

Cross-Border Litigation and Comity of Courts: A Landmark Judgment from the Delhi High Court

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In its recent judgment in *Shiju Jacob Varghese v. Tower Vision Limited*,^[1] the Delhi High Court (“HC”) held that an appeal before an Indian civil court was infructuous due to a consent order passed by the Tel Aviv District Court in a matter arising out of the same cause of action. The Court deemed the suit before Indian courts an attempt to re-litigate the same cause of action, thus an abuse of process violative of the principle of comity of courts.

In doing so, the Court appears to have clarified confusions arising in light of the explanation to Section 10 of the Civil Procedure Code, 1908 (“CPC”), on one side, and parties’ right to choice of court agreements and *forum non conveniens* on the other. The result is that, as per the Delhi HC, Indian courts now ought to stay proceedings before them if the same cause of action has already been litigated before foreign courts.

The Indian Position on Concurrent Proceedings in Foreign and Domestic Courts

In the European Union, Article 33 of the Brussels Recast gives European courts the power to stay proceedings if concurrent proceedings based on the same cause of action are pending before a foreign court. The European court may exercise this right if the foreign court will give a judgment capable of recognition, and such a stay is necessary for the proper administration of justice. By contrast, in India, the Explanation to Section 10 of the CPC provides that the pendency of a suit in a foreign Court does not preclude Indian courts from trying a suit founded

on the same cause of action.

The Indian Supreme Court in *Modi Entertainment v. WSG Cricket*[2] upheld parties' right to oust the jurisdiction of Indian courts in favour of a foreign forum through choice of court agreements. Where parties have agreed to approach a foreign forum by a non-exclusive jurisdiction clause, they would have considered convenience and other relevant factors. Therefore an anti-suit injunction cannot be granted.

Notwithstanding this judgment, however, when it came to situations where parties did not confer jurisdiction upon a foreign court through a choice of court agreement, the explanation to Section 10 of the CPC would still apply. Therefore, a party could initiate proceedings before both foreign and domestic courts on the same cause of action, resulting in the possibility of conflicting judgements and creating a nightmare for their enforcement. It would also increase the costs of resolving any dispute, as multiple litigation proceedings may occur simultaneously.

Courts in India tried to mitigate the impacts that could arise from these conflicting judgements through the doctrine of '*forum non conveniens*'. The doctrine permits courts to stay proceedings on the ground that another forum would be more appropriate or convenient to adjudicate the matter. There are no fixed criteria in considering whether to invoke the doctrine. However, courts may consider, *inter alia*, the existence of a more appropriate forum, the expenses involved, the law governing the transaction, the plausibility of multiple proceedings and conflicting judgements.

The doctrine of *forum non conveniens*, however, is only a discretionary power and can only be invoked if the defendant is able to prove that the current proceedings would be vexatious or oppressive to them and the foreign forum is "clearly or distinctly more appropriate than the Indian courts" (clarified by the Indian Supreme Court in *Mayar (HK) Ltd. v. Owners and Parties, Vessels MV Fortune Ltd.*[3]). Thus, it would not be mandatory in every situation for an Indian court to stay a suit pending before it, even if proceedings on the same cause of action are pending or completed in a foreign court.

Dismissal of the Appeal before Indian courts in *Shiju Jacob*

The dispute concerned a Share Entitlement executed in favour of the present Appellant, based on which the Appellant had filed a civil suit before the Tel Aviv District Court. More than two years later, they filed a suit for interim relief that was partially allowed by the Tel Aviv District Court but set aside by the Supreme Court of Israel. After that, the Appellant filed a suit before the Indian court, which was dismissed as a re-litigation and violative of the principle of comity. Consent terms were then filed in the Tel Aviv suit, and the suit was disposed of as settled. Shortly after that, the appellant moved an application to rescind the order to dispose of the suit, which the Tel Aviv District Court dismissed.

The Respondents now claimed, before the Indian court, that the appeal against the previous order by the Indian court was infructuous in view of the consent order passed by the Tel Aviv District Court. The Appellants, on the other hand, argued that the explanation to Section 10 of the CPC allowed them to file a suit in India, even if it was on the same cause of action as the suit before the Israeli courts.

The Delhi High Court held that allowing the appeal to continue would violate the principle of comity of courts, as it could result in conflicting decisions between the Israeli and Indian courts. It would also constitute re-litigation, which, although may not in every case be barred as *res judicata*, depending on the facts and circumstances, could be an 'abuse of process'. The concept of 'abuse of process' is thus more comprehensive than the concept of *res judicata* or issue estoppel. The Court therefore held that a suit or appeal must be struck down as an abuse of process even if the party is not bound by *res judicata* if it is shown that the new proceeding is manifestly unfair or would bring the administration of justice into disrepute.

Implications of the Judgment

The judgment thus provides that Indian courts must dismiss suits which have already been litigated before foreign courts. This is a welcome change, considering that the explanation to Section 10 of the CPC allows such proceedings to occur at the same time.

However, given that this is a High Court judgement, it will not be binding on Courts outside of Delhi and would simply have persuasive value. This difficulty is

compounded by the fact that as per the facts of *Shiju Jacob*, the suit had been dismissed by the Tel Aviv District Court by the time the appeal was heard. Thus, it is unclear whether Indian courts will be able to follow the same approach where proceedings in the foreign court haven't been completed yet. In fact, the HC had observed that the effect of the explanation to Section 10 of the CPC did not even arise for consideration in the present case, as the settlement in question was not being executed or enforced in the proceedings before the Indian Court.

That said, the judgment of the Single Judge (which was being challenged in the present appeal) dismissed the suit even before the consent terms were passed because it was violative of the principle of comity of courts and amounted to re-litigation. The judgment signals that the Delhi HC intended for courts to apply the same principle where proceedings on the same cause of action are ongoing in a foreign court.

Ultimately, however, it is unfortunate that this intervention had to come from the judiciary and not the legislature. India still does not have comprehensive legislation governing transnational disputes, and its position on private international law has been gauged by extending domestic rules by analogy. In the absence of legislation, uncertainty continues to reign as parties must piece together the position of law from hundreds of judgements. Regardless, the judgment in *Shiju Jacob* is an encouraging precedent for improving the finality of transnational litigation in India and ending the difficulties created by the explanation to Section 10 of the CPC.

[1] 2023 SCC OnLine Del 6630.

[2] (2003) 4 SCC 341.

[3] AIR [2006] SC 1828.

New rules for extra-territorial jurisdiction in Western Australia

The rules regarding service outside the jurisdiction are about to change for the Supreme Court of Western Australia.

In a March notice to practitioners, the Chief Justice informed the profession that the *Supreme Court Amendment Rules 2024* (WA) (**Amendment Rules**) were published on the WA legislation website on 26 March 2024.

The Amendment Rules amend the *Rules of the Supreme Court 1971* (WA) (**RSC**). The primary change is the replacement of the current RSC Order 10 (Service outside the jurisdiction) while amending other relevant rules, including some within Order 11 (Service of foreign process) and Order 11A (Service under the Hague Convention).

The combined effect of the changes is to align the Court's approach to that which has been applicable in the other State Supreme Courts for some years.

The changes will take effect on 9 April 2024.

Background

The rules as to service outside the jurisdiction are important to cross-border litigation in Australian courts. Among other things, the rules on service provide the limits to the court's jurisdiction *in personam*: *Laurie v Carroll* (1957) 98 CLR 310, 323.

Whether a litigant has a judicial remedy before a court with respect to a person located outside of that court's territorial jurisdiction will depend on that court's rules as to service, among other things.

'[C]ivil jurisdiction is territorial': *Gosper v Sawyer* (1985) 160 CLR 548, 564 (Mason and Deane JJ). So historically, the rules on service would authorise 'service out' when there was an appropriate connection between the subject matter of the claim and the court's territory. For example, a court would have the requisite connection to a contract dispute where the contract was made in the

forum jurisdiction, even though the defendant in breach was located outside the jurisdiction.

The requisite connection to forum territory sufficient to justify a court's extra-territorial jurisdiction over a person not within the forum would depend on the rules of that particular court.

State Supreme Courts' approaches to 'long-arm jurisdiction' depend on where the defendant is located. If within Australia, the rules are effected by the *Service and Execution of Process Act 1992* (Cth) as modified by the rules of the forum court. Within New Zealand, the rules are in the *Trans-Tasman Proceedings Act 2010* (Cth)—legislation in the spirit of the Hague Conference on Private International Law—as modified by the rules of the forum court. Defendants in any other foreign country are captured by the rules of the forum court. The same goes for the Federal Court of Australia via the *Federal Court Rules 2011* (Cth); see *Overseas Service and Evidence Practice Note* (GPN-OSE).

