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

**I. Introduction:**

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

The decision is particularly noteworthy, as it positively highlights the openness of Bahraini judges to adopting new legal doctrines previously unfamiliar within the country's legal framework. This openness likely signals an increasing acceptance of such jurisdictional adjustment mechanisms in legal systems outside the traditional common law or mixed jurisdictions. However, the decision also negatively highlights the challenges of importing foreign doctrines, particularly when such doctrines are applied in contexts where they are not fully integrated or properly understood. These challenges are further exacerbated when the reliance on the foreign legal doctrine appears to be driven by judicial convenience rather than a genuine commitment to the principles underlying the imported legal doctrine.

**II. Facts**

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

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

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

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

## III. The Ruling

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

"International jurisdiction of Bahraini courts, as regulated in the Civil and Commercial Procedure Act [CCCA] (The Legislative Decree No. 12/1971, Articles 14 to 20) and its amendments, is based on two fundamental principles: the principle of convenience (*al-mula'amah*) and the principle of party autonomy (*'iradat al-khusum*).

Concerning the principle of convenience, Article 14 of the CCCA states that Bahraini courts have jurisdiction over cases filed against non-Bahraini [defendants] who have domicile or residence in Bahrain, except for *in rem* actions concerning immovable properties located abroad. This is because it is more appropriate (*li-mula'amati*) for the courts where the immovable is located to hear

the case. Similarly, Article 15(2) of the CCCA stipulates that Bahraini courts have jurisdiction over actions involving property located in Bahrain, obligations originated, performed or should have been performed in Bahrain, or bankruptcies opened in Bahrain. This means *a contrario* that, under the principle of convenience (*mabda' al-mula'amah*), the [said] provision excludes [from the jurisdiction of the Bahraini courts] cases where the property is located outside Bahrain, or where the obligations originated in and performed abroad, or was originated and should have been performed abroad, or concerns a bankruptcy opened abroad unless the case involves a cross-border bankruptcy as governed by Law No. 22 of 2018 on Restructuring and Bankruptcy.

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

Based on the foregoing, nothing in principle prevents the parties from agreeing on the jurisdiction of a [foreign court]. However, if, one of the parties still brings the case before Bahraini courts despite such an agreement, the issue extends beyond merely honoring the agreement to a broader issue dependent solely on how Bahraini courts assess their own jurisdiction. In this case, the parties' agreement [relied upon] before the Bahraini courts becomes just one factor that the court shall consider when deciding whether or not to decline jurisdiction. The court, in this context, must examine whether there are grounds to decline jurisdiction in favor of a more appropriate foreign [court] in the interest of justice, and the court shall decide accordingly when the said grounds are verified. This

principle is known as "*The Doctrine of Forum Non Conveniens*" (*al-mahkamat al-mula'amat*).[1] Therefore, if all the conditions necessary for considering the taking of jurisdiction by a foreign court and the rendering justice is more appropriate (*al-'akthar mula'amah*) are met, Bahraini courts should decline jurisdiction. Otherwise, the general principles shall apply, i.e. that the taking of jurisdiction shall be upheld, and the courts will proceed with hearing the case.

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

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

Given the above, and based on the facts of the case [.....], the appellant—an English company—entered into an agreement of distribution and sale in Bahrain for pharmaceutical products [.....], supplying the appellee—a Bahraini company—with said products. Seven invoices were issued for the total amount claimed; yet the appellee refused to make payment. [Considering that] Bahrain is the most appropriate forum for the administration of justice in this case – given the facts that appellee's domicile and its place of business, as well as the place of performance of the obligation are located in Bahrain – the parties' agreement to submit disputes arising from the contract in question to the jurisdiction of the

English courts and to apply English law does not alter this conclusion. It is [therefore] not permissible to argue here in favor of prioritizing party autonomy to justify declining jurisdiction, as party autonomy alone is not sufficient to establish jurisdiction without the fulfillment of the other conditions required by the principle of *forum non conveniens* (*mabda' mahkamat al-mula'amah*).

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

## IV. Comments

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

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

### 1. International Jurisdiction and its Foundation in Bahrain

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

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

lack of jurisdiction.

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

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

Furthermore, one might question the inclusion of various aspects, such as the connection with Bahrain, administration of justice and efficiency, under the broad and somewhat vague label of "convenience". In a (more abstract) sense, *any* rule of international jurisdiction can be justified by considerations of "convenience". In any event, it worth mentioning here that modern literature offers a multitude of justifications for different rules of international jurisdiction, taking into account various interests at stake, theories of jurisdictions, paradigms, and approaches (for a detailed account, see Ralf Michaels, "Jurisdiction, Foundations" *in* J. Basedow *et al.* (eds.) *Elgar Encyclopaedia of Private international Law – Vol. 1* (Edward Elgar, 2017) 1042).

### 2. The Unexpected Reference to *Forum Non Conveniens*

Once the Court identified the foundational bases of the Bahraini courts'

jurisdiction, it engaged in a somewhat confusing discussion regarding the circumstances under which it might decline jurisdiction.

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

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

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

This impression is further strengthened by the manner with which the Court addressed the issue it raised itself. Indeed, after setting out the test for declining jurisdiction on the basis of *forum non conveniens* (but, in fact, primarily concern more the conditions for the validity of a choice-of-court agreement), the Court failed to examine and apply the very same tests it established. Instead, the Court concluded that Bahraini courts were *forum conveniens* simply because they *had* jurisdiction on the grounds that the defendant was a Bahraini company registered in Bahrain, had its domicile (principal place of business) there, and that Bahrain was the place of performance of the sale and distribution obligations.

However, upon a closer examination at the fact of the case, one can hardly agree with the Court's approach. On the contrary, all the reported facts indicate that

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

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

## V. Concluding Remarks

This is not the only case in which challenges to choice-of-court agreements in favor of a foreign court are framed in terms of *forum non conveniens* in Bahrain (see e.g., the *Bahrain Chamber of Dispute Resolution, Case No. 09/2022 of 17 October 2022*). However, to my knowledge, this is the first Supreme Court decision where explicit reference is made to "the doctrine of *forum non conveniens*" (with the terms cited in English).

