Brexit and PIL – Belgian Supreme Court confirms the application of the 2005 Hague Convention to jurisdiction clauses designating UK courts concluded after 1 October 2015

By Guillaume Croisant (Linklaters LLP)

The United Kingdom deposited an instrument of accession to the Hague Convention of 30 June 2005 on Choice of Court Agreements (the "**Convention**") on 28 September 2020. This instrument of accession became effective after the Brexit's transition period, on 1 January 2021, and gained binding force within the UK legal order following the adoption of the Private International Law (Implementation of Agreements) Act 2020.

As many readers will be aware, a controversy exists regarding the temporal scope of the Convention. It applies to exclusive choice of court agreements concluded after its entry into force for the State of the chosen court and to disputes initiated after its entry into force for the State of the seized court. EU Member States have been bound by the Hague Convention since its approval by the European Union on 1 October 2015, but what about the UK after its withdrawal from the EU?

According to a first viewpoint, reflected in the UK's instrument of accession, " *In accordance with Article 30 of the 2005 Hague Convention, the United Kingdom became bound by the Convention on 1 October 2015 by virtue of its membership of the European Union, which approved the Convention on that date.*"

Conversely, under a second viewpoint (apparently shared by the European Commission in its 'Notice to stakeholders – Withdrawal of the United Kingdom and EU rules in the field of civil justice and private international law' dated 27 August 2020, p. 9), the Convention could only apply after the United Kingdom's 'independent' ratification, which occurred on 1 January 2021. If this second

perspective were accepted, jurisdiction agreements concluded before this date would not benefit from the mutual recognition system established by the Convention.

In a judgment (in French) dated 27 March 2025 (C.24.0012.F), the Belgian Supreme Court (*Court de Cassation/Hof van Cassatie*) ruled in favour of the first viewpoint, holding that *"The Hague Convention of 30 June 2005 has been applicable to the United Kingdom as a bound State, owing to the European Union's approval of the Convention, from 1 October 2015 until 31 December 2020, and as a contracting party from 1 January 2021. The argument, in this regard, that the United Kingdom ceased to be bound by the Convention following its withdrawal from the European Union on 1 February 2020, is without legal basis."*

Foreign Sovereign Immunity and Historical Justice: Inside the US Supreme Court's Restrictive Turn in Holocaust-Related Cases

By Livia Solaro, PhD candidate at Maastricht University, working on the transnational restitution of Nazi-looted art

On 21 February 2025, the US Supreme Court issued a ruling in *Republic of Hungary v. Simon*,[1] a Holocaust restitution case with a lengthy procedural history. Delivering this unanimous decision, Justice Sotomayor confirmed the restrictive approach to cases involving foreign states inaugurated in 2021 by *Federal Republic of Germany v. Philipp*.[2] In light of the importance of US practice for the development of customary law around sovereign immunity,[3] and its impact on questions of historical justice and transnational accountability, the *Simon* development deserves particular attention.

The Jurisdictional Treatment of Foreign States as an "American Anomaly"[4]

In 2010, a group of Holocaust survivors filed a suit before the US District Court for the District of Columbia against the Republic of Hungary, the Hungarian State-owned national railway (Magyar Államvasutak Zrt., or MÁV) and its successor-in-interest Rail Cargo Hungaria Zrt. (RCH), seeking compensation for the Hungarian government's treatment of its Jewish population during World War II.[5] The survivors claimed that, in connection to their deportation, their properties had been expropriated and subsequently liquidated by defendants.

As the case repeatedly moved through federal courts (in fact, this was not the first time it reached the Supreme Court),[6] the possibility for the US judge to extend its adjudicative jurisdiction over the Hungarian State remained controversial. Claimants based their action on the so-called "expropriation exception" to sovereign immunity, codified by §1605(a)(3) of the 1976 Foreign Sovereign Immunities Act (FSIA).[7] This provision excludes immunity in all cases revolving around rights in property taken in violation of international law, at the condition that that property, or any property exchanged for such property: 1) is present in the US in connection with a commercial activity carried on in the US by the foreign state, or 2) is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the US.

This exception represents an *unicum* within the law of sovereign immunity, as it allows courts to extend their jurisdiction over a state's acta iure imperii

(expropriations are indeed quintessential sovereign acts).[8] In recent years, this provision has often been invoked in claims of restitution of Nazi-looted art owned by European states (see, for example, Altmann v. Republic of Austria,[9] Toren v. Federal Republic of Germany,[10] Berg v. Kingdom of Netherlands,[11] Cassirer v. Kingdom of Spain).[12] Crucially, this exception also requires a commercial nexus between the initial expropriation and the US. In its *Simon* decision, the US Supreme Court addressed the standard that plaintiffs need to meet to establish this commercial nexus in cases where the expropriated property was subsequently liquidated. The Court read a "tracing requirement" in the text of the provision, thus establishing a very high threshold.

Property Taken in Violation of International Law

The Court had recently addressed the interpretation of §1605(a)(3 in *Federal Republic of Germany* v. *Philipp,* where the heirs of German Jewish art dealers sought the restitution of a collection of medieval reliquaries known as the Guelph Treasure (*Welfenschatz*), In that case, the Supreme Court focused on the opening line of the expropriation exception, which requires that the rights in property at issue were "taken in violation of international law". By explicitly recognizing that this language incorporates the domestic takings rule,[13] the Court set in motion a trend of increasingly restrictive interpretations of the expropriation exception that is still developing today.

To reach this result, the Supreme Court interpreted the expropriation exception as referring specifically to the international law *of expropriation*. This narrow reading of §1605(a)(3) allowed the Court to assert that the domestic takings rule had "survived the advent of modern human rights law", as the two remained insulated from one another. Accordingly, even if the Nazi plunder were considered as an act of genocide, in violation of human rights law and the Genocide Convention,[14] it would not fall under §1605(a)(3), as this provision only applies to property takings against aliens (reflecting the traditional opinion that international law is concerned solely with the relations between states). From this perspective, the *Philipp* decision adhered to the International Court of Justice's highly criticized conclusion in Jurisdictional Immunities of the State (Germany v. Italy) that immunity is not excluded by serious violations of ius cogens.[15]

The impact of this restrictive turn has already emerged in a couple of cases

adjudicated after *Philipp*. In order to circumvent the domestic takings rule, claimants have tried to argue that the persecutory treatment of Jewish individuals by several states during the Holocaust deprived them of their nationality, rendering them either *de iure* or *de facto* stateless. In the wake of *Philipp*, courts have been sceptical of this statelessness theory – although they appear to have left the door ajar for stronger arguments in its support.[16] A recent decision by the District Court for the District of Columbia has gone so far as to exclude the expropriation exception in cases involving a states' taking of property from nationals of an enemy state in times of war.[17] The District Court followed the same reasoning as in *Philipp*: if §1605(a)(3) refers to the international law of expropriation, not only human rights law but also international humanitarian law are excluded by its scope of application. As I noted elsewhere,[18] post-*Philipp* court practice now excludes the expropriation exception in the vast majority of takings by sovereign actors, regardless of whether they targeted their own nationals, the nationals of an enemy state or stateless individuals.

The Commercial Nexus and the Commingling Theory

The recent *Simon* decision adopts the same restrictive approach as *Philipp,* but shifts focus to the expropriation exception's second requirement: the commercial nexus with the US. Under §1605(a)(3), the property that was taken in violation of international law, or *any* property exchanged for such property (emphasis added), needs to have a connection with a commercial activity carried by the foreign state, or one of its agencies or instrumentalities, in the US. Crucially, the Hungarian government liquidated the assets allegedly expropriated from defendants. The Supreme Court was asked to decide whether the claimants' allegation that Hungary used the proceedings to issue bonds in the US met the commercial nexus requirement. Complicating matters further, the proceeds were absorbed into the national treasury where, over the years, they had mingled with billions in other revenues.

The *Simon* question concerns an important portion of expropriation cases, since property is often taken for its monetary rather than intrinsic value. Therefore, with some specific exceptions (such as takings of artworks or land), expropriated properties are likely going to be liquidated, and the proceeds are bound to be commingled with other funds. Years after the initial liquidation, proving the location of the money originally exchanged for those properties is extremely challenging, if not impossible. In 2023, the Circuit Court had indeed concluded

that "[r]equiring plaintiffs whose property was liquidated to allege and prove that they have traced funds in the foreign state's or instrumentality's possession to proceeds of the sale of their property would render the FSIA's expropriation exception a nullity for virtually all claims involving liquidation".[19]

The *Simon* claimants thus proposed a "commingling theory", arguing that instead of tracing the initial proceeds, it is enough to show that they eventually mixed with funds later used in commercial activity in the US. Delivering the opinion of the Court, Justice Sotomayor rejected this theory, reading a specific tracing requirement into the wording of the expropriation exception. In order to meet this requirement, claimants can identify a US account holding proceeds from expropriated property, or allege that a foreign sovereign spent *all* funds from a commingled account in the United States. As clarified by the Justice, these are but some examples of how a claimant might chose to proceed. Rather than examining various common law tracing principles, however, the Court here simply ruled that alleging that a foreign sovereign liquidated the expropriated property, commingled the proceeds with general funds, and later used *some portion* of those funds for commercial activities in the US does not establish a plausible commercial nexus. Although this ruling imposes a high bar for claimants seeking to invoke the expropriation exception, the Court found this outcome less detrimental to the FSIA's rationale than accepting the "attenuated fiction" that commingled accounts still contain funds from the original property's liquidation. In *Simon*, for example, while the initial commingling of funds occurred in the 1940s, the suit was only brought in the 2010s, after "several institutional collapses and regime changes".

A Restrictive Parable

The Supreme Court based its *Simon* decision on a textual interpretation of the expropriation exception, which identifies "*that* property or *any* property exchanged for such property", without providing a specific alternative criterion for property exchanged for money. The Court also looked at the legislative history of the FSIA, rooted in the 1964 B*anco Nacional de Cuba v. Sabbatino* decision.[20] *The Sabbatino* case prompted US Congress to pass the FSIA's predecessor, the Second Hickenlooper Amendment to the Foreign Assistance Act of 1964, "to permit adjudication of claims the Sabbatino decision had avoided".[21] In *Simon*, the Court read its *Sabbatino* precedent as part of the FSIA's history, and as such relevant to its interpretation – especially considering

that *Sabbatino* also revolved around property that had been liquidated. Crucially in *Sabbatino* "the proceeds . . . in controversy" could be clearly traced to a New York account, aligning the case with the tracing requirement identified in *Simon*.

The *Simon* Court also echoed the foreign relations concerns that it already discussed in *Philipp*, justifying its restrictive interpretation of the FSIA on the Act's potential to cause international friction, and trigger reciprocity among other states' courts. In this regard, the *Philipp* and *Simon* decisions seem particularly keen to do some "damage control" on the effects of the expropriation exception, reducing its scope from a "radical" to a "limited" departure from the restrictive theory of foreign sovereign immunity.

This restrictive turn mirrors the trajectory of human rights litigation under the Alien Tort Statute (ATS).[22] Starting with the Second Circuit's decision in *Filártiga v. Peña-Irala*,[23] the 1789 ATS was used by US courts to extend their jurisdiction on human rights claims brought by aliens. In 2004 (the same year as the seminal Altmann decision on the FSIA's retroactive application),[24] the Supreme Court rejected the interpretation of the ATS as a gateway for "foreign-cubed" human rights cases.[25] Warning against the risk of "adverse foreign policy consequences", the Court provided a narrow interpretation of the ATS. This conservative approach has been framed as part of the shift in attitudes that marked the passage from the Third to the Fourth Restatement of the Foreign Relations Law of the United States.[26] The decision to restrict the reach of the ATS was in fact rooted in political considerations, as testified by the pressure exercised by the Bush administration to hear the case.[27] The new geopolitical landscape had diminished the strategic importance of vindicating international human rights law, and the use of domestic courts to advance public rights agendas had faced severe criticism, with US courts being accused of acting as judges of world history.[28] The *Philipp* and *Simon* interpretations of the FSIA reproduce this passage from an offensive to a defensive approach within the law of foreign sovereign immunity.

Conclusion

Since *Philipp*, the expropriation exception has been limited to property takings by foreign sovereigns against aliens during peacetime. This development has arguably returned the FSIA to its original intent: to protect the property of US citizens abroad, as an expression of "America's free enterprise system". With

Simon, this provision's application has been further restricted where the expropriated property was liquidated. This approach explicitly aims at aligning US law with international law. In this process, however, the US judiciary's controversial yet proactive contribution to human rights litigation, with its potential to influence the development of customary law, is taking a more conservative and isolationist stance.

[1] *Republic of Hungary v. Simon,* 604 U. S. ___ (2025).

[2] *Federal Republic of Germany* v. *Philipp,* 592 U. S. 169 (2021).

[3] Thomas Giegerich, 'The Holy See, a Former Somalian Prime Minister, and a Confiscated Pissarro Painting: Recent Us Case Law on Foreign Sovereign Immunity' in Anne Peters and others (eds), *Immunities in the Age of Global Constitutionalism* (Brill | Nijhoff 2014) 52. <https://brill.com/view/book/edcoll/9789004251632/B9789004251632_006.xml> accessed 11 December 2024. An important conference on the state of the art on the international law of foreign sovereign immunity recently took place at Villa Vigoni (Italy), under the auspices of the Max Planck Institute for Comparative Public Law and International Law. The full program of the event can be found here: https://www.mpil.de/en/pub/news/conferences-workshops/the-future-of-remedies-against.cfm.