In characteristically Western Australian fashion, the Supreme Court of Western Australia has historically taken a unique approach to service out as compared to other State Supreme Courts of the Federation. As Edelman J explained in *Crawley Investments Pty Ltd v Elman* [2014] WASC 233, [45], the Western Australian rules have derived from Chancery practice, whereas the approach under the historical *Supreme Court Rules 1970* (NSW) pt 10—underpinning leading authorities like *Agar v Hyde* (2000) 201 CLR 552—was quite different. See *Agar v Hyde*, CLR 572 [16].

The key difference was that the Supreme Court of WA had retained a need for leave to serve outside of the jurisdiction in advance, together with leave to have the writ issued, for persons outside Australia and not in New Zealand: see historical RSC O r 9 and O 10 r 4. Previously, the Federal Court was somewhat similar by also requiring leave, until it took a new approach from January 2023.

Some years ago, the Council of Chief Justices' Rules Harmonisation Committee agreed to harmonise the rules as to service out as between Australia's superior courts. New South Wales took the step of giving effect to what were then 'new rules' back in 2016. I discussed those changes with Professor Vivienne Bath: Michael Douglas and Vivienne Bath, 'A New Approach to Service Outside the Jurisdiction and Outside Australia under the Uniform Civil Procedure Rules'

(2017) 44(2) *Australian Bar Review* 160. Other States took the same approach.

In comparison to WA, the ‘new approach’ of the eastern States’ courts required very little connection between the forum jurisdiction and the subject matter of the dispute. For example, the Supreme Court of NSW could claim jurisdiction over a claim involving a tort occurring outside Australia provided there was just *some* damage occurring in Australia (not occurring in New South Wales—occurring in Australia): see *Uniform Civil Procedure Rules 2005* (NSW) sch 6(a). Damage in the forum was not enough in the Supreme Court of WA: the tort had to occur in Western Australia (not just occurring in Australia): see historical RSC O 10 r 1(1)(k).

Through the Amendment Rules, the Supreme Court of WA is finally giving effect to what was agreed by the Rules Harmonisation Committee.

The changes

The changes for practice in the Supreme Court of Western Australia are significant in a number of respects. The full impact of the changes will require further pondering. The following is immediately apparent.

First, RSC Order 10 has been replaced with most significant impact for cases where the person to be served is outside Australia and not in New Zealand: see the new RSC O 10 div 3.

Second, service outside Australia is now possible without leave in the same circumstances that service would be permitted without leave in other ‘harmonised’ jurisdictions, like the Supreme Court of NSW. See the new RSC O 10 r 5.

Third, even if the circumstances do not satisfy the very broad pigeonholes of connection specified by the new RSC O 10 r 5, service outside Australia is still permissible with leave if the claim has a real and substantial connection with Australia, and Australia is an appropriate forum (which oddly means not a clearly inappropriate forum per the Australian doctrine of *forum non conveniens*—a whole other conundrum), among other things: see the new RSC O 10 r 6(5).

A remaining issue is the interaction between the new RSC O 10 and RSC OO 11

and 11A, particularly as regards service in accordance with the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*. The latter order deals with service under the Hague Convention, but it is not clear if the Hague Convention procedure for service out displaces the autochthonous procedure for service out under RSC O 10, or merely prescribes the manner or mode of service in convention countries as opposed to impacting substantive bases for whether long-arm jurisdiction is warranted.

The relationship between the historical OO 10, 11 and 11A has been one for debate, as recognised by my co-author Bell CJ in chapter 3 of the latest edition of *Nygh's Conflict of Laws in Australia*: see [3.27]. The situation remains confusing. I am still confused. I look forward to becoming less confused after conferring with more learned colleagues.

Comment

The changes will likely be welcomed by the profession. They make cross-border litigation easier in Western Australia. They will make life easier for 'foreign' east-coast practitioners trying to dabble at practice in WA.

But I expect they will be lamented by many in the private international law community. Most academics I know subscribe to the Savigny orthodoxy that forum shopping is bad, and courts should only seize themselves of jurisdiction when they have a genuine, or *real and substantive*, territorial connection to the subject matter of the dispute. I know Professor Reid Mortensen will criticise these changes as 'exorbitant' and contrary to principle. I disagree with Reid (to hell with multilateralism—Australia first!) but I respect the arguments to the contrary. We can all agree: these changes reaffirm Australia's unique willingness to exercise jurisdiction in a way that many foreign courts would consider exorbitant.

International tech litigation reaches the next level: collective actions against TikTok and Google

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Introduction

We have reported on the Dutch WAMCA procedure for collective actions in a number of previous blogposts. This collective action procedure was introduced on 1 January 2020, enabling claims for damages, and has since resulted in a stream of (interim) judgments addressing different aspects in the preliminary stages of the procedure. This includes questions on the admissibility and funding requirements, some of which are also of importance as examples for the rolling out of the Representative Action Directive for consumers in other Member States. It also poses very interesting questions of private international law, as in particular the collective actions for damages against tech giants are usually international cases. We refer in particular to earlier blogposts on international jurisdiction in the privacy case against *TikTok* and the referral to the CJEU regarding international jurisdiction under the Brussels I-bis Regulation in the competition case against *Apple*.

In this blogpost we focus on two follow-up interim judgments: one in the collective action against TikTok entities and the other against Google. The latter case is being discussed due to its striking similarity to the case against Apple.

The next steps in the *TikTok* collective action

The collective action against *TikTok* that was brought before the Amsterdam District Court under the Dutch WAMCA in 2021. Three representative organisations brought the claim against seven *TikTok* entities located in different countries, on the basis of violation of the Code of Conduct of the Dutch Media Act

and the EU General Data Protection Regulation (GDPR). The series of claims include, among others, the destruction of unlawfully obtained personal data, the implementation of an effective system for age registration, parental permission and control, measures to ensure compliance with the Dutch Media Act and the GDPR as well as the compensation of material and immaterial damages.

In an earlier blogpost we reported that the Amsterdam District Court ruled that it had international jurisdiction under the Brussels I-bis Regulation and the GDPR. In the follow-up of this case, the court reviewed the admissibility requirements, one of which concerns the funding and securing that there is not conflict of interest (see Tzankova and Kramer, 2021). This has led to another interim judgment focusing on the assessment of the third party funding agreement as two out of the three claimant organisations had concluded such agreement, as reported on this blog here. In short, the court conditioned the admissibility of the representative claimant organisations on amendments of the agreement with the commercial funder due to concerns related to the control of the procedure and the potential excessiveness of the fee. The court provided as a guideline that the percentage should be determined in such a way that it is expected that, in total, the financiers can receive a maximum of five times the amount invested.

On 10 January 2024 the latest interim judgment was rendered. Without providing further details the Amsterdam District Court concluded that the required adjustments to the funding agreement had been made and that the clauses that had raised concern had been deleted or amended. It considered that the independence of the claimants in taking procedural decisions was sufficiently guaranteed. The court declared the representative organisations admissible, appointing two of them as Exclusive Representative (one for minors and the other for adults) based on their experience, the number of represented people they represent, their collaboration and support. The court confirmed its statement made in a previous interim judgment that the claim for immaterial damages is inadmissible as that would require an assessment per victim, which it considered impossible in a collective action. This is admittedly a setback for the collective protection of privacy rights, notably similar to the one following the 2021 United Kingdom Supreme Court ruling in *Lloyd v Google*.

With this last interim judgment the preliminary hurdles have been overcome, and the court proceeded to provide further guidelines as to the opt-out and opt-in as the next step. The WAMCA is an opt-out procedure, but to foreign parties in

principle an opt-in regime applies. The collective action was aimed representing people in the Netherlands, but was extended to people who have moved abroad during the procedure, and these are under the opt-in rule. The information on opt-out and opt-in will be widely published.

It remains to be seen how the case will progress considering the further procedural decisions and the assessment on the merits.

The claim against Google and its private international law implications

Another case with an international dimension is the collective action for damages against Google that was filed under the WAMCA, alleging anticompetitive practices concerning the handling of the app store (DC Amsterdam, 27 December 2023, ECLI:NL:RBAMS:2023:8425; in Dutch). This development comes amidst a landscape marked by high-profile antitrust collective actions with international dimensions, such as the one filed against Apple, in which there is an ongoing legal battle regarding Apple's alleged anticompetitive behavior in the market for app distribution and in-app products on iOS devices. Cases like these are either pending before courts or under investigation by competition authorities worldwide, reflecting a broader global trend towards increased scrutiny of antitrust practices in the digital marketplace.

