The Public Law-Private Law Divide and Access to Frozen Russian Assets

By Csongor István Nagy, Professor of Law at the University of Galway, Ireland, and at the University of Szeged, Hungary, and research professor at the HUN-REN Center for Social Sciences, Hungary.

The overwhelming majority of the international community condemned Russia's war against Ukraine as a gross violation of international law and several countries introduced unilateral measures freezing Russian assets. It has been argued that countries should go beyond that and use these assets for the indemnification of Ukrainian war damages. Confiscation would, however, be unprecedented and raise serious international law concerns. While states have, with good reason, been reluctant to react to one wrongful act with another, this question has given rise to intensive debate. Recently, the EU authorized the use of net profits from the frozen assets but not the assets themselves to support Ukraine.

In my paper forthcoming in the University of Pennsylvania Journal of International Law I argue that this question should be approached from the perspective of the public law-private law divide and international investment law may open the door to the use of a substantial part of the frozen assets for the purpose of war reparations. The pre-print version is available at SSRN.

Under international law, sovereign immunity rules out confiscation both as a countermeasure and a compensatory measure responding to *acta jure imperii*, such as military operations. Nonetheless, sovereign immunity does not extend to commercial matters, where judgments and awards can be enforced against state assets. Investment treaties, including the Russia-Ukraine BIT (RUBIT), "commercialize" *acta jure imperii*. They convert public law violations into *quasi*-commercial claims "immune from sovereign immunity." Although not the norm, mass claims are not unknown in investment arbitration. This implies that if Ukrainian claims for war damages can be submitted to investment arbitration and

incorporated into an arbitral award, they may have a solid legal basis for enforcement against Russian assets. A good part of these assets can be used for this purpose. Although "non-commercial" assets, such as the property of diplomatic missions, military assets, cultural property, items displayed at an exhibition and, most importantly, the property of the central bank are immune from enforcement due to sovereign immunity, sovereign direct investments, airplanes, ships and the assets of persons attributable to the state can be used to satisfy investment awards.

The key issue of the RUBIT's applicability is territorial scope. Although, at first, the idea that Ukrainians may be awarded compensation on the basis of the RUBIT may raise eyebrows, in the Crimea cases arbitral tribunals just did that. They consistently applied the RUBIT to Russian measures and treated Crimea (strictly for the purpose of the BIT!) as the territory of Russia on account of de facto control and legal incorporation. The foregoing principles should be valid also outside Crimea in cases where Russia occupies a territory and/or unilaterally incorporates (annexes) it. And if these territories can be treated as a territory for which Russia bears responsibility under international law, Ukrainians may be able to rely on this responsibility.

The Crimea arbitral awards' notion of territorial scope is not unprecedented in international law at all. For instance, in *Loizidou v. Turkey* and in *Cyprus v Turkey*, the European Court of Human Rights applied the European Convention on Human Rights to Turkey by reason of its occupation of Northern Cyprus. In *Al-Skeini v. United Kingdom*, it found the Convention applicable to the UK's operations in Iraq on account of the occupation of the country.

Although the RUBIT was recently terminated by Ukraine, it remains in force until January 27, 2025, and has a "continuing effects" clause in Article 14(3), which sustains investment claims for ten years after termination.

Tesseract: Don’t Over-React! The High Court of Australia, Proportionate Liability, Arbitration, and Private International Law

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On 7 August 2024, the High Court of Australia handed down its long-awaited decision in *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24. The dispute arose out of a domestic commercial arbitration seated in South Australia, where the C*ommercial Arbitration Act 2011* (SA) is the relevant lex arbitri. That Act is a domestically focused adaptation of the UNCITRAL Model Law on International Commercial Arbitration (with its 2006 amendments).

The respondent to the arbitration sought to rely upon proportionate liability legislation found in the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) and in the *Competition and Consumer Act 2010* (Cth). The High Court was asked to determine whether those proportionate liability regimes could be applied in the arbitration. A very practical difficulty arose here, reflected in Steward J noting (in dissent) that the High Court was ‘faced with an invidious choice’: see [228]. Were the proportionate liability laws not to apply in the arbitration, the respondent might find themselves liable for 100% of the applicant’s loss, when they would not be liable to that same extent in court proceedings applying the same body of South Australian law. But were the

proportionate liability laws to apply, the applicant might find themselves able to recover only a portion of their loss in the arbitration, and might then have to then pursue court proceedings against another third party wrongdoer to recover the rest: given that joinder is not possible in arbitration without consent.

By a 5-2 majority, the High Court decided that these proportionate liability regimes were to be applied in the arbitration. There has been much commentary published already as to what this means for arbitration law in Australia – including here, and here. What might be of most interest for this blog's audience, however, is to note that the High Court's reasoning was grounded in the application of private international law.

All of the High Court's judgments in *Tesseract* – both majority and dissenting – recognised that whether or not the substantive law aspects of the two relevant proportionate liability regimes applied in the arbitration was a question of applicable law, to be resolved via South Australia's implementation of Art. 28 Model Law. This is not the first time that this provision has been addressed by the High Court of Australia. The High Court was also required to analyse its effect in a failed constitutional challenge to Australia's implementation of the Model Law in the international commercial arbitration context in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533. In that case, it was confirmed that Art. 28 Model Law does not require arbitrators to apply the law correctly. It was also confirmed that there is no separate term implied into an arbitration agreement having that effect.

It does not appear that the relationship between *TCL* and *Tesseract* has been appreciated in some existing commentaries on Tesseract, including in this blog which asks '[i]f the arbitrator gets it wrong, will that open the award to an enforcement challenge[?]' Viewing Tesseract in light of *TCL*'s previous analysis, it appears that there should be no recourse against an award if an arbitrator correctly identifies the law of an Australian jurisdiction as applicable, but incorrectly applies (or even completely fails to apply) that jurisdiction's proportionate liability laws. It is now trite law in Australia, as around the world, that errors of law do not ground recourse against an award under either the Model Law or the New York Convention.

Interestingly, the fact that Art. 28 Model Law was the key provision underpinning the High Court's analysis in *Tesseract* should also answer a matter identified in

some other commentaries – including here, here, and here – around Queensland law prohibiting parties from contracting out of its proportionate liability regime, and Victorian, South Australian, ACT, and Northern Territory law being silent on that contracting out issue. Since Art. 28(1) Model Law permits parties to choose rules of law, and not only law in the sense of a complete State legal system, it is arguably open to arbitrating parties to exclude the operation of proportionate liability laws in all Australian jurisdictions regardless of what they say about contracting out. In such cases, the parties would simply be choosing rules of law – which is a type of choice that Art. 28(1) Model Law permits.

Thus, whilst one of the first questions asked about *Tesseract* has been '[i]s the decision arbitration-friendly?', it is perhaps not too controversial to suggest that *Tesseract* was a case less about arbitration itself, and more about private international law.

Recent U.S. Developments Concerning the Hague Judgments Convention and COCA

Although the United States signed Hague Convention on Choice of Court Agreements (COCA) in 2009, it has yet to ratify it. In this post, I report on some recent developments that offer a basis for (cautious) optimism that the United States may soon take the necessary steps to ratify both COCA and the Hague Judgments Convention.

History

On January 19, 2009, the United States signed COCA. In the years that followed, the State Department had conversations with the Uniform Law Commission (ULC) about how COCA should be implemented. The ULC is a non-partisan, non-profit,

unincorporated association comprised of volunteer attorneys appointed by each state of the United States plus the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Its mission is to promote uniformity in the law among these jurisdictions to the extent desirable and practicable.

Because the enforcement of foreign money judgments has been governed by state law in the United States since 1938, and because the ULC has promulgated widely adopted uniform state legislation on this topic, the ULC argued that COCA should be implemented—at least in part—through state law. In particular, the ULC proposed that the treaty be implemented through "cooperative federalism." Under this approach, there would be parallel federal legislation and state legislation implementing the treaty, with a reverse preemption provision in the federal legislation allowing state law to govern if the state had passed the appropriate act.

This proposal ultimately foundered due to disagreements between the State Department and the ULC as to whether federal courts sitting in diversity would apply the state or federal legislation. Stasis ensued. The State Department was reluctant to present the treaty to the Senate without the support of the ULC. And the ULC was reluctant to endorse an implementation framework that displaced existing state law.

A Shift on COCA

On March 2, 2022, the United States signed the Hague Judgments Convention (HJC), a multilateral agreement that seeks to facilitate the recognition and enforcement of judgments more generally. Shortly thereafter, the ULC approved a Study Committee, chaired by Bill Henning and Diane Boyer-Vine, to consider how best to implement the HJC in the United States. The goal was to find a method of implementation that would minimize the disruption to state law while representing sound public policy. About a year after the Study Committee was created, it sought and received permission to revisit the question of how best to implement COCA. I served as the Reporter for the Study Committee.

Following more than eighteen months of discussion and reflection, the Study Committee recommended that the ULC revisit its earlier position on COCA implementation. Specifically, the Study Committee recommended that the ULC

abandon the cooperative federalism approach and leave the method of implementing COCA to the discretion of the State Department. This recommendation, which included an endorsement of COCA, was made subject to several uncontroversial caveats relating to the preservation of state law. The recommendation was approved by the ULC's Executive Committee on July 18, 2024.

These developments should make it easier for the State Department to obtain the advice and consent of the Senate should it choose to push for ratification of COCA. Historically, the Senate has been sensitive to issues of federalism and sometimes hesitant to give its advice and consent for conventions that displace state law. The endorsement of the ULC, an organization formed by the states with a mission of preserving state law, will signal to the Senate that any disruption of state law is acceptable and in the public interest.

The Hague Judgments Convention

The Study Committee's initial charge was to consider the best method of implementing the Hague Judgments Convention (HJC). Whereas COCA seeks to facilitate the recognition and enforcement of judgments rendered by courts selected in an exclusive choice-of-court agreement, the HJC seeks to facilitate the recognition and enforcement of other judgments. Because the enforcement of foreign money judgments in the United States has long been governed by state law, the Study Committee sought to identify a path to ratification that would preserve existing state law to the extent possible. It concluded that this path ran through Article 15 of the HJC.