[4] As described by Riccardo Pavoni, 'An American Anomaly? On the ICJ's Selective Reading of United States Practice in Jurisdictional Immunities of the State' (2011) 21 *The Italian Yearbook of International Law Online* 143.

[5] For an historical contextualization, see Szabolcs Szita, 'It Happened Seventy Years Ago, in Hungary' [2014] Témoigner. Entre histoire et mémoire. Revue pluridisciplinaire de la Fondation Auschwitz 146.

[6] See *Republic of Hungary v. Simon*, 592 U. S. 207 (2021) (per curiam) (Supreme Court of the United States).

[7] The FSIA, enacted through Public Law 94-583 on October 21 on 1976, is codified in Title 28 of the U.S. Code, Chapter 97, Part IV – Jurisdictional Immunities of Foreign States.

[8] Charlene Sun and Aloysius Llamzon, 'Acta Iure Gestionis and Acta Iure Imperii' (*Oxford Constitutions – Max Planck Encyclopedia of Comparative Constitutional Law [MPECCoL]*) <https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e188> accessed 30 April 2025.

[9] *Altmann v Republic of Austria* [2001] 142 F. Supp. 2d 1187 (United States District Court, CD California).

[10] *Toren v Federal Republic of Germany* 2023 WL 7103263 (United States Court of Appeals, District of Columbia Circuit) (unreported).

[11] *Berg v Kingdom of the Netherlands* 2020 WL 2829757 (United States District Court, D. South Carolina, Charleston Division) (unreported).

[12] *Cassirer v Kingdom of Spain* [2006] 461 F.Supp.2d 1157 (United States District Court, CD California).

[13] Mayer Brown, '"Domestic Takings" Rule Bars Suit Against Foreign Nations in U.S. Court' (*Lexology*, 3 February 2021) <https://www.lexology.com/library/detail.aspx?g=1d4af991-a497-47be-80f2-dd78c184baa1> accessed 30 April 2025.

[14] UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, United Nations, Treaty Series, vol. 78, p. 277, 9 December 1948, https://www.refworld.org/legal/agreements/unga/1948/en/13495 [accessed 29 April 2025].

[15] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012. For a critical discussion of this judgment, see Benedetto Conforti, 'The Judgment of the International Court of Justice on the Immunity of Foreign States: A Missed Opportunity' (2011) 21 *The Italian Yearbook of International Law Online* 133.

[16] See *Simon v Republic of Hungary* [2023] 77 F4th 1077 (United States Court of Appeals, District of Columbia Circuit). The court here clarified that its decision did not "foreclose the possibility that such support exists in sources of international law not before us in this case or based on arguments not advanced here"> Ibid, para 1098.

[17] *de Csepel v Republic of Hungary* 2024 WL 4345811 (United States District Court, District of Columbia).

[18] Livia Solaro, 'US Case Further Restricts Holocaust-Related Art Claims' (*The Institute of Art & Law*, 11 November 2024) <https://ial.uk.com/author/livia-solaro/> accessed 30 April 2025.

[19] *Simon v Republic of Hungary* (n 16) para 1118.

[20] *Banco Nacional de Cuba v. Sabbatino,* 376 U. S. 398 (1964) (Supreme Court of the United States).This case revolved around the expropriation of sugar by Cuba against a private company in protest for the reduction of the US sugar quota for this country. After the sugar in question was delivered to a customer in Morocco, both the Cuban state and the private company claimed the payment of the price, which in the meantime had been transferred to a New York commodity broker. The case eventually was adjudicated in favour of the National Bank of Cuba, based on the Act of State doctrine.

[21] As noted by the Court in *Republic of Hungary* v. *Simon,* 604 U. S. ___ (2025) (Supreme Court of the United States) 15–16.

[22] 28 U.S. Code § 1350.

[23] *Filartiga v Pena-Irala* [1980] 630 F.2d 876 (United States Court of Appeals, Second Circuit).

[24] *Republic of Austria v. Altmann,* 541 U. S. 677 (2004) (Supreme Court of the United States).

[25] *Sosa v. Alvarez-Machain,* 542 U. S. 692 (2004) (Supreme Court of the United States); for a definition of 'foreign-cubed' claims, see Robert S Wiener, 'Foreign Jurisdictional Algebra and Kiobel v. Royal Dutch Petroleum: Foreign Cubed And Foreign Squared Cases' (2014) 32 *North East Journal of Legal Studies* 156, 157.

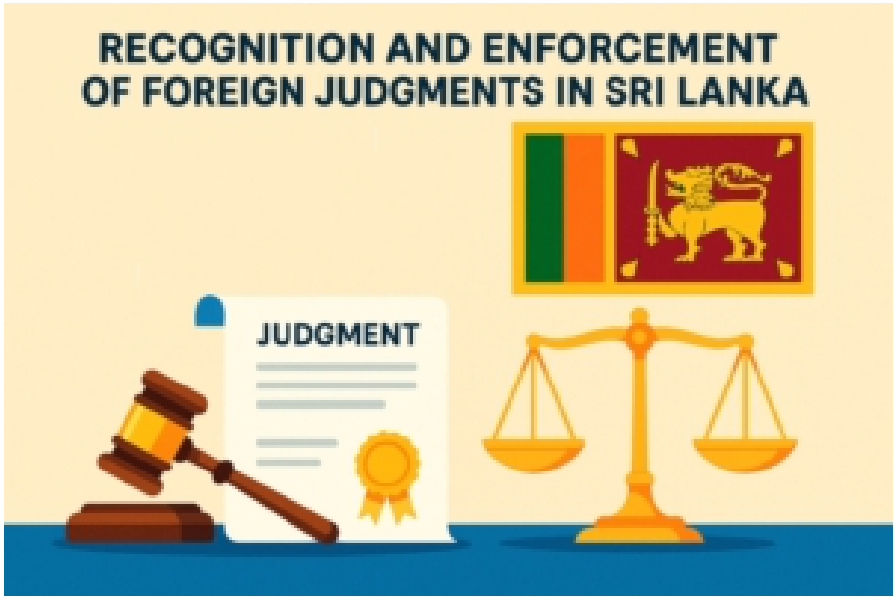
[26] See Thomas H Lee, 'Customary International Law and U.S. Judicial Power: From the Third to the Fourth Restatements', *SSRN Electronic Journal* (2020) <https://www.ssrn.com/abstract=3629791> accessed 14 March 2025.

[27] Naomi Norberg, 'The US Supreme Court Affirms the Filartiga Paradigm' (2006) 4 *Journal of International Criminal Justice* 387, 390.

[28] Ugo Mattei, 'A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance' (2003) 10 *Indiana Journal of Global Legal Indiana Journal of Global Legal Studies* 67, 420.

Legislative direction for recognition of foreign judgments in Sri Lanka: A new sign-post in the private international law landscape

This post was written by Rose Wijeyesekera, Professor of Private and Comparative Law, Chair / Department of Private and Comparative Law – Faculty of Law, University of Colombo



Introduction

Sri Lanka (formerly known as 'Ceylon') is an island in the Indian Ocean, and is home to a total population of 21,763,170, consisting of Sinhalese 74.9%, Tamils

15.4%, Muslims 9.3%, and 0.5% consisting of others such as Veddhas, Burghers, and gypsies.The legal system of this island nation is a unique blend of native laws and the laws that were placed by the colonial powers from 1505 to 1947, when the country gained independence. Since then, Sri Lanka has been a democratic republic and a Unitary State governed by a constitution. The Sri Lankan legal system is primarily based on Roman-Dutch law, inherited from its colonial past under the Dutch, and English common law introduced by the British colonial rulers. Apart from these two, the legal system incorporates elements of Kandyan law (representing indigenous customs of the Sinhalese), Tesawalamai(customary laws of the Tamils of the Northern province of the country) and Muslim law. These personal laws apply in matters of personal law, such as marriage, divorce, and inheritance, depending on the community to which an individual belongs. All Muslims including the sub-categories such as Moors and Malays, are governed by Muslim Law in their personal matters, while Kandyan Sinhalese (a minority of the Sinhalese who hail from "Kandyan Provinces" / the hill country, are governed by Kandyan Law. These customary laws bear a territorial and/or a religious nature. Most of these laws are enacted, but some remain open leaving room for judicial interpretation. The court system in Sri Lanka is structured hierarchically and is designed to ensure justice through a combination of traditional and modern legal principles. The system comprises the Supreme Court at the apex, the Court of Appeal, Provincial High Courts, District Courts, Magistrate Courts, and tribunals such as Labour Tribunals, Quazi Courts, and Mediation Boards.

The legislative sources of private international law are derived from multiple frameworks in Sri Lanka including the Civil Procedure Code (1889), Companies Act, No. 7 of 2007, Arbitration Act No. 11 of 1995 and Intellectual Property Act, No. 36 of 2003. The Reciprocal Enforcement of Foreign Judgments Ordinance No. 41 of 1921 (REJO) and the Enforcement of Foreign Judgements Ordinance No. 3 of 1937 (EFJO) were the most relevant in the sphere of reciprocal recognition, registration and enforcement of foreign judgments. Yet, these statutes, which were enacted during the British colonial era, were limited in their application as they applied only in judgments relating to commercial matters. The lacunae created by the absence of legal direction with regard to the recognition of foreign judgments in matters relating to divorce, annulment and separation of spouses, was huge in a socio-economic context where outward migration has become unprecedently large in recent times.

Pre-legislative judicial activism

In December 2023, the Court of Appeal had to face this lacuna, where *Champika Harendra Silva v. M.B. Weerasekara Registrar General and Others*. The case concerned a Sri Lankan-born couple who had registered their marriage in Sri Lanka and migrated thereafter to England, had obtained a divorce decree from a competent court in England. The divorcee man applied to the Registrar General (RG) of Sri Lanka to register the divorce, but it was rejected on the basis that the divorce was obtained from a British court, which according to the RG, was not a 'competent court' under the Marriage Registration Ordinance of Sri Lanka. Upon rejection by the RG, the divorcee filed for a writ of certiorari pleading the court to quash the RG's rejection, and a writ of Mandamus recognizing the decree of divorce granted by the English court. The court made headlines when, through judicial interpretation, it granted both writs declaring that a foreign decree of dissolution of a marriage contracted in Sri Lanka is valid and effectual in Sri Lanka subject to three guidelines. (a) Such Court must be in law vested with the jurisdiction in respect of the dissolution of a marriage and be the 'Competent Court' in the foreign country; (b) the Parties must have been residents of the foreign country for a reasonable period of time; and (c) the parties must have been properly represented and participated in the legal proceedings according to the laws and procedures of the foreign country. The decision was progressive and timely, and reiterated the necessity and urgency of legislative intervention in addressing this issue of recognizing foreign judgments especially with regard to matrimonial matters.

The legislature intervened promptly to address this legal lacuna by introducing the Reciprocal Recognition, Registration, and Enforcement of Foreign Judgments Act, No. 49 of 2024 (RRREFJ). The Act is effective from March 26, 2025, in respect of 53 countries listed in the Schedule. It repeals both REJO and EFJO.

Limited application of Private International law through REJO, EFJO, and Hague Conventions

REJO and EFJO, which were introduced to facilitate the cross-enforcement of foreign and Ceylonese (Sri Lanka as it was known then) judgments, had proved

woefully inadequate to cater to the country's ever increasing cross-border transactions in both commercial and personal matters. One of the main reasons was REJO's limited scope, as it catered to rather uncomplicated monetary matters arose during the colonial times. It did not address matrimonial matters, perhaps because of limited overseas travel and limited marriages between Sri Lankans and foreigners. It has also been subjected to criticism due to stringent rules and procedural complexities, and understandably, they catered to procedural requirements of a far-less technologically facilitated financial world. Another deficiency was the absence of clear provisions for appeals. This hindered the enforcement process, and created legal uncertainty.

The RRREFJ Act of 2024

The 2024 Act comes in to bridge the gap between global realities and the local legal framework. Its scope is much wider than REJO, as it applies to the reciprocal recognition, registration and enforcement of foreign judgments regarding matrimonial matters, i.e. divorce, annulment and separation, as well as monetary obligations. It recognizes final and conclusive judgments of Scheduled jurisdictions. As at present, they are the 53 Commonwealth countries. An application for recognition, registration and enforcement of a foreign judgment can be made within a period of ten years from the final judgment, and by way of summary procedure as provided for in the Civil Procedure Code.

In terms of commercial transactions, its application extends to natural persons as well as companies, including Business Process Outsourcing (BPO) companies, which are increasing in the country. The Act does not apply to tax, charge, fine or other penalty payable under a judgment of a foreign court.

However, the Act is restrictive in terms of the application of matrimonial matters of persons whose marriages have been contracted under special personal laws, which are very much a part of the Sri Lankan law relating to marriage and family.

