

Adoption in the proposal for a European Parenthood Regulation

This post was written by Aukje Mens, Jurist at INEA, the Dutch expertise centre on intercountry adoption. She wrote in her own name.

Recently, an article I wrote about adoption in the proposal for a European Parenthood Regulation was published in the Dutch *Journal of Family and Youth Law* (*Tijdschrift voor Familie- en Jeugdrecht*, 2026/3). This article examines the uncertainties and gaps in the regulation of adoption and argues for an autonomous European Adoption Regulation to adequately govern international adoptions. Below is a summary in English of the article.

Introduction

On 7 December 2022, the European Commission submitted a Proposal for a European Parenthood Regulation to govern jurisdiction, applicable law, and the recognition of decisions and authentic instruments relating to parenthood (COM(2022) 695 final). Although adoption is mentioned in the proposal, it remains to a significant extent unclear which types of adoption are covered by the proposal and how these adoptions are regulated. The proposal refers to adoption in three provisions—articles 1(2), 3(2)(e) and 66(3)—while explicitly excluding international (Dutch version) or intercountry (English version) adoption from its scope (article 3(2)(e)). This raises questions concerning the proposal's formal scope, since the terms 'international adoption' and 'intercountry adoption' are not synonymous.

Furthermore, it is initially unclear which substantive forms of adoption are governed by the proposal, since this is not explicitly stated in the provisions. The explanatory memorandum and recitals provide some guidance, but in certain cases it is necessary to consult additional documents to fully understand the material scope, and even then, some aspects remain ambiguous.

The unclear formal and material scope in relation to adoptions is indicative of the inadequate regulation of international adoption law in the proposal. The proposal also remains unclear, incomplete, or even entirely silent on several other essential

points. The article addresses the scope of the proposal, and then three questions: whether the proposed international jurisdiction rules and conflict-of-laws rules also apply to adoptions (point 2 below), what the legal consequences are of recognising a foreign adoption (point 3 below), and whether the proposal also governs the (recognition of) conversion of a “simple” or “weak” adoption, *i.e.*, an adoption which does not cut off the legal family ties between the child and the family of origin, into a “strong” or “full” adoption, *i.e.* an adoption which does cut off these ties (point 4 below).

1 Scope of the proposal with respect to adoption

1.1 Formal scope

a) Domestic adoptions (non-intercountry adoptions)

The proposal distinguishes between *domestic adoptions* (non-intercountry adoptions), and *intercountry adoptions*. Domestic adoptions, where the child and the adoptive parent(s) reside in the same Member State, fall implicitly within the scope, whereas intercountry adoptions—where the child is transferred across borders due to or with the purpose of the adoption—are excluded (article 3(2)(e)). This creates uncertainties, for example, in situations where one adoptive parent resides in another Member State. It is therefore recommended that the regulation explicitly apply to *non-intercountry adoptions*, after which this term should be clearly defined. In my view, this definition should include situations where one adoptive parent resides in another Member State, as long as there is no cross-border transfer of the child. Furthermore, for the sake of clarity, the regulation should also define precisely what is meant by an excluded ‘intercountry adoption’.[1] However, the proposal is criticised for excluding intercountry adoptions that fall outside the 1993 Hague Adoption Convention, which could lead to “limping adoptions” within the EU, *i.e.* adoptions that are valid in one Member State, but not in another.

b) Adoptions from a Member State

Furthermore, the proposal is limited to the recognition of non-intercountry adoptions *from a Member State* and excludes adoptions from third countries (article 3(3)). However, I argue that it is conceivable that a European regulation

could include recognition rules for decisions from third countries, as the EU appears to have the competence to do so.[2] A uniform recognition policy would increase legal certainty within the Union by providing a clear framework for when (adoption) decisions from outside the EU should or should not be recognised. This would eliminate the need for Member States to rely on national recognition rules and would generally prevent “limping” third-country adoptions.[3] However, the political feasibility of such rules remains questionable.

The article questions whether the proposal requires Member States to recognise a decision from another Member State that recognise a third-country adoption. The proposal does not explicitly address this issue. However, expert group reports suggest that such recognitions would not automatically circulate between Member States.[4] Since the proposal does not clearly regulate this matter, it is recommended that the Regulation specify whether it applies to these cases. Several authors, including Barth,[5] and Kohler and Pintens,[6] oppose the application of European recognition rules to recognition decisions made by Member States. In principle I oppose them too, as this could make the public policy of one Member State decisive for the others.[7] For this reason, a common European recognition policy for third-country adoptions is preferable,[8] although its political feasibility is questionable.

1.2 Material scope

a) Legal parent-child relationship

Only adoptions that establish a legal parent-child relationship are implicitly included in the proposal, so it does not seem to cover forms of care such as *kafala* or foster care.

Recital 26 refers to adoptions that establish a *permanent* parent-child relationship. This raises the question of whether the proposal only covers irrevocable adoptions, meaning adoptions that cannot be undone in the Member State where they were established. However, I believe this is not the case; rather, the intention seems to be that a genuine legal filiation bond must have been created. It is preferable that this be explicitly clarified in the proposal, as is done in the Hague Adoption Convention of 1993 (Article 2(2)), to avoid any misunderstandings.

Recital 26 further indicates that the proposal covers both “full” adoptions—which sever legal ties with the biological family—and “simple” adoptions, where those ties remain. However, this is not expressly regulated. The recitals refer to whether the “legal relationship” between the child and the family of origin is ended or maintained, but since the term “legal relationship” can be interpreted more broadly than “family-law relationship,” it would be preferable to use the latter term.