In the present case, the claimant organisation argues that the anticompetitive nature of Google's business stems from a collection of practices rather than an isolated practice. Such a collection of practices would shield Google from nearly all possible competition and allow it to charge excessive fees due to its dominance in the market. The practices that, taken together, form this anticompetitive behaviour are essentially:

- (i) The bundling of pre-installed apps, including Google's Play Store, with the licensing of the Android operating system to the manufacturers of smartphones;
- (ii) The imposition that transactions related to the Play Store be undertaken only within Google's own payment system;
- (iii) The charging of a fee of 30% from the app's developer, which the claimant organisation deems abusive and only possible due to Google's dominant position created by the abovementioned practices.

Based on these allegations, the claimant organisation accuses Google of engaging in mutually exclusive and exploitative practices, thereby abusing a dominant position in a manner contrary to Article 102 TFEU. This case unfolds within a broader global context where antitrust actions against Google's Play Store, its payment system, and the bundling with the Android operating system have gained significant momentum. Just last December, Google reached a settlement in a multidistrict litigation involving all 50 states of the United States, the District of Columbia, Puerto Rico, and the Virgin Islands. The settlement addressed issues very similar to those raised in this case, as explicitly outlined in the agreement. The Competition and Markets Authority in the United Kingdom is also conducting an antitrust investigation into these aspects of Google's operations. Furthermore, the practice of pre-installing Google apps as a requirement for obtaining a license to use their app store is under investigation by the Brazilian Competition Authority.

From a private international law perspective, this case closely resembles another one against Apple referred to the CJEU by the District Court of Amsterdam and discussed earlier in this blog, in which similar antitrust claims were raised due to the handling of the app store and the exclusionary design of the respective payment system. However, unlike the collective action against Apple, in this case the District Court of Amsterdam clearly did not refer the case to the CJEU and instead decided by itself whether it had jurisdiction to hear the claim. And again, like the Apple case, the court was called upon to decide on both international jurisdiction and its territorial jurisdiction within the Netherlands.

International jurisdiction

The collective action under the Dutch WAMCA in the Google case was filed against a total of eight defendants. Two of the defendants (Google Netherlands B.V. and Google Netherlands Holdings B.V.) against whom the claim was filed are established in the Netherlands, and for them the standard rule of Article 4 Brussels I-bis Regulation applies. There are also three other defendants (Google Ireland Limited, Google Commerce Limited, and Google Payment Ireland Limited) established in another EU Member State, namely Ireland. With regards to these defendants, the court also assessed whether it had jurisdiction based on the Brussels I-bis Regulation. Finally, there are three defendants based outside of the EU - Alphabet Inc. and Google LLC in the United States and Google Payment Limited in the United Kingdom. Jurisdiction with regards to these defendants

based outside of the EU was established under the pertinent rules contained in the Dutch Code of Civil Procedure (DCCP).

The court initiated its assessment by recognizing that, due to the lack of jurisdiction rules specifically addressing collective actions in both the Brussels I-bis Regulation and the Dutch Code of Civil Procedure, the standard rules within these frameworks should be applied. The court's reasoning was based on the established principle that no differentiation exists between individual and collective actions when determining jurisdiction. The court primarily conducted its assessment regarding whether the Netherlands could be considered the *Erfolgsort* under Article 7(2) of the Brussels I-bis Regulation, mostly *ex officio*, as this was not a point of contention between the parties.

The court's view is that the criteria from Case C-27/17 *flyLAL-Lithuanian Airlines* (ECLI:EU:C:2018:533) should be applied, according to which the location of the market affected by the anticompetitive practice is the *Erfolgsort*. The location of the damage is where the initial and direct harm occurred, which primarily involves users overpaying for purchases made on the Play Store. In the present case the court, applying such criteria, decided that the Netherlands can be considered the *Erfolgsort*, given that the claimant organisation represents users that make purchases and reside in the Netherlands. This reasoning is very similar to the one used by the District Court of Amsterdam in deciding to refer the Apple case to the CJEU.

Territorial jurisdiction within the Netherlands

With regards to the jurisdiction of the District Court of Amsterdam to hear this collective action in which the claimant organisation sues on behalf of all the users residing in the Netherlands, the decision contains an assessment starting from the CJEU ruling in Case C-30/20 *Volvo* (ECLI:EU:C:2021:604). Such ruling states that Article 7(2) Brussels I-bis Regulation grants jurisdiction over claims for damages due to infringement of Article 101 TFEU to the court where the goods were purchased. If purchases were made in multiple locations, jurisdiction lies with the court where the alleged victim's registered office is located.

In the case at hand, given the mobile nature of the purchases, it is not possible to pinpoint a specific location. However, under the criteria just mentioned, the District Court of Amsterdam has jurisdiction over the victims' registered offices

for those residing in Amsterdam in accordance with both Article 7(2) Brussels I-bis Regulation (Google Ireland Limited, Google Commerce Limited, and Google Payment Ireland Limited) and the similar provision in Article 102 DCCP (Alphabet Inc., Google LLC, and Google Payment Limited).

For users residing elsewhere in the Netherlands, the parties agreed that the District Court of Amsterdam would serve as the chosen forum for users who are not based in Amsterdam. The court decided that, with regards to Alphabet Inc., Google LLC, and Google Payment Limited, this is possible under Article 108(1) DCCP on choice of court. As to Google Ireland Limited, Google Commerce Limited, and Google Payment Ireland Limited, the court interpreted Article 7(2) Brussels I-bis Regulation in light of the principle of party autonomy (see Kramer and Themeli, 2016) as enshrined in Recitals 15 and 19, as well as Article 25 Brussels I-bis Regulation. The court also noted that no issues concerning exclusive jurisdiction arise in the present case and made a reference to the rule contained in Article 19(1) Brussels I-bis Regulation according to which the protective rule of Article 18 Brussels I-bis Regulation can be set aside by mutual agreement during pending proceedings.

Finally, the court decided that centralising this claim under its jurisdiction is justified under the principle of sound administration of justice and the prevention of parallel proceedings. In the court's understanding, the goal of Article 7 Brussels I-bis Regulation is to place the claim before the court that is better suited to process it given the connection between the two and, given that the mobile nature of the purchases gives rise to damages all over the Netherlands, such a court would be difficult to designate. Hence the need for respecting the choice of court agreement.

Applicable law

The court established the law applicable to the present dispute under Article 6(3)(a) Rome II Regulation. The court used the same reasoning it had laid out to establish jurisdiction in the Netherlands as the *Erfolgsort*, since it is the market affected by the alleged anticompetitive practices where the users concerned reside and made their purchases. The court also considered the claimant organization's argument that, according to Article 10(1) of the Rome II Regulation, the Dutch law of unjust enrichment could govern the claim. Although the court did not provide extensive elaboration, it agreed with this view.

Funding aspects of the claim against Google

Lastly, in a naturally similar way as regarding the TikTok claim explained above, the court assessed the funding arrangements of the claim against Google under the requirements set by the WAMCA. The court took issue with the fact that the funding arrangement entered by the claimant organisation is somewhat indirect, since it is apparent that the funder itself relies on another funder which is not a part of the agreement presented to the court. Under these circumstances, the court deems itself unable to properly assess the claimant organisation's independence from the "actual" funder and its relationship with the remuneration structure.

For this reason, the court ordered the claimant organisation to resubmit the agreement, which it is allowed to do in two versions. One version of the agreement will be presented in full and will be available to the court only, to assess it in its entirety. The other version, also available to Google, will have the parts concerning the overall budget for the claim concealed. However, the parts concerning the funder's compensation share must remain legible for discussion around the organisation's independence from the funder, and confirmation that such agreement reflects the whole funding arrangement of the claim was also required.

Conference on Informed Consent to Dispute Resolution Agreements, Bremen, 20-21 June 2024

On 20 and 21 June 2024, Galf-Peter Calliess and Nicholas Mouttotos (Institute for Commercial Law, University of Bremen) will convene a conference on 'Informed Consent to Dispute Resolution Dispute Agreements' in Bremen. They have shared the following announcement with us:

Dispute Resolution Agreements (DRA) are a very special kind of contract. They

allow parties to make a choice on the rights (applicable law) and remedies (competent forum, including procedural rules), which govern their relationship. Party autonomy, i.e. the freedom to enter into DRA, enables international merchants to provide for legal certainty and to bargain on the 'law market' for the most efficient institutional framework for their transactions. However, where DRA are included in the fine print of standard form contracts with less sophisticated contract parties, the question of legitimacy arises. For instance, where mandatory consumer rights or constitutional rights to a remedy are waived, a higher quality of consent might be required, one that is informed, instead of a simple manifestation of assent to the transaction. However, 'informed' consent has been criticized as a legal fiction.