Section 3(1)(b) of the new Act of 2024 states that the Act applies to a foreign judgment for the dissolution or annulment of a marriage or separation of the parties to a marriage only if such judgment is obtained in respect of marriages entered under the General Marriages Ordinance No. 19 of 1907 (GMO) and where such judgment shall be deemed final and conclusive as long as either party to the

marriage was domiciled in such country at the date of the judgement; habitual resident in such country for a period not less than one year before the date of the judgment; was a national of such country at the time of the judgment; or both parties have submitted to the jurisdiction of such country. This leaves out Muslims who, under Sri Lankan law, are compelled to marry under the Muslim Marriage and Divorce Act 13 of 1951 (MMDA), and the Knadyan Sinhalese who may choose to register their marriages under the Kandyan Marriage and Divorce Act 44 of 1952 (KMDA). While the majority of the population are governed by the General Law and are required to follow the GMO in matters relating to their marriages, a considerable percentage of the Sinhalese population who are recognized as 'Kandyans' still opt to marry under the KMDA. The Muslims who constitute 9.7% of the total population of the country have no choice but to contract their marriages under the MMDA. The exclusion of their marriages from the 2024 Act raises multiple concerns including their right to equality before the law, which is a fundamental right guaranteed under the national constitution.

Way forward

The RRREFJ of 2024 is a timely legislative intervention in the sphere of private international law in Sri Lanka as it addresses a socially relevant legal lacuna in the country. The legislative effort was well-recognized by the apex court of the country when the constitutionality of the RRREFJ Bill was challenged in S.C.(SD) No.80/2024 and S.C.(SD) 81/2024. However, the Act has room to be more democratic in terms of its application, especially in the current social context in which the nation is struggling to overcome socio-economic devastations caused by multiple reasons including ethnicity, race, and religion. With necessary amendments to avoid these obvious racial and religious exclusions, the Act can strengthen the countries ties with the global village more fully.

South Africa Grapples with the Act of State Doctrine and Choice of Law in Delict

By Jason Mitchell, barrister at Maitland Chambers in London and at Group 621 in Johannesburg.

The Supreme Court of Appeal delivered judgment today in East Asian Consortium v MTN Group. The judgment is available here.

East Asian Consortium, a Dutch company, was part of the Turkcell consortium. The consortium bid on an Iranian telecommunications licence. The consortium won the bid. East Asian Consortium alleged that it was later ousted as a shareholder of the ultimate license holder, the Irancell Telecommunications Services Company. East Asian Consortium sued, amongst others, several subsidiaries of the MTN Group, a South African telecommunications company, in South Africa. East Asian Consortium alleged that the defendants unlawfully induced the Iranian government to replace East Asian Consortium with one of the MTN subsidiaries.

In 2022, the South African High Court held that Iranian law applies to East Asian Consortium's claims. But the Court declined to exercise jurisdiction based on, amongst other things, state immunity and the act of state doctrine. East Asian Consortium appealed to the Supreme Court of Appeal.

The Supreme Court of Appeal reversed the High Court on state immunity and on the act of state doctrine. It reached the same conclusion as the High Court on the applicability of Iranian law, but for different reasons—and clarified that South African law uses the *lex loci delicti* as its general rule for choice of law in delict (or tort).

There are two immediate takeaways from the judgment:

South Africa's act of state doctrine differs from the doctrine in English law

> *"…while we owe much to the English common law, and have much to learn from*

it, our common law is not a supplicant species."

- English law (*Belhaj*, *Deutche Bank*) articulates the act of state doctrine as an exclusionary rule with limits and exceptions. The Supreme Court of Appeal rejects that approach, critiquing it as a doctrine "*principally comprehended by what it is not*."
- Instead, the Supreme Court of Appeal adopts a broader balancing of interests: a "*doctrine composed not of rules but of reasons that count for and against the court's adjudication of a foreign state's acts.*"
- This interest-balancing version of the doctrine applies even when the lawfulness of the executive acts of a foreign country, taken within its territory, will have to be adjudicated by the South African court.
- The act of state doctrine is a common law doctrine, and the common law is subject to the Constitution. This means that the basis for the doctrine cannot be the separation of powers because, under the Constitution, foreign policy decisions are not beyond judicial scrutiny.
- Comity justifies the doctrine, but comity requires judicial pause not judicial abdication.
- Interest balancing considers, for example, the plaintiff's constitutional rights (and, in particular, its right to have its dispute resolved in court), and the constitutional nature and implications of the claim (here, allegations of public corruption).

South Africa uses the *lex loci delicti*, but it can be displaced

- In 2010, the High Court in *Burchell* held that South Africa's choice of law rule for delict is the legal system that has the most real or significant relationship to the dispute, with the *lex loci delicti* merely being one factor in that analysis.
- The Supreme Court of Appeal held that *Burchell* is wrong: the general rule is lex loci delicti. The lex loci delicti can be displaced if another legal system has a "*manifestly closer connection*".
- The Supreme Court of Appeal also held that for transnational delicts (that is, when the relevant conduct or events do not happen in one country), a plurality approach should be taken to determine the *lex loci delicti*: the country in which the greater part of the events or conduct making up the elements of the delict took place.
- The Supreme Court of Appeal rejected an approach of subsidiary rules for

particular delicts. This approach causes uncertainty about which elements should be given primacy for certain delicts. More fundamentally, it is based on the "*doctrinal heresy*" that South Africa has a law of *delicts* (like the English law of torts); South Africa instead has a "*unified scheme of liability*". Subsidiary rules for each type of delict does not rhyme with that unified scheme.

The judgment was a relatively rare 3-2 split. A further appeal to the Constitutional Court is possible.

U.S. Court Issues Worldwide Anti-Enforcement Injunction

This post was written by Hannah Buxbaum, the John E. Schiller Chair in Legal Ethics and Professor of Law at the Indiana University Maurer School of Law in the United States.

Last month, Judge Edward Davila, a federal judge sitting in the Northern District of California in the United States, granted a motion by Google for a rare type of equitable relief: a worldwide anti-enforcement injunction. In *Google v. Nao Tsargrad Media*, a Russian media company obtained a judgment against Google in Russia and then began proceedings to enforce it in nine different countries. Arguing that the judgment was obtained in violation of an exclusive forum selection clause, Google petitioned the court in California for an order to block Tsargrad from enforcing it.

As Ralf Michaels and I found in a recent analysis, the anti-enforcement injunction is an unusual but important device in transnational litigation. There aren't many U.S. cases involving these orders, and one of the leading decisions arose in the context of the wildly complicated and somewhat anomalous Chevron Ecuador litigation. As a result, there is little U.S. authority on a number of important questions, including the legal standard that applies to this form of relief and the mix of factors that courts should assess in considering its availability. Judge

Davila's decision in the Google case addresses some of these questions.

Background

In 2020, Google terminated Tsargrad's Google account in order to comply with U.S. sanctions law. Tsargrad sued, alleging that Google violated its terms of service in terminating the account. Although those same terms included an exclusive forum selection clause choosing California courts, Tsargrad initiated the litigation in Russia. It cited a Russian procedural law that vested Russian arbitrazh courts with "exclusive jurisdiction" over disputes involving sanctioned parties, arguing that this rule prevented it from bringing suit in California.

Tsargrad prevailed on the merits in that case. The court ordered Google to restore Tsargrad's account or suffer a compounding monetary penalty. Google did not restore access, and the penalty mounted to more than twenty decillion dollars (in Judge Davila's words, "a number equal to two followed by thirty-four zeroes"). Tsargrad then started filing actions to enforce its judgment in a number of foreign courts. This prompted Google to seek an anti-enforcement injunction in the Northern District of California.

What Legal Standard Applies to Anti-Enforcement Injunctions?

An anti-enforcement injunction orders a party not to initiate or continue legal proceedings to enforce a judgment. It looks like a species of anti-suit injunction and might therefore be subject to the test used to decide those. As Judge Davila correctly recognized, though, the two contexts are quite different.

An anti-suit injunction aims to prevent parallel litigation from developing in the first place, avoiding a race to judgment and the possibility of inconsistent judgments on a single matter. Those risks aren't relevant to anti-enforcement injunctions, where the foreign court has already entered a judgment. In such cases, the policy of res judicata also comes into play. Anti-enforcement injunctions are also potentially much more intrusive into other legal systems than anti-suit injunctions. The type of injunction that Google sought would have worldwide effect, blocking legal proceedings not only in courts with concurrent jurisdiction over the underlying dispute but in any court, anywhere, in which an enforcement

proceeding might be brought. For these reasons, Judge Davila chose instead to apply the normal test for preliminary injunctions, requiring Google to demonstrate: (1) likely success on the merits, (2) irreparable harm, (3) a balance of equities favoring injunction, and (4) public interest favoring injunction.

Does Breach of a Forum Selection Clause Justify an Anti-Enforcement Order?

Once a foreign court has entered a judgment, it is (and should be) very difficult for the judgment debtor to obtain an order from a U.S. court completely blocking any enforcement efforts. In this case, there were two possible grounds for granting that relief. First, as in the *Chevron* case, it appeared that Tsargrad's enforcement campaign was vexatious and oppressive. Apparently, Tsargrad had itself described its strategy as a "global legal war"—and may have viewed the twenty-decillion-dollar penalty as leverage to extort a settlement or force Google to defend itself in multiple forums. Second, it appeared that Tsargrad had procured the Russian judgment in breach of an exclusive forum selection clause. As Google argued, issuing an anti-enforcement injunction under those circumstances would both preserve the jurisdiction of the chosen courts and vindicate Google's contractual rights.

The case proceeded on the second theory. This raised two interesting questions regarding a post-judgment injunction. First, because the breach of the forum selection clause had already happened, was there any ongoing or future harm to justify injunctive relief? Judge Davila concluded that there was—not based on the forum selection clause itself, but based on an additional *implied* term "bar[ring] parties from enforcing judgments obtained in violation of [a] forum selection clause."

Second, wouldn't the balance of equities here suggest that Google was far too late in seeking injunctive relief? It could have filed an ordinary anti-suit injunction based on the exclusive forum selection clause when Tsargrad initiated the litigation in Russia, rather than waiting until that action proceeded to judgment. (In Ralf's and my study, this kind of delay surfaced as one of the most common reasons to deny anti-enforcement injunctions.) Judge Davila maneuvered around this issue. The basis for injunctive relief, he said, wasn't the breach of the forum selection clause but rather the breach of the implied promise not to enforce

judgments procured in violation of the clause. And Google couldn't have sought relief for *that* breach until Tsargrad actually began its enforcement efforts.

What About Comity?

Every country has its own rules regarding the recognition and enforcement of foreign judgments. It's one thing for a U.S. court to deny enforcement of a foreign judgment in the United States, under U.S. rules. But by barring a judgment holder from taking steps to enforce its judgment *anywhere*, a worldwide anti-enforcement injunction indirectly prevents other countries from considering the enforceability of that judgment under their rules. Judge Davila appreciated the serious comity concerns this raises. He concluded, however, that those concerns were outweighed in this case, citing the "grossly excessive" penalty imposed on Google and the vexatious nature of Tsargrad's enforcement campaign. With the exception of Russia, then ("it is simply a bridge too far to enjoin a Russian citizen from enforcing a Russian judgment in Russian court"), he gave the order worldwide scope.

Conclusion

Pending a final decision on the merits, the court here did everything it could to block Tsargrad from enforcing the Russian judgment. In addition to entering the anti-enforcement injunction, the court entered an "anti-anti-suit injunction" barring Tsargrad from going back to Russia to seek an anti-suit injunction against the proceedings in California. The open question, as always, is what courts in other countries will do if Tsargard disregards the injunction and continues its efforts to enforce the Russian judgment.

This post is cross-posted at Transnational Litigation Blog.