The proposal is silent on whether family-law relationships are created between the child and the legal relatives of the adoptive parent(s), even though this is essential given the distinct legal consequences of adoption compared with regular parentage. The absence of any mention regarding these relevant forms of establishment might suggest that, for the purposes of the proposed regulation, it is immaterial whether they are used. However, this is not certain, and an explicit provision on this point would be preferable.

b) Judgments and authentic instruments with binding effect

According to Article 1, the proposal covers the recognition of both judicial decisions (Article 24 *et seq.*) and authentic instruments with binding legal effects (Article 36 *et seq.*). However, there is considerable uncertainty regarding the distinction between these two types of instruments, particularly as authentic instruments with binding effects presumably do not exist within the European Union.[9] With respect to adoptions, the proposal does not apply to purely contractual adoptions or those established automatically by law. However, such forms do not occur in the European Union.

c) Minor and adult adoptions

Article 4(2) indicates that the proposal covers both minor and adult adoptions, as the term ‘child’ is defined as ‘a person of any age whose parentage must be established, recognised or proved’. While the provision primarily focuses on regular parent-child relationships, if it is accepted that the proposal also applies to adoptions, then the age of the child at the time of adoption appears to be irrelevant.[10]

d) No requirements regarding the adoptive parent(s)

Finally, the proposal does not impose specific requirements regarding the status

of adoptive parents. Article 4 refers to “a particular parent or parents” and “any parent”. This indicates that the proposal covers single-parent adoptions—including stepparent or partner-of-parent adoptions—as well as adoptions by two persons jointly, without setting requirements relating to the marital status or sexual orientation of the adoptive parent(s). The European Commission has thus opted for the broadest possible material scope of application in this regard.[11]

2. International jurisdiction and applicable law

Although the proposal clearly provides for the recognition of domestic adoptions from Member States, it remains unclear whether the rules on international jurisdiction and conflict-of-laws are applicable to adoption.

The explanatory memorandum and Recital 25 indicate that the proposal does not apply to parentage in purely domestic situations without cross-border elements, such as a domestic adoption that takes place entirely within a single Member State. In this respect, the European Commission appears to assume that non-intercountry adoptions are, by definition, domestic cases without any cross-border aspect. However, this assumption is demonstrably incorrect. In fact, a non-intercountry adoption may well have an international character, for example, where the adopted child and/or the adoptive parent(s), though habitually resident in the same Member State, hold the nationality of another Member State or a third country. In such cases, there is in fact an *international* non-intercountry adoption, which raises questions about whether the court addressed has international jurisdiction to decide on the adoption request and which law should be applied. These questions of jurisdiction and applicable law seem to be left out, however.

Nevertheless, scholars suggest that the proposed international jurisdiction and conflict-of-law rules do apply to adoptions.[12] However, some of them argue that these rules are unsuitable for adoptions, as they are not primarily designed to prioritise the best interests of the child or to grant jurisdiction to the court best placed to assess those interests.[13]

The prevailing opinion in the literature thus seems to be that the proposed international jurisdiction and conflict-of-law rules do indeed apply to adoptions

but are nevertheless unsuitable. In my view, however, this position cannot be reconciled with the wording of the regulation, its explanatory memorandum and the recitals. My conclusion is therefore that these rules are not applicable to adoptions. They are clearly drafted solely for regular parentage relationships. Although the European Commission sought to regulate the recognition of non-intercountry adoptions from a Member State under the regulation, it has otherwise left international adoption law untouched. Since there appears to be differing views on this matter, clarity is needed on this point.[14] There should be specific private international law rules on adoption.

3. Legal effects of recognising foreign adoptions

The proposal does not explicitly address the legal effects of recognising a foreign adoption, leaving unclear what exactly is recognised. Case law of the Court of Justice of the European Union suggests that a recognised decision must be granted the same authority and effect as in the Member State of origin (*Hoffman/Krieg*; *Apostolides/Orams*; *Prism Investments/v/d Meer*; *Gothaer Allgemeine Versicherung/Samskip*; *BNP Paribas SA/TR*). But what does this mean for the recognition of an adoption?

It goes without saying that recognition should at the very least include the legal parent-child relationship between the child and the adoptive parent(s), since establishing such legal relationships is the fundamental aim of the proposal. Nevertheless, it seems desirable that this be explicitly clarified, so that there can be no doubt—especially in the case of simple adoption.

But does it end there? Should the creation of new family-law ties between the child and the legal relatives of the adoptive parent(s), as well as the possible severance of the original family-law relationships, also be recognised under the proposal, or are these legal consequences left to the ordinary law of the Member States? Perhaps the previously mentioned principle of the Court of Justice can or should be interpreted broadly, so that these legal consequences must also be recognised when they have arisen in the Member State where the adoption was pronounced. However, whether this is the case remains uncertain.

The foregoing leads me to conclude that an explicit provision is necessary, clearly stating the legal consequences of recognising either a full or simple adoption for

the legal parentage of the individuals concerned. This is essential to prevent Member States from taking divergent approaches, which could result in inconsistent or limping family law relationships across borders. In my view, it should simply be stipulated that the recognition of a foreign adoption means that *all* legal consequences for the lineage of those concerned are recognised—no more, no less. Such a provision is not only essential for achieving the objectives of the proposal, namely legal certainty and predictability—but is also dogmatically necessary.[15] By its very nature, adoption concerns both the creation of new family-law relationships and the possible dissolution of existing ones, and, consequently, the recognition of a foreign adoption also pertains to these aspects.[16] In short, if new family-law ties have been established between the child and the legal relatives of the adoptive parent(s) in the Member State where the adoption took place, or if the original family-law relationships have been severed there, then not only should the legal parent-child relationship between the child and the adoptive parent(s) be recognised, but these additional legal consequences should be recognised as well. Other possible legal consequences, such as those relating to parental authority, maintenance, name and inheritance, do not fall within the scope of the concept of adoption and therefore remain governed by their own private international law rules. This aligns with Article 3(2) of the proposal, which states, among other things, that the regulation does not apply to parental responsibility (subsection b), maintenance obligations (subsection f) and succession (subsection g).

4. Conversion of simple adoptions into full adoptions

The proposal does not explicitly address the conversion of simple adoptions into full adoptions, an important issue in adoption law whereby original family-law ties are severed. Although the EU lacks competence to regulate substantive family law, it may be able to adopt at least recognition rules for conversion decisions. The absence of such rules may lead to legal uncertainty about a child's legal parentage across Member States, which may also affect the child's identity development. Greater clarity and regulation in this area are therefore necessary.