DRA are regulated by diverse instruments on the national, supra-, and international level. Despite their similarities they are rarely discussed in a consistent fashion. The conference convenes leading scholars of private international law, international civil procedure, international arbitration, and standard form contracts from both sides of the Atlantic in an effort to develop a coherent framework.

In addition to the organizers, the conference will feature Symeon C. Symeonides, Daniel D. Barnhizer, Hannah Buxbaum, John F. Coyle, Nikitas Hatzimihail, Nancy S. Kim, Laura Little, Peter McColgan, Marta Pertegás Sender, Frederick Rieländer, Kermit Roosevelt, Stefan Thönissen, Camelia Toader, and Stephen J. Ware as speakers.

Further information can be found [here](#).

Turning Point: China First Recognizes Japanese Bankruptcy

Decision

This post is written by Guodong Du and Meng Yu and published at China Justice Observer. It is reproduced here by kind permission of the authors.

Key takeaways:

- In September 2023, the Shanghai Third Intermediate People's Court ruled to recognize the Tokyo District Court's decision to commence civil rehabilitation proceedings and the order appointing the supervisor ((2021) Hu 03 Xie Wai Ren No.1).
- This marks not only the first time that China has recognized a Japanese court's decision in a bankruptcy procedure, but also the first time that China has recognized a Japanese judgment.
- The case establishes a legal precedent for cross-border bankruptcy decisions, demonstrating that prior non-recognition patterns between China and Japan in civil and commercial judgments may not apply in such cross-border scenarios.
- While not resolving the broader recognition challenges between the two nations, this acknowledgment sends a positive signal from the Chinese court, hinting at potential future breakthroughs and fostering hope for improved legal cooperation.

This marks not only the first time that China has recognized a Japanese court's decision in a bankruptcy procedure, but also the first time that China has recognized a Japanese judgment (See the Chinese Court Ruling (2021) Hu 03 Xie Wai Ren No.1 ((2021)03???1)).

Related Posts:

- [China Recognizes Another German Bankruptcy Judgment in 2023](#)
- [How Chinese Judges Recognize Foreign Bankruptcy Judgments](#)
- [The First Time Chinese Court Recognizes Singapore Bankruptcy Judgment](#)

The Japanese law firm Nagashima Ohno & Tsunematsu, representing a Japanese

company, applied to the Tokyo District Court to initiate civil rehabilitation proceedings (a type of restructuring-type bankruptcy procedure under Japanese bankruptcy law). According to the application, the Tokyo District Court decided to commence civil rehabilitation proceedings and appointed a supervisor to monitor the debtor's activities.

As the Japanese company had certain assets in Shanghai, to facilitate the smooth progress of the civil rehabilitation proceedings in Japan, the company filed an application with the Shanghai Third Intermediate People's Court (the "Shanghai Court"), requesting recognition of the Tokyo District Court's to commence civil rehabilitation proceedings and the order appointing the supervisor. Nagashima Ohno & Tsunematsu provided legal opinions on relevant Japanese laws during the recognition process.

On 6 Sept. 2023, the Shanghai Court made a ruling recognizing the Japanese company's civil rehabilitation proceedings and the identity of the supervisor, and allowing the supervisor to monitor the company's self-management of property and business affairs within China under certain conditions.

In reviewing whether there was a reciprocal relationship between China and Japan in recognizing bankruptcy decisions, the Shanghai Court found that:

(1) Both sides have precedents of refusing to recognize each other's civil and commercial judgments, but these precedents do not necessarily apply to cross-border bankruptcy cases;

(2) According to Japanese laws, there are no legal obstacles to the recognition of Chinese bankruptcy decisions by Japanese courts, which confirms the existence of a reciprocal relationship between China and Japan in the recognition of cross-border bankruptcy cases.

This is the first time that China has recognized a decision made by a Japanese court in bankruptcy proceedings.

China and Japan have been at an impasse regarding the mutual recognition and enforcement of judgments. For more details, please read our earlier post *How to Start the Recognition and Enforcement of Court Judgments between China and Japan?*.

Related Posts:

- Some Thoughts on the Sino-Japanese Reciprocal Recognition Dilemma in Light of the Recent Developments in the Recognition and Enforcement of Foreign Judgments in China
- How to Start the Recognition and Enforcement of Court Judgments between China and Japan?

According to the Shanghai Court's statement, this case does not mean that the impasse between China and Japan has been broken, but it does send a positive signal from the Chinese court regarding Japanese judgments. We look forward to further breakthroughs between the two sides.

We have not yet obtained the original text of the judgment made by the Shanghai Court in this case. The above case information is from the website of Fangda Partners, the Chinese law firm representing the Japanese company in this case.

Another case commentary can be found here on the website of the Asian Business Law Institute (ABLI).

Disentangling Legal Knots: Intersection of Foreign Law and English Law in Overseas Marriages

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Introduction:

In a recent judgment *Tousi v Gaydukova* [2024] EWCA Civ 203, the Court of Appeal dealt with the issue of the relevance of foreign law to the remedy available

under English law in respect of an overseas ceremony of marriage. Earlier the High Court had held that the foreign law determines not only the validity or invalidity of the ceremony of marriage but also the ramifications of the validity or invalidity of the ceremony. The Court of Appeal disagreed and reiterated the rule that *lex loci celebrationis* is limited to the determination of the validity or invalidity of the ceremony of marriage. Therefore, English law will apply to provide a remedy or relief upon the breakdown of the relationship of the parties to a marriage ceremony that took place abroad.

In this comment, I argue that the judgment of the Court of Appeal conflates the distinction between the formal recognition of the relationship under the foreign law and the relief available thereto. The judgment of the Court of Appeal does not appreciate this distinction along with the distinction between the void marriage and 'non-qualifying ceremony' of marriage, which does not entitle the parties to any remedy or financial relief under the law in England and Wales.

The Facts:

The ceremony of marriage between the parties, an Iranian husband and a Ukrainian wife, took place at the Iranian Embassy in Kyiv on 12 December 1997 in the presence of two official witnesses. The marriage was not registered with the state authorities in Ukraine. The parties knew about the requirement of the registration of their marriage for its validity, but the husband refused to cooperate with the wife when she attempted to register the marriage. In 2000, the parties moved to the UK for the husband to study for a PhD. The Home Office granted entry clearance to the wife as the spouse of the husband. In 2010, the parties were granted the tenancy of a property in their joint names, but they separated in December 2019. In April 2020, the wife applied for non-molestation and occupation orders. The court granted a non-molestation order *ex parte* but refused an occupation order and observed that the wife could apply for the transfer of the tenancy. Therefore, the wife applied for the transfer of tenancy of the former matrimonial home into her sole name.

The wife made the application under section 53 and Schedule 7 of the Family Law Act 1996 which empowers the court to transfer a tenancy to cohabitants. Paragraph 3 of Schedule 7 of the Act authorises the court to make such orders

when cohabitants cease to cohabit. It is a curious aspect of this Act, that it puts a cohabitant applicant in a better position than a married applicant, who must wait until the court terminates their marriage, before their application can be heard. The court granted a transfer of tenancy to the wife by regarding her as a cohabitee because the marriage of the parties was not registered under Ukrainian law and hence it was not recognised under English law, not even as a void marriage.

The husband filed an appeal on the ground that the parties had entered into a marriage which was capable of recognition under English law. The wife argued that the court should regard the unregistered marriage as a 'non-marriage' which does not entitle the parties even to a nullity order under the Matrimonial Causes Act 1973 (MCA). Mostyn J addressed this single point of appeal in his detailed judgment at the High Court Family Division. He rejected the appeal after holding that the marriage ceremony did not qualify even as a void marriage and therefore, the couple were unmarried cohabitants because Ukrainian law did not recognise their marriage ceremony.

In his judgment, Mostyn J criticised the judicial creation of 'non-qualifying ceremony' (NQC) by the Court of Appeal in *AG v Akhter and Others* [2020] EWCA Civ 122 for its direct conflict with that statute [s. 11 of the MCA 1973] which extends financial relief even to void marriages to protect the rights of spouse. In highlighting the impact of the category of the NQC on the legal recognition of foreign marriages under English law, he held that foreign law determines not only the validity of a ceremony of marriage, but also the ramifications of the validity or invalidity of the ceremony.