Tatlici v. Tatlici: Malta Rejects $740 Million U.S. Defamation Judgment as Turkish Case Looms

Written by Fikri Soral, Independant Lawyer, Turkey; and LL.M. student, Galatasaray University, Turkey

A Maltese court has refused to enforce a $740 million default judgment issued by the 15th Judicial Circuit Court of Florida (Palm Beach County) in a defamation suit brought by Applicant Mehmet Tatlici against his half-brother, Defendant Ugur Tatlici. [1] The Florida court's award—issued on 8 January 2020 in a defamation suit filed by Mehmet Tatlici against his half-brother—was deemed procedurally deficient and substantively incompatible with Malta's public policy, particularly due to its lack of reasoning and its chilling effect on free expression.[2]

The Maltese court found that the Florida default judgment—submitted as a redacted, one-page certification—could not be meaningfully reviewed, as the complete, reasoned version was essential to assess whether any part of the judgment violated Maltese ordre public.[3] The court emphasized that it is not for the issuing court's clerk to determine what may be withheld, and that the absence of judicial reasoning in a claim involving hundreds of millions in damages was, in itself, contrary to Malta's fundamental procedural standards and ordre public.[4] Notably, the court flagged the stratospheric scale of the damages—€659,932,000—as irreconcilable with Malta's defamation laws, viewing enforcement as a potential threat to freedom of speech and contrary to Malta's ordre public.[5]

At the same time, parallel enforcement proceedings remain ongoing in Turkey, where Applicant Mehmet Tatlici is seeking recognition and enforcement of the same Florida judgment.[6] Simultaneously, a criminal investigation is underway in Turkey, concerning felonies of fraud, aggravated fraud, and document forgery in relation to how the Florida judgment was procured.[7]

Background and Procedural History

The proceedings stem from a protracted intra-family dispute between Mehmet Tatlici and his half-brother Ugur Tatlici, heirs to the late Turkish billionaire Salih Tatlici. On 8 January 2020, the 15th Judicial Circuit Court for Palm Beach County, Florida entered a default judgment in favour of Mehmet Tatlici in *Mehmet Tatlici v. Ugur Tatlici*, Case No. 50-2018-CA-002361-XXXX-MB, awarding him $740 million in damages for alleged defamation. The judgment was based on Mehmet Tatlici's allegations that online publications on websites and social media had harmed his reputation and caused the collapse of a real estate project in Istanbul, the legitimacy of which is now disputed and appears to be addressed before a Turkish heavy penal court in Turkey for alleged fraud.[8]

Mehmet Tatlici claimed that the online publications led to the termination of a real estate development project in Istanbul, allegedly abandoned by a Romanian investor due to reputational concerns.[9]

Defendant U?ur Tatlici, however, denies any involvement in the publications and maintains that the defamatory material was fabricated by Applicant Mehmet Tatlici and his Florida lawyers to manufacture a basis for litigation.[10] According to his filings and expert submissions, the alleged project was never viable to begin with. The same materials state that the project was legally impossible under Istanbul's zoning laws, relied on fictitious contractual arrangements, and was tied to a Romanian company with only $50 in registered capital, two offshore shareholders, and a concealed ultimate beneficial owner (UBO), lacking any credible financial capacity to support a development of that scale.[11] Defendant Ugur Tatlici also states that he was not made aware of the Florida proceedings at the time and therefore had no opportunity to contest the allegations or raise these objections in the original action.[12] He argues that the judgment was obtained by default through fraud and misrepresentation.[13]

Following the Florida judgment, Mehmet Tatlici launched recognition and enforcement proceedings in Malta and Turkey. In Malta, he filed Application No. 719/2020TA before the Civil Court (First Hall), which dismissed the application on 13 February 2025, citing several grounds, including the absence of a reasoned judgment, the gross disproportionality of damages, and the judgment's incompatibility with Maltese public policy.

Meanwhile, enforcement efforts are ongoing in Turkey, where the case is before the Istanbul 13th Civil Court of First Instance presided over by Judge Hakan

Kabalci. In parallel, Turkish prosecutors have opened a criminal investigation into the circumstances surrounding the Florida judgment, focusing on felonies of fraud, aggravated fraud, and document forgery. The matter is expected to be brought before a Turkish heavy penal court for further proceedings.

The Maltese Court's Decision

In its judgment dated 13 February 2025 (Application No. 719/2020TA), the Civil Court (First Hall) of Malta, presided by Judge Toni Abela LL.D., denied enforcement of the $740 million (€659 million) Florida defamation judgment obtained by Mehmet Tatlici. The court grounded its refusal on unreasoned and incomplete nature of the Florida judgment, violations of Maltese ordre public, lack of jurisdiction, and broader free expression principles under Maltese and EU law.[14]

First, a critical basis for refusal was the failure to submit a full, reasoned version of the Florida judgment. The 740-million-dollar default judgment was a product of a single-page handwritten jury verdict form, devoid of any accompanying judicial opinion explaining the basis for the award.[15] The court highlighted that such a submission made it impossible to evaluate whether the judgment was consistent with Maltese public order and emphasized that reasoned judgments are not merely technical requirements but essential to meaningful judicial review.[16] Procedural formalities, the court stated, are part of ordre public in Malta and cannot be waived, even with party consent. [17]This alone rendered the application unenforceable.

Significantly, this procedural deficiency mirrors difficulties Applicant Mehmet Tatlici is encountering in ongoing Turkish enforcement proceedings, where the Applicant has also been requested to provide a complete, authenticated copy of the Florida judgment.

Second, beyond procedural failings, the court strongly objected to the scale of damages—€659,932,000—awarded for defamation. It observed that such "stratospheric" sums are entirely incompatible with the way defamation is treated under Maltese law.[18] The court emphasized that while monetary penalties for defamation are permissible, they must not have a chilling effect on individual expression or public discourse.[19]

The court explicitly referenced the applicant's own anticipation that the

respondent might invoke a SLAPP (Strategic Lawsuit Against Public Participation) defence.[20] While Malta does not directly adjudicate the merits of U.S. legal standards, it emphasized that the chilling effect of such judgments—especially when arising from online speech—raises serious concerns under Maltese and European principles of democratic discourse. Crucially, the court did not make any finding as to whether Defendant Ugur Tatlici authored the allegedly defamatory material. It declined to engage with the underlying merits of the Florida judgment and limited itself to the enforceability of that decision under Maltese law.

Third, the court further held that it lacked jurisdiction under Article 742 of the Maltese Code of Organization and Civil Procedure[21]. The application failed to establish any sufficient nexus with Malta—either through residence, assets, or subject matter.[22]

Broader Analysis

The *Tatlici* decision highlights how courts in recognition proceedings are increasingly attentive to the substantive and procedural legitimacy of foreign default judgments—particularly in cases involving defamation, extraordinary damages, and minimal jurisdictional connection to the forum of origin. Rather than approaching enforcement as a purely formal exercise in judicial comity, the Maltese court subjected the Florida judgment to a rigorous public policy review, grounded in Maltese constitutional values and European legal standards.

This cautious approach is especially warranted in defamation matters, which remain a notoriously unsettled area of private international law. The Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, which aims to promote the mutual recognition and enforcement of civil and commercial judgments across borders, expressly excludes defamation claims from its scope under Article 2(1)(k). This exclusion is not incidental—it reflects the deep and enduring divergences between legal systems in balancing reputation and freedom of expression, and in regulating media liability, damage awards, and procedural safeguards.

As a result, defamation judgments—especially when obtained by default and accompanied by disproportionate damages—remain subject to domestic standards in the enforcing forum. The *Tatlici* ruling exemplifies how national courts can, and

must, use that discretion to filter out foreign judgments that fail to meet local thresholds of proportionality and constitutional legitimacy.

In this respect, the case underlines a growing transatlantic divergence. Although the United States offers strong First Amendment protections in theory, its procedural system permits extraordinary libel damages, especially through default, without requiring the detailed judicial reasoning expected in civil-law jurisdictions. In Europe, by contrast, the enforcement of such awards is viewed not only as a matter of technical admissibility, but as a question of whether the judgment itself comports with core constitutional commitments—particularly the protection of democratic discourse and media freedom.

The *Tatlici* judgment sits comfortably alongside other recent European decisions—such as *Real Madrid v. Le Monde****[23]*** in France and *ZDF****[24]*** in Germany—which have refused to enforce even intra-EU defamation rulings where the outcome would infringe national free expression standards. These cases reflect the principle that domestic free expression standards must not be undermined by "importing" judgments from systems with differing legal thresholds.

The question of jurisdiction further reinforces the court's reasoning. In both *Tatlici* and the New Zealand case *Kea Investments Ltd v. Wikeley Family Trustee Ltd****[25]***, the enforcing courts questioned the legitimacy of default judgments rendered in forums with no meaningful connection to the underlying dispute. In *Tatlici*, the Florida judgment was entered by default, despite both parties being Turkish nationals, with no substantial ties to Florida, and the disputed real estate project located in Istanbul. Similarly, in *Kea*, the Kentucky default judgment was obtained without adversarial process. Notably, while the New Zealand Court of Appeal ultimately lifted an anti-enforcement injunction on procedural grounds, it upheld the High Court's finding that the judgment had been fraudulently procured and was not entitled to recognition.[26]

The *Kea* case offers a compelling comparative example, where the courts found a U.S. default judgment to be fraudulently obtained and not entitled to recognition, despite ultimately reversing an anti-enforcement injunction on procedural grounds.[27] Though the injunction was lifted, the underlying concerns remained and reinforced the principle that fraudulently and strategically engineered default judgments cannot be presumed enforceable.[28]

In both cases, the core issue is not hostility to foreign law, but resistance to opportunistic use of foreign legal systems to generate leverage in unrelated or parallel disputes. The *Tatlici* decision affirms that enforcement forums are not neutral venues for rubber-stamping foreign awards. They are guardians of legal coherence and public policy, tasked with ensuring that enforcement respects the procedural and constitutional identity of the local legal order.

Taken together, these themes point toward a developing global norm that recognition and enforcement of defamation judgments will continue to operate outside the harmonized legal frameworks of instruments like the Hague Judgements Convention—and rightly so. The reasons are structural, not incidental. As long as national systems take various positions on how to balance speech, reputation, and remedies, enforcement will remain subject to localized scrutiny, particularly when judgments are opaque, exorbitant, or jurisdictionally artificial.

Conclusion

While Malta has now delivered a clear repudiation of the Florida judgment on procedural and public policy grounds, the spotlight now shifts to Turkey, where enforcement proceedings remain ongoing, and a parallel criminal investigation is actively examining whether the judgment was procured through fraud. As the jurisdiction most closely connected to both parties and to the disputed commercial project at the heart of the defamation claim, Turkey is uniquely positioned to conduct a fuller legal inquiry—assuming the proceedings unfold independently and free from undue influence, unlike concerns raised in the Florida case.

The outcome of the Turkish proceedings may prove decisive—not only for the parties involved but also for evolving standards of cross-border enforceability. In this sense, *Tatlici* is a test of how national courts respond to foreign default judgments used strategically— and whether such judgments can withstand scrutiny in jurisdictions with stronger procedural safeguards and a more immediate interest in the truth.

[1] *Mifsud Av. Malcolm Noe v. Ugor Tatlici*, Civil Court (First Hall), Judgment of 13 February 2025, Application No. 719/2020TA. Available at: https://ecourts.gov.mt/onlineservices/Judgements/PrintPdf?JudgementId=0&CaseJ

udgementId=151468 (“**Judgement**”)

[2] *ibid*, at pp. 2–8.

[3] *ibid*, at p. 3.

[4] *ibid*, at p. 5.

[5] ibid.

[6] Istanbul 13th Civil Court of First Instance (File No. 2024/416 E.)

[7] Beykoz Chief Public Prosecutor’s Office, Case No. 2025/720 Sor.

[8] Istanbul Anadolu 8th Criminal Judgeship of Peace, File No. 2024/9316 Misc.

[9] Docket Entry no. 183, 184 and 185, Mehmet Tatlici v. Ugur Tatlici (Case No. 50-2018-CA-002361-XXXX-MB) (“**Original Action**”) available at: https://appsgp.mypalmbeachclerk.com/eCaseView/search.aspx

[10] ibid. Docket Entry no. 105.

[11] ibid.

[12] ibid.

[13] ibid.

[14] *Judgement*, at pp. 2–8.

[15] Original Action, Docket Entry no. 38.

[16] *Judgement*, at p.4.

[17] *ibid*.

[18] *ibid*. at p.5.

[19] ibid.

[20] ibid.

[21] *ibid*. at p.8.

[22] ibid.

[23] Real Madrid Club de Fútbol v. Le Monde, Case C-633/22, ECLI:EU:C:2024:843 (CJEU, 4 October 2024)

[24] Bundesgerichtshof (BGH) [Federal Court of Justice], Case IX ZB 10/18, Judgment of 19 July 2018.

[25] Wikeley v Kea Investments Ltd [2024] NZCA 609.

[26] ibid.

[27] ibid.

[28] ibid.

The Personal Status Regimes in the UAE — What's New and What Are the Implications for Private International Law? A Brief Critical Appraisal

Prologue

On 15 April 2025, the new federal UAE law on personal status (Federal Decree Law No 41 of 14 October 2024) officially entered into force ("2024 PSL"). This law fully replaces the 2005 Federal Act on Personal Status (Federal Law No. 28 of 19 November 2005 as subsequently amended) ("2005 PSL"). The new law marks the latest step in the UAE remarkable wave of legal reforms, particularly regarding personal status matters. It follows a series of significant developments at both the federal and local levels. *At the federal level*, this includes the adoption of the law on Civil Personal Status (Federal Decree-Law No. 41 of 3 October 2022 on Civil Personal Status) ("2022 CPSL") and its executive regulation. *At the local level*, specific legislations were adopted in the Emirate of Abu Dhabi, most notably the 2021 Law on Civil Marriages and its Effects (as subsequently amended) ("2021 ADCML"), and its Procedural Regulation. These legislative efforts collectively address what is commonly referred to as "civil family law" (for further details see previous posts on this blog here, here, here, and here). Together with the new 2024 PSL, these instruments will collectively be referred to as the "Family Law Regulations" (see Table below).

This overactive legislative activity has inevitably impacted on the articulation between the different legislative texts, both within the federal framework and

between the federal and local levels. *At the federal level*, there is a need to consider the interaction between the 2024 PSL and the 2022 CPSL. *At the intergovernmental level*, this extends to the interplay between these two federal laws and the 2021 ADCML.

The icing on the cake – or perhaps the tipping point – is when private international law enters the equation. This is because the above family law regulations include provisions determining their scope of application, and in some cases allow for the application of foreign law under some conditions. This necessarily bring them into contact with the conflict of law rules contained in the 1985 Federal Act on Civil Transactions (Federal Law No. 5 of 21 March 1985, as subsequently amended) ("1985 FACT").