By way of conclusion: argument for an autonomous European Adoption

Regulation

In the article I argue that the current proposal insufficiently accounts for the special nature and legal consequences of adoption. International adoptions merit an autonomous and clear regulation within European private international family law. A separate European Adoption Regulation would provide space to address adoption-specific issues such as recognition, conversion, jurisdiction, and conflict-of-law rules. Common recognition rules are necessary to prevent “limping adoptions” and to enhance legal certainty for all parties involved. Although political feasibility poses challenges, a separate regulation is seen as the most effective way to regulate international adoptions within the EU.

In sum, the proposed European Parenthood Regulation insufficiently regulates adoption and fails to acknowledge the unique legal consequences associated with it. International adoptions require an autonomous European Adoption Regulation that offers room for careful and effective governance, with the aim of ensuring legal certainty and predictability for all involved, in particular the children.

[1] See also European Group for Private International Law (EGPIL), *Observations on the Proposal for a Council Regulation in matters of Parenthood*, 2023, <https://gedip-egpil.eu/>, p. 2, no 7, and C. Budzikiewicz e.a., *The Marburg Group’s Comments on the European Commission’s Parenthood Proposal*, Cambridge: Intersentia 2024, <https://epub.ub.uni-muenchen.de/>, pp. 10- 11.

[2] See also A. Bonomi, ‘European private international law and third states’, *IPRax* 2017, pp. 190- 191; D. Martiny, ‘The recognition and enforcement of court decisions between the EU and third states’, in: A. Trunk & N. Hatzimihail (red.), *EU civil procedure law and third countries. Which way forward?*, Baden- Baden: Nomos Verlagsgesellschaft 2021, pp. 129- 130 en 138.

[3] Compare Bonomi 2017, pp. 190- 191, and Martiny 2021, p. 132 (note 3). See also S.M. Carbone, ‘What about recognition of third states’ foreign judgments?’, in: F. Pocar, I. Viarengo & F.C. Villata (red.), *Recasting Brussels I*, Milaan: Cedam 2012, p. 301 en W. Hau, ‘Unified European rules on the recognition and enforceability of third- country judgments’, *Law & Criminology Journal* 2025, par. 3.

[4] Minutes of 7 February 2022, of the 5th Meeting of the Expert Group on the recognition of parenthood between Member States, 2 December 2021, and Minutes of 20 February 2022, of the 6th Meeting of the Expert Group on the recognition of parenthood between Member States, 9 February 2022.

[5] M. Barth, 'Parent in every country? - Der Kommissionsvorschlag einer EU Abstammungs- VO mit Europäischem Elternschaftszertifikat', *Studentische Zeitschrift für Rechtswissenschaft Heidelberg Wissenschaft online* 2023, p. 26.

[6] C. Kohler & W. Pintens, 'Entwicklungen im europäischen Personen-, Familien- und Erbrecht 2022- 2023', *FamRZ* 2023, p. 13, note 15.

[7] Compare C.G. van der Plas, A.F. Veldhuis & B.H.B. Verheul, 'Automatische erkenning en tenuitvoerlegging van vonnissen in het Europa van nu: de noodzaak van een nieuwe blik op wederzijds vertrouwen na *J/H Limited*', *NIPR* 2024, p. 263.

[8] See also C. González Beilfuss & I. Pretelli, 'The proposal for a European Regulation on Filiation Matters - Overview and Analysis', *Yearbook of Private International Law* 2022/2023, p. 292.

[9] Marburg Group 2024, p. 77 (note 1); C. Mayer, 'Keine verfahrensrechtliche Anerkennung von beurkundeten oder registrierten familienrechtlichen Rechtsgeschäften innerhalb der EU', *RabelsZ* 2025, p. 753 *et seq.*

[10] See also P. Twardoch, 'Regulating international filiation law at the EU- level. Comments on applicable law under the European Commission's Proposal', *European Review of Private Law* 2024, p. 276.

[11] See also D. Danieli, "'Third- state connections" in the proposal for an EU Regulation on parenthood: More than a regime of circulation of status between member states?', *Cuadernos de Derecho Transnacional* 2023, p. 1392- 1393.

[12] González Beilfuss & Pretelli 2022/2023, p. 291 en 296 (note 8); A. Fillers, 'Proposal for the Regulation in matters of Parenthood: A critical overview of jurisdiction and conflict- of- laws rules', in: *Revisiting the limits of freedom while living under threat. I*, Collection of research papers in conjunction with the 9th International Scientific Conference of the Faculty of Law of the University of Latvia, 2024, p. 227; Marburg Group 2024, p. 50-51 (note 1); Twardoch 2024, p. 275- 276 (note 10); I. Queirolo, 'The proposed EU Regulation on Parenthood: A

critical overview of the rules on jurisdiction', *The European Legal Forum* 2024, p. 3.

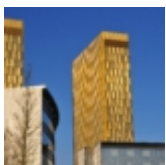
[13] Beilfuss & Pretelli 2022/2023, p. 291 (note 8); Observations EGPIIL 2023, p. 1, No 4 (note 1); Fillers 2024, p. 228 *et seq.* (see note 12); Marburg Group 2024, p. 50-51 (note 1).

[14] See also Twardoch 2024, p. 289 (see note 10).

[15] A. Mens, *Erkenning en omzetting van buitenlandse adopties in Nederland. Over de betekenis van beide fenomenen in het Nederlandse internationaal privaatrecht*, diss. 2024, par. II.3.2.2.1.

[16] Ibid, par. II.1.3.2, II.3.2.2.1, III.1.3.2, III.4.3.2, and III.6.3.2.

Copyright, Targeting and Geo-Blocking: The CJEU Stirs the Pot



By Graham Smith, Of Counsel, Bird & Bird LLP, London, UK

The CJEU's recent copyright decision in *Anne Frank* endorses state of the art geo-blocking as an effective way of shielding a website from the different copyright laws of another EU Member State. Although the result on the facts is welcome, the potential implications of the Court's underlying reasoning are less so. At a principled level, the judgment creates post-Brexit divergence with the UK courts' targeting approach to cross-border online copyright infringement.