In the case under discussion, there is a concern that the Court seems to have conflated two related yet distinct matters: the power of the court to decline jurisdiction on the ground of *forum non conveniens*, and the court's authority to decline jurisdiction on the basis of the parties' agreement to confer jurisdiction to a particular court (*cf.*, R. Fentiman, "*Forum non conveniens*" in Basedaw *et al.*,

*op. cit.* 799). In this regard, it is true that in common law jurisdictions the doctrine of *forum non conveniens* is generally recognized as a valid defense against the enforcement of choice-of-court agreements (see J.J. Fawcett, "General Report" *in* J.J. Fawcett (ed.), *Declining Jurisdiction in Private International Law* (Oxford University Press, 1995) 54). However, it also generally admitted that the respect of the parties' choice should not be easily disregarded, and courts should only intervene in exceptional circumstances where there is a clear and compelling reasons to do so (see, Fentiman, *op. cit.*, 799). Such compelling reasons, however, are clearly absent in the present case.

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

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

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

[2] Numbers and letters added.

# “Other Appropriate Connections”: China’s Newly Adopted Jurisdiction Ground

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1. **Background**

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

2. **Legislative Purposes**

Regarding the legislative purposes behind the incorporation of “other appropriate connections”, the then President of the Supreme People’s Court explained at the 38th meeting of the Standing Committee of the 13th National People’s Congress that the purpose is to “increase the types of foreign-related cases under China’s jurisdiction, expand jurisdiction grounds, better protect the rights of both Chinese and foreign parties, and effectively safeguard China’s sovereignty, security, and development interests.”[1] Additionally, the head of the Civil Law Office of the Legal Affairs Commission of the Standing Committee of the National People’s Congress, one of the principal figures involved in drafting the amendment,

emphasized that the incorporation of “other appropriate connections” is intended to “expand the jurisdiction of Chinese courts over foreign-related cases.”[2] From these official explanations, it can be concluded that the legislative purposes of incorporating “other appropriate connections” as a jurisdictional ground are threefold: (a) expanding jurisdiction over foreign-related cases, (b) protecting the rights of parties, and (c) safeguarding national and public interests.

3. **Potential Function**

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

**a) Filling Jurisdiction Gaps**

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

**b) Articulating Extraterritoriality Provisions**

Second, “other appropriate connections” can strengthen the enforcement of extraterritoriality provisions in Chinese laws. China has introduced extraterritoriality provisions in several regulatory laws, including the Personal Information Protection Law, Anti-Trust Law, and Security Law. However, the previous Civil Procedure Law lacked corresponding provisions that granted Chinese courts adjudicative jurisdiction over related disputes. The incorporation of “other appropriate connections” addresses this gap, allowing courts to assert jurisdiction in such cases.

**c) Substituting Necessity Jurisdiction**

Third, “other appropriate connections” may act as a substitute for necessity jurisdiction. The CPL 2024 does not formally establish the necessity jurisdiction,

despite scholarly calls for its establishment.[4] Although the adoption of necessity jurisdiction in China remains a topic for further discussion, “other appropriate connections” may provide a mechanism for courts to exercise this type of jurisdiction when required.[5]

4. **Interpretation**

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

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

The next question regarding interpretation is the extent of connection required by “other appropriate connections”. To clarify this, the wording used must be considered. During the legislative process, the term “appropriate connections” was specifically chosen to distinguish it from terms like “real and substantial

connections" and "minimum contacts", which are commonly used in comparative law and academic literature. This suggests that "appropriate connections" do not necessitate a close connection to "substantial connection", yet should not be overly broad like "minimum contacts".[10] However, the precise extent required remains to be determined. It appears that the necessary extent may depend on the interests at stake since the primary purpose of incorporating "other appropriate connections" is to protect China's private and public interests. Thus, a more vital interest may necessitate a lower threshold for connection, while less vital interests may demand higher.

## 5. **Concluding Remarks**

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

[1] See Zhou Qiang, 'Explanation on the Civil Procedure Law of the People's Republic of China (Draft Amendment)' (*National People's Congress of the PRC Website*, (27 February 2021) <www.npc.gov.cn/npc/c2/c30834/202112/t20211227_315637.html> accessed 13 October 2024.

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

[3] See Shen Hongyu & Guo Zaiyu, 'Commentary on and Interpretation of the

Revised Provisions of the Foreign-Related Part of the Civil Procedure Law’ (2023) 54 China Law Review 70, 73.

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

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

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

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

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

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

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

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# The Moroccan Supreme Court on the Authenticity of an Apostillised

# Certificate of Conversion to Islam

### I. Introduction

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

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

### II. Facts

The case involves a dispute over inheritance of A (apparently a Moroccan national). After A's death, his heirs (collectively here referred to as "Y") issued a

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

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

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

Dissatisfied, Y filed an appeal to the Supreme Court.

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

widow was even in Spain on the date the certificate was issued.

## III. The Ruling

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

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

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

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

## IV. Comments

### 1. About the HCCH 1961 Apostille Convention

The HCCH 1961 Apostille Convention is undoubtedly one of the most successful HCCH conventions, with its 127 contracting parties (as of the date of the writing). The Convention's status table shows that more than 15 countries are Muslim-

majority jurisdictions or have legal systems influenced by or based on Islamic law. Among them are five Arab jurisdictions from the MENA region: Saudi Arabia, Tunisia, Morocco, Bahrain and Oman. Marocco ratified the Convention on 27 September 2015, and it entered into force on 14 August 2016.

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

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

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

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

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

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

*a) What is a public document under the Convention?*

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

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

*b) The Public nature of Certificates of Conversion to Islam*

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

Apostille Convention.

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

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

There is also no indication in the Supreme Court's decision that the certificate in question falls under the exceptions outlined above (see IV(2)(a)). Therefore, it remains unclear on which grounds the certificate of conversion was apostillised, as "[t]he Convention does not authorize the issuance of an Apostille for a document that is not a public document under the law of the State of origin [Spain *in casu*], even if the document is a public document in the State of destination [Morocco *in casu*]" (the Apostille Handbook, p. 52, para. 107).

### 3. Contestation for forgery of an apostillised document

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

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

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

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

On 24th September 2024, Mimmie Chan J handed down the judgment of the Court

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

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

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

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

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

to the EU Regulation.

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

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

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

The plaintiff hence came to the court in Hong Kong seeking a final injunction to restrain the defendant from pursuing or continuing any proceedings in Russia. The defendant resisted that by raising the arguments based on Article 19 and Article 13 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted at the Third Session of the Seventh National People's Congress on 4 April 1990 Promulgated by Order No. 26 of the President of the People's Republic of China on 4 April 1990 Effective as of 1 July 1997) (hereinafter the "Basic Law") (*which is effectively a mini-constitution for Hong Kong) SAR):*

"Article 13

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

> Administrative Region to conduct relevant external affairs on its own in accordance with this Law.