Moreover, with the exception of the federal regulation on civil personal status, the other legislative texts also contain detailed rules on international jurisdiction. This leads to further interaction with the 2022 federal law on Civil Procedure (Federal Decree-Law No. 42 of 10 October 2022 on the Civil Procedure). This aspect, however, will not be addressed in this post. For a comparative overview of international jurisdiction in divorce matters, see my previous post here.

Table of relevant legislative texts:

Legislation	Federal level	Local Level

<table>
<tr><td rowspan="2">Family Law Regulations</td><td>Federal Decree-Law No. 41 of 3 October 2022 on Civil Personal Status (*)
• Art. 1: Scope of application and applicability of foreign law
• Art. 11(3): Possibility of applying foreign law in successions and wills?</td><td>Abu Dhabi Law No. 14 of 7 November 2021 On Civil Marriage and its Effects in the Emirate of Abu Dhabi (as subsequently amended)
• Art. 3: Direct application of the law
• Art. 11(3): Possibility of application of foreign law in matters of successions and wills
• Art. 17bis: International jurisdiction
Procedural regulation (Resolution No. (8) of 1 February 2022 concerning the Marriage and Civil Divorce Procedures in the Emirate of Abu Dhabi)
• Art. 4: International jurisdiction (confusingly referred to as territorial jurisdiction in the Regulation)
• Art. 5: Scope of applicationadjd.gov.ae/…/regulation 8 2022 family law.pdf</td></tr>
<tr><td colspan="2">Federal Decree Law No 41 of 14 October 2024 on Personal Status
• Art. 1: Scope of application and applicability of foreign law
• Arts. 3 and 4: International jurisdiction</td></tr>
<tr><td>Private International law</td><td colspan="2">Federal Decree-Law No. 42 of 10 October 2022 on the Civil Procedure
• Arts. 19 – 23: International jurisdictions
Federal Law No. 5 of 21 March 1985 on Civil Transactions
• Arts. 10 – 28: Conflict of laws rules</td></tr>
</table>

(*) One of the unresolved questions is whether the 2022 CPSL also applies in Abu Dhabi—at least in a way that would override the provisions of the Abu

Dhabi Law that are inconsistent with the federal legislation. This aspect is briefly addressed below.

It must be acknowledged that the current framework is highly complex, marked with multiple layers of interaction, and at times, inconsistencies and unresolved questions. The aim of this short post is simply to highlight these difficulties, particularly those relating to the scope of application and the interplay with choice of law rules, leaving a more-in-depth analysis for another occasion.

I. Innovations and clarifications

1. Scope of application

One of the most significant innovations introduced by the new 2024 PSL is its clear delineation of its scope of application, particularly in relation to the other foundational law, that is the 2022 CPSL. Indeed, the latter has already defined its scope by limiting its application to family law matters between *non-Muslims*, whether nationals or foreigners. Accordingly, it can be inferred that 2024 PSL limits its scope to family law matters *involving Muslims*. This is explicitly stated in respect of family relations involving UAE citizens. As for *non-citizens*, since family relations of foreign non-Muslims are primarily governed by the 2022 CPSL, the reference to *"non-UAE citizen"* in 2024 PSL should be understood as referring to "*foreign Muslims*".

2024 PSL	2022 CPSL
Art. 1 [Scope of Application]: (1) The provisions of this Law shall apply to *UAE citizens* if *both parties of the relationship or one of them is Muslim*.	**Art. 1 [Scope of Application]**: (1) The provisions of this Decree-Law shall apply *to non-Muslims who are national citizens of the United Arab Emirates*, and to *non-Muslim foreigners residing in the state* […]

Art. 1 [Scope of Application]: (3) The provisions of this Law shall apply to *non-UAE citizens* […]

(*) All translations are based on the officially adopted versions, with modifications made where necessary. Own underlines and Italics.

2. Parties' agreement

Another point worth highlighting is that both federal personal status laws contain provisions suggesting that a certain degree of party autonomy is permitted. However, the extent of this autonomy remains unclear. This issue will be discussed below.

<table>
<tr><th>2024 PSL</th><th>2022 CPSL</th></tr>
<tr><td>Art. 1 [Scope of Application]:
(2) The provisions of this Law apply to non-Muslim UAE citizens unless […] they agree to apply another law permitted by the legislation in force in the State.</td><td rowspan="2">Art. 1 [Scope of Application]:
(2) The persons governed by the provisions of this Decree-Law … may agree to apply other legislation regulating the family or personal status matters currently in force in the State instead of applying the provisions of this Decree-Law.</td></tr>
<tr><td>Art. 1 [Scope of Application]:
(3) The provisions of this Law shall apply to non-UAE citizens unless […] any other law that has been agreed to be applied, as permitted by the legislation in force in the State.</td></tr>
</table>

3. Possibility of applying foreign law

Finally, like the 2022 CPSL and the now-repealed 2005 PSL, the 2024 PSL also allows for the application of foreign law. What is particularly noteworthy, however, is that the formulation originally found in the repealed 2005 PSL was

not reproduced in the newly adopted 2024 PSL, despite its inclusion – albeit with some modifications – in the 2022 CPSL (see the underlined portion below). The reasons for this divergence remain unclear.

2024 Personal Status Law	2022 Civil Personal Status Law
Art. 1 [Scope of Application]: (3) The provisions of this Law shall apply to non-UAE citizens *unless one of them invokes the application of his law* [….] (*)	**Art. 1 [Scope of Application]**: (1) The provisions of this Decree-Law shall apply to non-Muslims who are national citizens of the United Arab Emirates, and to non-Muslim foreigners residing in the state, *unless one of them invokes the application of his law, with regard to matters of marriage, divorce, successions, wills, and establishment of filiation*, <u>without prejudice to the provisions of Articles (12), (13), (15), (16), and (17) of the Federal Law No. (5) of 1985[on Civil Transactions]</u> (**).

(*) The Gender biased formulations found in the original texts are maintained.

(**) Art. 1(3) of the now-repealed 2005 PSL stated as follows: "The provisions of this Law shall apply to non-UAE citizens, unless one of them invokes the application of his law, without prejudice to the provisions of Articles (12), (13), (15), (16), (17), <u>(27) and (28)</u> of the Federal Law No. (5) of 1985 on Civil Transactions".

The numbered articles concern respectively, conflict of law rules in matters of marriages (12), divorce (13), maintenance (15), guardianship and other institutions of protection of persons with limited capacity and absentees (16), successions and wills (17), as well as public policy (27) and failure to prove foreign law (28).

II. Ambiguities and persistent problems

1. Ambiguities

a) Scope of application

i) The 2021 ADCML and its 2022 Procedural Regulation

One of the most crucial points concerns the relationship between federal and local laws. As previously mentioned, the Emirate of Abu Dhabi took the initiative in 2021 by enacting its "Law on Civil Marriage and Its Effects". This law – originally titled the "*Personal Status Law of Non-Muslim Foreigners*" – defined its scope of application in a more restrictive manner compared to the 2022 CPSL. While the latter applies to both *foreign and local non-Muslims*, the 2021 Abu Dhabi law was limited, as its title suggests, to *foreign non-Muslim only*.

2021 ADCML (before amendment)	2022 CPSL
Art. 1 [Definitions]: ***Foreigner*:** *Any male or female non-Muslim foreigner*, having a domicile, residence or place of work in the Emirate.	**Art. 1 [Scope of Application]**: (1) The provisions of this Decree-Law shall apply to *non-Muslims who are national citizens of the United Arab Emirates*, and to *non-Muslim foreigners residing in the state […]*
Civil Marriage: A union that is intended to be of indefinite duration according to the provisions of this Law, *between a foreign man and woman, both non-Muslim*.	

Only a few weeks after its adoption, the 2021 ADCML was amended. Notably, in addition to the change of the title as mentioned above, all references to "foreigners" and "foreign non-Muslims" were replaced with the more neutral phrase of "*persons covered by the provisions of this law*". Moreover, new jurisdictional rules were adopted (Art. 17bis). Despite this amendment, and somewhat surprisingly, the amended law does not only define "*persons covered by the provisions of this law*" in an ambiguous manner (see some critical comments here), but also it continues to define civil marriage as union "between a foreign man and woman, *both non-Muslim*". This has reinforced the impression that both the original law and its subsequent amendments were enacted without thorough consideration of their internal consistency or of the broader legal context in which they would operate.

2021 ADCML (after amendment)

Art. 1 [Definitions]: **Civil Marriage:** A union that is intended to be of indefinite duration according to the provisions of this Law, *between a foreign man and woman, both non-Muslim*. **Persons covered by the provisions of this law:** Foreigners and Nationals, non-Muslims, whether male or female. (*)

(*) The original ambiguity in the formulation is maintained in purpose.

In 2022, a Procedural Regulation ("2022 Procedural Regulation") was adopted with the intention of clarifying, *inter alia*, the scope and application of the 2021 ADCML. However, this instrument has introduced more inconsistencies and ambiguities than it has resolved. This is particularly evident with regard to the definition of "civil marriage", as well as the *ratione personae* and *ratione materiae* of both the 2021 ADCML and its accompanying 2022 Procedural Regulation.

Abu Dhabi 2021 Law (after amendment)	The 2022 Procedural Regulation
Art. 1 [Definitions]: **Civil Marriage:** A union that is intended to be of indefinite duration according to the provisions of this Law, *between a foreign man and woman, both non-Muslim.*	**Art. 1 [Definitions]:** **Civil Marriage:** Marriage that is concluded and registered under statutory laws and regulations, *without taking into account of any particular religious law.*

Persons covered by the provisions of this law: *Foreigners and Nationals, non-Muslims,* whether male or female	**Persons covered by the provisions of this law:** *Foreigners and non-Muslims Nationals,* whether male or female
	Article 5 (Persons covered by the provisions of this law): The provisions of this law govern civil marriages and their effects, as well as all matters concerning the civil family according to the following cases: *1) Non-Muslim citizens* 2) A foreigner who holds the nationality of a *country that does not primarily apply rules of Islamis Sharia in matters of personal status* […] In the case of multiple nationalities, the nationality to be taken into account shall be the one used based on the person's status of residence in the State. 3) Where the marriage is concluded *in a country that does not primarily apply rules of Islamic Sharia in matters of personal status* [….] 4) Where the *marriage is concluded in accordance with the provisions of civil marriage*. 5) Any other case for which a decision is issued by the Head of the Department.

Problems of interpretation and application generated by the ambiguities and inconsistencies of the 2021 ADCML and its 2022 Procedural Regulations have already been addressed on this blog (see here, here, and here). These issues particularly concern the application of these instruments to foreign Muslims, a

possibility permitted under the 2021 ADCML and its 2022 Procedural Regulations as confirmed by recent case law, but not allowed under the 2022 CPSL.

ii) Constitutional implications

Given the differing scopes of application, a crucial issue has arisen: whether the 2022 CPSL overrides the local law in this respect. In other words, does the Federal Civil Personal Status Law also apply in Abu Dhabi?

From a constitutional perspective, the answer should be affirmative (see Article 151 of the Federal Constitution). However, the issue remains largely unresolved. In practice, lower courts in Abu Dhabi appear to give little weight to the federal law, applying the local law and its regulations instead. (The Abu Dhabi Supreme Court seems to follow a slightly different approach, as on some occasions it cited the 2022 Federal Law on Civil Personal Status. For examples, previous posts here, and here).

iii) Impact of the 2024 PSL

The situation, however, changes significantly with the adoption of the 2024 PSL. It is undisputed that this new federal law applies in Abu Dhabi as well. The absence of any local regulation on personal status (other than the 2021 ADCML and its 2022 Procedural Regulation) makes the application of the new federal law self-evident. Therefore, even if one were to argue (for the sake of discussion) that the 2022 CPSL does not apply in Abu Dhabi, it will still be necessary to observe how Abu Dhabi courts will reconcile the new law, which explicitly applies to *Muslims* (regardless of their nationality or whether their country of origin applies Islamic sharia in personal status matters), with the existing local regulations. A typical case would be a Muslim couple from Europe or elsewhere where Islamic Sharia does not primarily apply in matters of personal status, or Muslims from Muslim jurisdictions *who got married under the 2021 ADCML*, but then one of the parties claims the application of the 2024 PSL because they are Muslim, and therefore subject to the federal and not local law.

b) The Parties' agreement

As mentioned above, both federal laws allow the parties to "agree" to apply "another law permitted by the legislation" (2024 PSL) or "other legislation regulating family or personal status matters" currently in force in the UAE (2022 CPSL). The formulations used here are highly problematic, as their exact meaning remains unclear.

For instance, it is unclear, whether the phrase "legislation in force" includes also local laws, notably the 2021 ADCML. Assuming that the 2022 CPSL does not override the 2021 ADCML, could parties residing in Dubai agree to apply it? This remains unresolved.

Moreover, an open question also concerns the form that such an agreement must take. Is an explicit agreement required, e.g., one that is formally recorded in the marriage contract? Or can consent be implied, such that a party's reliance on the provisions of a given law is sufficient to infer tacit agreement?