The EU Position

The *Anne Frank* case concerns a scholarly digital edition of the Anne Frank

diaries made available free of charge on a website in Belgium, a country in which copyright in the full diaries has expired. The website owner geo-blocked countries, including the Netherlands, in which parts of the diaries are still in copyright.

Geo-block notwithstanding, the owner of copyright in the diaries (the Anne Frank Fund) sued those involved in the Belgian website project (the Anne Frank Foundation, the Dutch Royal Academy and a Belgian association) in the Dutch courts for infringement of Dutch copyright (specifically, the communication to the public right). The Dutch Supreme Court (Hoge Raad) referred three questions about cross-border copyright infringement to the CJEU.

The Hoge Raad's first question raised the issue of whether a targeting test, familiar from CJEU caselaw on other territorial intellectual property rights, should be applied to the copyright communication to the public right:

“Is Article 3(1) of [Directive 2001/29] to be interpreted as meaning that the publication of a work on the internet is only to be regarded as a communication to the public in a particular country if the publication is addressed to the public in that country? If so, what factors must be considered in assessing that?”

(The unfamiliar term ‘addressed’ in the first question looks like a quirk of translation. The Dutch language originals use ‘gericht’, which appears to translate readily into the familiar ‘directed’ or ‘targeted’.)

The CJEU, however, did not give a direct answer to that question. By dint of the time-honoured device of reframing and combining the referring court's questions, it rolled the territoriality question into the labyrinth of its previous substantive jurisprudence on communication to the public. None of that case law was concerned with a cross-border question.

The operative part of its judgment concluded that where a work is in the public domain in some EU Member States but is still in copyright in another, and is published free of charge on a website that implements state of the art geo-blocking designed to prevent access by users from that other Member State, there is no communication to the public under the copyright law of that other Member State. That is the case even if internet users can circumvent the geo-blocking by means of a VPN or similar service.

That is a highly fact-specific formulation. What of the corollary? Does it follow that a website that does not implement geo-blocking necessarily engages the communication to the public right in another Member State? That would imply that mere accessibility of a website on the internet is sufficient to engage the communication to public right of another country; or, which comes to the same thing, that targeting is to be inferred from not geo-blocking.

The CJEU addresses the fact-specific corollary at para 42:

“Indeed, where a work is protected by copyright in only one Member State but is in the public domain in other Member States, any person who knows or ought reasonably to have known that to be the case ... and who publishes the work on a website must ensure that that work is made accessible only to internet users who are liable to access that website from Member States in which the work is in the public domain, so as not to infringe the exclusive and inexhaustible [communication to the public] right of the copyright holder ... in the Member State in which the work is still protected.”

It goes on:

“It follows that such a person is under an obligation to adopt effective technological measures to restrict access to the website solely to those internet users, failing which, given the freely accessible nature of websites, that person would be giving access to the work concerned to all internet users and would thus be infringing that right.”

That starts from either mere accessibility or targeting inferred from lack of geo-blocking, but with the added condition of actual or constructive knowledge of continuing copyright protection in the other Member State. The Court borrowed the knowledge requirement from its CTP jurisprudence on hyperlinks to infringing material on the internet (*G S Media*).

It is unclear whether an equivalent knowledge condition (or indeed some other condition or factor plucked from the CJEU’s voluminous CTP caselaw) would apply in other cross-border factual situations. Nor is it clear whether the CJEU’s approach would apply to websites located in countries outside the EU.

What can be said is that the Court did not apply the conventional targeting test.

Targeting requires evidence of positive conduct directed towards the country in question before its local law can be engaged. To the extent that mere accessibility, or targeting inferred from lack of geo-blocking, underlies the CJEU's reasoning, that either rejects or inverts the targeting test.

The UK position

The *Anne Frank* judgment opens up a post-Brexit divergence of principle with the UK. Five years ago the Court of Appeal in *TuneIn* [2021] EWCA Civ 441 applied the CJEU's well known intellectual property targeting caselaw to the copyright CTP right:

"...the internet is global and users in the UK can, in the absence of geo-restriction, access websites hosted, and content posted on or streamed from such websites, from anywhere in the world. Intellectual property rights, however, are territorial. At least in the case of copyright and similar rights and trade marks, the CJEU has held that accessibility of a website from a Member State is not sufficient to give rise to an infringement of rights conferred by the law of that State, and that the relevant act must be targeted at that State: see [L'Oréal v eBay [2011] (trade marks), Donner [EU:C:2012:370] (copyright) and Football Dataco v Sportradar [EU:C:2012:642] (database right)]. This case law has been applied in this jurisdiction to communication to the public: EMI Records Ltd v British Sky Broadcasting Ltd [2013] EWHC 379 (Ch).

The principle is clear: mere accessibility is not sufficient. Nor, it follows, can a website be inferred to be targeting a country by reason of not geo-restricting. That would be mere accessibility in a different guise. (The *Donner* case, to be clear, concerned the copyright distribution right, which is separate from the communication to the public right.)

The status of targeting as a prior threshold condition is well illustrated in Birss J's (as he then was) first instance judgment in *TuneIn*:

"I will address [targeting] first because if TuneIn does not target the UK then UK copyright is not engaged at all." [15]

That fundamental territoriality point (subsequently endorsed by the Court of Appeal) is obscured in the CJEU's approach of combining the Hoge Raad's first

question with consideration of substantive CTP law. None of the CJEU caselaw on targeting and the territoriality of IP rights relied on by the Court of Appeal is mentioned in the *Anne Frank* judgment.

In the context of trade marks, the UK Supreme Court in *Lifestyle Equities v Amazon* [2024] UKSC 8 summarised the rationale for the targeting test:

“Led by the CJEU, EU jurisprudence has sought to chart a safe course between the Scylla of watching trade mark protection become entirely illusory in the context of internet marketing and sale, and the Charybdis of creating an exorbitant and unprincipled extension into the international sphere of the territorial jurisdiction to protect trade marks. It has done so by reference to two separate concepts. The first is by treating the advertisement and offering for sale of branded goods in a way which is targeted at a protected territory as a use of the mark in the targeted territory. ...”