Article 19

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

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

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

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

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

> "In my judgment, what is pertinent is that the question for determination by the Court in this case is simply whether there is a valid and binding arbitration agreement between the Plaintiff and the Defendant, which covers the scope of the dispute between the two parties and the claims made by them in these proceedings and in the two sets of Russian proceedings, and whether to grant the injunctions on the Plaintiff's application. It is trite, that the arbitration agreement contained in the Arbitration Clause is severable from and separate to the underlying TSA between the parties. Any illegality of the TSA, and any alleged impossbility to perform the TSA, cannot affect the validity and operation of the arbitration agreement. Nor does the impossibility of performance of any award obtained in the HK Arbitration affect the validity and enforceability of either the arbitration agreement, the HK Arbitration itself, or the award obtained …
>
> … It is simply not necessary for the Court to decide whether the issue and application of the EU Sanction confers a good answer to the Defendant's claim for payment under the TSA, whether the Plaintiff can be excused from payment, and the effect of the EU Sanction on the TSA are all matters which go to the merits of the claim in the HK Arbitration, and it should not be forgotten that the Court does not consider the merits of the underlying dispute when it decides the Plaintiff's claim for the injunctions – which are made solely on the basis of a valid arbitration agreement. This is also a

> reason to reject the Defendant's assertion that by granting the injunctions to the Plaintiff, the Court is implementing or facilitating the EU Sanction. Any injunction which the Court grants in this case is to facilitate the arbitration agreement between the parties, and nothing else".

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

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

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# Compensation, y nada más – CJEU decides against Real Madrid in

# Case C-633/22

Just two days after losing to LOSC Lille in the Champions League, Real Madrid suffered another defeat against a French opponent. Among the 44 (!) judgments published this Friday by the CJEU – a flurry of decisions reminiscent of the madness that is the current Champions League format –, the Court decided a true 'clásico' of European private international law in Case C-633/22 *Real Madrid Club de Fútbol*.


The decision has long been awaited: eigth months after the Opinion by AG Szpunar (discussed here) has been published and almost 18 years since the facts of the case. It concerns an article published by leading French newspaper Le Monde in 2006, which claimed that both FC Barcelona and Real Madrid had retained the services of Eufemiano Fuentes, a sports doctor heavily implicated in numerous doping scandals. Real Madrid and a member of their medical team sought damages for the harm to their reputation and were eventually awarded payment of € 390,000 to the former and of € 30,000 to the latter by a Spanish court in 2014. Their attempts to enforce those awards in France were thwarted, though, with the Paris Court of Appeal holding that they were violating French public policy by deterring the media's freedom of expression as guaranteed by Art 11. of the Charter of Fundamental Rights of the European Union. The French Cour de cassation finally referred the case to the CJEU in 2022, raising questions as to whether such a deterrent effect on freedom of expression would be a valid ground of public policy to refuse enforcement based on (what is now) Art. 45(1)(a) Brussels Ia and, if so, how it could be established.

In its decision (not yet available in English), the Court largely follows the Opinion of its Advocate General. After reiterating the importance of striking the right balance between swift recognition and enforcement of judgments between Member States and the defendant's right of defence (paras. 29–31), the Court emphasises that – except in exceptional circumstances – the courts of the Member State of enforcement must not review the substance of the foreign decision (paras. 36–39) and may even have to presume that the fundamental rights of the defendant, including those derived from EU law, have been respected (paras. 42–43). Yet, a violation of the freedom of expression enshrined in Art. 11 of the Charter (and Art. 10 of the European Convention of Human Rights) may constitute such exceptional circumstances (paras. 45–53).

Focusing on the present case, the Court then goes on to emphasise the role of the press as a 'public watchdog' (using the English term even in the French original), not least with regard to reporting on doping in professional sports, and the risks of a deterring effect, relying extensively on jurisprudence by the European Court of Human Rights (paras. 54–56). According to the Court, it follows that in this context,

> *'toute décision accordant des dommages-intérêts pour une atteinte causée à la réputation doit présenter un rapport raisonnable de proportionnalité entre la somme allouée et l'atteinte en cause.' (para. 57)*

In order to establish the existence of such a reasonable proportion, the courts of the Member State of enforcement may indeed consider, in particular, the amount awarded: if it exceeds the material and immaterial damage, or if it is significant in comparison to the ressources of the defendant, a deterrent effect may be found (paras. 62–64). What is more, the courts may also take into the account *'la gravité de la faute [des personnes condamnées]*' (para. 68).

While it remains for the French courts to apply these criteria to the Spanish decision – and to potentially refuse enforcement to the extent (!) that it has a deterrent effect on freedom of expression (i.e. not entirely; see para. 72) on this basis –, the Court of Justice certainly appears open towards the possibility of such a deterring effect being found to exist in the present case.

# The Dubai Supreme Court on Indirect Jurisdiction – A Ray of Clarity after a Long Fog of Uncertainty?

### I. Introduction

It is widely acknowledged that the recognition and enforcement of foreign judgments depend, first and foremost, on whether the foreign court issuing the judgment was competent to hear the dispute (see Béligh Elbalti, "The Jurisdiction of Foreign Courts and the Enforcement of Their Judgments in Tunisia: A Need for Reconsideration", 8 *Journal of Private International Law* 2 (2012) 199). This is often referred to as "indirect jurisdiction," a term generally attributed to the renowned French scholar Bartin. (For more on the life and work of this influential figure, see Samuel Fulli-Lemaire, "Bartin, Etienne", in J. Basedow *et al.* (eds.), *Encyclopedia of Private International Law – Vol. I* (2017) 151.)

Broadly speaking, indirect jurisdiction refers to the jurisdiction of the foreign court in the context of recognizing and enforcing foreign judgments. Concretely, the court being asked to recognize and enforce a foreign judgment evaluates whether the foreign court had proper jurisdiction to hear the dispute. The term "indirect" distinguishes this concept from its legal opposite: direct jurisdiction. Unlike indirect jurisdiction, direct jurisdiction refers to the authority (international jurisdiction) of a domestic court to hear and adjudicate a dispute involving a foreign element (see Ralf Michaels, "Some Fundamental Jurisdictional Conceptions as Applied in Judgment Conventions," in E. Gottschalk et al. (eds.), *Conflict of Laws in a Globalized World* (2007) 35).