Finally, and more importantly, it is not clear whether "non-UAE citizens" under the 2024 PSL, which applies primarily to *Muslims* (see above), would be allowed to choose the application non-Muslim law. While this can be somewhat "tolerated" in matters of marriage or divorce as the practice now in Abu Dhabi clearly shows (see previous post here, although the boundaries of such "tolerance" remains certainly unclear notably in other Emirates. From a broader perspective, see examples cited in Béligh Elbalti, "The Recognition and Enforcement of Foreign Filiation Judgments in Arab Countries", *in* Nadjma Yassari *et al.* (eds.), *Filiation and the Protection of Parentless Children* (T.M.C. Asser Press, 2019), 397), such a possibility seems to be inconceivable in matters of successions, giving the longstanding position of UAE courts to consider that the Federal Personal Status Law – which is largely based on Islamic Sharia – should apply whenever one of the parties (the deceased or the heir) is Muslim (for detailed analyses and overview of applicable case law, see Béligh Elbalti, "Applicable Law in Succession Matters in the MENA Arab Jurisdictions – Special Focus on Interfaith Successions and Difference of Religion as Impediment to Inheritance", 88(4) *RabelsZ* 2024 748, 751).

2. Persistent problems

Two are particularly relevant here, both concern (a) the applicability of foreign law, and (b) the interplay of the family law regulations with private international law.

a) Applicability of foreign law

A key difference between the 2021 ADCML and the 2022 CPSL (as well as the 2024 PSL) lies in the fact that the former excludes the very application of foreign law, rendering the 2021 ADCML directly and automatically applicable in all disputes that enter into its scope of application (it must be acknowledged, however, that a recent Abu Dhabi Supreme Court's ruling suggests otherwise. Upon examination, though, the Court's reference to choice of law rules does not have any tangible implication on the above stated conclusion). The only exception concerns matters of succession and wills, for which, a reference to choice of law rules is explicitly provided for within the law itself.

2021 ADCML (after amendment)	2022 CPSL
Article 3 [Scope of Application] (*) (**): (1) If the marriage is concluded in accordance with this law, it shall be the applicable law governing the effects of the marriage and its dissolution. (2) This law shall apply to wills and succession matters concerning persons subject to its provisions, provided that the estate or the bequeathed property is located within the State.	**Art. 1 [Scope of Application]**: (1) The provisions of this Decree-Law shall apply to non-Muslims who are national citizens of the United Arab Emirates, and to non-Muslim foreigners residing in the state, *unless one of them invokes the application of his law, with regard to matters of marriage, divorce, successions, wills, and establishment of filiation […]*

Article 11 [Distribution of Estate]: (3) Notwithstanding paragraph (2) of this Article [testate succession], any heir of the foreign deceased may request the application of the law governing the estate in accordance with the provisions of [1985 FACT], unless a registered will provides otherwise.	**Article 11 [Distribution of Estate]:** (3) Notwithstanding paragraph (2) of this Article [testate succession], any heir of the foreign deceased may request the application of the law governing the estate in accordance with the provisions of [1985 FACT], unless a registered will provides otherwise.

(*) It is worth noting that article 3 in its original form was similar to that of Article of the 2022 CPSL. It stated as follows: "Unless the foreigner requests the application of their national law, the court shall apply this law to foreigners in matters relating to marriage, divorce, inheritance, wills, and the establishment of parentage."

(**) See also Article 5 of the Procedural Regulation cited above.

This does not only give rise to problems of inconsistency with the federal personal status laws, but also with the 1985 FACT.

b) Interplay with choice of law rules

This is arguably the main issue that remains unresolved despite the various reforms and amendments. As mentioned above, the federal laws allow "one of the parties" to invoke the application of "his law". Theoretically, if properly invoked, the foreign law would apply instead of the federal provisions. However, this possibility raises three core issues:

1) who is exactly meant by "one of the parties" (*ahadihim*)?

2) what is meant by "his law" (*qanunihi*), and

3) what is the current relevance of choice of law rules governing family matters as set out in the 1985 FACT?

i) Meaning of "one of the parties"

Regarding 1), there is a range of diverging opinions. For instance, the Explanatory Report of the now-repealed 2005 PSL referred to the *"adversary party"* (*al-khasm*). Certain strands in literature, *contra legem*, suggest that this concerns any party, but only *when both of them share the same nationality*. Case law, however, reveals more diverse scenarios: courts addressed the issue of the application of foreign law regardless of whether the parties hold the same nationality or not, and when the foreign is invoked by any of them. Yet, to the best of our knowledge, UAE courts have not provided a definitive answer to this question, often focusing instead on whether the party's claim could be accepted or not.

ii) The Meaning of "his law"

Regarding 2), case law has largely clarified that "his law" refers to the *lex patriae*. Still, ambiguity remains in cases involving parties of different nationalities. Prior to 2020, the main connecting factor in matters of marriage and its dissolution was the *lex patriae* of *the husband*. It was thus unclear whether the wife could invoke the application of *"her law"* or whether she should claim the application of the *lex patriae* of her husband, when the latter based his claim on UAE law. In any case, where a party holds multiple nationalities, Article 24 (still in force) states that the *lex fori* (UAE law) shall apply.

However, in 2020, an amendment to the 1985 FACT introduced significant changes, shifting away from *lex patriae* as the main connecting factor in personal status. Particularly, articles 12 and 13 dealing respectively with marriage and its dissolution now refer to *lex loci celebrationis*. Moreover, Article 17 dealing with successions and wills grants considerable weight to *professio juris*, allowing a person in testate successions to designate the law that shall govern their estate. These changes have further deepened the discrepancy between the federal personal status regulations and the choice of law provisions contained in the 1985

FACT.

iii) Relevance of choice of law rules

Regarding 3), an as a result of what was stated above, resolving conflicts of law and coordinating the application of the various legislative instruments has become particularly difficult without significantly stretching the wording, and arguably, the intended meaning of the law. This difficulty is especially evident when the *lex loci celebrationis* differs from the parties' *lex patriae*.

Article 1(2) of the 2022 CPSL offers somehow better articulation by including a two-part clause: "*unless* one of the parties invoke the application of his law, *without prejudice* to the provisions of Articles (12), (13), (15), (16), and (17)" of the 1985 FACT. Nevertheless, this articulation becomes problematic when both parties share the same nationality but have concluded their marriage abroad.

In any case, both laws remains silent on the consequences of the parties invoking his *lex patriae* when it conflicts with the law designated under the conflict of laws rules included in the 1985 FACT.

Epilogue

In practice, these theoretical complexities are often resolved in a far more radical and pragmatic way: *foreign law is rarely applied*, even when validly invoked by one or both parties.

It is against this backdrop that one can understand the rationale behind the adoption of civil family law regimes and the recent adoption of the 2024 PSL: rather than refining the existing conflict-of-law mechanisms, these instruments aim to sidestep them altogether by offering a self-contained and directly applicable alternative.

Opinion of AG de la Tour in C-713/23, Trojan: A step forward in the cross-border recognition of same-sex marriages in the EU?

Dr. Carlos Santaló Goris, Postdoctoral researcher at the University of Luxembourg, offers an analysis of the Opinion of Advocate General de la Tour in CJEU, Case C-713/23, Trojan

From *Coman* to *Trojan*

On 5 June 2018, the Court of Justice of the European Union ('CJEU') rendered its judgment in the case C-673/16, *Coman*. In this landmark ruling, the CJEU decided that Member States are required to recognize same-sex marriage contracted in another Member Stated to grant a residence permit to the non-EU citizen spouse of an EU citizen under the EU Citizens' Rights Directive. The pending case C-713/23, *Trojan* goes a step further than C-673/16, *Coman*. On this occasion, the CJEU was asked whether EU law requires a civil registry of Poland, a Member State that does not provide any form of recognition to same-sex couples, to transcribe the certificate of same-sex marriage validly contracted in another Member State. A positive answer would imply that the same-sex marriage established under German law would be able to deploy the same effects as a validly contracted marriage under Polish law. While the CJEU has not yet rendered a judgment, on 3 April 2025, Advocate General de la Tour issued his Opinion on the case. While the CJEU might decide differently from AG de la Tour, the Opinion already gives an idea of the solution that might potentially be reached by the CJEU. This post aims to analyse the case and explore its implications should the CJEU side with AG de la Tour.

Background of the case

Mr. Cupriak-Trojan, a German-Polish citizen, and Mr. Trojan, a Polish national,

got married in Germany, where they used to live. Then, they moved to Poland, where they requested to transcribe the German marriage certificate in the Polish civil registry. Their request was rejected on the ground that marriage is not open to same-sex couples under Polish law. It was considered that the transcription of the certificate would go against Polish public policy. Upon the rejection, the couple decided to contest the decision before Polish administrative jurisdiction. They considered that refusal to transcribe the certificate contravenes the right to freedom of movement and residence enshrined in Article 21 of the Treaty on the Functioning of the European Union ('TFEU') and Article 21 of the EU Charter of Fundamental Rights ('EUCFR') in light of the principle of non-discrimination under Article of 7 of the EUCFR. In other words, when they decided to move to Poland, the non-recognition of their marriage under Polish law hindered their right to freedom of movement and residence. Eventually, the case reached the Polish Supreme Administrative Court, which decided to submit the following preliminary reference to the CJEU:

'Must the provisions of Article 20(2)(a) and Article 21(1) TFEU, read in conjunction with Article 7 and Article 21(1) of [the Charter] and Article 2(2) of Directive [2004/38], be interpreted as precluding the competent authorities of a Member State, where a citizen of the Union who is a national of that State has contracted a marriage with another citizen of the Union (a person of the same sex) in a Member State in accordance with the legislation of that State, from refusing to recognise that marriage certificate and transcribe it into the national civil registry, which prevents those persons from residing in the State in question with the marital status of a married couple and under the same surname, on the grounds that the law of the host Member State [(18)] does not provide for same-sex marriage?'

AG de la Tour's analysis

AG de la Tour starts his analysis by acknowledging that matters concerning the civil status of persons depend on the national law of the Member States. However, the right of freedom of movement and residence imposes on Member States the recognition of the civil status of persons validly established in other Member States. In this regard, he recalls that the CJEU adopted a two-fold approach to civil status matters. In matters concerning an EU citizen's identity (e.g. name or gender), Member States are required to include those identity details in the civil registries. However, in civil status matters concerning ties

legally established in other Member States (e.g. marriage or parenthood), there is no such obligation, and recognition of those ties is limited to the 'sole purpose of exercising the rights which the person concerned derived from EU law' (para. 29).

In the present case, AG de la Tour considers that the non-recognition of the same-sex marriage amounts to a 'restriction on the exercise of the right' to freedom of movement and residence under EU law (para. 32). Subsequently, he proceeds to examine whether such restriction is compatible with the right for respect for private and family life guaranteed by Article 7 of the EU Charter of Fundamental Rights ('EUCFR'). He examines this issue through the lens of the European Court of Human Rights ('ECtHR') case law on Article 8 of the European Convention of Human Rights ('ECHR'), the equivalent provision of Article 7 of the EUCFR. It should be reminded that the EUCFR expressly acknowledges in its Article 53 the ECHR and the ECtHR case law as the term of reference for establishing the minimum standards for its interpretation. In this regard, the ECtHR has repeatedly stated that Article 8 of the ECHR requires its contracting States to provide same-sex couples with a 'specific legal framework'. Nonetheless, contracting States are not required to legalize same-sex marriages and enjoy a margin of discretion to decide how the recognition of the same-sex couple provided.

Based on the referred ECtHR case law, it appears that the non-recognition would constitute a restriction on the right to freedom of movement and residence incompatible with the EUCFR. At this point, the question arises whether such recognition should be done by entering the same-sex marriage certificate into the civil registry. Here, AG de la Tour considers that EU law does not require the marriage licence transcription. As he mentioned at the beginning of his reasoning, 'Member States' obligations in terms of civil status relate only to the determination of a Union citizen's identity' (para. 38). In his view, the registration of foreign marriage certificate 'falls within the exclusive competence of the Member States' (para. 42). Member States can thus refuse the transcription of the marriage certificate if the recognition of the same-sex marriage can be achieved through other means. This discretion is given to Member States to decide whether they enter a foreign same-sex marriage in their civil registry or not would also be in line with the ECtHR case law, which acknowledges States a wide margin of appreciation on how to recognize foreign same-sex marriages.

In the case of Poland, since there is no kind of legal framework for same-sex

couples in this Member State, the only possible solution appears to be the registration of the marriage certificate. Therefore, as an exception, and given the specific Polish circumstances, AG de la Tour considers that Poland would be required to entry into its civil registry of the same-sex marriage.

Recognition yes, transcription no

The fil rouge of AG de la Tour's reasoning was to find a manner to provide recognition for same-sex marriages without overstepping on the Member States' competences in matters concerning the civil status. Finding that right to freedom of movement and residence entails an obligation to transcribe the marriage certificate would not be 'in strict compliance with the division of competences between the European Union and the Member States' (para. 55). That would imply that an understanding of the 'freedom of movement and residence of Union citizens which may be exercised without limit so far as concerns personal status' (para. 56). Such a solution that would depart from the well-established CJEU case law on this matter, moving 'from an approach based on the principle of free movement of a Union citizen that is limited to his or her identity, to an approach based solely on the right to respect for his or her family life' (para. 57). This why AG de la Tour adopted a solution that allows recognition without the need for transcription of the marriage licence in the civil registry.

