practice remains to be seen.

This post is cross-posted at Transnational Litigation Blog.

Improving the settlement of (international) commercial disputes in Germany

This post was written by Prof. Dr. Giesela Rühl, LL.M. (Berkeley), Humboldt University of Berlin, and is also available via the EAPIL blog.

As reported earlier on this blog, Germany has been discussing for years how the framework conditions for the settlement of (international) commercial disputes can be improved. Triggered by increasing competition from international commercial arbitration as well as the creation of international commercial courts in other countries (as well as Brexit) these discussions have recently yielded a first success: Shortly before the German government coalition collapsed on November 6, the federal legislature adopted the Law on the Strengthening of Germany as a Place to Settle (Commercial) Disputes (Justizstandort-Stärkungsgesetz of 7 October 2024)[1]. The Law will enter into force on 1 April 2025 and amend both the Courts Constitution Act (Gerichtsverfassungsgesetz – GVG) and the Code of Civil Procedure (Zivilprozessodnung – ZPO)[2] with the aim of improving the position of Germany's courts vis-à-vis recognized litigation and arbitration venues – notably London, Amsterdam, Paris and Singapore. Specifically, the new Law brings three innovations.

English as the language of proceedings

The first innovation relates to the language of court proceedings: To attract international disputes to German courts, the new Law allows the German federal states *(Bundesländer)*[3] to establish "commercial chambers" at the level of the regional courts *(Landgerichte)* that will offer to conduct proceedings in English from beginning to end if the parties so wish (cf. § 184a GVG). Before these chambers parties will, therefore, be allowed to file their briefs and all their statements in English, the oral hearings will be held in English and witnesses will be examined in English. In addition, commercial chambers will communicate with the parties in English and write all orders, decisions and the final judgment in English. Compared to the status quo, which limits the use of English to the oral hearing (cf. § 185(2) GVG) and the presentation of English-language documents

(cf. § 142(3) ZPO) this will be a huge step forward.

The new Law, however, does not stop here. In addition to allowing the establishment of (full) English language commercial chambers at the regional court level it requires that federal states ensure that appeals against English-language decisions coming from commercial chambers will also be heard (completely) in English in second instance at the Higher Regional Courts *(Oberlandesgerichte)* (cf. § 184a(1) No. 1 GVG). The new Law also allows the Federal Supreme Court *(Bundesgerichtshof)* to conduct proceedings entirely in English (cf. § 184b(1) GVG). Unfortunately, however, the Federal Supreme Court is not mandated to hear cases in English (even if they started in English). Rather, it will be in the discretion of the Federal Supreme Court to decide on a case-by-case basis (and at the request of the parties) whether it will hold the proceedings in English – or switch to German (cf. § 184b GVG). The latter is, of course, unfortunate, as parties cannot be sure that a case that is filed in English (and heard in English at first and second instance) will also be heard in English by the Federal Supreme Court thus reducing incentives to commence proceedings in English in the first place. But be this as it may: it is to be welcomed that the German federal legislature, after long and heated debates, finally decided to open up the German civil justice system to English as the language of the proceedings.

Specialized "commercial courts" for high-volume commercial disputes

The second innovation that the new Law brings relates to the settlement of high-volume commercial cases (whether international or not). To prevent these cases from going to arbitration (or to get them back into the state court system) the new Law allows the German federal states to establish specialized senates at the Higher Regional Courts. Referred to as "commercial courts" these senates will be distinct from other senates in that they will be allowed to hear (certain) commercial cases in first instance if the parties so wish (cf. § 119b(1) GVG) thus deviating from the general rule that cases have to start either in the local courts (if the value in dispute is below € 5.000,00) or in the regional courts (if the value in dispute is € 5.000,00 or higher). In addition, commercial courts will conduct their proceedings in English (upon application of the parties) and in a more arbitration-style fashion. More specifically, they will hold a case management conference at the beginning of proceedings and prepare a verbatim record of the hearing upon application of the parties (cf. §§ 612, 613 ZPO). Commercial courts will, hence, be able to offer more specialized legal services as well as services

that correspond to the needs and expectations of (international) commercial parties.