While indirect jurisdiction is universally admitted in national legislation and international conventions on the recognition and enforcement of foreign judgments, the standard based on which this requirement is examined vary at

best running the gamut from a quite loose standard (usually limited *only* to the examination of whether the dispute fall under the exclusive jurisdiction of the requested court as legally determined in a limitative manner), to a very restrictive one (excluding the indirect jurisdiction of the rendering court every time the jurisdiction of the requested court – usually determined in a very broad manner – is verified). The UAE traditionally belonged to this latter group (for a comparative overview in MENA Arab Jurisdictions, see Béligh Elbalti, "Perspective of Arab Countries," in M. Weller *et al.* (eds.), *The 2019 HCCH Judgments Convention – Cornerstones, Prospects, Outlook* (2023) 187-188; *Idem* "The Recognition of Foreign Judgments as a Tool of Economic Integration – Views from Middle Eastern and Arab Gulf Countries, *in* P Sooksripaisarnkit and S R Garimella, *China's One Belt One Road Initiative and Private International Law* (2018) 226-229). Indeed, despite the legal reform introduced in 2018 (see *infra*), UAE courts have continued to adhere to their stringent approach to indirect jurisdiction. However, as the case reported here shows this might no longer be the case. The recent Dubai Supreme Court's decision in the *Appeal No. 339/2023 of 15 August 2024* confirms a latent trend observed in the UAE, particularly in Dubai, thus introducing a significant shift towards the liberalization of the recognition and enforcement requirements. Although some questions remain as to the reach of this case and its consequences, it remains a very important decision and therefore warrants attention.

## II. Facts

The summaries of facts in UAE courts' decisions are sometimes sparse in details. This one particularly lacks the information necessary to fully understand the case.

What can be inferred from the description of facts in the decision is that the dispute involved two Polish parties, a company as a plaintiff (hereafter referred to as "X") and a seemingly a natural person as a defendant (hereafter referred to as "Y") who has his "residence [*iqamah*]" in Dubai.

X was successful in the action it brought against Y in Poland and obtained a judgment ordering the latter to pay a certain amount of money. Later, X sought to enforce the Polish judgment in Dubai.

X's enforcement petition was first admitted by the Execution Court of Dubai. On

appeal, the Dubai Court of Appeal overturned the enforcement order on the ground that the international jurisdiction over the dispute lied with Dubai courts since Y had his "residence" in Dubai. Dissatisfied, X filed an appeal before the Dubai Supreme Court.

Before the Supreme Court, X argued that Y's residence in the UAE does not prevent actions from being brought against him in his home country, where the "event [*waqi'a*]" giving rise to the dispute occurred, particularly since both parties hold the same nationality. In addition, X claimed that it was not aware that Y's residence was in the UAE.

## III. The Ruling

The Supreme Court admitted the appeal and overturned the appealed decision with remand.

In its ruling, and after recalling the basic rules on statutory interpretation, the Supreme Court held as follows:

"According to Article 85 paragraph [……] of the Executive Regulation of the Civil Procedure Act (issued by Cabinet Decision No. 57/2018,[i] applicable to the case in question), [……], "enforcement shall not be ordered unless the following is verified: "UAE courts do not have exclusive jurisdiction over the dispute [……], and that the foreign rendering court had jurisdiction according to its own laws."

"This clearly indicates that the legislator did not allow enforcement orders to be granted [……] unless UAE courts do not have exclusive jurisdiction over the dispute in which the foreign judgment to be declared enforceable was rendered. Therefore, in case of concurrent jurisdiction between UAE courts and the foreign rendering court, and both courts are competent to hear the dispute, this does not, by itself, prevent the granting of the enforcement order. This marks a departure from the previous approach prior to the aforementioned Executive Regulation, where, under the provisions of Article 235 of Federal Act on Civil Procedure No. 11/1992,[ii] it was sufficient to refuse the enforcement of a foreign judgment if the UAE courts were found to have jurisdiction over the dispute—even if their jurisdiction was not exclusive. [This continued to be the case until] the legislator intervened to address the issue of the jurisdiction that is exclusive to UAE courts

[as the requested State] and concurrent jurisdiction that shared the foreign rendering court whose judgment is sought to be enforced [in UAE]. [Indeed,] the abovementioned 2018 Executive Regulation resolved this issue by clarifying that what prevents from declaring a foreign judgment enforceable is [the fact that] UAE courts are conferred exclusive jurisdiction over the dispute in which the foreign judgment was rendered. This was reaffirmed in [……] in [the new] Article 222 of the Civil Procedure Law issued by Federal Decree-Law No. 42 of 2022,[iii] which maintained this requirement [without modification].

[…] the appealed decision departed from this point view, and overturned the order declaring the foreign judgment in question enforceable on the ground that Y resides UAE, which grants jurisdiction to Dubai courts over the dispute […], despite the fact that [this] basis [of jurisdiction] referred to by the appealed decision [i.e. – the defendant's residence in the UAE] does not grant exclusive jurisdiction to UAE courts to the exclusion of the foreign rendering court's jurisdiction. Therefore, the ruling misapplied the law and should be overturned." (underline added)

## IV. Analyses

The conclusion of the Dubai Supreme Court must be approved. The decision provides indeed a welcomed, and a *much-awaited clarification* regarding what can be considered one of the most controversial requirements in the UAE enforcement system. In a previous post, I mentioned indirect jurisdiction as one of the common grounds based on which UAE courts have often refused to recognize an enforce foreign judgments in addition to reciprocity and public policy.[iv] This is because, as explained elsewhere (Elbalti, *op. cit*), the UAE has probably one of the most stringent standard to review a foreign court's indirect jurisdiction.

### 1. Indirect jurisdiction – Standard of control

The standard for recognizing foreign judgments under UAE law involves three layers of control (former article 235 of the 1992 FACP). First, UAE courts must not have jurisdiction over the case in which the foreign judgment was issued(former article 235(2)(a) first half of the 1992 FACP). Second, the foreign

court must have exercised jurisdiction in accordance with its rules of international jurisdiction (former article 235(2)(a) second half of the 1992 FACP). Third, the foreign court's jurisdiction must align with its domestic law, which includes both subject-matter and territorial jurisdiction, as interpreted by the court (former Article 235(2)(b) of the 1992 FACP).