Regarding the recognition of same-sex marriages, it should also be noted that AG de la Tour leaves the Member States with wide discretion on how same-sex marriage is recognized. This means that the marriage does not necessarily need to be recognized as a marriage. They could be recognized in the form of a civil partnership. That is, for instance, the solution that exists under Italian law. Article 32bis of the Italian Private International Law Act provides that 'a marriage contracted abroad by Italian citizens with a person of the same sex produces the effects of the civil union regulated by Italian law'. Based on AG de la Tour's reasoning, had Poland had a similar, he would have accepted the recognition of a same-sex marriage in the downgraded form of a civil partnership and the transcription of the marriage certificate would have been required.

Promoting the effectiveness of the ECtHR case law through EU law

On its reasoning, AG de la Tour strongly relies on the ECtHR case law. This does not come as a surprise. Other LGBT rights cases involving civil status matters and

the right to freedom of movement contain similar references to the ECtHR jurisprudence. The most recent example is the C-4/23, *Mirin* in which the CJEU found that Romania had to recognize the gender change that occurred in another Member State. The main basis of this ruling was the ECtHR judgment, in which Romania had been found in violation of Article 8 of the ECHR because Romanian law did not provide a clear procedure to obtain legal gender recognition (*X and Y v. Romania*).

Such reliance on the ECtHR case law also serves to expose that Member States do not duly implement the ECtHR rulings. Poland has been found twice in violation of Article 8 of the ECtHR for not providing same-sex couples with any kind of formal legal recognition (*Przybyszewska and Others v. Poland* and *Formela and Others v. Poland*). While the Polish government has proposed an act introducing a civil partnership regime open to same-sex couples, it has not been approved yet. Furthermore, such an initiative only appeared after a more progressive government emerged out of the 2023 Polish general election. The situation is similar in other Member States such as Romania or Bulgaria. These Member States have been also called out by the ECtHR (*Buhuceanu and Others v. Romania* and *Koilova and Babulkova v. Bulgaria*) for not providing any sort of legal recognition for same-sex couples. However, unlike in Poland, no legislative changes are expected on this matter in the near future. If the CJEU adopts AG de la Tour's solution, all these Member States would have to allow the recognition of same-sex marriages contracted in other Member States, even if in the downgraded form of civil partnership. Unlike the Council of Europe with regards to the ECtHR rulings, the EU counts with more effective means to ensure that CJEU rulings are followed by Member States. Formally, the Commission could even trigger an infringement procedure against them in case they do not comply with the judgment in C-713/23, *Trojan*. Therefore, EU law would become the indirect path to make Member States comply with the ECtHR rulings.

The potential for reverse discrimination

The solution proposed by AG de la Tour entails the risk of recreating a situation of reserve discrimination of same-sex couples that have not left Poland against those who have obtained certain legal status for the relationship in other Member States while exercising the right to freedom of movement. A same-sex couple moving who married or entered a civil partnership in a Member State would be able to attain the recognition of their marriage or civil partnership in a Member

State that does not provide any legal framework for same-sex relationships. This is as far as EU law can go in this matter, given domestic family law matters strictly fall within the scope of Member States competencies.

It should also be noted that going to another Member State to get a marriage licence because the Member State where the same-sex couple resides does not provide any legal recognition would not be sufficient to achieve the recognition of such marriage in the Member State of residence. As AG de la Tour pointed out in his Opinion in C-4/23, *Mirin*, a close link needs to exist between the person and the Member State where the legal gender recognition is obtained (para. 71 and 72). Otherwise, there would be an abuse of EU law. The same would apply in the case of a marriage. Going to another Member State with the only purpose of obtaining a marriage licence and circumventing domestic law that does not provide a legal status for same-sex couples. The same-sex couple would have to establish a close link with the Member State where they seek to contract their marriage.

A New Precedent in Contract Conflicts: Decoding the Tyson v. GIC Ruling on Hierarchy Clauses

By Ryan Joseph, final-year BBA LLB (Hons) student, Jindal Global Law School, India.

Introduction

The recent decision of the UK High Court ("**Court**") in *Tyson International Company Limited* ("**Tyson**") *v. General Insurance Corporation of India* ("**GIC**") sets a critical precedent for cases that lie at the intersection of arbitration, contractual hierarchy, and judicial intervention through anti-suit injunctions. The

principal issue in the case revolved around the harmonious application of two conflicting dispute resolution clauses contained in two separate agreements pertaining to the same transaction. While one provided for dispute settlement through arbitration seated in New York, the other was an exclusive jurisdiction clause that provided for dispute settlement by England and Wales courts. To resolve this apparent conflict between the two clauses, the Court relied on a confusion clause (also known as a hierarchy clause) in the parties' agreement to rule that the exclusive jurisdiction clause, in favour of England and Wales courts, prevails over the arbitration clause. Based on this conclusion, the Court issued an anti-suit injunction against GIC from arbitrating the dispute in New York.

Factual Background

Tyson entered into a reinsurance agreement with General Insurance Corporation of India ("**GIC**"), a state-owned-entity. The transaction involved two agreements; a Market Reforms Contract ("**MRC**") and second Facultative Certificates ("**Certificates**"). The MRC contained an explicit choice of law and an exclusive jurisdiction clause, submitting disputes to English courts to be governed by the laws of England and Wales (**"English DRC"**). However, the subsequently issued Certificates introduced an arbitration clause referring disputes to arbitration in New York to be governed by the laws of New York (**"Arbitration Clause"**). A pivotal provision, termed the "Confusion Clause," was embedded within the Certificates, stipulating that in the event of a confusion, the MRC would take precedence over the Certificates.

The dispute arose when GIC claimed that Tyson had undervalued certain commercial numbers on which the insurance premium was based. Therefore, GIC sought to initiate arbitration in New York pursuant to the arbitration clause in the Certificates. In response, Tyson approached the High Court for an anti-suit injunction against the arbitration, arguing that pursuant to the English DRC, English courts would have exclusive jurisdiction over any dispute emanating from the transaction.

The Court stressed on the importance of circumspect judicial intervention when interfering in arbitration. However, considering the existence of the "confusion clause", Tyson argued that the arbitration agreement did not come into existence. Therefore, the principal question before the Court was: what is the effect of the confusion clause when interpreting the two agreements? If the confusion clause

had the effect of a hierarchy clause (as argued by Tyson) and hence gave precedence to the MRC, the arbitration agreement wouldn't come into existence and the anti-suit injunction would be granted. On the other hand, if the confusion clause was merely to give meaning to confusing terms in the Certificates (as argued by GIC), the two agreements would be read harmoniously without giving preference to either. GIC argued this can be done in two ways. First, the conflicting clauses could be read as an agreement between parties to treat the arbitration as a condition precedent to raising any claims before the English Courts. Or in the alternative, the two agreements would be read together to mean that English Courts will have jurisdiction to supervise the New York arbitration. Either ways, the arbitration agreement would be valid and hence the anti-suit injunction should fail.

Submissions of Parties

The Court summarised the principles governing anti-suit injunctions in *Times Trading Corp v National Bank of Fujairah*[1] to hold that an anti-suit injunction can be granted in all cases where it is just and convenient to do so.[2] However, such power must be exercised with circumspection where the claimant can demonstrate a negative right to not be sued. Tyson can establish such a right if it can demonstrate that an arbitration agreement was not concluded between the parties. Crucial to this conclusion would be determining the effect of the confusion clause in the Certificates.

The judge cited various authorities; specifically *Surrey County Council v Suez Recycling and Recovery Surrey Limited*[3], to discuss principles of contractual construction and summarised the position in that the role of the court is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. GIC made the following submissions in this regard: First, the phrase "confusion" in the clause refers to obscurity or uncertainty in the meaning of provisions and does not refer to a conflict or a contradiction. They relied on the meaning of the word "confusion" in the Oxford dictionary to support this premise and submitted that the clause operates to address any uncertainty that may arise when reading the provisions of the Certificates. Such uncertainties must then be addressed by interpreting the provisions in light of the MRC. However, the clause does not operate to address a conflict between the MRC and the Certificates, for such an instance is a "conflict" and not a "confusion". Lastly, they submitted that there is no confusion because the arbitration clause in the

Certificates should be read as a *Scott v. Avery*[4] clause[5] or, a clause conferring English Courts with supervisory jurisdiction over the New York arbitration.

Tyson submitted that by using the phrase "takes precedence" in the confusion clause, the clear objective intent of the parties is to create a hierarchy between the MRC and Certificates whereby in case of a confusion, the terms contained in the MRC will prevail over those in the Certificates. They further submitted that GIC is taking a very narrow interpretation of the word "confusion" and is reading it in isolation of the remainder of the clause to arrive at its conclusion. The word "confusion", when read in the context of the provision, has a broader purport to cover circumstances of contradicting terms between the MRC and the Certificates that create confusion regarding which clause will prevail. Thus the clause operates as a hierarchy clause whereby it clears the confusion by giving precedence to clauses in the MRC.

The Judgement

The Judge agreed with the submissions of Tyson and found that GIC's interpretation of "confusion" was too narrow to reflect an objective meaning of the language used by parties. He ruled that confusion can also arise where there are two clauses within a contract which are inconsistent such that there is confusion as to the intent of the parties as to their respective rights and obligations under the contract because of such inconsistency. Second, when the MRC grants exclusive jurisdiction to English Courts and the Certificates provide for disputes to be resolved through arbitration in New York, there is an obvious confusion as to which dispute resolution clause should apply. The judge noted that English courts must give generally give effect to an arbitration clause but this is a case of routine construction of contracts wherein courts cannot rewrite the parties' agreement. Accordingly, when parties have explicitly agreed that the MRC must take precedence in case of a confusion, such intention must be given effect. The Court opined that any attempt to resolve the confusion through any other means such as viewing arbitration as a condition precedent to any right of action or allowing the arbitration to continue under the supervision of English Courts would amount to rewriting the contract. As a sequitur, the court ruled in favour of Tyson and granted an anti-suit injunction against GIC.

GIC's Attempt to Appeal

In response to the judgment, GIC sought permission to appeal on two grounds (i) the court misconstrued the Confusion Clause in the Certificates and (ii) the court misconstrued the MRC and the Certificates in concluding that the English Court did not have jurisdiction over New York arbitration. When considering whether to grant an appeal, the test is whether GIC has a real prospect of success in relation to any of its grounds.

In order to discharge this burden, GIC made the following arguments: (1) the 'confusion' language is novel and has not been interpreted by courts in the past which gives it considerable scope to argue about its meaning; (2) the Certificates were contractual documents intended to supersede the MRC and not merely administrative documents; and (3) the Court has failed to consider the strong policy adopted by English courts in favour of giving effect to arbitration agreements whereby the conflict should be interpreted in a manner that upholds the agreement to arbitrate. Tyson in response argued that (1) the Court's construction of the word "confusion" gives effect to the meaning of the word in light of the clause as a whole whereas GIC's construction focuses only on the word 'confusion' in isolation of the entire clause. (2) GIC's interpretation of the Confusion Clause runs against commercial common sense; for an overriding effect would essentially nullify many of the provisions contractually agreed to in the MRC. (3) judicial precedents[6] that have ruled in favour of arbitration by resolving potential conflicts between contractual provisions lacked a hierarchy clause necessitating the courts to engage in the endeavour of contractual interpretation. In this case, where a hierarchy clause exists, it is not a matter of resolving conflicts by applying judicial standards of interpreting contracts but one giving effect to the parties' method of resolving confusion between conflicting provisions.

Based on the submissions, the Judge concluded that GIC did not have a realistic prospect of success on either of its grounds. At the outset, although one could accept GIC's construction of the Confusion Clause, it still lacks the realistic prospect of persuading the Court of Appeal to eschew the construction adopted by the Court and instead acceding to GIC's construction. Finally, the Confusion Clause in this case is a relevant factor that distinguishes this case from previous

cases favouring arbitration because it operates as a hierarchy clause to mitigate any confusion when reading the Certificates and the MRC together. Since the parties have contractually agreed to the hierarchy clause when resolving any confusion, the court must give effect to the clause when resolving conflicts and cannot apply its own principles of interpreting conflicting terms of a contract; for any such attempt would amount to rewriting the parties' agreement. Therefore, even the second ground lacks a realistic prospective of succeeding before the court of appeals. Since both the grounds for appeal lacked a realistic prospective of succeeding, the application for leave to appeal was refused.

Key Takeaways and Implications

The said ruling in underscores the Court's role in upholding contractual intention of parties when resolving conflicts between competing dispute resolution clauses. By affirming the primacy of the Market Reform Contract through the Confusion Clause, the court reinforced the principle that hierarchy clauses serve as decisive mechanisms in contractual interpretation. Furthermore, the court's refusal to grant leave to appeal solidifies the precedent that courts will not rewrite contracts but will instead give effect to unambiguous terms agreed upon by parties. This case sets as an important judicial precedent for interpreting confusion clauses and strengthens the predictability of contractual enforcement in commercial agreements. As a takeaway, when drafting multiple contracts for the same transaction, it is worth considering the harmonious impact of differing clauses in the various agreements. Parties, must discuss their commercial objectives and have a clearer communication of their intended outcomes before agreeing to multiple dispute resolution clauses that cover the same transaction.