Article 15 reads as follows:

> *Subject to Article 6 [dealing with judgments based on rights in rem in real property], this Convention does not prevent the recognition or enforcement of judgments under national law.*

This language makes clear that ratifying countries may be more generous when it comes to the recognition and enforcement of foreign judgments than the Convention requires. It follows that state law may continue to be used to recognize and enforce foreign judgments in the United States so long as applying

that law produces outcomes consistent with the minimum standards laid down by the HJC.

With this insight in mind, the Study Committee recommended that the ULC "endorse ratification of the Hague Judgments Convention as long as the United States preserves the ability of litigants to seek recognition and enforcement of money judgments rendered in another country under existing state law . . . in cases where applying state law would produce results that are consistent with the requirements of the Convention." This recommendation was approved by the ULC's Executive Committee on July 18, 2024.

How might this work in practice? Imagine the following scenario. Immediately after the United States ratifies the HJC, Congress enacts a statute listing the minimum standards that must be met for a foreign judgment to be enforced via the HJC in the United States. Thereafter, judgment creditors would have a choice. On the one hand, they could seek recognition and enforcement under the federal statute. On the other hand, they could seek recognition and enforcement under state law. The benefit of this approach is that it preserves the ability of judgment creditors to rely on (what most observers describe as) a simple and efficient system of state law to recognize and enforce foreign judgments. The minimum standards laid down in the federal statute ensure that the application of state law in such cases will not take the United States out of compliance with the HJC. And if the judgment creditors prefer to enforce under the federal statute, they are free to do so.

Next Steps

With the Study Committee having completed its work, the action will now shift to the State Department's Advisory Committee on Private International Law, which will hold its next meeting at Texas A&M University School of Law in Fort Worth, Texas on Thursday and Friday, October 24-25, 2024. At that meeting, the State Department will be seeking input and guidance with respect to efforts toward U.S. ratification of COCA, the HJC, and the Singapore Convention.

First Thai Monetary Judgment Enforced in China, Highlighting Presumptive Reciprocity in China-ASEAN Region

This post is kindly provided by Dr. Meng Yu, lecturer at China University of Political Science and Law, and co-founder of China Justice Observer.

Key Takeaways:

- In June 2024, the China-ASEAN Free Trade Area Nanning International Commercial Tribunal under the Nanning Railway Transportation Intermediate Court in Guangxi ruled to recognize and enforce a Thai monetary judgment (*Guangxi Nanning China Travel Service, Ltd. v. Orient Thai Airlines Co., Ltd.* (2023) Gui 71 Xie Wai Ren No. 1).
- Apart from being the first case of enforcing Thai monetary judgments in China, it is also the first publicly reported case confirming a reciprocal relationship based on "presumptive reciprocity".
- The Chinese court's confirmation that "presumptive reciprocity", as outlined in the Nanning Statement, is a form of mutual consensus between China and ASEAN countries helps to promote the circulation of judgments within the China-ASEAN region.

On 18 June 2024, the China-ASEAN Free Trade Area Nanning International Commercial Tribunal under the Nanning Railway Transportation Intermediate Court, Guangxi (hereafter the "Nanning Court"), ruled to recognize and enforce a Thai monetary judgment.

This case marks the first time that a Chinese court has recognized and enforced a Thai monetary judgment. It is also the first publicly reported case to confirm a reciprocal relationship based on "presumptive reciprocity". The "presumptive reciprocity" test, outlined in the Nanning Statement of the 2nd China-ASEAN Justice Forum in 2017, has now been confirmed by the Nanning Court as a form of reciprocal consensus [1] between China and ASEAN countries. This explains

the use of the term “presumptive reciprocity consensus” in the Chinese news report (cf. Guangxi High People’s Court’s news).

Although the full text of the judgment has not yet been made publicly available, the Chinese news report and related court announcements provide valuable details about the case. This case marks the latest application of the new reciprocity requirement by Chinese courts and actively promotes the circulation of judgments within the China-ASEAN region.

I. Case background

In July 2015, Guangxi Nanning China Travel Service Co., Ltd. (“Nanning China Travel”), a Chinese company, and Orient Thai Airlines Co., Ltd. (“Orient Thai Airlines”), a Thai company, entered into an airline ticket sales contract based on their long-term cooperation in charter flights. The contract was signed in Nanning and stipulated that disputes would be settled by the court where the Orient Thai Airlines was located. Subsequently, disputes arose between the parties, and Nanning China Travel filed a lawsuit against Orient Thai Airlines in the Central Intellectual Property and International Trade Court of Thailand (“Thai Court”).

On 16 September 2019, the Thai Court issued a civil judgment No. GorKor 166/2562 (the “Thai Judgment”), ordering Orient Thai Airlines to pay CNY 18,002,676 (approx. USD 2,476,330) plus interest to Nanning China Travel.

In February 2023, in order to enforce the rights confirmed by the Thai Judgment, and considering that Orient Thai Airlines has multiple branches in China that may have executable assets, Nanning China Travel applied to the Nanning Court for recognition and enforcement of the Thai Judgment.

On 18 June 2024, the Nanning Court rendered the civil ruling (2023) Gui 71 Xie Wai Ren No. 1 to recognize and enforce the Thai Judgment.

II. Court’s views

Although China and Thailand have signed the “Treaty on Judicial Assistance in Civil and Commercial Matters and on Cooperation in Arbitration”, the treaty does

not contain provisions on judgment recognition and enforcement. In the absence of a treaty, as this is the case with Thailand, recognition and enforcement can be pursued on the basis of the principle of reciprocity (New Art. 299 of the PRC Civil Procedure Law [former article 288 of the 2021 Amendment of the PRC Civil Procedure Law]).[2]

Determining whether reciprocity exists between China and Thailand is, therefore, a crucial first step.

As Judge Huayan Wang of the Nanning Court explained, "We (the court) examined two issues: the time limit of the application for recognition and enforcement, and the existence of reciprocity. The key to this case is the determination of reciprocal consensus, in the absence of *de jure* reciprocity and *de facto* reciprocity".

In doing so, the Nanning Court referred to the presumptive reciprocity test proposed in the Nanning Statement as a form of reciprocal consensus, and ultimately determined that reciprocity existed between China and Thailand.

III. Comments

1. "Presumptive reciprocity" in this case

Interestingly, the Nanning Statement was adopted in Nanning in June 2017, and seven years later, in a striking coincidence, a local intermediate court in the same city confirmed the reciprocity between China and Thailand, relying on presumptive reciprocity proposed the Nanning Statement.

Simply put, the so-called "presumptive reciprocity" means that, unless proven otherwise, reciprocity is presumed to exist between the requested State and the State of origin, to the extent permitted by domestic law of the requested State.[3] Here, "proven otherwise" refers to any existing case where the judgments from the requested State have been refused enforcement in the State of origin on the ground of the lack of reciprocity. Since no such cases were found by the Nanning Court, reciprocity is presumed to exist between Thailand and China.

It is, however, still unclear how Thai courts would react to the "first move" from Chinese courts: will they follow suit or not? Given that it is unlikely, if not

impossible, to have any foreign judgment recognized and enforced in Thailand, as discussed in an post provided by Asian Business Law Institute (ABLI), should a Thai court refuse to recognize and enforce a Chinese judgment on the ground of lack of reciprocity one day, the presumed reciprocity might have to be reviewed, or even revoked. By then, will there be any other way out? More issues need to be clarified and settled in future cases.

2. Wider Implication: reciprocal understanding or consensus in China-ASEAN region

What is more noteworthy is that the reciprocity consensus applied by Nanning court is considered to be a subcategory of "reciprocal understanding or consensus", which is one of the three new reciprocity tests in addition to de jure reciprocity and reciprocal commitment.



Chart – Reciprocity tests in China

Compared to the other two current reciprocity tests—de jure reciprocity and reciprocal commitment—reciprocal understanding or consensus is a more easily overlooked test, because it is neither as well-known as *de jure* reciprocity nor as novel as the reciprocal commitment (cf. other related posts including: (i) De jure reciprocity – The First Time China Recognizes English Judgment, Implementing 2022 Judicial Policy in Full; (ii) Reciprocal commitment – First Case of Reciprocal Commitment: China Requests Azerbaijan to Enforce its Judgment Based on Reciprocity; (iii) How Chinese Courts Determine Reciprocity in Foreign Judgment Enforcement – Breakthrough for Collecting Judgments in China Series (III); (iv)

China’s 2022 Landmark Judicial Policy Clears Final Hurdle for Enforcement of Foreign Judgments.)

Although the presumptive reciprocity proposed in the Nanning Statement is considered the best example of reciprocal consensus, from the time the Nanning Statement was adopted in 2017 until June 2024, the “presumptive reciprocity” remained largely theoretical. Prior to this case, there were no publicly reported cases indicating whether, and if so, how, Chinese courts applied “presumptive reciprocity” when dealing with cases involving the recognition and enforcement of judgments from ASEAN countries.

This case changed this situation.

The “presumptive reciprocity” outlined in the Nanning Statement, as a form of reciprocal consensus between China and ASEAN countries, has been confirmed by the Chinese court in this case. This means that for the ten ASEAN countries, apart from Laos and Vietnam, which already have applicable bilateral treaties with China, the remaining eight countries—Brunei Darussalam, Burma, Cambodia, Indonesia, Malaysia, the Philippines, Singapore, and Thailand—can have their civil and commercial judgments recognized and enforced in China based on the presumptive reciprocity.

In addition, for monetary judgments from Singapore, there is also the China-Singapore Memorandum of Guidance (MOG), which can be considered another example of “reciprocal understanding or consensus”. This MOG serves as a practical guideline for Chinese courts on how to recognize and enforce Singaporean monetary judgments. (Cf. other related posts including: (i) Series – Singapore-China Judgments Recognition and Enforcement; (ii) Chinese Court Recognizes Singaporean Judgment Again: No Bilateral Treaty But Only Memorandum?).