It is unfortunate, however, that the German legislature was afraid that the commercial courts would be flooded with (less complex) cases – and, therefore, decided to limit their jurisdiction to disputes with a value of more than € 500.000,00 (cf. § 119b(1) GVG). As a consequence, only parties with a high-volume case will have access to the commercial courts. This is problematic for several reasons: First, it is unclear whether a reference to the value of the dispute is actually able to distinguish complex from less complex cases. Second, any fixed threshold will create unfairness at the margin, as disputes with a value of slightly less than € 500.00,00 will not be allowed to go to the commercial courts. Third, requiring a minimum value can lead to uncertainty because the value of a dispute may not always be clear *ex ante* when the contract is concluded. Fourth, a fixed threshold may create the impression of a two-tier justice system, in which there are "luxury" courts for the rich and "ordinary" courts for the poor. And, finally, there is a risk that the commercial courts will not receive enough cases to build up expertise and thus reputation. Against this background, it would have been better to follow the example of France, Singapore, and London and to open commercial courts for all commercial cases regardless of the amount in dispute. At the very least, the legislature should have set the limit much lower. The Netherlands Commercial Court, for example, can be used for any disputes with a value higher than € 25,000.00.

Better protection of trade secrets

The third innovation, finally, concerns the protection of trade secrets. However, unlike the other innovations the relevant provisions are not limited to certain chambers or senates (to be established by the federal states on the basis of the new Law), but apply to all civil courts and all civil proceedings (cf. § 273a ZPO). They allow the parties to apply for protection of information that qualifies as a trade secret within the meaning of the German Act on the Protection of Trade Secrets (Gesetz zum Schutz von Geschäftsgeheimnissen – GeschGehG). If the court grants the application, all information classified as a trade secret must be kept confidential during and after the proceedings (cf. §§ 16 Abs. 2, 18 GeschGehG). In addition, the court may restrict access to confidential information at the request of a party and exclude the public from the oral hearing (§ 19 GeschGehG). The third innovation, thus, account for the parties' legitimate

interests in protecting their business secrets without unduly restricting the public nature of civil proceedings, which is one of the fundamental pillars of German civil justice. At the same time, it borrows an important feature from arbitration. However, since the new rules are concerned with the protection of trade secrets only, they do not guarantee the confidentiality of the proceedings as such. As a result, the parties cannot request that the fact that there is a court case at all be kept secret.

Success depends on the federal states

Overall, there is no doubt that the new Law is to be welcomed. Despite the criticism that can and must be levelled against some provisions, it will improve the framework for the resolution of high-volume (international) commercial disputes in German courts. However, there are two caveats:

The first caveat has its root in the Law itself. As it places the burden to establish commercial chambers and commercial courts on the federal states, the extent to which it will be possible for civil court proceedings to be conducted entirely in English and the extent to which there will be specialized senates for high-volume commercial disputes will depend on whether the federal states will exercise their powers. In addition, the practical success of the Law will also depend on whether the federal states will make the necessary investments that will allow commercial chambers and commercial courts to strive. For example, they will need to make sure that commercial chambers and commercial courts are staffed with qualified judges who have the necessary professional and linguistic qualifications and ideally also practical experience to settle high-volume (international) commercial disputes. In addition, they will have to ensure that judges have sufficient time to deal with complex (national and international) cases. And, finally, federal states will have to ensure that sufficiently large and technically well-equipped hearing rooms are available for the kind of high-volume disputes that they seek to attract. Should federal states not be willing to make these kinds of investments commercial chambers and commercial courts will most likely be of limited use.

The second caveat concerns the likely success of the new Law with regards to *international* disputes. In fact, even if the federal states implement the new Law in a perfect manner, i.e. even if they establish a sufficient number of commercial chambers and commercial courts and even if they make the investments described above, it seems unlikely that German courts will become sought-after

venues for the settlement of international commercial disputes. This is because the German civil justice system has numerous disadvantages when compared with international commercial arbitration. In addition, the attractiveness of German courts suffers from the moderate reputation and poor accessibility of German substantive law. Both problems will not disappear with the implementation of the new Law.

