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.

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).'

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

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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.

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

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

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

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

Under international law, sovereign immunity rules out confiscation both as a countermeasure and a compensatory measure responding to *acta jure imperii*, such as military operations. Nonetheless, sovereign immunity does not extend to

commercial matters, where judgments and awards can be enforced against state assets. Investment treaties, including the Russia-Ukraine BIT (RUBIT), "commercialize" *acta jure imperii*. They convert public law violations into *quasi*-commercial claims "immune from sovereign immunity." Although not the norm, mass claims are not unknown in investment arbitration. This implies that if Ukrainian claims for war damages can be submitted to investment arbitration and incorporated into an arbitral award, they may have a solid legal basis for enforcement against Russian assets. A good part of these assets can be used for this purpose. Although "non-commercial" assets, such as the property of diplomatic missions, military assets, cultural property, items displayed at an exhibition and, most importantly, the property of the central bank are immune from enforcement due to sovereign immunity, sovereign direct investments, airplanes, ships and the assets of persons attributable to the state can be used to satisfy investment awards.

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

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

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

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

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.

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

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

History

On January 19, 2009, the United States signed COCA. In the years that followed, the State Department had conversations with the Uniform Law Commission (ULC) about how COCA should be implemented. The ULC is a non-partisan, non-profit, unincorporated association comprised of volunteer attorneys appointed by each state of the United States plus the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Its mission is to promote uniformity in the law among these jurisdictions to the extent desirable and practicable.

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

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

A Shift on COCA

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

implement COCA. I served as the Reporter for the Study Committee.

Following more than eighteen months of discussion and reflection, the Study Committee recommended that the ULC revisit its earlier position on COCA implementation. Specifically, the Study Committee recommended that the ULC abandon the cooperative federalism approach and leave the method of implementing COCA to the discretion of the State Department. This recommendation, which included an endorsement of COCA, was made subject to several uncontroversial caveats relating to the preservation of state law. The recommendation was approved by the ULC's Executive Committee on July 18, 2024.

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

The Hague Judgments Convention

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

Article 15 reads as follows:

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

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

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

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

Next Steps

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

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

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

Key Takeaways:

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

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

This case marks the first time that a Chinese court has recognized and enforced a Thai monetary judgment. It is also the first publicly reported case to confirm a reciprocal relationship based on "presumptive reciprocity". The "presumptive

reciprocity" test, outlined in the Nanning Statement of the 2nd China-ASEAN Justice Forum in 2017, has now been confirmed by the Nanning Court as a form of reciprocal consensus [1] between China and ASEAN countries. This explains the use of the term "presumptive reciprocity consensus" in the Chinese news report (cf. Guangxi High People's Court's news).

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

I. Case background

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

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

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

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

II. Court's views

Although China and Thailand have signed the "Treaty on Judicial Assistance in Civil and Commercial Matters and on Cooperation in Arbitration", the treaty does not contain provisions on judgment recognition and enforcement. In the absence of a treaty, as this is the case with Thailand, recognition and enforcement can be pursued on the basis of the principle of reciprocity (New Art. 299 of the PRC Civil Procedure Law [former article 288 of the 2021 Amendment of the PRC Civil Procedure Law]).[2]

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

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

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

III. Comments

1. "Presumptive reciprocity" in this case

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

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

It is, however, still unclear how Thai courts would react to the "first move" from Chinese courts: will they follow suit or not? Given that it is unlikely, if not impossible, to have any foreign judgment recognized and enforced in Thailand, as discussed in an post provided by Asian Business Law Institute (ABLI), should a Thai court refuse to recognize and enforce a Chinese judgment on the ground of lack of reciprocity one day, the presumed reciprocity might have to be reviewed, or even revoked. By then, will there be any other way out? More issues need to be clarified and settled in future cases.

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

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

Chart – Reciprocity tests in China

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

Reciprocity; (iii) How Chinese Courts Determine Reciprocity in Foreign Judgment Enforcement – Breakthrough for Collecting Judgments in China Series (III); (iv) China's 2022 Landmark Judicial Policy Clears Final Hurdle for Enforcement of Foreign Judgments.)

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

This case changed this situation.

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

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

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[1] Since the 2000s, the standards to establish reciprocity have evolved significantly, reflecting China's efforts to liberalize its rules on the recognition

and enforcement of foreign judgments. The 2021 "Conference Summary of the Symposium on Foreign-related Commercial and Maritime Trials of Courts Nationwide" issued by China's Supreme People's Court introduces new standards for determining reciprocity that replace the previous de facto reciprocity test. The new reciprocity standards include de jure reciprocity, reciprocal understanding or consensus, and reciprocal commitment. These standards coincide with possible outreaches of legislative, judicial, and administrative branches.