Ruling and Comments:

Earlier, Mostyn J had observed that it is "well established under our rules of private international law that the formal validity of a marriage celebrated overseas (*forma*) is governed by the *lex loci celebrationis*" [para 65]. He held that "If the foreign law not only determines the question of validity, but also determines the ramifications of invalidity (if found), then in my judgment that corollary should also be binding, provided that it is not obviously contrary to justice." [para 68]

At the Court of Appeal, Moylan LJ observed, “The effect of the judge’s approach ... was that the relief available under the foreign law should determine ... the relief available under English law.” [para 29]. This, according to Moylan LJ was wrong because “the relief available, or not available, is determined by the law governing the dissolution and annulment of marriages, not the law governing the formation of marriages.” [para 35]. In this case however the issue was not related to “the dissolution and annulment of marriages” because both Mostyn J and Moylan LJ agreed that the ceremony of marriage of the parties did not “qualify” as a marriage and hence did not require to be dissolved or annulled because it did not have any legal effect at all. Therefore, the main issue in this case was whether Ukrainian law recognised the marriage ceremony that took place at the Iranian embassy in Kyiv. Both judges found that Ukrainian law did not recognise the marriage ceremony, not even as a void marriage and hence did not provide any remedy or relief.

It is important to note that the judges of the Court of Appeal did not appreciate that there is a third stage between the validity of marriage and relief on breakdown of marriage, and it is the stage of legal recognition or non-recognition of a marriage as valid, void or non-marriage. For instance, in *Hudson v Leigh* [2009] EWHC 1306, South African law recognised the ceremony as a void marriage; and in *Asaad v Kurter* [2013] EWHC 3852, the ceremony could be subsequently ratified, but a similar option was not available under Ukrainian law. Ukrainian law however recognised since 2002 a “so-called in-fact marriage relations” which provided the parties with rights and remedies in respect of property acquired during their cohabitation. Similar provisions are available for the transfer of tenancy but not for the provision of other financial relief under English law.

Moylan LJ highlighted that “there is a fundamental distinction between the law governing the formation of marriages and the law governing the dissolution and annulment of marriages. The remedies or relief which might be available under the latter are distinct from former.” [para 73]. This binary distinction however does not cater to the situations where “the law governing the formation of marriages” regards the marriage ceremony as “non-qualifying ceremony” and hence “the law governing the dissolution and annulment of marriages” does not provide any “remedies or relief”. In *Hudson v Leigh*, the former category of the law regarded the marriage as void and the latter category provided financial

relief. In the case at hand, “the law governing the formation of marriages” regarded the marriage ceremony as “non-marriage” and hence “the law governing the dissolution and annulment of marriages” did not apply and could not provide any remedy or relief.

As the category of “non-qualifying ceremony” which was previously described as “non-marriage” is relatively new under English law, the case law is unclear about their treatment especially in cases involving conflict of laws. Mostyn J argued that the category of “non-qualifying ceremony” would be treated under the foreign law as the governing law both for the determination of such ceremonies and their consequent legal ramifications while Moylan LJ has favoured limiting the foreign law to the question of validity or invalidity of marriage ceremonies. I submit that the tension between these two conflicting views can be resolved by appreciating a third stage between the formation and dissolution/annulment of marriage, which is the legal recognition or non-recognition of the marital relationship by taking into account the possibilities of subsequent ratification or registration of marriages. In this way, the governing law of marriage regulates both the formation of the marriage and its subsequent treatment as legally recognised or not while the remedy or relief is determined under *lex fori* when the relationship breaks down.

**Connection in a divided world:
Rethinking ‘community’ in
international law - 9th Annual
T.M.C. Asser Lecture, 25 April**

2024

On 25 April, Fleur Johns (University of New South Wales) will deliver the 9th Annual T.M.C. Asser Lecture at the Peace Palace in The Hague, Netherlands. The organizers have kindly shared the following abstract (and this invitation) with us.

The concept of ‘community’ (as in the ‘international community’ or the ‘community of nations’) has been a cornerstone of international law, sometimes aiding the articulation and promotion of public interests. For example, recent attempts to forge international agreement on pandemic prevention, preparedness, and response have been spurred by governments acknowledging ‘the catastrophic failure of the international community’ to ensure solidarity and equity in response to the COVID-19 pandemic.

And lately, international legal litigants have invoked ‘community interest’ in seeking to hold states accountable for alleged violations of international law. Such claims have been central to recent proceedings brought before the International Court of Justice (ICJ) alleging genocide or torture: by The Gambia against Myanmar; by Canada and the Netherlands against the Syrian Republic; and by South Africa against Israel.

Nonetheless, international legal notions of ‘community’ have also served racist, exclusionary purposes. The 19th century international lawyer James Lorimer famously argued that some religious and racialised peoples could never be full members of a community of nations under international law. Current international legal vocabularies, such as the ICJ Statute’s reference to the ‘law recognized by civilized nations’ for example, remain redolent of this racist idea of community-as-privilege.

In view of their ambivalence, claims about ‘international community’ should be made with caution. They often imply commonality of experience and shared value on a global scale when the experiences and values at issue may, in fact, be partial or contested, perhaps increasingly so. Digital technologies have changed how nations and peoples are brought together or connect, creating new disparities between those made more vulnerable to violence and injustice by digital connectivity, and those who benefit from the uneven global spread of computation.

This lecture will examine the concept of 'community' in today's international law, especially in the context of humanitarianism and the growing use of technology. We will revisit key texts such as Georges Abi-Saab's 1998 article, 'Whither the International Community?'. Ideas of 'community' have long played a role in making insiders and outsiders in international law, and continue to do so. Yet techniques of community-making in international law may nevertheless present egalitarian possibilities—or so this lecture will show.

Seats can be booked via [this link](#).

Workshop on International Investment Contracts in Lillehammer, December 2024

On 6 December 2024, Yuliya Chernykh (Norway University of Applied Sciences) is going to host a workshop on international investment contracts in Lillehammer, Norway. She has kindly shared the Call for Abstracts with us.

Egyptian Supreme Court on the Enforcement of Foreign Judgments - Special Focus on the Service Requirement

I . Introduction

Egypt and its legal system occupy a unique position within the MENA region. Egyptian law and scholarship exert a significant influence on many countries in the region. Scholars, lawyers, and judges from Egypt are actively involved in teaching and practicing law in many countries in the region, particularly in the Gulf States. Consequently, it is no exaggeration to say that developments in Egyptian law are likely to have a profound impact on neighboring countries and beyond, and warrant special attention.

The cases presented here were recently released by the Egyptian Supreme Court (*mahkamat al-naqdh*). They are of particular interest because they illustrate the complex nature of legal sources, particularly with respect to the enforcement of foreign judgments (on this topic, see Bélih Elbalti, “Perspective of Arab Countries”, in M. Weller et al. (eds.), *The 2019 HCCH Judgments Convention – Cornerstones, Prospects, Outlook* (Hart, 2023), pp. 195 ff). These cases also provide a good opportunity to elucidate the basic principles regarding the service requirement, which, as the cases discussed here and the comments that follow show, can pose particular challenges.

II. Facts

Two cases are presented here. Both involve the enforcement of judgments from neighboring countries (Kuwait in the first case and Saudi Arabia in the second) with which Egypt has concluded conventions on the enforcement of foreign judgments. In both cases, enforcement was granted by lower courts. The parties challenging the enforcement then appealed to the Supreme Court. The main grounds of appeal in both cases revolve around the issue of proper service of process. Ultimately, the Supreme Court ruled in favor of the appellants in both cases.

III. Summary of the Rulings

- **Case 1: Appeal No. 2765 of 25 June 2023 (Enforcement of a Kuwaiti Monetary Judgment)**

Proper service is a prerequisite to be verified by the enforcing court before

declaring a foreign judgment enforceable, as stipulated in Article 298 of the Code of Civil Procedure (hereinafter CCP). Enforcement should be refused unless it is established that the parties were duly served and represented. This is in line with the provisions of the Convention on the Enforcement of Judgments concluded between States of the Arab League, in particular Article 2(b), as well as Article 30 of the Riyadh Convention on Judicial Cooperation, which was ratified by Egypt by Presidential Decree No. 278 of 2014, and according to which foreign default judgments rendered in a contracting state shall not be recognized if the defendant has not been properly served with the proceedings or the judgment. [...] [The record indicates that the appellant challenged the enforcement of the foreign judgment on the basis of insufficient service. The enforcing court admitted the regularity of the service, but without stating the basis for its conclusion. As a result, the appealed decision is flawed and requires reversal with remand].