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[1] Since the 2000s, the standards to establish reciprocity have evolved significantly, reflecting China’s efforts to liberalize its rules on the recognition and enforcement of foreign judgments. The 2021 “Conference Summary of the Symposium on Foreign-related Commercial and Maritime Trials of Courts

Nationwide" issued by China's Supreme People's Court introduces new standards for determining reciprocity that replace the previous de facto reciprocity test. The new reciprocity standards include de jure reciprocity, reciprocal understanding or consensus, and reciprocal commitment. These standards coincide with possible outreaches of legislative, judicial, and administrative branches.

[2] Art. 299: "After examining an application or request for recognition and enforcement of a legally effective judgment or ruling of a foreign court *in accordance with an international treaty concluded or acceded to by the People's Republic of China or under the principle of reciprocity*, a people's court shall render a ruling to recognise the legal force of the judgment or ruling and issue an order for enforcement, as needed, to enforce the judgment or ruling in accordance with the relevant provisions of this Law, if the people's court deems that the judgment or ruling neither violates the basic principles of the laws of the People's Republic of China nor damages the sovereignty, security, and public interest of the State" (emphasis added).

[3] Below is the original statement from the Nanning Statement:"If two countries have not been bound by any international treaty on mutual recognition and enforcement of foreign civil or commercial judgments, both countries may, subject to their domestic laws, *presume the existence of their reciprocal relationship*, when it comes to the judicial procedure of recognizing or enforcing such judgments made by courts of the other country, provided that the courts of the other country had not refused to recognize or enforce such judgments on the ground of lack of reciprocity."(emphasis added)

Travel destination in another (Member) State's territory in an otherwise purely domestic case

triggers application of Art. 18(1) Brussels Ia

By Salih Okur, University of Augsburg

Earlier today, the CJEU rendered its long anticipated decision in Case C-774/22 (FTI Touristik) on whether Art. 18(1) Brussels Ia Regulation concerns "matters relating to a travel contract where both the consumer, as a traveller, and the other party to the contract, the tour operator [,] have their seat in the same Member State, but the travel destination is situated not in that Member State but abroad […]".

In accordance with the Opinion of AG Emiliou, the Court held that it does.

1. International Scope of the Brussels Ia Regulation

The question goes straight to the problem of the international scope of the Brussels Ia Regulation. In Case C-281/02 (Owusu), the CJEU had held that the application of the Brussels Ia Regulation always required an "international element" – otherwise the national rules of the Member State apply.

Whether this international element exists is particularly problematic in cases like the one at hand, where the parties of the dispute are domiciled in the same Member State but certain elements of the case are situated abroad.

With today's decision, the CJEU has now adjudicated on two of the most practically relevant situations in quick succession: Only recently, in Case C-566/22 (Inkreal), the CJEU held that the **choice of another Member State's court** is enough to establish the international element of a case, even if the parties are both domiciled in the same Member State, triggering the application of Art. 25 Brussels Ia Regulation.

In the present Case C-774/22 (FTI Touristik), the CJEU had to decide whether the **travel destination** of consumer package travel contracts is enough to establish an international element in the sense of the Brussels Ia Regulation, which would open up the consumer forum of Art. 18 Brussels Ia Regulation.

2. Facts

The parties to the dispute, JX, a private individual domiciled in Nuremberg (Germany), and FTI Touristik, a tour operator established in Munich (Germany), concluded a package travel contract for a trip to Egypt. JX brought proceedings against FTI before the Local Court of Nuremberg, claiming that he was not informed properly of the visa requirements in Egypt.

JX claimed that the Local Court of Nuremberg has international and territorial jurisdiction pursuant to Art. 18(1) Brussels Ia Regulation. FTI, on the other hand, argued that the case lacked any international element, meaning that not the Brussels Ia Regulation but the German Code of Civil Procedure (*ZPO*) was applicable. Under the latter, the Local Court of Nuremberg would not have had jurisdiction over the dispute as German law does not contain a general consumer forum.

3. The Court's decision

According to previous decisions of the CJEU, the existence of the international element is not only reserved to cases where the parties to the dispute are domiciled in different Member States (**para. 29**).

Thus, according to the Court, the place of performance being abroad can on its own raise questions relating to the determination of international jurisdiction and thus establish an international element, triggering the application of the Brussels Ia Regulation (**para. 30**).

Specifically for consumer contracts, this interpretation is confirmed by Art. 18(1) Brussels Ia Regulation, which applies "regardless of the domicile of the other party" (**para. 31**) and by Art. 19(3) Brussels Ia Regulation, which addresses choice of law agreements entered "by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State" (**para. 32**).

Finally, the Court refers to the general purpose of the Brussels Ia Regulation, which seeks to establish rules of jurisdiction which are highly predictable and thus pursues an objective of legal certainty which consists in strengthening the legal protection of persons established in the European Union, by enabling both the applicant to identify easily the court before which he or she may bring

proceedings and the defendant reasonably to foresee the court before which he or she may be sued (**para. 33**).

These arguments lead the Court to the conclusion that the foreign travel destination of a package travel contract triggers the application of the Brussels Ia Regulation even if both parties are domiciled in the same Member State (**para. 40**).

4. Commentary

While this interpretation of the international element in the sense of the Brussels Ia regulation is in line with the opinion of AG Emiliou, it is difficult to square with the Court's interpretation in Case C-566/22 (Inkreal): There, the Court primarily relied on the existence of a conflict of (international) jurisdiction to establish the international element (**para. 31**): if the courts of two or more different Member States could find international jurisdiction under their domestic rules, it would disturb legal certainty. In that case, the application of the Brussels Ia Regulation is justified as it restores said legal certainty by unifying the rules on international jurisdiction.

Case C-774/22 (FTI Touristik) lacks this potential for a conflict of international jurisdiction. Within the European Union, no other court would have international jurisdiction under Art. 18(1) and 18(2) Brussels Ia Regulation as the domiciles of the parties to the consumer contract are situated in the same Member State – pursuant to Art. 17(1) Brussels Ia Regulation, Art. 7(1) Brussels Ia Regulation doesn't apply. Thus, within the European Union there cannot be a conflict of international jurisdiction; consequently, the Brussels Ia Regulation shall not apply. This argument does not seem to resonate with the Court, though; instead, the Court argues that the nature of the relevant provision of the Brussels Ia Regulation does not play a role when establishing the international element (**para. 39**).

Still, it cannot be denied that this decision immensely benefits consumers. The Brussels Ia Regulation now applies to all (package) travel contracts for trips abroad, meaning that pursuant to Art. 18(1) Brussels Ia Regulation, consumers may at all times bring proceedings against the tour operator at their domicile.

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

*Written by Aguada, Yasmín*** [1]– *Jeifetz, Laura Martina****[2]

This post will be divided into two Views. This is Part I.

Abstract: In a globalized world, International Judicial Cooperation (IJC) and advanced technologies are redefining Private International Law (PIL). 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 future prospects.

Keywords: private international law, international judicial cooperation, new technologies, videoconferencing, Iber@, Apostille.

I. INTRODUCTION

In an increasingly interconnected context, international judicial cooperation (IJC) and the advancement of new technologies have been linked in a notable way, reshaping the landscape of private international law (PIL). The dynamic interaction between these two elements has triggered a profound change in how cross-border legal issues are treated and resolved.

Since ancient times, IJC has been essential to address disputes involving multiple jurisdictions. From the harmonization of laws to the enforcement of judgments in foreign countries, the interaction of legal systems has been a constant challenge.

However, in recent times, the emergence of technologies has brought with it revolutionary tools and approaches that are transforming IJC.

As borders become more transparent in the digital world, the implications for PIL are immense. Direct judicial communications, videoconferencing, and other technological innovations are streamlining cross-border legal processes. These technological solutions are not only overcoming traditional obstacles in international judicial cooperation but are also giving way to new challenges that require careful evaluation.

This work explores the convergence between these two fields: assistance between jurisdictions and adopting technological innovations. In this way, we propose researching their intersections and how the transnational legal scenario is transformed, with some specific references to Argentine PIL. Collaboration between nations in the search for legal solutions and the potential of new technologies to accelerate these processes are intertwined in a dynamic symbiosis that redefines PIL's scope and very nature. In this framework, it is essential to understand the joint evolution of IJC and new technologies to anticipate how this relationship will continue to shape this discipline in the future.

II. INFLUENCE OF TECHNOLOGY ON PIL

There is no doubt that the phenomenon of globalization has impacted all branches of the law without distinction. Historically, the primary purpose of PIL was to ensure the continuity of legal relations across different jurisdictions[3]. However, we must recognize that the impact of globalization, the emergence of telecommunications, and the widespread growth of the use of the means of transportation, have led to the movement of people beyond borders. Added to these phenomena is the rise of electronic commerce and online contracting platforms. All these conditioning factors generate a multiplication of private legal relations with foreign elements.

As indicated by Calvo Caravaca and Carrascosa González,[4] the emergence of the Internet produces a shock wave in all branches of law, but more specifically in PIL, a subject that is revealed as the main protagonist in the repercussions of cyberspace in the legal field. The use of online tools globalizes international private legal situations and, therefore, increases their number and variety.

It is a fact: internationalization is not foreign to the eyes of a jurist. However, from the perspective of our subject, the virtualization of borders through the Internet has managed to put classic concepts established since the Middle Ages in crisis. Undoubtedly, the environment has been transformed, and the law – although always behind – has accompanied the new demands of an increasingly digital society at its own pace.

These trends expand with the increase in regional integration processes, by which States generate agreements to promote the circulation of goods, people, diplomatic relations, reduction of customs fees, etc. Without hesitation, these processes even check the basic foundations of the States. And with this, transnational relations achieve an ever greater increase, so their extension requires their inclusion in legislative agendas.[5]

To this complex panorama of challenges and questions, disruptive technologies are now added that are already seen as the protagonists of the new era. Artificial intelligence, smart contracts, the blockchain, the Internet of Things (IoT), and the analysis of large volumes of data (big data) are demanding an exhaustive examination of the basic paradigms of law in general and the PIL in particular.