### *a) Traditional (stringent) position under the then applicable provisions*

The interpretation and application of the first rule have been particularly problematic as UAE courts. The courts have, indeed, often rejected foreign courts' indirect jurisdiction when UAE jurisdiction can be justified under the expansive UAE rules of direct jurisdiction (former articles 20 to 23 of the 1992 FACP), even when the foreign court is validly competent by its own standards (*Dubai Supreme Court, Appeal No. 114/1993 of 26 September 1993* [Hong Kong judgment in a contractual dispute – defendant's domicile in Dubai]). Further complicating the issue, UAE courts tend to view their jurisdiction as mandatory and routinely nullify agreements that attempt to derogate from it (article 24 of the 1992 FACP, current article 23 of the 2022 FACP. See e.g., *Federal Supreme Court, Appeals No. 311 & 325/14 of 20 March 1994*; *Dubai Supreme Court, Appeals No. 244 & 265/2010 of 9 November 2010*; *Abu Dhabi Supreme Court, Appeal No. 733/2019 of 20 August 2019*).

### *b) Case law application*

While there are rare cases where UAE courts have accepted the indirect jurisdiction of a foreign court, either based on the law of the rendering state (see e.g., *Abu Dhabi Supreme Court, Appeal No. 1366/2009 of 13 January 2010*) or by determining that their own jurisdiction does not exclude foreign jurisdiction unless the dispute falls under their exclusive authority (see e.g., *Abu Dhabi Supreme Court, Appeal No. 36/2007 of 28 November 2007*), the majority of cases have adhered to the traditional restrictive view (see e.g., *Federal Supreme Court, Appeal No. 60/25 of 11 December 2004*; *Dubai Supreme Court, Appeal No. 240/2017 of 27 July 2017* ; *Abu Dhabi Supreme Court, Appeal No. 106/2016 of 11 May 2016*). This holds true even when the foreign court's jurisdiction is based on a choice of court agreement (see e.g., *Dubai Supreme Court, Appeal No. 52/2019*

*of 18 April 2019*). Notably, UAE courts have sometimes favored local interpretations over international conventions governing indirect jurisdiction, even when such conventions were applicable (see e.g., *Dubai Supreme Court, Appeal No. 468/2017 of 14 December 2017*; *Abu Dhabi Supreme Court, Appeal No. 238/2017 of 11 October 2017*. But *contra*, see e.g., *Dubai Supreme Court, Appeal No. 87/2009 of 22 December 2009*; *Federal Supreme Court, Appeal 5/2004 of 26 June 2006*).

## 2. The 2018 Reform and its confirmation in 2022

The 2018 reform of the FACP introduced significant changes to the enforcement of foreign judgments, now outlined in the 2018 Executive Regulation (articles 85–88) and later confirmed in the new 2022 FACP (articles 222~225). One of the key modifications was the clarification that UAE courts' exclusive jurisdiction should only be a factor when the dispute falls under their exclusive authority (Art. 85(2)(a) of the 2018 Executive Regulation; article 222(2)(a) of the new 2022 FACP). While courts initially continued adhering to older interpretations, a shift toward the new rule emerged, as evidenced by a case involving the enforcement of a Singaporean judgment (which I previously reported here in the comments). In this case, Dubai courts upheld the foreign judgment, acknowledging that their jurisdiction, though applicable, was not exclusive (*Dubai Court of First Instance, Case No. 968/2020 of 7 April 2021*). The Dubai Supreme Court further confirmed this approach by dismissing an appeal that sought to challenge the judgment's enforcement (*Appeal No. 415/2021 of 30 December 2021*). This case is among the first to reflect a new, more expansive interpretation of UAE courts' recognition of foreign judgments, aligning with the intent behind the 2018 reform.

## 3. Legal implications of the new decision and the way forward

The Dubai Supreme Court's decision in the case reported here signifies a clear shift in the UAE's policy toward recognizing and enforcing foreign judgments. This ruling addresses a critical issue within the UAE's enforcement regime and aligns with broader trends in global legal systems (see Béligh Elbalti, "Spontaneous Harmonization and the Liberalization of the Recognition and Enforcement of Foreign Judgments" 16 *Japanese Yearbook of Private*

*International Law* (2014) 273). As such, the significance of this development cannot be underestimated.

However, there is a notable caveat: while the ruling establishes that enforcement will be granted if UAE courts do not have exclusive jurisdiction, the question remains as to which cases fall under the UAE courts' exclusive jurisdiction. The 2022 FACP does not provide clarity on this matter. One possible exception can be inferred from the 2022 FACP's regulation of direct jurisdiction which confers broad jurisdiction to UAE courts, "except for actions relating to immovable located abroad" (article 19 of the 2022 FACP). Another exception is provided for in Article 5(2) of the Federal Act on Commercial Agencies,[v] which subjects all disputes regarding commercial agencies in UAE to the jurisdiction of the UAE courts (see e.g., *Federal Supreme Appeal No. 318/18 of 12 November 1996*).

Finally, one can question the relevance of the three-layer control of the indirect jurisdiction of foreign courts, particularly regarding the assessment of whether the foreign court had jurisdiction based on its own rules of both domestic and international jurisdiction. It seems rather peculiar that a UAE judge would be considered more knowledgeable or better equipped to determine that these rules were misapplied by a foreign judge, who is presumably well-versed in the legal framework of their own jurisdiction. This raises concerns about the efficiency and fairness of such a control mechanism, as it could lead to inconsistent or overly stringent standards in evaluating foreign judgments. These requirements are thus called to be abolished.

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[i] The 2018 Executive Regulation Implementing the 1992 Federal Act on Civil Procedure (Cabinet decision No. 57/2018 of 9 December 2018, as subsequently amended notably by the Cabinet Decision No.75/2021 of 30 August 2021; hereafter referred to as "2018 Executive Regulation".)

[ii] The 1992 Federal Act on Civil Procedure (Federal Law No. 11/1992 of 24 February 1992, hereafter "1992 FACP").

[iii] The 2022 Federal Act on Civil Procedure (Federal Legislative Decree No. 42/2022 of 30 October 2022). The Act abolished and replaced the 2018 Executive

Regulation and the 1992 FACP (hereafter “2022 FACP”).