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

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

Travel destination in another

(Member) State's territory in an otherwise purely domestic case triggers application of Art. 18(1) Brussels Ia

By Salih Okur, University of Augsburg

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

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

1. International Scope of the Brussels Ia Regulation

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

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

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

In the present Case C-774/22 (FTI Touristik), the CJEU had to decide whether the

travel destination of consumer package travel contracts is enough to establish an international element in the sense of the Brussels Ia Regulation, which would open up the consumer forum of Art. 18 Brussels Ia Regulation.

2. Facts

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

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

3. The Court's decision

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

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

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

Finally, the Court refers to the general purpose of the Brussels Ia Regulation,

which seeks to establish rules of jurisdiction which are highly predictable and thus pursues an objective of legal certainty which consists in strengthening the legal protection of persons established in the European Union, by enabling both the applicant to identify easily the court before which he or she may bring proceedings and the defendant reasonably to foresee the court before which he or she may be sued (**para. 33**).

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

4. Commentary

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

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

Still, it cannot be denied that this decision immensely benefits consumers. The Brussels Ia Regulation now applies to all (package) travel contracts for trips

abroad, meaning that pursuant to Art. 18(1) Brussels Ia Regulation, consumers may at all times bring proceedings against the tour operator at their domicile.

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

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

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

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

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

I. INTRODUCTION

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

Since ancient times, IJC has been essential to address disputes involving multiple jurisdictions. From the harmonization of laws to the enforcement of judgments in foreign countries, the interaction of legal systems has been a constant challenge. However, in recent times, the emergence of technologies has brought with it revolutionary tools and approaches that are transforming IJC.

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

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

II. INFLUENCE OF TECHNOLOGY ON PIL

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

As indicated by Calvo Caravaca and Carrascosa González,[4] the emergence of the Internet produces a shock wave in all branches of law, but more specifically in PIL, a subject that is revealed as the main protagonist in the repercussions of

cyberspace in the legal field. The use of online tools globalizes international private legal situations and, therefore, increases their number and variety.

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

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

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

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

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

III. IMPACT OF NEW TECHNOLOGIES ON INTERNATIONAL JUDICIAL COOPERATION

In recent years, a series of tools and mechanisms have been consolidated that, promoted by the benefits derived from the use of technology in the process, seek to generate a more direct connection between authorities to provide assistance. Clear examples of this are direct judicial communications, electronic requests, and the use of videoconferences. These innovations are accompanied by different cooperation networks: the central authorities, key actors in the operation of the agreements, which facilitate legal cooperation; judicial networks[9] and contact point networks.

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

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

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

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

It follows from this principle "*the need to seek the delicate balance between the duty of cooperation, through available and suitable means, and respect for the guarantees of due process*".[10]

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

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

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

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

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

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

As Mercedes Albornoz and Sebastián Paredes point out[13], this instrument does not regulate the formal, procedural, or substantial requirements of the request but instead offers a renewing and perfected perspective of the existing treaties on international cooperation. The proposed innovation, in line with current times, involves eliminating the traditional transmission of requests for international assistance in paper format and instead favoring the Iber @ electronic platform as the main means (Article 1). However, its use is not mandatory (Article 4).

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

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

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

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

In 2006, the Hague Conference (HCCH), together with the National Notary

Association of the United States of America (NNA), officially launched the electronic Apostille Pilot Program (e-APP), which was a pilot program until 2012, when it became a permanent program.

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

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

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

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

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

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

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

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

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

[8] Since 2022, the UNCITRAL Working Group on Electronic Commerce has been analyzing legal issues related to the digital economy. They have especially

dedicated themselves to making a legislative proposal for artificial intelligence and automated contracting. More information at: https://uncitral.un.org/es/working_groups/4/electronic_commerce. Accessed: 7 July 2024.

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

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

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

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

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

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

notary public.

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

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

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

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

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

A wide range of documents has been drafted for this Special Commission, such as the usual questionnaires on the practical operation and the summary of responses

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

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

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

For ease of reference, I include the links below:

Service Handbook (track version, clean version)

Evidence Handbook (track version, clean version)

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

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

channels is particularly significant, given the litigation regarding service on Chinese defendants through postal channels.

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

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

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

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

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

to direct service by email across States). And in this regard, see for example the comment from China (Prel. Doc. 15, click here, p. 41).

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

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

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

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

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

As with the Service Handbook, the graphs and tables have been improved and made more reader-friendly.

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

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

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

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

[Update of 19 July 2024]

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

with some updated text.

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

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

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

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

Alternative channels of transmission – Service by e-mail

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

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

Relationship of the [Service] Convention with other instruments

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

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

Contractual waivers and the Convention

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

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

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

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

Handbooks

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

Future work

137 *The SC encouraged Contracting Parties to meet online to further discuss and exchange experiences to develop a deeper understanding of the use of IT and to develop further guidance for e-transmission and associated matters. These discussions will be supported by, or conducted under the auspices of, the PB. Such meetings will be held by way of online workshops for Central Authorities and other users of the Service and Evidence Conventions.*