▪ Case 2: Appeal No. 17383 of 14 November 2023 (Enforcement of a Saudi custody judgment)

According to Article 301 of the CCP, conventions signed by Egypt take precedence over domestic law. Egypt ratified the Convention on the Enforcement of Judgments issued by the Council of the League of Arab States by Law No. 29 of 1954 and deposited the instruments of ratification with the General Secretariat of the League on July 25, 1954. The Kingdom of Saudi Arabia also signed the Convention on May 23, 1953. Consequently, the provisions of this Convention are applicable to the present case. [...] The appellant argued that he had not been properly served with the summons because he had left the Kingdom of Saudi Arabia before the trial, which led to the foreign judgment. However, the judgment under appeal did not contain any valid response to the appellant's defense or any indication that the enforcing court had reviewed the procedures for serving the appellant. Furthermore, it did not examine whether the service of the appellant was in accordance with the procedures laid down by the law of the rendering State. Consequently, the appealed decision is vitiated by an error of law which requires it to be quashed.

Comments

The enforcement of foreign judgments in Egypt is regulated by Articles 296 to 301 of the CCP (for an English translation of these provisions, see J. Basedow *et al.* (eds.), *Encyclopedia of Private International Law – Vol. IV* (Elgar Editions, 2017), pages 3163-4). It is also governed by the conventions on the enforcement of foreign judgments ratified by Egypt (for a detailed overview in English of the enforcement of foreign judgments in Egypt under the applicable conventions and domestic law, see Karim El Chazli, “Recognition and Enforcement of Foreign Decisions in Egypt”, *Yearbook of Private International Law*, Vol. 15 (2013/2014), pp. 387). The two cases presented above concern enforcement under these conventions.

In this regard, it is noteworthy that Egypt has established an extensive network of bilateral and regional multilateral conventions (for a detailed list, see Elbalti, *op. cit.* pp. 196, 199). With regard to multilateral conventions, Egypt has ratified two conventions adopted under the auspices of the League of Arab States: (1) The Arab League Convention on the Enforcement of Foreign Judgments and Arbitral Award of 1952 (hereinafter referred to as the “1952 Arab Judgments Convention”. On this Convention, see eg, El Chazli, *op. cit.* pp. 395-399) and (2) The Riyadh Convention on Judicial Cooperation of 1983 (hereinafter referred to as the “1983 Riyadh Convention”. On this Convention, see eg, Elbalti, *op. cit.* pp. 197-198). It is important to note that the 1983 Riyadh Convention is intended to replace the 1952 Arab Judgments Convention in relations between the States Parties to both Conventions (see Article 72).

Bilateral conventions include a convention concluded with Kuwait in 1977. This convention was replaced by a new one in 2017.

1. *With regard to the first case*, the following observations can be made:

a. This case appears to be the first case in which the Supreme Court has referred to the 1983 Riyadh Convention since its ratification in 2014. This is noteworthy in light of the numerous missed opportunities for the Court to apply the Convention (see eg., *Supreme Court Appeal No. 5182 of 16 September 2018*. In the *Appeal No. 16894 of June 6, 2015*, the Riyadh Convention was invoked by the parties, but the Court did not refer to it. See also 2(b) below).

b. It is also noteworthy, and somewhat surprising, that the Supreme Court referred to the 1983 Riyadh Convention in a case concerning the enforcement of a Kuwaiti judgment. This is because, contrary to what is widely acknowledged, Kuwait has *only signed* but *did not ratify* the Riyadh Convention (on this point see Elbalti, *op. cit.*, page 197 fn (118)). Since Kuwait is a party only to the 1952 Arab Judgments Convention, the Supreme Court's reference to the 1983 Riyadh Convention was inaccurate. Moreover, if the 1983 Riyadh Convention had been applicable, there would have been no need to refer to the 1952 Arab Judgments Convention, since the former is intended to replace the latter (Article 72 of the Riyadh Convention).

c. Conversely, the Supreme Court completely overlooked the application of the 2017 bilateral convention with Kuwait, which, as noted above, superseded the 1977 bilateral convention between the two countries. This case provided another missed opportunity for the Court to address the so-called problem of conflict of conventions, as both the 1952 Arab Convention and the 2017 bilateral convention were applicable with overlapping scopes. In the absence of special guidance in the text of the conventions, such a conflict could have been solved on the basis of one of the two generally admitted principles: *lex posteriori derogat priori* or *lex specialis derogat generali* (for an example of a case adopting the latter solution from the UAE, see *Abu Dhabi Supreme Court, Appeal No. 950 of 26 December 2022*).

d. This is not the first time the Egyptian Supreme Court has dealt with the enforcement of Kuwaiti judgments (there are 10 cases, by my count). In all of these cases, the court referred to the 1952 Arab Judgments Convention in addition to domestic law. It is only in two cases that the Court referred to the 1977 Kuwait-Egypt bilateral convention in addition to the 1952 Arab Judgments Convention (*Supreme Court Appeal No. 3804 of 23 June 2010* and *Appeal No. 15207 of 11 April 2017*). In the majority of cases (8 out of 10), the Court refused to enforce Kuwaiti judgments. The main ground of refusal was mainly due to, or including, lack of proper service.

2. *With regard to the second case*, the following observations can be made:

a. Egypt does not have a bilateral convention with Saudi Arabia. However, both

Egypt and Saudi Arabia are parties to the 1952 Arab Judgments Convention and the 1983 Riyadh Convention. As noted above, the 1983 Riyadh Convention replaces the 1952 Arab Judgments Convention for all States that have ratified it (Article 72). Therefore, the Supreme Court's affirmation that "the provisions of the [1952 Arab Judgments] Convention are therefore applicable to the present case" is incorrect. It is also surprising that the court made such a statement, especially considering that the party seeking enforcement relied on the 1983 Riyadh Convention, and given its erroneous application in Case 1.

b. This is not the first time that the Supreme Court has overlooked the application of the 1983 Riyadh Convention in a case involving the enforcement of a Saudi judgment. In a case decided in 2016, almost two years after the Convention entered into force in Egypt, the Supreme Court referred to the 1952 Arab Judgments Convention to reject the enforceability of a Saudi judgment, again citing the lack of proper service (*Supreme Court, Appeal No. 11540 of 24 February 2016*).

3. Enforcement of Foreign Judgments and Service Requirement in Egypt

As a general rule, service of process under Egyptian law is considered a procedural matter that should be governed by the *lex fori* (Article 22 of the Civil Code. For an English translation, see Basedow *et al*, *op. cit.*; see also El Chazli, pp. 397, 402). In the context of foreign judgments, this means that the service of process or judgment is, in principle, governed by the law of the state of origin, subject, however, to considerations of public policy (see eg., *Supreme Court, Appeal No. 2014 of 20 March 2003*). Based on the case law of the Supreme Court, the following features are noteworthy:

- Service by publication was considered sufficient for enforcement purposes if the court could confirm that it had been duly carried out in accordance with the law of the State of origin (*Supreme Court, Appeal No. 232 of 2 July 1964*).
- However, if it appears that the service by publication did not comply with the requirements of the foreign law, the regularity of the service will be denied (*Supreme Court of, Appeal No. 14777 of 15 December 2016* [service of summons]; *Appeal No. 1441 of 20 April 1999* [notification of

judgment])).

- Conversely, the Court held that the service irregularities may be cured if the defendant voluntarily appears before the foreign court and presents arguments on the merits of the case (*Supreme Court, Appeal No. 18249 of April 13, 2008*).
- Merely asserting that service was made in accordance with the law of the country of origin is not sufficient. Egyptian courts are required to verify that the judgment debtor has been properly served in accordance with the law of the country of origin and that such service is not contrary to Egyptian public policy (*Supreme Court of Cassation, Appeal No. 558 of 29 June 1988*). This aspect can be particularly important when it appears that the judgment debtor had permanently left the State of origin at the time when the service was made (*Supreme Court, Appeal No. 8376 of 4 March 2010; Appeal No. 14235 of 1 January 2014; Appeal No. 1671 of 18 February 2016*).
- With regard to ensuring that the defendant has been duly served, the courts are not bound by any specific method imposed by Egyptian law; therefore, the conclusions made by the enforcing court as to the regularity of the service based on the findings of the foreign judgment and not disputed by the appellant may be accepted (*Supreme Court, Appeal No. 1136 of 28 November 1990*).
- Where an international convention applies, the rules for service set out in the convention must be complied with, even if they differ from the rules of domestic law. Failure to comply with the methods of service prescribed by the applicable convention would render the foreign judgment unenforceable (*Supreme Court, Appeal No. 137 of 8 March 1952*).
- The rules provided for by the conventions prevail, including the method of determining whether proper service has been made (eg., the submission of a certificate that the parties were duly served with summons to appear before the proper authorities). Therefore, failure to comply with this rule would result in the rejection of the application for enforcement by the party seeking enforcement (*Supreme Court, Appeal No. 5039 of 15 November 2001; Appeal No. 3804 of 23 June 2010*).