The CJEU in *Anne Frank* justified its conclusion in para 50:

“a [state of the art geo-blocking] measure serves to ensure a fair balance between, on the one hand, the interest of the rightholder in his or her work not being freely accessible in the Member States in which he or she still has an exclusive and inexhaustible right to authorise or prohibit any communication of the work to the public under Article 3(1) and (3) of Directive 2001/29 and, on the other hand, the interest of any third party in making the work freely accessible online free of charge in the Member States in which the work is in the public domain as well as the public’s interest in enjoying such access in those Member States, in accordance with both the freedom of expression and the freedom of information.”

However, that recitation of balancing factors appears to assume the conclusion that the legitimate interest of the rightholder is in restraining mere accessibility cross-border. In any event it does not explain why an approach that the CJEU has applied to other territorial intellectual property rights is not appropriate for the copyright CTP right.

Whatever the precise reasoning that may underlie it, the CJEU judgment in *Anne Frank* is for the moment the leading authority on the cross-border aspects of the

communication to the public right within the EU. As for the UK courts, as a general matter they are not bound to follow new CJEU judgments although they may have regard to them. However, in any event the formal precedential status of the Court of Appeal judgment in *TuneIn* applying targeting is not altered by the CJEU judgment.

Graham Smith is writing in his personal capacity and opinions expressed are his personal opinions.

A Follow-Up: The German Judges Association's Response to the HCCH Draft Text of a Future Convention on Parallel Proceedings and Related Actions

This post follows up on our earlier observations on the public consultation responses to the HCCH Draft Text of a future Convention on Parallel Proceedings and Related Actions. At the time our overview was prepared, the response of the German Judges Association was not yet available to us among the consultation materials on the HCCH website and could therefore not be included. It has since been made available, and we would like to take this opportunity to briefly add its key points to the discussion, notwithstanding that there are still coming up new responses such as the ones by Jonathan Mance (UK) – „Former Deputy President of UK Supreme Court, Co-Chair of the LC Advisory Committee“, the International Association of Consumer Law (IACL) or the Philippine Women Judges Association. We will leave it to others to comment on these.

I. Support in principle

The German Judges Association supports, in principle, the idea of an international instrument on parallel proceedings. This corresponds to the broad overall support for the project identified in our earlier overview. A uniform framework could promote legal certainty and predictability in cross-border litigation beyond the Brussels Ia Regulation.[1]

At the same time, the response is cautious as to whether the current Draft Text can actually meet these expectations, not least in view of constitutional and European standards of access to justice and the right to be heard before the competent court.[2] Its concern is therefore not directed against international coordination as such, but against a coordination mechanism that may rely too heavily on discretion.

II. The core concern: discretion instead of predictability

The central point of the response concerns the relationship between predictability and discretion. From the perspective of German judicial practice, the Draft Text risks replacing the predictability of jurisdiction with judicial discretion. The Association stresses that German and European civil procedure have traditionally relied on clearly defined jurisdictional rules. These rules allow the parties to know in advance which court is competent. According to the Association, this predictability is closely linked to legal certainty, litigation costs, time efficiency and the parties' right to be heard before the court determined by law.[3]

Against this background, the Association views the proposed mechanism of Articles 9 and 10 of the Draft Text with particular scepticism. The "more appropriate court" test is seen as introducing a *forum non conveniens*-type assessment into a legal environment in which such a discretionary displacement of jurisdiction is not familiar.[4] From this perspective, the concern is also constitutional in nature: jurisdiction should be sufficiently determined by law and should not depend too heavily on a later judicial balancing exercise.[5]

The Association therefore points out that the assessment of the more appropriate forum could establish a time- and cost-consuming preliminary procedure and significantly slow down proceedings, since several examination steps would precede the court's review of the merits.[6] This concern is reinforced by the practical uncertainty surrounding the connecting factors, which are new to German judicial practice and whose application would first have to be developed

by the courts.[7] The Association also warns that the connecting factors in Article 10 may lead to an inequality of arms between natural and legal persons, especially in light of changing business relations, complex corporate structures and increasingly globalised transnational operations.[8] Against this background, the Association sees a risk that the mere possibility of another forum being considered more convenient could lead to more satellite litigation and forum shopping than today.[9]

III. What should be done instead?

The German Judges Association therefore pleads for a more rule-based solution. The Draft Text should not replace jurisdictional rules with a broad assessment of the “better” forum, but should preserve the predictability of clear jurisdictional criteria.[10]

In particular, the Association welcomes the idea that the court first seised should generally be the court to proceed where Articles 6 to 8 of the Draft Text do not resolve the conflict.[11] More specifically, it suggests examining whether the court first seised could be treated as a clearly appropriate forum where its jurisdiction is based on established jurisdictional rules.[12] This would come closer to the Brussels Ia model, which combines priority with foreseeability.

At the same time, if connecting factors are retained, they should be framed narrowly and precisely. The suspension of proceedings under Article 9 should also not be mandatory.[13] Connecting factors should guide the allocation of proceedings, not open the door to a general forum non conveniens-style balancing exercise.

In short: legal certainty should remain the rule; discretionary correction should be limited and exceptional.

IV. Concluding remark

The response of the German Judges Association usefully complements our earlier overview. It confirms support in principle for an international instrument on parallel proceedings, but adds a note of caution from the perspective of German judicial practice. Its central concern is that coordination should not come at the expense of legal certainty and foreseeability. This is particularly relevant for Articles 9 and 10 of the Draft Text, which should remain sufficiently rule-based

and compatible with constitutional and European procedural standards.

[1] See Submission by the *German Judges Association*, Response to Question 1.1.

[2] *Ibid.*

[3] *Ibid.*

[4] *Ibid.*, Response to Question 8.1.

[5] *Ibid.*

[6] *Ibid.*, Response to Question 7.2 and 8.1.

[7] *Ibid.*, Response to Question 1.1 and 8.2.

[8] *Ibid.*, Response to Question 7.3.

[9] *Ibid.*, Response to Question 13.3.