[iv] However, since then, there have been subsequent developments regarding reciprocity that warrant attention as reported here.

[v] Federal Law No. 3/2022 of 13 December 2022 regulating Commercial Agencies, which repealed and replaced the former Federal Law No. 18/1982 of 11 August 1981.

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# How many monetary judgments that Chinese courts decided to enforce are successfully enforced?

It is necessary to distinguish (1) a court’s decision to acknowledge the validity of a foreign judgment (judgment recognition and enforcement), and (1) whether a judgment creditor successfully recovers the awarded amount in practice.

For example, *Kolmar Group AG v. Jiangsu Textile Industry (Group) Import & Export Co., Ltd*. is notable because it was the first case where a foreign monetary judgment was recognized based on the principle of *de facto* reciprocity in China. However, the recognition and enforcement of the judgment does not necessarily mean that Kolmar Group actually recovered the money.

Up to 10 September 2023, there had been 63 cases in total concerning the recognition and enforcement of foreign judgments on the grounds of reciprocity or judicial assistance treaties ratified by China in civil or commercial matters. Of these, 26 were successful cases where the Chinese courts decided to recognize and enforce foreign judgments while 3 were partially successful cases (the Chinese courts recognized compensatory damages but rejected punitive damages); the recognition and enforcement of foreign judgments were rejected in the remaining 34 cases.

Have the creditors of the 29 foreign judgments recovered their money in China?

After extensive empirical research, the findings can be divided into three groups.

Firstly, the (partially) successful enforcement group includes both voluntary and compulsory enforcement cases. Among the 9 judgments, 3 were to appoint insolvency administrators and with no or limited enforcement contents. For example, in the case of *In re DAR*, real property owned by the German insolvent company had already been fully paid for and been occupied by the company associated with the creditor before the German insolvency judgment was recognized in China. As this real property was the only property owned by the insolvent company in China, there was no other property to be collected or debt to be paid by the insolvency administrator. Another 3 judgments in this group were rendered against the same party. The plaintiffs, when applying for US judgments to be recognized and enforced in China, successfully requested the Guangzhou Intermediate People's Court to preserve a significant amount of the defendant's assets in China in order to pay the judgment debts. Importantly, the cases in this group do not necessarily mean that the judgment creditors will have their foreign judgments completely satisfied.

Secondly, 7 cases are in the group of unsuccessful compulsory enforcement, where all of the compulsory enforcement proceedings had been closed due to the debtors having no assets for enforcement. In *Kolmar Group AG v. Jiangsu Textile Industry (Group) Import & Export Co., Ltd,* although the Chinese court decided to recognize and enforce the Singaporean judgment, the debtor did not voluntarily fulfill the obligations under the judgment. Consequently, the creditor applied to the Chinese court for compulsory enforcement, and the court docketed the case on 21 December 2016. On 24 January 2017, the same court made a civil ruling and accepted another Chinese company's application to reorganize the debtor due to the latter's insolvency. On 8 December 2017, the court made a series of civil rulings approving the merger and reorganization plan of the debtor and terminating the insolvency proceedings. On 28 December 2017, the creditor withdrew its application for the compulsory enforcement of the judgment. From the publicly available documents, the relationship between the judgment creditor and the Chinese company that merged with the judgment debtor is unknown. However, if the judgment creditor had received the payment from the insolvency reorganization proceedings, the Chinese Judgment Enforcement Decision would have contained this information.

Thirdly, 13 cases are in the group containing an unknown enforcement status. This group covers three circumstances. (1) The foreign judgments have been voluntarily enforced by judgment debtors so compulsory enforcement decisions are unnecessary. (2) The judgment creditors have not applied for compulsory enforcement and the foreign judgments remain outstanding. (3) The judgment creditors have applied for compulsory enforcement, but the relevant compulsory enforcement decisions are not available to the public, so the enforcement status remains unknown.

As a conclusion, although the empirical study only covered 29 foreign judgments, which is a relatively small number, it exhausts all foreign judgments that the Chinese courts have decided to recognize and enforce up to September 2023. It reflects that, for a judgment creditor, obtaining a Chinese court's decision to recognize and enforce a foreign judgment is only the first step to recovering funds in China.

All comments are welcome.

For detailed information about this research, please refer to section 5.3.1 of 'Jie (Jeanne) Huang, Developing Chinese Private International Law for Transnational Civil and Commercial Litigation: The 2024 New Chinese Civil Procedure Law, Netherlands International Law Review (2023).'

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# Insights and Future Directions of PIL Based on the 2024 Online Summer Courses at The Hague Academy of International Law

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

From 29 July till 16 Augustus 2024, the Summer Courses on Private International Law (PIL) were held at the 93rd session of the summer courses of the Hague Academy of International Law. The PIL courses were followed by 250 onsite attendees and remotely 61 attendees from 74 different countries. The inaugural lecture was presented by Lord Lawrence Collins of Mapesbury (Former Justice at the United Kingdom Supreme Court) on the "Use and Abuse of Comity in International Litigation". In the next three weeks, the general course was given by Charalambos Pamboukis (Professor at the National and Kapodistrian University of Athens) titled "The Metamorphoses of Private International Law". During these three weeks, six special courses were given by Alessandra Zanobetti (Professor at the University of Bologna) on "The Effects of Economic Sanctions and Counter-Measures on Private Legal Relationships"; Natalie Y. Morris-Sharma (Director at the Attorney-General's Chambers of Singapore) on "The Singapore Convention and the International Law of Mediation"; Carlos Esplugues Mota (Professor at the University of Valencia) on "New Dimensions in the Application of Foreign Law by Courts (and Arbitrators) and Non-judicial Authorities"; Jack Coe (Professor at Pepperdine Caruso School of Law) on "Non-ICSID Convention Investor-State Awards in Domestic Courts"; Eva Lein (Professor at the University of Lausanne) on "Breathing Space in International Commercial Litigation"; Andrew Dickinson (Professor at the University of Oxford) on "Natural Justice in Recognition and Enforcement of Foreign Judgements". These PIL experts provided very interesting and valuable insights, including future (desirable) directions on PIL that can guide and inspire students, researchers, legal practitioners, courts, and legislators. The courses will be published by Brill in the series *Collected Courses of The Hague Academy of International Law / Recueil des cours de l'Académie de La Haye*. The fact that the courses commonly focused on PIL globally, by including national, regional and international PIL, is particularly laudable in view of our interconnected world. This blog aims to describe common threads of the 2024 Online Summer Courses on PIL that may encourage you to read the Hague Academy Collected Courses and inspire further research.[1]