4. Service under Conventions

Most of the bilateral and regional conventions ratified by Egypt contain provisions on the service of judicial documents. The Riyadh Convention is particularly noteworthy in this regard, as 18 of the 22 members of the League of Arab States are parties to it (see Elbalti, *op. cit.*, pp. 196-197). In addition, Egypt has been a party to the HCCH 1965 Service Convention since 1968.

The proliferation of these international instruments inevitably leads to the problem of conflict of conventions. This problem can be particularly acute in some cases, where as many as three competing instruments may come into play. This scenario often arises with some Arab countries, such as Tunisia or Morocco, with which Egypt is bound by (1) bilateral conventions, (2) a regional convention (namely the Riyadh Convention), and (3) a global convention (namely the HCCH Hague Service Convention).

In this context, the solution adopted by the Hague Convention deserves attention. Article 25 of the Convention provides that “[...] *this Convention shall not derogate from conventions containing provisions on matters governed by this Convention to which the Contracting States are or will become Parties*“. However, the evaluation of this solution deserves a separate comment (for analyses on a similar issue regarding the HCCH 2019 Judgments Convention, see Elbalti, *op. cit.*, p. 206).

International Jurisdiction between Nationality and Domicile in Tunisian Private International Law - Has the Perennial Debate Finally been Resolved?

I would like to thank Prof. Lotfi Chedly for providing me with the text of the decision on which this post is based.

I. Introduction

Scholars of private international law are well familiar with the classic debate on nationality and domicile as connecting factors in the choice of applicable law (see, for example, L. I. de Winter, “Nationality or Domicile? The Present State of Affairs” 128 *Collected Courses* III (1969) pp. 357 ff). In Tunisian private international law, this controversy has been particularly pronounced with regard to the role of nationality as a ground for the international jurisdiction of Tunisian courts. Since the enactment of the Tunisian Private International Law Code (“PILC”) in 1998 (for an English translation, see J. Basedow *et al.* (eds.) *Encyclopedia of Private International Law - Vol. IV* (Elgar Editions, 2017) 3895 and my own translation of the provisions dealing with international jurisdiction and the enforcement of foreign judgments in 8 *Journal of Private International Law* 2 (2012) pp. 221 ff)), the debate between opponents and proponents of nationality as a ground for international jurisdiction, especially in family law matters, has never ceased to be intense (for detailed analyses, see eg. Salma Triki, “La compétence internationale tunisienne et le critère de nationalité” in Ben Achour/Triki (eds.), *Le Code de droit international privé - Vingt ans d'application (1998-2018)* (Latrach edition, 2020) 119ff). This divergence in academic opinion is also reflected in the judicial practice of the courts, with the emergence of two opposing trends: one extends the international jurisdiction of the Tunisian courts when the dispute involves a Tunisian party, in particular as a defendant even when domiciled abroad. The other firmly rejects nationality as a ground for international jurisdiction.

The case commented here illustrates the culmination of this disagreement within the courts. The Supreme Court (*mahkamat al-ta'qib - cour de cassation*), in a second appeal, strongly denied the existence of such a privilege and emphasized the primacy of domicile over nationality as a basis for international jurisdiction in Tunisia. The Court of Appeal, acting as a court of remand, explicitly recognized that the jurisdiction of the Tunisian courts could be based on what is commonly referred to as “privilege of jurisdiction”. The Court of Appeal went even further by describing the decision of the Supreme Court, from which the case had been remanded, as “legally incorrect”. This stark contrast between the two courts prompted the intervention of the Joint Chambers (*chambres réunies*) of the

Supreme Court, which issued what appears to be the first decision of its kind in the field of private international law in Tunisia (*Ruling No. 36665 of 15 June 2023*), signed by 62 judges of the Supreme Court (including the Chief Justice (President of the Court), 21 Presidents of Chambers and 40 other judges as counsellors).

II. Facts

The case concerns a divorce action brought in Tunisia by X (plaintiff husband and appellee in subsequent appeals) against his wife, Y (defendant and appellant in subsequent appeals). The text of the decision indicates that X and Y were married in 2012 and had a child. Moreover, while X's Tunisian nationality appears to be undisputed, there may surprisingly be some doubts about Y's Tunisian nationality, as emerged later in the parties' arguments before the Joint Chambers.

In 2017, the Court of First Instance of Sousse (a city located about 150 km south of the capital Tunis) declared the parties divorced and ordered some measures regarding maintenance, custody and visitation. Dissatisfied, Y appealed to the Court of Appeal of Sousse. In 2018, the court overturned the appealed decision, considering that the Tunisian courts did not have jurisdiction over the dispute. X appealed to the Supreme Court (1st appeal). In its decision issued later in 2018, the Supreme Court overturned the appealed decision with remand, holding that the Court of Appeal did not correctly examine the existence (or not) of a foreign element in the dispute in order to decline jurisdiction on the grounds that X claimed that the spouses' matrimonial domicile was in Tunisia, where Y lived and worked.

In 2019, the Court of Appeal of Sousse, as the court of remand, accepted jurisdiction and confirmed the decision of the court of first instance with some modifications. Y appealed to the Supreme Court (2nd appeal). Y argued, *inter alia*, that the rules of international jurisdiction laid down in the PILC had been violated, since the spouses' matrimonial domicile was in France and that the couple had only returned to Tunisia during the summer vacations. In 2020, the Supreme Court ruled in favor of Y, stating, *inter alia*, that the Tunisian legislator had made from "the domicile of the defendant the decisive ground for the international jurisdiction of the Tunisian courts". The Court also held that the

Court of Appeal had reached an erroneous conclusion based on a misapplication of the facts and a misinterpretation of the law. The case was referred back again to the Court of Appeal.

In 2021, the Court of Appeal, in a frontal opposition, declared that the decision of the Supreme Court, according to which the domicile of the defendant was the ground based on which Tunisian courts could assume international jurisdiction, “cannot be followed” and is “legally incorrect”. Then the court affirmed that Tunisian nationals enjoy a “privilege of jurisdiction”, and this “means that Tunisian defendants should be subject to their national courts, even if they are domiciled abroad, since the purpose of granting jurisdiction to Tunisian courts in this category of disputes is to ensure better protection of their interests”.

Y challenged the decision of the Court of Appeal again before the Supreme Court (3rd appeal). As this was a disagreement between the Court of Appeal and the Supreme Court on a second appeal, the jurisdiction of the Joint Chambers was justified (articles 176 and 177 of the Code of Civil and Commercial Procedure, hereafter “CCCP”).

Before the Joint Chambers, Y argued, *inter alia*, that (1) that she was not a Tunisian national but a holder of dual Algerian/French nationality; (2) that the court had also based its decision on the fact that she was resident in Tunisia, ignoring the fact that she had returned to Tunisia only to spend her summer vacation; (3) that she had left Tunisia for France.

On the other hand, X argued that the Court of Appeal was right to hold that disputes in which one of the parties is Tunisian and in which the subject matter concerns matters of personal status fall within the jurisdiction of the Tunisian courts, since matters concerning the family and its protection concern public policy, especially when the dispute also involves a Tunisian minor.

III. Ruling

The Joint Chamber of the Supreme Court held that the Tunisian courts did not have jurisdiction and decided to overturn the decision of the Court of Appeal without further remand. The court ruled as follows (only relevant parts are reproduced here. The gendered style reflects the language used in the text of the

Court's decision):

"The dispute concerns the question whether the international jurisdiction of the Tunisian courts should be determined on the basis of the defendant's domicile (*maqarr*), in accordance with Article 3 of the PILC, or on the basis of the privilege of jurisdiction, according to which a Tunisian national is subject to the jurisdiction of his national courts even if he is domiciled abroad.

It goes without saying that in Articles 3 to 10 of the PILC, the legislator has sought to confer jurisdiction on the Tunisian courts on the basis of close connections between the Tunisian legal system and the legal relationship, thereby abolishing the exceptional grounds such as nationality, representation or reciprocity. The reason for the abolition of these exceptional grounds lies in the fact that they do not constitute a genuine connection between the dispute and the Tunisian legal system [...].

[...]

As appears from the files of the case, the residence (*iqama*) of Y in France is established either on the basis of the service of the summons [...] on her domicile (*maqarr*) in France [...] or the judicial admission made by X [...] [in which he] admitted that his wife had moved to France where she had settled with their daughter and refused to return to Tunisia.