[1] Times Trading Corp v National Bank of Fujairah (Dubai Branch) [2020] EWHC 1078 (Comm)

[2] Girish Deepak, 'ANALYSIS: UK HIGH COURT ISSUES ANTI-SUIT INJUNCTION AGAINST NEW YORK-BASED COURT ANDARBITRATION PROCEEDINGS IN DISPUTE INVOLVING INDIAN STATE-OWNED INSURANCE COMPANY' (IA Reporter, 27 February 2025) <https://www.iareporter.com/articles/analysis-uk-high-court-issues-anti-suit-injun

ction-against-new-york-based-court-and-arbitration-proceedings-in-dispute-involving-indian-state-owned-insurance-company/> accessed 11 March 2025

[3] Surrey County Council v Suez Recycling and Recovery Surrey Limited [2021] EWHC 2015 (TCC)

[4] Scott v Avery (1856) 5 HL Cas 811

[5] Keren Tweeddale, Andrew Tweeddale, 'Scott v Avery Clauses: O'er Judges' Fingers, Who Straight Dream on Fees' [2011] 77(4) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, pp. 423 – 427

[6]Sulamerica CIA Nacional de Seguros SA & Ors v Enesa Engenharia SA & Ors [2012] EWHC 42 (Comm), Surrey County Council v Suez Recycling and Recovery Surrey Limited. [2021] EWHC 2015 (TCC)

Australian Federal Court Backs India on Sovereign Immunity: Another Twist in the Devas v. India Saga

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The Federal Court of Australia ("**Federal Court**"), in its recent judgement in the *Republic of India v. CCDM Holdings, LLC*[1] ("**Judgement**"), held that the Republic of India ("**India**") was entitled to jurisdictional immunity from Australian Courts in proceedings seeking recognition and enforcement of foreign arbitral awards dealing with disputes arising from 'non-commercial' legal relationships. The Court's judgment was rendered with respect to an appeal filed by India against an **interlocutory judgement** of a primary judge of the same court, rejecting India's sovereign immunity claim.

Background of the Dispute

Three Mauritian entities of the Devas group ("**Original Applicants**") had commenced arbitration proceedings in 2012 under the 1998 India-Mauritius BIT, impugning India's actions with respect to an agreement for leasing of space spectrum capacity entered between Devas Multimedia Private Limited (an Indian company in which the Original Applicants held shares) and Antrix Corporation Limited (an Indian state-owned entity). In 2011, India's Cabinet Committee on Security decided to annul the said agreement, citing an increased demand for allocation of spectrum towards meeting various military and public utility needs ("**Annulment**"). The arbitration proceedings that followed culminated in a jurisdiction and merits award in 2016[2] and a quantum award in 2020 ("**Quantum Award**")[3]. The Original Applicants have since sought to enforce the Quantum Award against India in different jurisdictions, discussed **here**.[4]

Proceedings Before the Primary Judge

The Original Applicants commenced proceedings before a primary judge of the Federal Court ("**Primary Judge**") in April 2021 for recognition and enforcement of the Quantum Award. In May 2023, the Original Applicants were substituted with three US entities of the Devas Group which were respectively assignees of each of the Original Applicants (collectively the "**Applicants**").

India asserted that it was immune to the jurisdiction of the Federal Court under section 9 of the Foreign State Immunity Act, 1985 ("**Act**"), which states: "*Except as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding.*" An exception to this general rule of immunity is provided in section 10(1), which states: "*A foreign State is not immune in a proceeding in which it has submitted to the jurisdiction in accordance with this section.*" Section 10(2) further provides that a State may submit to jurisdiction "*by agreement or otherwise*". The Applicants argued that by ratifying the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("**Convention**"), India has submitted to the jurisdiction of Australian courts by agreement within the meaning of Section 10(1) and (2) of the Act in relation to proceedings for recognition and enforcement of foreign arbitral awards.

In deciding whether India has waived its immunity, the Primary judge invoked the judgement of the High Court of Australia ("**High Court**) in *Kingdom of Spain v Infrastructure Services* ("***Spain v. Infrastructure Services***")[5], which dealt with a similar claim of jurisdictional immunity by Spain with respect to enforcement of an ICSID Convention award. Observing that that the "*standard of conduct for submission by agreement under Section 10(2) requires either express words or an implication arising clearly and unmistakably by necessity from the express words used*", the Primary Judge held that ratification of the Convention by India amounts to a "*clear and unmistakable necessary implication*" that it has agreed to submit to the jurisdiction of Australian courts as per Section 10(2).[6] The Primary Judge opined that permitting India to take a sovereign immunity defence would be inconsistent with Article III of the Convention, which requires all Contracting States to "*recognize arbitral awards as binding and enforce them*".[7]

The Primary Judge noted that India had made a commercial reservation to the Convention, per which it would "*apply the Convention only to differences arising out of legal relationships [. . .] which are considered as commercial under the Law of India.*" ("**Commercial Reservation**"). However, he did not consider this to be relevant to the instant case as enforcement of the Quantum Award was sought in Australia, which had made no such reservation.[8]

The Primary Judge thus rejected India's claim to jurisdictional immunity, while granting leave to appeal to the Full Court of the Federal Court ("**Full Court**").

The Full Court Judgement

India appealed the judgement of the Primary Judge to the Full Court, contending that he erred in rejecting India's plea on jurisdictional immunity. The Full Court framed two issues for consideration: (1) by ratifying the Convention, did India waive foreign state immunity in respect of enforcement of an award that is generally within the scope of the Convention but excluded by its Commercial Reservation ("**Issue 1**"), and (2) is the Quantum Award outside the scope of India's Commercial Reservation? ("**Issue 2**").[9]

On Issue 1, India asserted that it had not submitted to the jurisdiction of Australian courts with respect to proceedings for recognition and enforcement of

awards that fell outside the scope of its Commercial Reservation. The Applicants submitted that the Commercial Reservation is a unilateral reservation that does not oblige other contracting States to the Convention ("**Contracting States**") to limit recognition and enforcement of such awards in the same manner.

In considering these submissions, the Full Court undertook a detailed analysis of the rules set out in the Vienna Convention on the Law of Treaties ("**VCLT**") that deal with the legal effects of reservations made by a State while expressing its consent to bound by a treaty. The Court observed that as the Commercial Reservation is a reservation "*expressly authorised*" by Article I (3) of the Convention, it falls within the terms of Article 20(1) of the VCLT and does not require any subsequent acceptance by other Contracting States. To determine the legal effects of the Commercial Reservation, the Court turned to Article 21 of the VCLT, read with the *Guide to Practice on Reservations to Treaties* published by the International Law Commission. Based on the foregoing analysis, the Court concluded that "*the effect of a reservation is that between the reserving and accepting state (which in the case of the New York Convention is all other states), the reservation modifies the provision of the treaty to the extent of the reservation for each party reciprocally (. . .).*"[10] Applying the said understanding, the Full Court opined that obligations under the Convention undertaken towards or by a Contracting State that has made a commercial reservation are limited by such reservation. Both India and Australia thus had no obligation towards each other to enforce awards that do no not pertain to "commercial" relationships under Indian law.[11]

The Full Court then considered whether India's ratification of the Convention, qualified by its Commercial Reservation, entails a "*clear and unmistakable necessary implication*" that it has waived its immunity from Australian courts (as per the standard articulated in *Spain v. Infrastructure Services*). The Court found that no such implication arises as India's ratification of the Convention subject to the Commercial Reservation is "*a sufficiently (un)equivocal expression of India's intention not to waive foreign State immunity in proceedings enforcing the Convention in respect of non-commercial disputes (. . .).*" [12]

Despite the parties not contesting Issue 2, the Full Court determined the issue for the sake of completeness of legal analysis. Interestingly, given the absence of evidence on what constitutes "commercial" relationships under Indian law, the Full Court approached the question of whether the Quantum Award fell within the

scope of the Commercial Reservation from the perspective of Australian law (following case law from the High Court[13]). In doing so, the Court considered Section 11 of the Act, which provides for a "commercial transaction" exception to foreign State immunity. While acknowledging that considerations under Section 11 and those concerning India's Commercial Reservation are different, the Full Court opined that there is a significant overlap between the two and proceeded to analyse the Quantum Award under Section 11. The Applicants had invoked the exception under Section 11 as a separate ground before the Primary Judge, which he rejected on the ground that the Annulment "*was made by the body vested with the highest form of executive policy-making in India, and was stated to be for reasons of public policy*" and was not thus not a "commercial transaction". Reiterating the Primary Judge's reasoning, the Full Court concluded that the Quantum Award is not an award dealing with differences arising from a "commercial" relationship.[14]

It is interesting to consider if the court's approach would have been any different if it were answering this question from an Indian law perspective. The position under Indian law on whether awards rendered in investor-State arbitrations ("**Investment Awards**") can be considered as pertaining to "commercial" relationships is ambiguous. Of particular relevance are two Delhi High Court judgements, in which the court opined that Investment Awards cannot be considered "commercial" for the purposes of enforcement under Part II of the Arbitration and Conciliation Act (which implements the Convention in India).[15] Critics of these judgements, on the other hand, have emphasised that there is enough basis in Indian law and policy to suggest that Investment Awards are commercial in nature. Perhaps the strongest argument in this regard is that India's 2016 Model BIT expressly states that Investment Awards "*shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention.*"[16]

Reflections on the Judgement

The Applicants have filed a special leave to appeal the Full Court judgement ("**Judgement**") to the High Court. The reflections shared below are thus subject to a potential reconsideration of the Judgement by the High Court.

Firstly, prevailing uncertainty regarding enforceability of Investment Awards in India (as discussed above) is what has prompted investors such as Devas to seek enforcement of such awards in other jurisdictions. In this regard, the Judgement could render Australia an unfavourable enforcement jurisdiction for Investment awards to which India is a party. This is because India could invoke jurisdictional immunity in all future enforcement proceedings until the ambiguity concerning the commercial nature of Investment Awards under Indian law is resolved (either through legislative action or a Supreme Court ruling).

Secondly, this Judgement may have significant implications for enforcement in Australia of all Investment Awards not rendered under the ICSID Convention and thus subject to enforcement under the Convention ("**Convention Awards**"). *Spain v. Infrastructure Services* has settled the position that jurisdictional immunity is not available to a foreign State under Australian law with respect to enforcement of ICSID Convention awards. This Judgement, however, casts a shadow of doubt on the enforceability of Convention Awards in Australia by leaving the door open for other Contracting States that have made a commercial reservation to the Convention to invoke jurisdictional immunity in enforcement proceedings for such awards.

Given its likely implications, it is no surprise that the Judgement has come in for criticism by some commentators[17] who have highlighted the following issues: (1) the Full Court's approach to commerciality of Investment Awards is inconsistent with that of courts in comparable jurisdictions such as the US and Canada, which have enforced Convention Awards despite these States having made a commercial reservation to the Convention, and (2) the characterisation of the Quantum Award as 'non-commercial' is contrary to the wide interpretation of term "commercial" envisaged in the UNCITRAL Model Law[18], which has the force of law in Australia.[19]

All stakeholders will now have to wait and watch how the High Court, if and when it takes up the appeal, deals with the Full Court's findings.

[1] *Republic of India v CCDM Holdings, LLC* [2025] FCAFC 2 ("**Judgement**").

[2] *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. the Republic of India*, PCA Case No. 2013-09,

UNCITRAL ("**CC/Devas Arbitration**"), Award on Jurisdiction and Merits (25 July 2016).

[3] CC/Devas Arbitration, Award on Quantum (13 October 2020).

[4] Jeanne Huang, *The Indian Satellite Saga and Retaliation: Recognizing the Supreme Court of India's Judgment Abroad?*, Coonflictoflaws.net, https://conflictoflaws.net/2024/the-indian-satellite-saga-and-retaliation-recognizing-the-supreme-court-of-indias-judgment-abroad/#_edn1.

[5] *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11.

[6] *CCDM Holdings, LLC v Republic of India (No 3)* [2023] FCA 1266, ¶ 51 ("**Primary Judgement**").

[7] Primary Judgement, ¶43.

[8] Primary Judgement, ¶58.

[9] Judgement, ¶54.

[10] Judgement, ¶67.

[11] Judgement, ¶68.

[12] Judgement, ¶72.

[13] *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54.

[14] Judgement,¶82.

[15] *Union of India v. Vodafone Group,* 2018 SCC OnLine Del 8842, ¶¶ 90-91; *Union of India v. Khaitan Holdings (Mauritius) Limited & Ors*, SCC OnLine Del 6755, ¶¶ 29-30.

[16]Model Text for the Indian Bilateral Investment Treaty (2016), Article 27.5, https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf.

[17] Micheal Lee, *Check for NYC Reservations: Federal Court of Australia Affirms India's Sovereign Immunity Against Recognition and Enforcement of Non-ICSID Arbitral Award*, Steptoe Clients Alerts (26 March 2025),

https://www.steptoe.com/en/news-publications/check-for-nyc-reservations-federal-court-of-australia-affirms-indias-sovereign-immunity-against-recognition-and-enforcement-of-non-icsid-arbitral-award.html?tab=overview.

[18] UNCITRAL Model Law on International Commercial Arbitration (1985), Article I(1), footnote 2 states as follows: "*The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. [. . .].*"

[19] International Arbitration Act 1974, Section 16(1).