[10] *Ibid.*, Response to Question 1.1 and 8.3.

[11] *Ibid.*, Responses to Questions 7.1.

[12] *Ibid.*, Responses to Questions 8.1.

[13] *Ibid.*, Responses to Questions 8.1 and 8.3.

Private International Law Dimensions of Singapore's New Legislation to Combat Online

Harms

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Much has been in the news about governmental endeavours to protect children from the ills of social media, which has partially eclipsed the equally important issue of social media being used to cause online harms to both the young and not so young alike. The Online Safety (Relief and Accountability) Act 2025 (OSRAA) came into effect in Singapore on 29 June 2026, with the objective to strengthen the protection of victims against various types of emerging online harm, including intimate image abuse, image-based child abuse, doxxing, online harassment, and online stalking. The statute established the Online Safety Commission that can make orders to hold accountable those who post harmful content (Communicators), control the hosting of the harmful content (Administrators), or host the harmful content (Platforms).

In addition to regulatory orders, the OSRAA provides civil law relief to victims by imposing duties on: (a) Communicators (not to communicate, publish or engage in conduct relating to specified online harm); (b) Administrators (not to create, set up, or administer online locations that facilitate the conduct of online harm with intention or knowledge that such harm would ensue, and to take reasonable measures to address such harms upon notification); and Platforms (to take reasonable measures to address specified online harms upon notification). Victims can seek civil remedies, including damages and injunctions, from the Singapore court.

Online harms inevitably happen in the borderless world of electronic communications. Of significance to private international law are the following provisions in the OSRAA:

Tort treated as taking place in Singapore

101. For the purposes of any proceedings for a tort under Part 10, 11 or 12, that tort is to be treated as having taken place in Singapore if any act or omission or any part of an act or omission that is an element of the tort

- (a) *was initiated or occurred in or from Singapore;*
- (b) *is perceived by one or more persons in Singapore; or*
- (c) *caused damage, loss or harm suffered in Singapore.*

Limits to exclusion of liability

102.—(1) This Act has effect despite any provision or term to the contrary in any contract, agreement or notice and any provision or term in a contract, agreement or notice is void if and to the extent that —

- (a) *it is inconsistent with Part 11 or 12;*
- (b) *it purports to exclude or limit the jurisdiction of the courts of Singapore for a claim made under Part 11 or 12; or*
- (c) *it purports to prevent a person from making a claim under Part 11 or 12.*

(2) Subsection (1) does not apply to a provision or term of a contract, agreement or notice that is fair and reasonable having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract, agreement or notice was made.

(3) In determining for the purposes of subsection (2) whether a provision or term of a contract, agreement or notice is fair and reasonable, the court is to take into consideration the prescribed matters.

(4) To avoid doubt, section 26(1) of the Electronic Transactions Act 2010 (which relates to the limitation of liability of network service providers) does not apply in relation to any liability under the provisions of Part 12 or 13 in relation to the liability of an online service provider.

Section 101

Section 101 is clearly intended to affect private international law, since the

concept of the place of the tort has no legal significance within Singapore domestic law. The substantive tortious duties are enumerated in Parts 10 (Communicators), 11 (Administrators) and 12 (Platforms). Section 101 situates the relevant statutory tort within Singapore upon the occurrence of any one of the disjunctive connections in subsections (a), (b), and (c). The connections in (a) and (c) are standard ways to measure the connections of a tort to a particular jurisdiction, but there is no weighing of these factors against countervailing factors pointing elsewhere. Further, the connection in section 101(b) can be pretty tenuous. There is clear intention to locate the tort in Singapore so long as there is some connection with Singapore. Section 101 has significant implications for both jurisdiction and choice of law analysis.

The Singapore court has *in personam* jurisdiction over defendants who are served in Singapore, or who are served outside Singapore with the permission of the court. Permission for service out of jurisdiction may be granted when: (a) the claim has sufficient nexus with Singapore; (b) Singapore is the forum conveniens; and (c) there is a serious issue to be tried on the merits. Locating the tort in Singapore immediately secures a sufficient nexus with Singapore by reinforcing the tort gateway (which strictly only requires a tort to occur partially in Singapore), although sufficient nexus can already be established simply by invoking a power of the court under a Singapore statute (which will be the case here). Moreover, it triggers a presumption that Singapore is forum conveniens. This is not a legal presumption but a factual one arising from the likelihood of the location of the events, evidence and witnesses as well as the applicable law (more on this below) being of significance in the evaluation of the forum conveniens question. Thus, this presumption may not be a high hurdle to the defendant who wishes to object to the Singapore court exercising jurisdiction if the connections to Singapore are otherwise fragile. The legislative intention of the scope of protection of the administrative measures (ie, orders made by the Online Safety Commission) is clear: only Singapore citizens, permanent residents, and persons with a prescribed connection with Singapore (eg, legal migrant workers in Singapore) can raise a complaint to the Commission. It is indicative, however, that even though there is no express limitation in the statutory tort provisions, the primary legislative target of protection by the tortious duties are people connected with Singapore. Forum conveniens becomes the critical tool for the Singapore court to sieve out cases with minimal connections with Singapore, in particular cases where a foreigner is opportunistically seeking to take advantage

of the Singapore statute to make OSRAA tort claims against another foreign entity.

Under Singapore private international law, the choice of law rule for torts is double actionability subject to a flexible exception. The claim must succeed as a tort under domestic law (in this case, OSRAA), and civil liability in respect of the same claim must also be made out under the law of the place of the tort. Where section 101 applies to deem Singapore to be the place of the tort, the second limb of double liability will be tested under Singapore law. The result is that Singapore law will apply exclusively to the tort so long as one of the connections under section 101 is made out under the general rule of double actionability. Given especially the span of section 101(b), it will be a rare case brought before the Singapore court that will not trigger section 101. In such a rare case, the common law test of substance of the tort will determine where the tort occurred instead. This requires an evaluation of the connections of the events constituting the tort to determine where in substance the tort occurred. If even the section 101 connections are not satisfied, then it is highly unlikely that the tort will be found to have occurred in substance in Singapore. In the eventuality that the tort is found to have occurred outside Singapore (assuming it is not already filtered out through *forum non conveniens*), double actionability will require civil liability to be satisfied under the foreign law of the place of the tort in addition to the OSRAA under Singapore law (as the law of the forum), and it will be unlikely that Singapore law can displace foreign law under the flexible exception given the paucity of connections with Singapore. The result is that the claimant can only recover the common denominator between the law of the forum and the law of the foreign place of the wrong.