[However], by considering that the privilege of jurisdiction entails subjecting the Tunisian defendant to the jurisdiction of his or her national courts, even if he resides (*muqim*) abroad, the remand court misjudged the facts and drew erroneous conclusion, leading to a misunderstanding and misapplication of article 3 of the PILC [...]."

IV. Comments

The principle established by the Joint Chamber regarding the role of the defendant's Tunisian nationality as a ground for international jurisdiction can be considered a welcome clarification of the interpretation and application of Tunisian law. However, it must also be said that the decision commented on here contains some intriguing and to some extent confusing features, particularly in

the parts of the decision not reproduced above relating to the meaning of and the distinction between “domicile (*maqarr*)” and “residence (*iqama*)”. For the sake of brevity, only the issue of nationality as a ground of international jurisdiction will be commented on here.

1. Prior to the Enactment of the PILC

Prior to the enactment of a PILC, nationality – especially that of the defendant – was used as a general ground for international jurisdiction in all disputes brought against Tunisians, even if they were domiciled abroad (former art. 2 of the CCPC). This rule is common in the MENA region and is generally followed even if it is not explicitly stated in the law (For the case of Bahrain, see [here](#), for the case of Morocco, where a new draft code of civil procedure proposes to introduce a similar rule *ex lege*, see [here](#)).

2. Nationality as a ground for international jurisdiction under the PILC

The PILC, adopted in 1998, introduced a radical change in this regard by completely excluding nationality as a ground for international jurisdiction (see eg. Imen Gallala-Arndt, “Tunisia”, in J. Basedow *et al.* (eds.) *Encyclopedia of Private International Law – Vol. III* (Elgar Editions, 2017) p. 2586). Henceforth, the PILC recognizes only one legitimate ground of *general jurisdiction* over any civil or commercial dispute (including family law disputes) arising between persons *regardless of their nationality*, if the defendant has its “residence (*iqama*)” in Tunisia, although the semi-official French version of the PILC (as officially published in the Official Gazette) refers to “*domicile*” (*maqarr* in Arabic). In literature, there is a general consensus among Tunisian scholars that the word *iqama* (residence) in the Arabic version of article 3 actually means “*maqarr* (domicile)”. Case law is, however, quite inconsistent on this issue, with Tunisian courts, including the Supreme Court itself, reaching contradictory decisions on the interpretation and application these basic notions. This issue was addressed in the decision commented here (although in a quite unsatisfactory manner as the Joint Chambers, while distinguishing between “residence” and “domicile”, used both notions interchangeably in a particularly intriguing manner). However, this aspect of the decision will not be discussed here.

It is worth mentioning that the solutions introduced in the PILC have attracted the attention of renowned foreign scholars, who have highlighted the peculiarity of the Tunisian solutions in this regard, describing the Tunisian solutions as “interesting” and the exclusion of nationality as ground for international jurisdiction in all matters, including family law disputes, as “courageous” (see eg., Diego P. Fernando Arroyo, “Compétence exclusive et compétence exorbitantes dans les relations privées internationales” 323 *Collected Courses* 2006, pp. 140-141).

3. Judicial Application

However, as soon as the PILC entered into force, a trend developed in judicial practice whereby Tunisian courts at all levels showed a willingness to extend their jurisdiction when the dispute involved Tunisian nationals. At the same time, there has been a parallel trend whereby some courts, also at all levels, have strictly adhered to the new policy of international jurisdiction and have refused to assume jurisdiction whenever it appeared that the defendant (whether a Tunisian national or not) was domiciled abroad. (For a detailed analysis with different scenarios and cases, see Souhayma Ben Achour, “L'accès à la justice tunisienne en droit international privé tunisien” in Ben Achour/Ben Jemia (dir.), *Droit fondamentaux & droit international privé* (La Maison du Livre, 2016) pp. 11 ff).

a. Regarding the former, Tunisian judges have used various approaches and methods to circumvent the law and extend their jurisdiction beyond the limits set by the PILC. For example:

- In some cases, the courts have simply denied the international nature of the dispute on the grounds that all the parties were Tunisian, even though it was established that all or some of the parties (particularly the defendant) were domiciled abroad (see eg. *Supreme Court, Ruling No. 12295 of 14 February 2002*).
- In other cases, the courts have inferred a tacit submission to the jurisdiction of the Tunisian courts, even in the absence of the appearance of the defendant (often a foreign wife) (see eg. *First Instance Court of Tunis, Ruling No. 30605 of 18 January 2000*).
- In some other cases, the courts have confirmed their jurisdiction either on

the basis of

- the choice-of-law rules, according to which personal status shall be governed by the *lex patriae* of the parties (*Supreme Court, Ruling No. 3181 of 22 October 2004*), or,
- on the basis of the rules of indirect jurisdiction laid down in bilateral conventions on mutual judicial assistance, knowing that these conventions do not contain rules of direct jurisdiction (see eg., *Supreme Court, Ruling No. 6238 of 23 December 2004*).
- More problematically, some courts have relied on the “place of performance” as a ground for international jurisdiction in contractual matters, considering the marriage to be a “contract” and its “performance” to have taken place in Tunisia when the parties consummated the marriage or established their matrimonial residence/domicile there (see eg. *First Instance Court of Tunis, Ruling No. 77280 of 12 July 2010*).
- In some cases, the courts have invoked *forum necessitatis* to extend their jurisdiction without indicating whether the requirements of its invocation were met (see eg. *First Instance Court of Tunis, Ruling No. 75738 of 22 February 2010*).
- Last but not least, in some cases, and in direct violation of the law, the courts have declared themselves to be the “natural” courts in family law disputes involving Tunisians, and that their jurisdiction could be based on the idea of “jurisdictional privilege” based on the Tunisian nationality of the defendant (see eg., *Tunis Court of Appeal, Ruling No. 76011 of 12 November 2008*) (interestingly, the grounds invoked here are similar to those invoked by the Bahraini courts here).

All these cases, and many others (see eg., Ben Achour *op. cit.*), have given the impression that Tunisian courts would go to any lengths to assume jurisdiction over disputes involving Tunisians in family law matters (cf., eg., Sami Bostanji, “Brefs propos sur un traité maltraité” *Revue tunisienne de droit*, 2005, p. 347).

b. This trend should not, however, be allowed to overshadow another that has also developed in parallel as mentioned above. The Supreme Court itself, despite some inconsistencies in its case law, has reaffirmed on several occasions that the jurisdiction of the Tunisian courts can be established only on the basis of the rules laid down in the CPIL, thereby rejecting the idea of nationality as an additional

ground of jurisdiction in disputes involving Tunisian nationals (see eg., *Supreme Court, Ruling No. 32684 of 4 June 2009*).

c. In this respect, the decision of the Joint Chambers is likely to bring some order to the judicial cacophony on this issue, although it may not put an end to the ongoing debate and divergence of opinions among legal practitioners and scholars on the relevance of nationality as a criterion of international jurisdiction. Moreover, the tendency of some judges – sometimes described as “conservative” (cf. Arroyo *op. cit.*) – to continue to assume jurisdiction in disputes involving Tunisians (particularly in family law disputes) seems to be so entrenched that some scholars in Tunisia have described it as a “movement of resistance” against the legislative policy of the State (cf. eg. Lotfi Chedly, “Droit d’accès à la justice tunisienne dans les relations internationales de famille et for nationalité” in *Mélanges offerts à Dali Jazi* (Centre de Publication Universitaire, 2010) p. 264). This state of affairs has led some leading authors in Tunisia to question the state’s policy of excluding nationality altogether, even in family law disputes. One of the arguments put forward is that nationality in family law disputes is not an excessive ground for jurisdiction and is widely used in other legal systems (for the various arguments in favor of nationality, see Triki, *op. cit.*).

4. Legislative amendment?

These voices found their way into two legislative proposals in 2010 and 2019 to amend the PILC and introduce nationality as a ground for international jurisdiction in divorce cases (on the 2019 proposal, its background and peculiarities, see Triki, *op. cit.*). However, these attempts were unsuccessful, mainly due to the unstable political situation in Tunisia (the outbreak of the Tunisian revolution at the end of 2010 and the political crisis that led to the dissolution of the parliament and the suspension of the post-revolutionary constitution of 2014 in 2021). In this general context, and despite the decision of the Joint Chambers, it would not be surprising if some courts persisted in extending their jurisdiction in a disguised manner, based on the methods they themselves have developed to circumvent the constraint imposed by the PILC, when the dispute – particularly in matters of family law – involves Tunisians.