**The interaction between public international law and PIL**

All lectures showed that there cannot be drawn a sharp distinction between public international law and PIL.[2] Several lecturers have illustrated the current interaction between these two fields of law. On the basis of case law in England

and the U.S. involving private parties, Collins argued that the principle of comity has often been misused in favour of the interests of the forum state. For instance, in a case involving a request for evidence from French airplane manufacturing companies by victims of an airplane crash, instead of a first resort to the Hague Evidence Convention, the U.S. Supreme Court ruled that comity requires an assessment of the interests of the foreign nation involved and the requesting nation.[3] Collins argued that in practice, U.S. and English courts do not give effect to foreign blocking statutes, like the French Blocking Statute, but have ruled in favor of disclosure of documents and information. As the main abuse of comity, Collins pointed out that the Court of Appeals for the Second Circuit in New York has rejected the enforcement of arbitral awards for reasons of *forum non conveniens*. With respect to the grant of anti-suit injunctions, courts nonetheless ruled that comity requires caution as these injunctions involve an indirect interference with proceedings of foreign courts unless the injunction aims to prevent a breach of a choice of court agreement or arbitration agreement.[4] Another illustration on the interplay between public and private international law can be drawn from the Zanobetti's lectures who argued that economic sanctions may set aside the *lex contractus* by means of the public policy exception in PIL. In the context of investor-state arbitration, Coe and Morris-Sharma have referred to the intersection between PIL and public international law. Coe in particular demonstrated the common features between business-to-business arbitration and non-ICSID (International Centre for Settlement of Investment Disputes) arbitration, both types of arbitration result in awards to which the New York Convention applies. Morris-Sharma has argued that although the investor-state dispute settlement regime mainly concerns state-to-state obligations, a foreign (private) investor may bring a claim directly against the state. While Morris-Sharma gave her lectures on the United Nations Convention on International Settlement Agreements Resulting from Mediation, adopted in 2018, (the Singapore Convention on Mediation, SCM), she noted that whereas this treaty concerns a public international law instrument, it has as subject matter the regulation of private relationships and therefore concerns issues of PIL. In view of current global issues, Morris-Sharma emphasised the importance of "continuing conversations" between public and private international law to bring order into global governance. In addition to research, Maastricht University shows that education could also be a tool to foster these type of conversations as students of the European Law School are taught PIL integrated into courses of European and international law.[5]

## The global governance role of PIL[6]

Several courses have demonstrated the increasing role that contemporary PIL plays regarding global goals, varying from the protection of human rights, such as to guarantee the right of a fair hearing in the context of the recognition of foreign judgements as indicated by Dickinson and Lein, to trans-human goals like the protection of the environment as pointed out by Pamboukis. Pamboukis also emphasised the importance of the 'peacemaking' role of contemporary PIL, in the sense of the pacification of different values, which facilitates pluralism and the acceptance of the 'otherness'.[7] However, Pamboukis argued that the trend of anti-globalisation may lead to other metamorphoses of PIL. Esplugues Mota pointed out that there already exist a trend of "nationalisation of transnational situations" fostered by PIL. For instance, as a result of the anti-immigration trend in western countries, the connecting factor of the nationality has increasingly been changed into the 'habitual residence' to nationalise situations. Nonetheless, in view of the current global problems, such as climate crises, war and economic sanctions, Jean-Marc Thouvenin (Secretary-General of The Hague Academy of International Law, Professor at the University Paris Nanterre) made in his welcome speech of the 2024 Summer Course the bold statement that "private international law is faring better these days than public international law". The lectures given by Lein showed that PIL can indeed be a valuable global governance tool in this era of "polycrises"[8] as it facilitates international trade by providing "breathing space" mechanisms to international contractual parties. For instance, parties can generally make a choice for a national contract law that enables them to renegotiate or adapt their contract in case unforeseen circumstances impede the performance of contractual obligations.

## Justice as objective of PIL

The courses showed that PIL is increasingly providing justice and PIL should also aim to serve justice. Yet, as mentioned by Pamboukis, the notion of justice is broad.[9] According to Pamboukis, justice is fairness, which includes equality. In the context of PIL, he illustrated that equality is, *inter alia,* visible by the multilateral character of conflict-of-laws rules and rules that protect weaker parties. Based on natural justice, Dickinson also referred to the importance of the principle of equality for the law that includes both substantive and procedural aspects. To safeguard this principle, he pointed out the public policy exception regarding the recognition and enforcement of foreign judgments.

As the meta-metamorphosis of the traditional, Von Savigny-based, conflict-of-laws rule, Pamboukis pointed out the change of its purpose from conflictual justice, i.e. justice based on geographically closest connection, to substantive justice in the sense of a just, fair result by means of a more flexible conflict-of-laws rule and methods. Pamboukis advocated the increasing important role of the method of recognition, in particular with respect to acquired rights and personal status. He also referred to adaptation and a more flexible application of *conflit mobile* to achieve a just result *in concreto*. Furthermore, Pamboukis argued to apply in PIL the principle of proportionality as balancing the concrete interests involved should lead to a fair result. The decision of the French Supreme Court on 17 November 2021, which opened up the possibility of recognising a foreign bigamous marriage in a particular case,[10] seems to be in line with the direction of PIL as advocated by Pamboukis.

With respect to the interpretation of justice in PIL, human rights are also increasingly playing an important role. As indicated by Dickinson and Lein, fair trail rights in human right treaties, like the right to be heard, have influenced the interpretation of the public policy exception in the context of the recognition of foreign judgements. Esplugues Mota nonetheless pointed out the "human rights discourse" regarding the recognition of personal situations abroad as a factor militating against the application of foreign law.[11] The recent Anti-SLAPPs ('Strategic lawsuits against public participation') Directive (EU) 2024/1069 could also be seen as an expression of the human rights impact on PIL that influences the concept of justice in the PIL.[12]

Several lecturers highlighted the importance of justice at procedural level. Zanobetti called for further research on the issue whether the 'no-claim' clause related to economic sanctions is contrary to the right to have access to courts. Lein argued that PIL provides various tools that facilitate access to justice in times of crises, such as the change of a choice of court clause that can easily be done according to various PIL instruments[13]. Dickinson advocated to pursue natural justice by recognising and enforcing foreign judgements unless they are unjust or inconsistent with the core values of the requested state. Furthermore, the procedure that resulted into the foreign judgement should have complied with procedural principles of natural justice such as due process, and the competence of the court of origin should be in accordance with these principles such as jurisdiction based on the parties' consent. Dickinson illustrated that several

national legal systems and treaties reflect natural right-based principles with respect to the recognition of foreign judgements.[14] On the basis of natural law, Dickinson also advocated that states and courts should pursue multi-dimensional justice when developing rules of recognition and enforcement, which requires an assessment on different levels of relational perspectives, including the parties to the dispute, states, and other human beings. Morris-Sharma argued that access to justice is also facilitated by alternative dispute resolution mechanism. However, Esplugues Mota pointed out that the risk of "second class justice" is high in case arbitrators apply foreign law wrongly, as this application is generally even not subject to control.