Insofar as the tort is located in Singapore, there remains the possibility of the flexible exception being invoked to apply the law of a foreign country with the closest connection to the parties and the tort, displacing Singapore law. The flexible exception will be invoked only in exceptional circumstances where the connections with Singapore are so fortuitous that the application of the general rule of double actionability will lead to serious injustice to the parties. Thus, in most cases involving victims with connections in Singapore, the Singapore court is likely to have and exercise jurisdiction, and to apply OSRAA to the facts.

This is consistent with the intention of Parliament to protect residents of Singapore. The operation of section 101 appears to have the practical effect of

imbuing the OSRAA torts with the character of overriding forum mandatory rules that will apply to all cases with specified connections to Singapore, albeit under the cloak of connecting factor design. This technique, rather than a straightforward forum mandatory rule approach, leaves a safety valve for the courts to apply foreign law in exceptional cases. Thus, the important work of drawing the limits to the extraterritorial reach of the OSRAA is left to the judiciary applying private international law, at both the jurisdictional (forum conveniens) and the choice of law (exception to double actionability) levels.

This deliberate general overriding effect over otherwise connected foreign legal systems arises from a powerful legislative concern to protect victims of online harms, as well as a legitimate concern that foreign laws may not have adequate rules to protect victims of online harm given the novelty and scale of such harms committed using new technologies. However, one problem that could emerge in the future is where a connected foreign law provides stronger protection to the victim than the OSRAA. In such a case, Section 101 will result in the lower level of protection under Singapore law being afforded to the victim, even if the foreign law would be applicable under the common law if the section had not existed (provided the law of the place of the wrong applies to the exclusion of the law of the forum under the flexible exception, or if the Singapore court decides to excise the law of the forum limb of double actionability in an exercise of judicial law reform). The simple solution is to sue outside Singapore, but this type of choice of law arbitrage requires wherewithal beyond the means of most victims. Second, in endorsing – albeit impliedly – the place of the wrong as the connecting factor for torts, the legislation may impede further judicial development of this aspect of the common law choice of law rule. It will not be an obstacle to the removal of the law of the forum limb (as the Canadian and Australian courts have done), but it may prevent further consideration of alternatives to the place of the tort as a connecting factor (even though it remains as the sole connecting factor in Canadian and Australian torts choice of law). A connecting factor relying on the concept of locating a tort in a physical place appears increasingly out of touch with the realities of human interactions in the modern world.

Another possible interpretation of section 101 is that it sets out the connecting factors for a unilateral choice of law rule for the application of the OSRAA torts, displacing the common law multilateral approach to the extent that the statute applies. This will also lead to the application of Singapore domestic law once any

connection in section 101 is found. However, there is no flexible exception in this statutory choice of law rule. The language of the provision does not direct the application of Singapore law; it modifies the meaning of the connecting factor of the place of the tort by replacing the common law test of the substance of the tort with a statutory test, a connecting factor which has been clearly established as part of Singapore private international law for torts. The statutory language is more consistent with legislative intention to ride on the common law multilateral choice of law approach, and there is nothing in the Parliamentary materials to suggest the contrary.

Section 102

Section 102 is directed at the issue of Administrators and Platforms excluding or limiting potential liability under the OSRAA by the use of contractual terms or non-contractual notices. Beyond standard exclusion of substantive liability clauses and notices, the section also catches exclusions practically effected by means of an arbitration clause, an exclusive choice of foreign court agreement or even a mediation agreement that takes the dispute out of the reach of the Singapore courts (section 102(1)(b)). Whether this is indeed the effect will depend on what remedies are available in the alternative forum, and whether mediation agreements which normally only impose temporary restraint on recourse to courts will have that effect may depend on the terms of the agreement and the underlying factual matrix. Exclusion cannot, however, be done using a choice of foreign law clause as party autonomy is not recognised under the Singapore torts choice of law rule in its present form. Section 102 also prevents Administrators and Platforms from invoking the protection, found in the Electronic Transactions Act, against liability as a network service provider. Nevertheless, section 102 allows for exclusion or limitation of liability where it is fair and reasonable in the circumstances at the time of the contract or notice, taking into account the relative bargaining positions of the parties and the extent to which the term or notice makes it more convenient or cost-effective to resolve the dispute between the parties (as prescribed pursuant to section 102(3)).

The question arises whether Section 102 applies when the contract containing the relevant term excluding or limiting liability is governed by foreign law. Nothing in Section 102 expressly renders the provision to be an international or overriding mandatory rule that will apply irrespective of the relevance of foreign law by choice of law analysis. The concept of evasion has very limited application in

Singapore private international law. A contract is governed by the law expressly or impliedly chosen by the parties provided the choice is legal, bona fide and not against public policy. In the absence of party choice, a contract is governed by the system of law objectively most closely connected with the contract. Circumvention has a residual role in contract choice of law where a choice of law by the parties may not be given effect to if the sole purpose of the choice is to evade the rules of the otherwise applicable foreign law (ie, a non-bona fide choice). This limitation has never been applied in Singapore law, as it is improbable that parties' choice has only a single and evasive purpose. In any event, the likely consequence is that the contract will be governed by the objective proper law rather than the law of the forum.