These technologies are rapidly transforming procurement methods, the way business relationships are established, and governance systems, raising fundamental questions about applying PIL rules and protecting the rights and interests of the parties involved.

International organizations have also echoed these modern challenges. Organizations such as the World Trade Organization (WTO)[6], the Institute for the Unification of Private Law (UNIDROIT)[7] and the United Nations Commission on International Trade Law (UNCITRAL)[8] are taking a leading role in the development of practical guides intended to harmonize solutions to the possible legal consequences derived from the use of these tools.

III. IMPACT OF NEW TECHNOLOGIES ON INTERNATIONAL JUDICIAL COOPERATION

In recent years, a series of tools and mechanisms have been consolidated that, promoted by the benefits derived from the use of technology in the process, seek

to generate a more direct connection between authorities to provide assistance. Clear examples of this are direct judicial communications, electronic requests, and the use of videoconferences. These innovations are accompanied by different cooperation networks: the central authorities, key actors in the operation of the agreements, which facilitate legal cooperation; judicial networks[9] and contact point networks.

Although the application of new technologies was not considered when most of the regulations and agreements that we have today were negotiated, there is no regulatory obstacle to their use since the operation of such instruments is substantially optimized through the application of these modern tools.

In the field of soft law, the Principles of the American Association of Private International Law (ASADIP), Chapter 4, *"Interjurisdictional Cooperation"*, article 4.7, provides in this regard: *"As long as the security of the communications can be guaranteed, judges and other judicial officials shall promote and foster the use of new information and communication technologies, such as telephone communications, videoconferencing, electronic messaging and any other means of communication appropriate for effecting the requested cooperation"*.

Most of the current regulations contain requirements incompatible with the communication technologies we have available today. In pursuit of a more favorable interpretation of the implementation of ICT, article 4.5 of the ASADIP Principles on Transnational Access to Justice (TRANSJUS Principles), approved by the Assembly of the American Association of Private International Law, in its meeting held in Buenos Aires, on November 12, 2016, points out that:

"*…the requested State shall interpret and apply the rules on inter-jurisdictional cooperation in a particularly flexible manner, minimizing the relevance of formalities. The courts of the requested State may act ex officio, making normative adjustments as necessary in order to carry out the corresponding procedural measures. Where the law does not prescribe a specific form, method or means for the cooperation sought by the requesting State, the courts of the requested State shall have the authority to adopt any appropriate measures to carry out the requested assistance, always with a view to protecting the fundamental procedural safeguards."*

It follows from this principle "*the need to seek the delicate balance between the*

duty of cooperation, through available and suitable means, and respect for the guarantees of due process".[10]

III.I. Electronic transmission of requests. Iber@.

Firstly, electronic requests are those that are transmitted within the framework of an international judicial procedure by which the court of one State requires a court of another State to provide judicial assistance or the execution of a procedural act (*e.g.,* notification, evidence), and which is formalized through electronic means.

A vitally important tool in the context of international judicial cooperation is the Iber@ electronic communication platform. This system, characterized by its confidentiality, security, ease of use, and access, is used both by the contact points of the Ibero-American Network for International Legal Aid (IberRed) [11], and by other relevant networks, such as Eurojust, the General Secretariat of INTERPOL and the Ibero-American Network of Specialized Prosecutors Against Trafficking in Human Beings.

User access is required, as provided by the General Secretariat of IberRed, previously designated by the institutions that make up the Network. Then, each user generates a private password, which must be renewed every six months. It should be noted that Iber@ does not impose specific requirements beyond a computer and an internet connection, allowing one to log in from anywhere in the world.[12]

Once the user is authenticated in the system, he or she accesses the platform through the IberRed portal and select the institution to which to direct their query: a Contact Point, a Liaison, or a National Member of Eurojust. After submitting the query, the designated recipient receives an email notification. Subsequently, he or she is asked to enter the platform to view the request.

An important boost for this platform came with the ratification of the Treaty on the Electronic Transmission of Requests for International Legal Cooperation between Central Authorities, which took place in Medellín in July 2019, commonly known as the Medellín Treaty. For the full status, click here.

As Mercedes Albornoz and Sebastián Paredes point out[13], this instrument does

not regulate the formal, procedural, or substantial requirements of the request but instead offers a renewing and perfected perspective of the existing treaties on international cooperation. The proposed innovation, in line with current times, involves eliminating the traditional transmission of requests for international assistance in paper format and instead favoring the Iber @ electronic platform as the main means (Article 1). However, its use is not mandatory (Article 4).

Unquestionably, cross-border cooperation demands the incorporation of new technologies to guarantee effective judicial protection, which requires collaborative efforts on the part of States. The ultimate objective is to achieve the digitalization of existing mechanisms in the field of international judicial cooperation. In this trajectory, the Iber@ platform presents a significant opportunity, considering its distinctive security characteristics, immediacy, and friendly accessibility.

III.II. e-Apostille. Digitization of evidence and documents.

Another fundamental tool in the framework of international judicial cooperation is the digitization of evidence and documents. At that level, and explicitly concerning public instruments, the electronic apostille is a simplification and streamlining mechanism for the circulation of such documents. Broadly speaking, it is a digital document that is transmitted electronically, allowing a country to expedite the authentication of public documents to produce their effects in other States[14]. This is the electronic implementation of the Hague Apostille, the single and simplified authentication process for public documents provided for by the 1961 Hague Convention[15]. It is carried out by electronic means and on an electronic public document.

Regarding the use of technological tools, the Special Commission, when evaluating the practical operation of the Apostille Convention, reiterated in several meetings that the spirit and letter of the Convention *"do not constitute an obstacle to the use of modern technology"*, even affirming that the use of said technology can significantly improve the application and operation of the Convention.

In 2006, the Hague Conference (HCCH), together with the National Notary Association of the United States of America (NNA), officially launched the electronic Apostille Pilot Program (e-APP), which was a pilot program until 2012,

when it became a permanent program.

The e-APP allows for a much more effective performance of the Convention, considerably increasing security. It can be used with any type of technology and does not privilege the use of one technology over another, so the state parties can freely choose the one that best suits their needs and structures. The e-APP comprises two components: the issuance of e-Apostilles and the operation of e-registers.

The Hague Conference periodically organizes International Fora on the e-APP to discuss and promote its implementation. In 2021, the twelfth Forum on the e-APP was held via videoconference for the first time, and during its celebration, the effects of the COVID-19 pandemic on the operation of the Apostille Convention were pointed out, and the e-APP. Specifically, the number of (e-)Apostilles requested and issued decreased, and public services were hampered by restrictions, prompting a transition towards online services. However, they also noted that Contracting Parties that had already implemented the e-APP, particularly the e-Apostille component, reported fewer issues.

Currently, 53 countries have implemented one or two components of the e-APP. Faced with technologies in constant innovation, the 1961 Hague Convention *"remains in force and has even increased its number of ratifications by designing the electronic Apostille Program (e-APP) with the objective of guaranteeing that the Convention functions in a manner effective, safe and uninterrupted, we opted for the incorporation of technology, in this case, through the issuance of electronic apostilles (e-Apostilles) and the use of electronic records (e-Registrie*s)[16]." The e-APP provides the Apostille Convention with renewed energy and relevance, ultimately seeking to extend the scope of the Convention to the electronic medium and strengthen its important benefits by making its operation more effective and secure. In this way, we see how the incorporation of new technologies is possible to optimize the operation of existing agreements and facilitate international judicial and administrative cooperation, and thus promote access to justice.

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[3] DREYZIN DE KLOR, ADRIANA. *El derecho internacional privado actual*. Volume I. Zavalia, Ciudad Autónoma de Buenos Aires, 2015.

[4] CALVO CARAVACA, ALFONSO L. and CARRASCOSA GONZÁLEZ, JAVIER. *Conflictos de leyes y conflictos de jurisdicciones en Internet,* Madrid, Colex, 2001.

[5] SCOTTI, LUCIANA. *Los escenarios del derecho internacional privado actual: globalización, integración y multiculturalidad*. Derecho Internacional Privado y Derecho de la Integración– Book tribute to Roberto Ruíz Díaz Labrano, coord. Fernández Arroyo, D. Moreno Rodríguez, José A. CEDEP, Asunción, 2001.

[6] The World Trade Organization prepared a work directed by Emmanuelle Ganne in which the impacts of blockchains on global trade are analyzed. GANNE, Emmanuelle. Can blockchains revolutionize international trade? 2018.

Available at: https://www.wto.org/spanish/res_s/booksp_s/blockchainrev18_s.pdf. Accessed: 7 July 2024.

[7] For its part, since 2020, UNIDROIT has commissioned a specialized group, at the initiative of some European countries, to prepare a regulatory instrument that contains principles and practical guides on Digital Assets and Private Law. For more details: https://www.unidroit.org/work-in-progress/digital-assets-and-private-law/#1456405893720-a55ec26a-b30a . Accessed: 7 July 2024.

[8] Since 2022, the UNCITRAL Working Group on Electronic Commerce has been analyzing legal issues related to the digital economy. They have especially dedicated themselves to making a legislative proposal for artificial intelligence and automated contracting. More information at:

https://uncitral.un.org/es/working_groups/4/electronic_commerce. Accessed: 7 July 2024.

[9] As an example, we mention the International Hague Network of Judges, a group of judges who jointly cooperate on requests for international return of children. For more details: International Network of Judges of The Hague. Available at: https://www.hcch.net/es/instruments/conventions/specialized-sections/child-abduction/ihnj. Accessed: 7 July 2024.

[10]SCOTTI, LUCIANA . op. cit., 2020, p. 428.

[11]The Ibero-American Network of International Judicial Aid (IberRed) constitutes a valuable collaboration network in areas of civil and criminal law. The Network is made up of Central Authorities and members of the Ministries of Justice, and other judicial bodies from 22 Ibero-American countries. It is also made up of the Supreme Court of Puerto Rico. The basic objective is to optimize the operation of the current civil and criminal assistance agreements, and to strengthen cooperation between the member countries of the Ibero-American Community of Nations. Such a structure constitutes a fundamental advance in the construction of an Ibero-American Judicial Space. In order to safeguard effective judicial protection, it aims to strengthen international legal cooperation mechanisms and, in addition, simplify the instruments and tools currently in force. Its official languages are Spanish and Portuguese IBERO-AMERICAN NETWORK OF INTERNATIONAL JUDICIAL AID. https://iberred.notariado.org/, 2014. Accessed: 7 July 2024.