Against this background, the new Law holds the greatest potential for *national* high-volume commercial disputes. However, it should not be forgotten that these kinds of disputes represent only a small fraction of the disputes that end up before German courts each year. In order to really strengthen Germany as a place to settle dispute, it would, therefore, be necessary to address the problems that these cases are facing. However, while the (now former) Federal Minister of Justice made promising proposals to this effect in recent months, the collapse of the German government coalition in early November makes is unlikely, that these proposals will be adopted any time soon. In the interest of the German civil justice system as a whole, it is, therefore, to be hoped that the proposals will be reintroduced after the general election in early 2025.

[1] Gesetz zur Stärkung des Justizstandortes Deutschland durch Einführung von Commercial Courts und der Gerichtssprache Englisch in die Zivilgerichtsbarkeit (Justizstandort-Stärkungsgesetz) vom 7. Oktober 2024, Bundesgesetzblatt (Federal Law Gazette) 2024 I Nr. 302.

[2] Note that both the translations of the GVG and the ZPO do not yet include the amendments introduced through the new Law discussed in this post.

[3] The German civil justice system divides responsibilities between the federal state *(Bund)* and the 16 federal states *(Bundesländer)*. While the federal state is responsible for adopting unified rules relating to the organization of courts as well as the law of civil procedure (Art. 74 No. 1 of the Basic Law), the federal states are responsible for administering (most) civil courts on a daily basis (Art. 30 of the Basic Law). It is, therefore, the federal states that organize and fund most civil courts, appoint judges, and manage the court infrastructure.

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?

Written by Lena-Maria Möller,

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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.

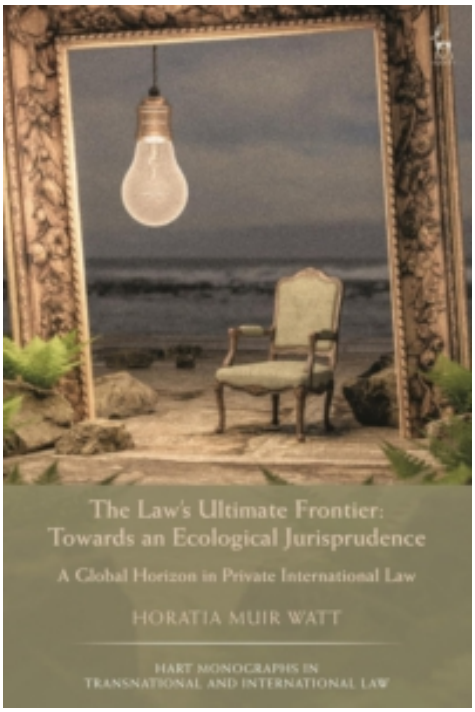
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[1] See on this blog, Béligh Elbalti, Abu Dhabi Supreme Court on the Applicability of Law on Civil Marriage to Foreign Muslims, idem, The Abu Dhabi Civil Family Court on the Law on Civil Marriage – Applicability to Foreign Muslims and the Complex Issue 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.

[5] GOICOECHEA, IGNACIO. "Nuevos desarrollos en la cooperación jurídica internacional en materia civil y comercial", in *Revista de la Secretaría del Tribunal Permanente de Revisión (STPR)*, 7, year 4, 2016.

[6] TIRADO ESTRADA, JESÚS JOSÉ. "Videoconferencia, cooperación judicial internacional y debido proceso.", in *Revista de la Secretaria del Tribunal Permanente de Revisión*, year 5, no. 10, 2017, p. 154. Available in:

https://dialnet.unirioja.es/servlet/articulo?codigo=6182260. Consultation date: 10/11/2024.

[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.

[12]ASADIP PRINCIPLES ON TRANSNATIONAL ACCESS TO JUSTICE (TRANSJUS). Available at: http://www.asadip.org/v2/wp-content/uploads/2018/08/ASADIP-TRANSJUS-EN-FINAL18.pdf. Consultation date: 10/11/2024.

[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.

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[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.