**The changed state-based approach in PIL**

While in international civil disputes, PIL traditionally indicates in which state, or states, the court is competent and the law of which country, or countries, applies, most of the lecturers addressed the growing role of arbitrators with respect to the application of foreign law, including non-state law. Nonetheless, Dickinson's lectures on the principle of peaceful dispute resolution derived from natural law pointed out the importance of access to an independent and impartial judge who provides binding solutions and the possibility of appeal. As mentioned earlier, Esplugues Mota emphasised the risk of "second class justice" in case of alternative dispute resolution. Several lecturers referred to the use of AI technologies in dispute resolution, including AI courts. However, as indicated by Lein, judgements based on the use of AI technologies run the risk of not being recognised on the basis of the public policy exception. This risk seems high considering the fact that AI technologies are not (yet) accurate and fully impartial as they are based on human biases, like gender bias.

Several courses showed that the application of non-state law is playing an increasing role with respect to cross-border disputes between private parties.[15] As explained by Esplugues Mota, the application of non-state law may entail difficulties as regards its meaning, content, characterisation, and level of certainty. Esplugues Mota nonetheless asserted that certain non-state rules, namely the law of the *societas mercatorium*,[16] religious law,[17] and indigenous law,[18] are increasingly taken into account, or even applied by non-state and state authorities. In this way, PIL facilitates legal pluralism.

**Concluding remarks**

As argued by Pamboukis, PIL generally became more open, flexible. The courses indicated the need for PIL to remain open to the influence of human rights, pluralism, non-state law, including the law of nature, and the 'otherness'. Fingers crossed that this openness of PIL continuous to grow in spite of the upcoming movement of anti-globalization, nationalism, including right-wing extremism. Therefore, international cooperation in PIL remains highly important.

[1] As I followed the courses online, this blog does not concern the seminars or elective courses that were given onsite at the Hague Academy of International Law. The assignment for writing this blog was given by Maastricht University, which made it possible for me to attend these courses.

[2] The scholar Alex Mills has frequently published on the blurry distinction between public international law and private international law.

[3] See *Societe Nationale Industrielle Aerospatiale v. U.S. District Court* 482 US 522 (1987).

[4] Collins referred to the *Laker Airways* litigation, *inter alia, Laker Airways Ltd v Sabena Belgian World Airways,* 731 F. 2d 909 (DC Cir 1984).

[5] On the combination of teaching of public and private international law, see also Poomintr Sooksripaisarnkit and Dharmita Prasad, "Private International Law and Public International Law-Increasing Convergence or Divergence as Usual?", in: Poomintr Sooksripaisarnkit and Dharmita Prasad (eds.), *Blurry boundaries of public and private international law: towards convergence or divergent still?*, Singapore: Springer 2022.

[6] Robert Wai and Horatia Muir-Watt are among the scholars who frequently published on the role of global governance role of PIL.

[7] With respect to the concept of pluralism and the 'otherness', Pamboukis referred to the scholar Santi Romano. On this interesting topic, see also Horatia Muir Watt who has published her 18th Rabel Lecture in November 2002 on Alterity in the Conflict of Laws-An Onthology of the In-Between.

[8] Lein defined the term 'polycrises' as "the simultaneous occurrence of several catastrophic events" such as pandemics, environmental disasters, and armed conflicts. Lein referred in this context to Catherine Kessedjian, "Chapter 12,

International Law and Crisis Narratives after the Covid-19 Pandamic", in: Mbengue, d'Aspremont, *Crises Narratives in international Law* 2022, pp. 132 ff.

[9] With respect to various views on the concept of justice in PIL, see also Michael S. Green, Ralf Michaels, Roxana Banu (eds), *Philosophical Foundations of Private International Law,* Oxford University Press 2024.

[10] See the EAPIL blog post, on 6 January 2022, "French Supreme Court Opens Door for Recognition of Foreign Bigamous Marriage" by Marion Ho-Dac.

[11] Esplugues Mota referred in this context to the *Wagner and J.M.W.L. v. Luxembourg* case of 2007 involving the right to have a family on the basis of Article 8 European Convention on Human Rights.

[12] With respect to improvements and challenges of the Anti-SLAPPs Directive (EU) 2024/1069 in the context of PIL, see my forthcoming article in *Nederlands Internationaal Privaatrecht* no. 4, 2024.

[13] In this context, Lein referred to, *inter alia,* Article 25(2) Brussels I Regulation (EU) 1215/2012.

[14] Dickinson referred to, *inter alia,* the criterion of "fundamental principles of procedural fairness" in Article 7(1)(c) of the 2019 Hague Judgements Convention.

[15] Ralf Michaels has frequently published on non-state law in the context of PIL. See, *inter alia*, Ralf Michaels, "The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge From Global Legal Pluralism", 51 *Wayne Law Review* 1209-1259, 2005.

[16] In this context Esplugues Mota referred, *inter alia,* to Article 13. III of the Private International Law Act of Uruguay of 2020; Article 3 Hague Principles on Choice of Law in International Commercial Contracts of 2015.

[17] Esplugues Mota referred to, *inter alia,* the decision of the French Cour de cassation on 6 May 1985 that awarded damages to a divorced Jewish woman as she could not remarry within the Jewish faith because her husband did not 'give the Get'.

[18] In this context Esplugues Mota referred, *inter alia,* to Article 1(1) of the South African Law of Evidence Amendment Act 45 of 1988 on judicial notice of

law of foreign state and of indigenous law.

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# 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.

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

**By Dr Benjamin Hayward**
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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.