[12] AGUADA, YASMÍN and JEIFETZ, LAURA MARTINA. “Nuevas oportunidades de la cooperación judicial internacional: exhorto electrónico y blockchain”. Legal and Social Research Center, *Anuario XIX*, 2019.

[13] ALBORNOZ, MERCEDES and PAREDES, SEBASTIAN. “Nuevo Tratado de Medellín: la tecnología de la información al servicio de la cooperación internacional” in *Derecho en Acción,* 2019.

[14] Private documents, in order to be apostillised, require prior certification by a notary public.

[15] It is worth remembering that the 1961 Hague Convention eliminated the requirement for legalization of foreign public documents, replacing it with the apostille. This Convention is one of the most accepted and applied international treaties globally. It is currently in force in 126 States, making it one of the most successful international instruments in the field of international legal and administrative cooperation.

[16] ALL, PAULA. "Legalización de documentos en la fuente convencional y en la fuente interna. Un paso más en el avance hacia lo tecnológico y lo digital" in, *LA LEY,* 04/29/2019, 1. Online Citation: AR/DOC/961/2019

This week at The Hague: A few thoughts on the Special Commission on the HCCH Service, Evidence and Access to Justice Conventions

Written by Mayela Celis, Maastricht University [updated on 19 July 2024]

The Special Commission on the practical operation of the 1965 Service, 1970 Evidence and 1980 Access to Justice Conventions will take place in The Hague from 2 to 5 July 2024. For more information (incl. all relevant documents), click here. Particularly worthy of note is that this is the first meeting in the history of the Hague Conference on Private International Law (HCCH) in which Spanish is an official language – the new language policy entered into force on 1 July 2024.

A wide range of documents has been drafted for this Special Commission, such as the usual questionnaires on the practical operation and the summary of responses of Contracting States. These documents are referred to as Preliminary Documents

(Prel. Doc.). Particularly interesting is the document relating to **Contractual Waiver and the Service Convention** (*i.e.* when the parties opt out of the Convention), the conclusions of which I fully endorse (Prel. Doc. No. 12, click here, p. 10).

Country profiles have also been submitted for approval (Prel. Docs 9 and 10), a practice which is in line with what has been done with other HCCH Conventions. A document on **civil and commercial matters** has also been issued and while it basically restates previous Conclusions and Recommendations, it includes the suggestion made by some States to develop "a list-based approach to identify the scope of "civil or commercial matters"" and recommends not following that route but rather take a case-by-case approach (Prel. Doc. 11, click here) – a very wise approach.

Moreover, it is worth noting that **revised versions of the Service and Evidence Handbooks** have been submitted for approval. A track changes version of each has been made available on the website of the Hague Conference. The Handbooks are usually only available for purchase on the HCCH website so this is a unique opportunity to view them (although not in final form).

For ease of reference, I include the links below:

Service Handbook (track version, clean version)

Evidence Handbook (track version, clean version)

With regard to the **Service Handbook**, a few changes are worth underscoring. I will refer to changes in comparison to the **4th edition of the Handbook**. While I will refer to the track changes version, please note that not all changes have been marked as changes as this version refers to changes made to an intermediate version circulated internally:

1. **P. 61 of the track changes version – Service on an agent** – The clarification of the two lines of cases that have emerged regarding service on an agent (*e.g.* the US Secretary of State) and whether the document should be sent abroad is particularly interesting.
2. **P. 66 of the track changes version – Service by postal channels on Chinese defendants** – The emphasis on China's opposition to postal channels is particularly significant, given the litigation regarding service

on Chinese defendants through postal channels.

3. **P. 69 *et seq.* of the track changes version – Substituted service** – a welcome addition to underscore that this type of service is also used when the Convention does *not* apply.
4. **P. 87 *et seq.* of the track changes version – a practical example from Brazil on how to locate a person to be served –** this is an interesting example and it enriches the Handbook by including an example from Latin America.
5. **P. 101 *et seq* of the track changes version and glossary – EU digitalisation** – a fleeting reference is made to the modernization initiative of the European Union.
6. **P. 145 *et seq* of the track changes version – Water Splash, Inc. v Menon decision by the US Supreme Court** – The position of the US regarding article 10(a) has been updated and all the previous case law of lower and appeal courts has been deleted.

The above-mentioned changes are very welcome and will be very useful to practitioners.

On a more critical note, it should be noted that it is unfortunate that the **Annex on the use of information technology** featured in a previous edition of the Service Handbook has been deleted (previously **Annex 8**). In this Annex, there were references to the latest case law on electronic service by electronic means (approx. 26 pages), including email (incl. references to the first case and the evolution in this regard), Facebook, X previously known as Twitter, message board, etc. and an analysis whether the Service Convention applied and why (not).

Unfortunately, very few excerpts of this Annex have been included throughout the Handbook. The concept of address under Article 1(2) of the Service Convention vs email address is of great importance and it has remained in its place (p. 88 of the track changes version).

As a result, the Service Handbook contains now very few references to “service by e-mail” (1 hit), “electronic service” (3 hits), “e-service” (2 hits) or “service by electronic means” (10 hits, see in particular, p. 100) and no hits for “service by Facebook” or “service by Twitter”. It also seems to focus on e-service executed by Central Authorities of the requested State according to domestic laws (as opposed to direct service by email across States). And in this regard, see for example the

comment from China (Prel. Doc. 15, click here, p. 41).

Having said that, an **additional document on IT** was drafted (Prel. Doc. No 13, click here), which summarises the way in which information technology can be used to enhance the above-mentioned Hague Conventions and focuses specifically on electronic transmission, electronic service and video-link.

With regard to **e-service**, Preliminary Document No 13 notes among other things that Contracting Parties remain divided as to whether or not service – of process or otherwise – via e-mail or other forms of e-service is within the scope of Article 10(a) postal channels (p. 9). See in this regard the comment from the European Union (Prel. Doc. 15, click here, p. 38). This casts a shadow on the 'functional equivalence' approach of this Convention. Moreover, this document only discusses e-service very briefly and the literature referred to in the Prel. Doc. is outdated pertaining to one or two decades ago. On the other hand, however, reference is made to the 2022 responses to the Questionnaire and two recent cases.

Another perhaps unfortunate deletion is the **relationship between the Service Convention and the applicable EU regulation** (No. 2020/1784). The Handbook merely dedicates a half page to this important relationship (p. 169 of the track changes version) and does not analyse the similarities and the differences between them, as was the case in previous versions. A missed opportunity.

On a positive note, the graphs and tables have been improved and made more reader-friendly and a new Annex has been included "Joining the Convention" (new States can only accede to the Convention).

With regard to **Evidence Handbook**, it could be noted that this Handbook has been subject to a more recent update in 2020, as well as the publication of a Guide to Good Practice on Video-Link in the same year. Therefore, in a way there are less new developments to include. In particular, it has been noted that sections of the Guide to Good Practice on Video-Link have been included into the Evidence Handbook. A question may then arise as to whether the Guide will remain a stand-alone document (but apparently, it will not – for now the free version of the GGP can be downloaded. Hopefully, the Handbook will also be translated into as many languages as the Guide was).

As with the Service Handbook, the graphs and tables have been improved and

made more reader-friendly.

Of great significance is the delicate split of views with regard to the possibility of obtaining direct taking of evidence by video-link under Chapter I of the Evidence Convention. In my view, this is the Achilles' heel of the Evidence Convention since without direct taking of evidence under Chapter I, there is a real danger that this instrument has become obsolete. Let alone the fact that the Evidence Convention has no specific safeguards for the direct taking of evidence.

In sum, the Service and Evidence Conventions work well in a paper environment. However, these Conventions are struggling to keep up with technological developments as some States are reluctant to accept the 'functional equivalence' approach of some of their provisions, in particular art. 10(a) of the Service Convention and art. 9(2) of the Evidence Convention (direct service by postal channels and direct taking of evidence by the requesting State). An easier implementation of IT is the electronic transmission of requests, something that is left as a long-term goal (see below), the effecting of e-service by the Central Authority of the requested State or the use of video-link in the indirect taking of evidence. A question then arises as to how fit are these Conventions for the future and that is something that only time will tell.

This aside – the updating of the Handbooks and the drafting of the preliminary documents is a huge enterprise. The drafters should be congratulated, as these documents will certainly be of great benefit to the users of both Conventions.

At the end of a meeting of the Special Commission, Conclusions and Recommendations are adopted. In this regard, Prel. Doc. No. 13 submits a few proposals regarding information technology (see pages 15-17). In particular, it stands out [for the long-term] "the proposal for the development of an international system to facilitate the e-transmission of requests or alternatively, to propose how a decentralised system of platforms for the transmission of requests may function effectively." In that respect, a question arises as to how to combine synergies and avoid overlapping efforts at the international and the EU level.

[Update of 19 July 2024]

The Special Commission (SC) adopted 138 Conclusions & Recommendations (C&R), some of which paraphrase previous C&R – and are identified as such – with some updated text.

Below I include the most relevant C&R with regard to this post. For the full version, click here (also available in French and Spanish, click here).

> ***General Conclusions and Recommendations regarding IT [information technology]***
>
> *C&R 10-14, see in particular:*
>
> ***13*** *The SC emphasised that the Conventions operate in an environment which is subject to important technological developments, which have been further stimulated by the COVID-19 pandemic. Although the evolutionary use of IT could not be foreseen at the time of the adoption of the Conventions, the SC reiterated that IT is an integral part of today's society and its usage is a matter of fact. In this respect, the SC recalled that the spirit and letter of the Conventions do not constitute an obstacle to the usage of IT, and that the application and operation of the Conventions can be further improved by relying on such technology. [See C&R No 4 of the 2003 SC, C&R No 3 of the 2009 SC].*
>
> ***Use of IT – taking evidence by video-link***
>
> *C&R 46-51, see in particular:*
>
> ***51*** *The SC acknowledged the different views regarding the use of video-link to take evidence directly under Chapter I [Letters of Request], despite the benefits that it can bring. The SC encouraged Contracting Parties which permit the direct taking of evidence by video-link under Chapter I [Letters of Requests] to provide more information to the PB [Permanent Bureau of the HCCH] about how this occurs in practice so that examples can be summarised and included in the Evidence Handbook and, if required, further information can be developed to inform Contracting Parties on this issue. (Our emphasis as this is precisely the problem highlighted above).*
>
> ***Use of IT (service by digital means – the Service Convention)***
>
> ***73*** *The SC also recognised that in some domestic legal systems the relevant legal procedures and technological conditions do not allow for service by electronic means, although in certain systems the use of e-mail and online platforms is permitted in certain circumstances, particularly where approved by*

the judicial authority in advance or there is prior consent by the addressee. [See C&R No 64 of the 2003 SC]. (Our emphasis, same as above).

***74** The SC noted that, subject to the domestic law of the requested State, requests for service transmitted under the main channel of transmission (the Central Authority) may be executed by electronic means under Article 5. The SC also noted developments in the use of IT under the alternative channels of Article 10. [See C&R No 37 of the 2014 SC].*

Alternative channels of transmission – Service by e-mail

***105** The SC noted that Article 10(a) [of the Service Convention] includes transmission and service by e-mail, insofar as such method is provided by the law of the State of origin and permitted under the law of the State of destination. The SC reiterated that service by e-mail under Article 10(a) [of the Service Convention] must meet the requirements established under Article 1 of the [Service] Convention, in particular that the addressee's physical address in the State of destination is known. The SC noted that e-mail domains are not sufficient for locating the person to be served under Article 10(a). (Our emphasis, as this is particularly complex to determine and prove).*

***106** The SC reiterated that Contracting Parties may impose other requirements and safeguards regarding the use of e-mail under Article 10(a) [of the Service Convention] and encouraged Contracting Parties to indicate any such requirements in their Country Profiles.*

Relationship of the [Service] Convention with other instruments

***110** Recalling the relationship of the [Service] Convention with other instruments, the SC recommended greater elaboration in the Service Handbook on such relationship, including with regional and bilateral instruments. The SC encouraged Contracting Parties to provide information about all other instruments that would apply in parallel with the Service Convention in their Country Profiles.*

This is in line with what I stated above. See also C&R No 58, which replicates this Conclusion regarding the Evidence Convention

Contractual waivers and the Convention

111 *The SC took note of a case reported by one Contracting Party in which the court found that the parties' agreement to use alternative means of notification constituted a waiver of formal service of process under the applicable law. The SC recalled the Convention's non-mandatory, but exclusive, character, according to which the [Service] Convention will only apply if the domestic law of the forum determines that there is occasion to transmit a document for service abroad; if so, one of the available channels under the Convention must be used. The SC also stressed the potentially negative impact of such contractual agreements, namely, in relation to the protection of defendants under Articles 15 and 16 of the [Service] Convention, and the recognition and enforcement of judgments in the Contracting Party. The SC further questioned the effect of privately negotiated agreements in light of Contracting Parties' declarations and reservations. (As suggested by the relevant Preliminary Document).*

"Civil or commercial matters" under the Service and Evidence Conventions

125 *The SC noted that some Contracting Parties do not regard as "civil or commercial matters" claims in relation to acts of States in the exercise of State authority.*

126 *The SC recommended that rather than Contracting Parties developing a list-based approach to identify the scope of "civil or commercial matters", Contracting Parties consider requests on a case-by-case basis, with the aim of providing the broadest possible cross-border judicial cooperation. (As suggested by the relevant Preliminary Document).*

Handbooks

131 *The SC approved, in-principle, the fifth edition of the Handbooks, while noting that further amendments will be made, including incorporating the discussions at the SC meeting and relevant C&R, in cooperation with the Working Groups. The SC recommended to CGAP to approve the Handbooks.*

Future work

137 *The SC encouraged Contracting Parties to meet online to further discuss and exchange experiences to develop a deeper understanding of the use of IT*

and to develop further guidance for e-transmission and associated matters. These discussions will be supported by, or conducted under the auspices of, the PB. Such meetings will be held by way of online workshops for Central Authorities and other users of the Service and Evidence Conventions.

First Case of Reciprocal Commitment: China Requests Azerbaijan to Enforce its Judgment Based on Reciprocity

It has been a hot topic to explore the recognition and enforcement of judgments between China and other countries. The core issue of the topic is the role of reciprocity under Chinese law and practice concerning the recognition and enforcement of foreign judgments in China. Reciprocity was narrowly interpreted by Chinese courts in the past, blocking the circulation of lots of foreign judgments in China. Encouragingly, China's Supreme People's Court (SPC) is adopting new rules to interpret reciprocity, which is now far more favorable to establishing the reciprocal relationship between China and foreign countries. Then it is up to lower Chinese courts to follow up and the new reciprocity rules established by the SPC are tested in practice.

This piece of comment is written by Dr. Meng Yu, lecturer at China University of Political Science and Law, and co-founder of China Justice Observer.

In 2019, in the Zhou et al. v. Vusal case, China's request to Azerbaijan for

judgment recognition and enforcement was accompanied by its reciprocal commitment through a diplomatic note, marking the first time China made a reciprocal commitment to a foreign country regarding recognition and enforcement of foreign judgments.

Key takeaways:

- In the field of recognition and enforcement of foreign judgments (REFJ), the new reciprocity criteria in China include three tests, namely, de jure reciprocity, reciprocal understanding or consensus, and reciprocal commitment.
- In 2019, in the Zhou et al. v. Vusal case, China's request to Azerbaijan for judgment recognition and enforcement was accompanied by its reciprocal commitment through a diplomatic note, marking the first time China made a reciprocal commitment to a foreign country regarding REFJ.
- A reciprocal commitment is essentially a unilateral promise that takes effect upon being made.
- Before making such a commitment, China's Supreme People's Court (SPC) examines and decides on the matter. This is logically consistent with the requirement from the Conference Summary that Chinese courts need to examine, on a case-by-case basis, the existence of reciprocity, on which the SPC has the final say.

Reciprocity is not new but reciprocal commitment is.

Readers familiar with the topic of recognition and enforcement of foreign judgments (REFJ) will undoubtedly be familiar with the concept of "reciprocity". Although its manifestations and extent vary, the principle of reciprocity serves as the basis or precondition for REFJ in many countries, including China.

However, few countries have developed the concept of reciprocity as creatively as China, which has had at least five different standards for its determination—*de facto* reciprocity, presumptive reciprocity, *de jure* reciprocity, reciprocal understanding or consensus, and reciprocal commitment.

Among these, Reciprocal Commitment, as the most recently developed reciprocity criterion, often leaves people puzzled. What exactly is this unicorn-like criterion?

In 2019, in the case of *Zhou et al. v. Vusal* (hereinafter the "Vusal Case"), China requested Azerbaijan to recognize and enforce a judgment, making a commitment through diplomatic notes. This was the first reported case in which China made a reciprocal commitment to a foreign country regarding REFJ. This case will unveil to us the nature of Reciprocal Commitment.

I. What is "Reciprocal Commitment"?

Since the 2000s, reciprocity criteria have evolved significantly, reflecting China's efforts to liberalize its REFJ rules.

Over a decade, the early, high-threshold reciprocity criterion—*de facto* reciprocity, was abandoned. One after another, more pragmatic and flexible criteria such as presumptive reciprocity and *de jure* reciprocity have emerged in the form of judicial policies, declarations, and memoranda. Following the release of the "Conference Summary of the Symposium on Foreign-related Commercial and Maritime Trials of Courts Nationwide" (hereinafter the "Conference Summary") of the Supreme People's Court (SPC), a new generation of more open reciprocity criteria[1] has been established.

The new reciprocity criteria include three tests, namely, *de jure* reciprocity, reciprocal understanding or consensus, and reciprocal commitment, which also coincide with possible outreaches of legislative, judicial, and administrative branches.

Related Posts:

- How Chinese Courts Determine Reciprocity in Foreign Judgment Enforcement – Breakthrough for Collecting Judgments in China Series (III)[2]
- China's 2022 Landmark Judicial Policy Clears Final Hurdle for Enforcement of Foreign Judgments[3]

It then begs the question, what exactly is reciprocal commitment?

According to the Conference Summary, the test of reciprocal commitment means that when trying a case applying for recognition and enforcement of a foreign judgment or ruling, the people's court may recognize the existence of reciprocity, if "the country where the judgment-making court is located has made reciprocal

commitments to China through diplomatic channels or China has made reciprocal commitments to the country where the judgment-making court is located through diplomatic channels, and there is no evidence that the country where the judgment-making court is located has refused to recognize and enforce a Chinese judgment or ruling on the ground of lack of reciprocity".

For a while, reciprocal commitment was like a mysterious unicorn—because there were almost no cases or reports mentioning it. In contrast, the other two reciprocity tests have well-known instances, including the SPAR case, which involved the *de jure* reciprocity, where an English judgment was recognized and enforced in China for the first time[4]; the China-Singapore MOG, which demonstrated reciprocal understanding[5]; and the Nanning Statement, which involved reciprocal consensus[6].

One year after the Conference Summary, the first public document on reciprocal commitment finally appeared. This is the Vusal case, which was introduced as a typical case of reciprocal commitment in "Understanding and Application of the *Conference Summary*" authored by the SPC's Fourth Civil Division, published in June 2023.

II. The Case of Vusal: First Case of Reciprocal Commitment

In July 2018, Yiwu Primary People's Court, Zhejiang (the "Yiwu Court"), issued a first-instance civil judgment (2018) Zhe 0782 Min Chu No. 8836, in the case of a sales contract dispute between Zhou et al. and the defendant Vusal (a national of Azerbaijan). The judgment ordered the defendant Vusal to pay the plaintiffs Zhou et al. for the goods. The defendant Vusal failed to appear in the court after being duly summoned, and did not appeal during the appeal period. The judgment became effective in August of the same year.

After the judgment took effect, Vusal refused to satisfy the judgment, and the plaintiff applied to the court for enforcement of the judgment. The Yiwu Court filed the case for enforcement but did not find any of Vusal's enforceable asset in China.

In October 2019, the Yiwu Court reported to the SPC to request the competent court of the Republic of Azerbaijan to recognize and enforce the judgment.

Upon review, SPC decided to submit the judicial assistance request to Azerbaijan,

and to make a reciprocal commitment.

Finally, when making a judicial assistance request, the Chinese Embassy in Azerbaijan made a commitment to Azerbaijan in a diplomatic note that "it will provide equal assistance to Azerbaijan under similar circumstances in accordance with the law".

III. Comments

This case marks the first time that China has proactively made a reciprocal commitment to a foreign country regarding REFJ. It is still unclear whether Azerbaijan has acted on China's judicial assistance request for REFJ. There is also no available report or discussion on how Azerbaijan views the reciprocal commitment made by China through diplomatic notes.

One thing is certain: combined with the Vusal case, the meaning and application of reciprocal commitment have become clearer.

First, a reciprocal commitment is essentially a unilateral promise that takes effect upon being made. This "unilateral" commitment can be made by a foreign country (the future country where the judgment-making court is located) to China (the future requested country), or by China to the foreign country, as exemplified by China's commitment to Azerbaijan in the Vusal case.

Second, a reciprocal commitment can be regarded as a presumption of the existence of reciprocity. Since the commitment is unilateral and differs from the bilateral reciprocity understanding or consensus, the making of such a commitment does not automatically prove the existence of reciprocity. Instead, reciprocity is presumed unless there is evidence to the contrary (i.e., the other country has previously refused to recognize and enforce a Chinese judgment on the grounds that a reciprocal relationship does not exist).

Third, reciprocal commitments are made through diplomatic channels, as in the Vusal case where the Chinese Embassy in Azerbaijan made the commitment through a diplomatic note. Before making such a commitment, the SPC examines and decides on the matter. This is logically consistent with the requirement from the Conference Summary that Chinese courts need to examine, on a case-by-case basis, the existence of reciprocity, on which the SPC has the final say.

[1]
https://conflictoflaws.net/2022/chinas-2022-landmark-judicial-policy-clears-final-hurdle-for-enforcement-of-foreign-judgments/

[2]
https://www.chinajusticeobserver.com/a/breakthrough-for-collecting-judgments-in-china-series-3

[3]
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[4]
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https://www.chinajusticeobserver.com/p/nanning-statement-of-the-2nd-china-asean-justice-forum

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The Abu Dhabi Civil Family Court on the Law on Civil Marriage – Applicability to Foreign Muslims

and the Complex Issue of International Jurisdiction

The Indian Satellite Saga and Retaliation: Recognizing the Supreme Court of India's Judgment Abroad?

Introduction

As one of the most complex and fiercely contested recent investment disputes, the Indian Satellite Saga originated from India's annulment of an agreement for leasing S-band electromagnetic spectrum on two satellites (Satellite Agreement) to Devas Multimedia Private Ltd. (Devas). The Saga involved multiple international arbitrations and domestic litigations. In 2022, the Supreme Court of India made a judgment (SCI Judgment) to wind up Devas. Devas and its foreign investors allege the SCI Judgment is a retaliatory measure against them for enforcing arbitration awards.

Since 2023, courts worldwide, including those in Australia, Canada, Germany, Mauritius, the Netherlands, Singapore, Switzerland, and the US, rendered decisions regarding whether to recognize the SCI Judgment and to allow it as a defence against the enforcement of arbitration awards.[1] This Insight analyzes these courts' judgments and reflects on the decentralized judgment/award recognition and enforcement system for addressing alleged state retaliation measures.

Investment Disputes and Alleged Retaliatory Measures

Devas was an Indian telecommunications company with investors from Germany and Mauritius. Antrix Corporation Ltd. (Antrix) was under the direct control of the Department of Space of India. In 2005, Antrix concluded the Satellite Agreement with Devas but unilaterally terminated it in 2011 on the ground of force majeure because the Government of India decided not to provide orbital slots in S-band for commercial activities.[2]

Consequently, Devas initiated a commercial arbitration seated in India before an International Chamber of Commerce (ICC) Tribunal against Antrix.[3] The ICC Tribunal rejected Antrix's force majeure argument and awarded damages to Devas, reasoning that the Chairman of Antrix failed to do everything in his power to ensure that the Satellite Agreement would remain on track.[4] Devas's investors from Mauritius and Germany also brought UNCITRAL investment arbitrations against India separately in the *CC/Devas (1)*[5] and *DT*[6] arbitrations. Both tribunals rejected, at least in part, India's defense that it had annulled the Satellite Agreement to protect essential security interests.[7]

The three arbitration tribunals rendered billion-dollar awards in favor of Devas and its investors.[8] Devas and its investors have started to enforce these awards against Indian assets abroad. Devas also entrusted its related US company, Devas Multimedia America Inc., with collecting debts arising from the ICC award.

Meanwhile, the Indian Central Bureau of Investigation filed a First Information Report against Devas and the officers of Devas and Antrix for corruption in 2015.[9] Antrix initiated proceedings to wind up Devas in 2021 at India's National Company Law Tribunal (NCLT). Devas appealed to the National Company Law Appellate Tribunal (NCLAT) and the Supreme Court of India. The Supreme Court upheld the judgments of NCLT and NCLAT to liquidate Devas due to fraudulent activities, including Devas improperly enticing Antrix into the Satellite Agreement.[10] The fraud also involved collusion between Devas, Antrix, and Indian government officials.[11]

The shareholders of Devas were found to be fully aware of the fraud.[12] Notably, Devas and one of its shareholders, namely Devas Employees Mauritius Private Limited, were fully represented in the SCI proceedings. Devas's other

shareholders did not participate in the SCI proceedings.

As a consequence of the SCI Judgment, under its authority at the seat of the ICC arbitration, the High Court of Delhi set aside the ICC award.[13] Devas and its investors initiated the *CC/Devas (2)* investment arbitration against India alleging the latter's retaliation for the enforcement of the ICC award.[14] Upon India's request, the Supreme Court of Mauritius issued an interim anti-arbitration injunction.[15] India also sought to set aside the *DT* and *CC/Devas (1)* awards in their respective seats in Switzerland and the Netherlands.

Devas or its investors have sought to enforce the ICC, *DT*, and *CC/Devas (1)* awards in approximately 6 different countries.[16]

Recognize or not?

In the award-setting-aside proceedings and the award-enforcement proceedings, a critically important defense for India is the finding of fraud in the SCI Judgment.

To determine whether to recognize the SCI Judgment, the focal points are: whether foreign enforcement courts can exercise jurisdiction over India and whether the SCI Judgment should create *res judicata* effects in these courts. The varying approaches taken show how enforcement jurisdictions can independently decide whether retaliation existed and how to address it based on their laws.

Sovereign Immunity of India

When deciding whether to enforce the *CC/Devas (1)* award, both the Australian Federal Court and the Superior Court of the Province of Quebec in Canada held that India waived its sovereign immunity by ratifying the 1958 New York Convention because of the "clear and unequivocal submission" in Article 3 of the Convention.[17]

When enforcing the *DT* award, the Higher Regional Court of Berlin held that India did not enjoy sovereign immunity because according to the German Code of Civil Procedure, India's liability came from Antrix's commercial activities, and it was thus irrelevant that the Satellite Agreement was revoked partially due to national

security concerns.[18] Taking another path, the US District Court for the District of Columbia held that it had jurisdiction over India based on the arbitration exception to sovereign immunity, which requires "the existence of an arbitration agreement, an arbitration award, and a treaty governing the award."[19] In discussing the last requirement, the court mentioned the membership of the US and Switzerland (the seat of arbitration), rather than India's membership in the 1958 New York Convention[20] as the Australian Federal Court and the Superior Court of the Province of Quebec had. When rejecting the enforcement of the ICC award, the US Court of Appeals for the Ninth Circuit held that a minimum contacts analysis should be satisfied.[21]

Notably, the Australian Federal Court did not consider the legality of investment under the applicable bilateral investment treaty and the validity of the arbitration agreement because, when determining sovereign immunity, Devas needed only to provide prima facie evidence that a valid arbitration agreement existed.[22] The US District Court for the District of Columbia reached the same conclusion for a different reason: because the legality of investment was an arbitrability issue falling under the merits, not a jurisdictional matter.

Res Judicata

This issue can be analyzed from four aspects:

Preclusion effects of other tribunals' decisions: India was not successful in setting aside the *CC/Devas (1)* Award on Merits at the Hague Court of Appeal, which found that India did not sufficiently substantiate the accusations of fraud.[23] After the SCI Judgment was rendered, India asked the Hague District Court to set aside the Award on Quantum.[24] An important factor for the District Court in rejecting India's request was that the Hague Court of Appeal had already rejected India's assertions of fraud in the setting aside proceedings concerning the Award on Merits, and despite some new evidence, the fraud allegations in the request to set aside the Award on Quantum were virtually identical.[25] Therefore, the Hague District Court found that the SCI Judgment should not be recognized because of the *res judicata* effect of the earlier judgment of the Hague Court of Appeal.[26] In an action to enforce the *DT* arbitration, the Court of Appeal in Singapore similarly declined to consider the SCI Judgment's fraud findings

because the Swiss Federal Supreme Court at the seat of the arbitration had dismissed the setting-aside application and affirmed the *DT* arbitration tribunal's jurisdiction and the validity of the award.[27] Further, based on the competence-competence doctrine, the US District Court for the District of Columbia considered itself precluded from second-guessing the *DT* arbitrators' findings about arbitrability.[28]

Timing: In rejecting the revision proceedings against the *DT* final award, the Swiss Federal Supreme Court found that India's fraud allegation based on the SCI Judgment was time-barred.[29] This was because the 90-day limitation period to request the revision of the *DT* final award started to run when India obtained "sufficiently certain knowledge" of fraud even before the SCI Judgment was issued.[30] Like the Hague District Court, the Swiss Federal Supreme Court held that the SCI Judgment did not provide new evidence of fraud because the Supreme Court of India did not conduct its own fact-finding investigation.

The *(un)due process of* the Supreme Court of India is also hotly debated. In 2023, the Hague District Court declared the request of Devas Multimedia America Inc. to enforce the ICC award on behalf of Devas inadmissible, after a liquidator appointed under the SCI Judgment instructed the company not to act as an agent of Devas in enforcement efforts.[32] The Hague District Court found no evidence showing that the SCI failed to act independently and impartially.[33] In contrast, when deciding to enforce the *DT* award, the Singapore International Commercial Court expressed reservations about the proceedings at the SCI, finding that they had been carried out based on summary evidence without oral evidence or the cross-examination of witness;[34] and the same view was shared by the Higher Regional Court of Berlin.[35]

Divergence of parties is a significant barrier to extending the *res judicata* effects of the SCI Judgment against Devas to its investors. At the Superior Court of the Province of Quebec, India relied on the SCI Judgment arguing that its consent to arbitration was induced by fraud. The Court held that the SCI Judgment could prove only that Devas was liquidated and addressed a different question from that in the enforcement proceeding, because it did not rule on the validity of the *CC/Devas (1)* arbitration agreement, and the Devas investors were precluded from participating in the liquidation proceeding.[36] Similarly, the Singapore International Commercial Court held that the fraud finding in the SCI Judgment should not be binding on Devas's investor, Deutsche Telekom, because it was not

a party to the proceedings at the Supreme Court of India.[37]

Decentralized System to Address States' Retaliatory Measures

As the Indian Satellite Saga demonstrates, private international law and international investment law use a decentralized judgment/award recognition and enforcement system to address alleged states' retaliatory measures against foreign investors.

In terms of practical lessons, one is that fraud allegations should be argued as early as possible in the award-rendering proceedings, rather than waiting for the enforcement proceedings. Notably, India raised fraud late without reasonable justifications, so the claim was rejected by the arbitration tribunals.[38] Although some enforcement courts may allow parties to re-argue a fraud claim that has been fully litigated by a judgment/award-rendering tribunals, the Saga shows that saving these claims for the enforcement proceedings is risky because not every court will allow this practice.

More broadly, although the decentralized system produces inconsistent results, it also has an overlooked benefit of resilience when addressing state retaliatory measures, as it has no choke points and can function regardless of political tensions. This system, although sacrificing consensus and consistency, promotes democracy because each state has its voice. In contrast, some international systems to resolve alleged state retaliatory measures are centralized based on consensus. The centralized systems are supposed to bring authority, consistency, and certainty. However, the malfunction of one choke point can effectively dismantle the whole system. For example, although the WTO can authorize its members to retaliate against another member that continuously adopts non-compliance measures, the "WTO consensus" system enables one member to dismantle the WTO Appellate Body.[39] Another example is the United Nations Security Council, where the "veto privilege" and political tensions among its standing members have impeded international efforts to resolve the Gaza war.[40] The inconsistent outcomes reached over the course of the Indian Satellite Saga should thus be understood in light of the benefits of decentralization and resilience.

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[1] *Devas Multimedia Private Ltd., v. Antrix Corporation Ltd. & Anr.*, Civil Appeal No. 5906 of 2021 (India) [hereinafter SCI Judgment].

[2] *Id.*, ¶ 3.11.

[3] *Devas Multimedia Private Limited v. Antrix Corporation Limited* (Final Award) ICC Case No. 18051/CYK (Sept. 14, 2015).

[4] ICC Case No. 18051/CYK, ¶¶ 230-236, 312.

[5] *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. the Republic of India*, Case No. 2013-09, UNCITRAL, Award on Quantum (Perm. Ct. Arb. 2020) ("*CC/Devas (1)*").

[6] *Deutsche Telekom AG v. India*, Case No. 2014-10, UNCITRAL, Final Award (Perm. Ct. Arb. 2020) ("*DT Arbitration*").

[7] *CC/Devas (1)* Award on Jurisdiction and Merits (July 25, 2016), ¶¶ 354-361, 371-73; *DT* Interim Award (Dec. 13, 2017), ¶¶ 280-286.

[8] Approximately USD 562.5 million (ICC), USD 93.3 million (*DT*), USD 111 million (*CC/Devas (1)*), plus interest and costs.

[9] SCI Judgment, ¶ 3.13.

[10] SCI Judgment, ¶ 12.8 (vi).

[11] *Id.* ¶ 12.8 (xii).

[12] *Id. ¶* 12.8 (xv).

[13] *Devas Employees Mauritius Pvt. Ltd. v. Antrix*, High Court of Delhi at New Delhi, 2023: DHC: 1933-DB.

[14] *CC/Devas v. India (2)*, Case No. 2022-34 (Perm. Ct. Arb. 2022) ("*CC/Devas (2)*").

[15] *India v. CC/Devas (Mauritius) Ltd.,* SC/COM/WRT/000010/2023, Sup. Ct. Mauritius.

[16] *See CC/Devas v. India (I)* on Jus Mundi at https://jusmundi.com/en/document/decision/fr-cc-devas-mauritius-ltd-devas-employees-mauritius-private-limited-and-telcom-devas-mauritius-limited-v-republic-of-india-arret-de-la-cour-dappel-de-paris-22-11819-tuesday-13th-february-2024.

[17] *CC/Devas (Mauritius) Ltd. v. India*, 2022 QCCS 4786, ¶¶ 161 & 167; *CCDM Holdings, LLC v. India (No. 3)* [2023] FCA 1266, ¶¶ 35, 38, 45, and 51.

[18] Lisa Bohmer, *German Court Grants Application for Partial Enforcement of* Deutsche Telekom v India *Award, as Neither Fraud Allegations Nor BIT's Unique Wording on Enforcement Sway the Judges*, Investment Arb. Rep. (Feb. 9, 2023), https://www.iareporter.com/articles/german-court-grants-application-for-partial-enforcement-of-deutsche-telekom-v-india-award-as-neither-fraud-allegations-nor-bits-unique-wording-on-enforcement-sway-the-judges/.

[19] *Deutsche Telekom AG v. India*, Civil Case No. 21-1070 (RJL), Memorandum Opinion (Mar. 27, 2024), at 6.

[20] *Id.*

[21] *Devas Multimedia Private Ltd v Antrix Corp. Ltd.,* No. 20-36024 (9th Cir. 2023), ¶ 1.

[22] *CCDM Holdings, supra* note 17, ¶ 44.

[23] India's set-aside application against the *CC/Devas (1)* Award on Merits was rejected by the District Court of the Hague on November 14, 2018 (ECLI:NL:RBDHA:2018:15532), the Hague Court of Appeal on February 16, 2021 (ECLI:NL:GHDHA:2021:180), and the Dutch Supreme Court on February 3, 2023 (ECLI:NL:HR:2023:139).

[24] *India v. CC/Devas (Mauritius) Ltd.* (C/09/615682/HA ZA 21-674), October 25, 2023 issued by the District Court of the Hague.

[25] *Id.* ¶¶ 4.16, 4.19, and 4.20.

[26] *Id*. ¶ 4.09.

[27] *India v. Deutsche Telekom AG,* [2023] SGCA(I) 10, ¶¶ 142-178; 2023 SGHC(I) 7, ¶¶ 136-155.

[28] *Deutsche Telekom AG v. India*, Civil Case No. 21-1070 (RJL), Memorandum Opinion (Mar. 27, 2024).

[29] Swiss Bundesgericht Tribunal Fédéral (4A_184/2022), Urteil vom 8. März 2023.S.

[30] Lisa Bohmer, *Swiss Federal Tribunal Decides that Revision Proceedings Are not Available against Interim Award that Withstood Set-aside Request, while Finding that Request for Revision on Final Award is Time-Barred and Not Based on New Evidence*, Investment Arb. Rep. https://www.iareporter.com/articles/analysis-swiss-federal-tribunal-decides-that-revision-proceedings-are-not-available-against-interim-award-that-withstood-set-aside-request-while-finding-that-request-for-revision-of-final-award-is-t/.

[31] *Id. India v. CC/Devas (Mauritius) Ltd.*, *supra* note 24, ¶ 4.20.

[32] Order issued by Judge H.J. Vetter at the Hague District Court (July 18, 2023), https://www.iareporter.com/articles/dutch-court-declares-request-for-enforcement-of-devas-antrix-icc-award-inadmissible/.

[33] *Id*.

[34] *India v. Deutsche Telekom,* [2023] SGHC(I) 7, paras¶¶ 126-134.

[35] Bohmer, *supra* note 18.

[36] *CC/Devas (Mauritius) Ltd. v. India*, *supra* note 17, ¶¶ 210-215.

[37] Deutsche Telekom, "would be the victim, rather than a perpetrator" in the alleged fraud, *Deutsche Telekom AG v The Republic of India*, [2023] SGHC(I) 7, ¶¶ 87 and 123.

[38] Prabhash Ranjan, *Corruption and Investment Treaty Arbitration in India*, *in* Corruption and Illegality in Asian Investment Arbitration 235, 248 (Nobumichi Teramura, et al. eds., 2024).

[39] Chad Bown & Joost Pauwelyn, The Law, Economics and Politics of Retaliation in WTO Dispute Settlement 21-86 (2010).

[40] Press Release, United Nations, Security Council passes resolution demanding "an immediate ceasefire" during Ramadan,

https://news.un.org/en/story/2024/03/1147931?_gl=1*1y7ggfh*_ga*MTYxNDY2ODE4Ni4xNzA5NzczMDA4*_ga_TK9BQL5X7Z*MTcxMTQxMzkxNS4xLjAuMTcxMTQxMzkxNS4wLjAuMA.