The choice of law approach to contractual defences against tortious liability lacks clarity under Singapore private international law. The general approach to the contractual exclusion or limitation of tort liability was advocated in O. Kahn-Freund, "Delictual Liability and the Conflict of Laws" (1968) 11 *Hague Recueil* 1 at 142-145 and endorsed in P.M. North, "Contract as a Tort Defence in the Conflict of Laws" (1977) 76 *ICLQ* 914 at 922 *et seq*: whether tort liability allows for exclusion or limitation at all is a question of *admissibility* of the contract defence which is a tort issue, while the *validity* of the contract term in question raises a contract issue. On the premise of Singapore law applying to the substantive tort liability, whether liability under the OSRAA can be limited or excluded raises a question of tort governed by Singapore law, so Section 102 is engaged as the applicable law to the issue. This is clearly the correct approach when it is a notice rather than a contract term that is the agent of exclusion or limitation. However, in the case of contractual exclusion or limitation, the applicable law of the contract is still relevant to govern the validity of the clause. This in turn raises the further characterisation question: do the conditions of validity under section 102 (reasonableness) raise questions of admissibility or validity? That they set limits to party autonomy might incline towards a contractual characterisation, but the limits are dictated by policies in tort law. Arguably they go to the admissibility of the defence to the extent that they are designed to safeguard the principles of tort liability (Kahn-Freund, *supra*, at 144). On this view, foreign law has limited significance under section 102. The only role for foreign law would be to determine contractual validity *per se* (ie, whether subject to duress, misrepresentation, etc), and there is no need to resort to forum mandatory rule reasoning to apply section 102.

On the other hand, the Singapore court may take a leaf from the majority of the English Court of Appeal in *Sayers v International Drilling Co NV* [1971] 1 SLR 1176 to characterise the contractual defence to tort liability as a contractual issue, and apply the proper law of the contract. This may be a compelling argument in the case of a dispute resolution clause because the exclusion will clearly arise from a contractual promise not to sue in the Singapore court. It is uncontroversial under Singapore private international law that the validity of a choice of court or arbitration clause is governed by the law applicable to the clause as a contract issue (except under the Hague Convention on Choice of Court Agreements 2005 where the private international law of the chosen court applies). On this approach, Administrators and Platforms might rely on dispute resolution clauses governed by foreign law to take themselves out of the reach of OSRAA by taking the case out of the Singapore jurisdiction. Outside of international conventions, two responses are possible. First, the effect of a jurisdiction agreement on the jurisdiction of the Singapore court is a matter of procedure governed by the law of the forum and thus section 102 applies. Second, section 102 may be interpreted as a mandatory and overriding provision, or as a source of fundamental public policy, in order to give effect to the strong protective policy of the OSRAA. Thus, the Singapore court is likely to test any dispute resolution clause that has the practical effect of limiting or excluding tort liability under the OSRAA for enforceability under Section 102, in addition to assessing its contractual validity under the law applicable to the clause.

Finally, international conventions may also be engaged in the application of Section 102. The Singapore Convention on Mediation (2018) is not relevant at this point because it only applies to the resulting settlement agreements and not to the validity or enforcement of mediation agreements. The Hague Convention on Choice of Court Agreements (2005) is unlikely to be activated by a choice of court agreement in this context because consumer contracts are out of scope. Singapore did not make a reservation to exclude non-commercial cases in acceding to the New York Convention (1958), so it can apply. In the rare case that the Hague Convention should apply, and in a case where the New York Convention applies, recourse will likely be made to Singapore public policy to justify applying section 102 to determine whether the clause is null and void. Non-arbitrability arguments may be also invoked in the case of the New York Convention, but it is unlikely that Parliament intended to exclude arbitration of OSRAA tort disputes altogether given the possibility of upholding the clause

within the bounds of Section 102. In any event, under Singapore private international law, arbitrability at the jurisdiction stage is governed by the law applicable to the arbitration agreement and the law of the seat (though non-arbitrability may also arise as a defence at the subsequent enforcement stage). For a foreign-seated arbitration agreement governed by foreign law, the only practical argument for the victim is that the agreement is null and void for contravention of the public policy of the forum. Statute can be a source of common law public policy. Whether Singapore public policy is actually contravened on the facts will however depend on the parameters in section 102.

The 1961 HCCH Apostille Convention: Why All African Countries Should Ratify It? — Insights from Judicial Practice in Africa



I. The Apostille Convention

The HCCH has recently announced that “[o]n 9 July 2026, the *Convention of 5*

October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (1961 Apostille Convention) entered into force for the People's Democratic Republic of Algeria following the deposit of its instrument of accession on 5 November 2025." With Algeria's accession, the 1961 Apostille Convention now has 130 Contracting Parties, making it by far the most successful of all HCCH Conventions in terms of global participation.

The reason for this success appear to be straightforward: the Convention replaces the cumbersome and often costly chain of diplomatic and consular legalisations with a single formality: the issuance of an Apostille by the competent authority of the State from which the public document originates. Therefore, by considerably simplifying the circulation of public documents across borders, the Convention reduces both the time and expense involved in having documents recognised abroad, and significantly contributes to facilitating international mobility and cross-border legal transactions for individuals, businesses, and public official documents, including judgments, notarial deeds and authentic instruments alike.

2. The situation in Africa

However, a closer look at the list of Contracting Parties reveals that only 17 African States have so far ratified the Convention. These are, Algeria, Botswana, Burundi, Cabo Verde, Eswatini, Lesotho, Liberia, Malawi, **Mauritius, Morocco, Namibia, Rwanda**, Sao Tome and Principe, Senegal, Seychelles, **South Africa and Tunisia** (countries in bold characters are HCCH Member States). In other words, only about 31% of the continent's 54 sovereign States currently benefit from the simplified authentication procedure established by the Apostille Convention. This is the lowest rate in the world, as the following table clearly shows (AI generated table):

Region	Contracting Parties	Total States	Coverage rate
Europe	46	46	100.0%

Region	Contracting Parties	Total States	Coverage rate
North America (incl. Central America & Caribbean)	20	23	87.0%
South America	12	12	100.0%
Oceania	9	14	64.3%
Asia	26	49	53.1%
Africa	17	54	31.5%
Total	130	198	65.7%

Yet, a closer look at judicial practice across Africa demonstrates beyond doubt the practical need for wider adherence to the Convention. Courts throughout the continent are frequently confronted with issues relating to the authentication and legalisation of foreign public documents, often resulting in delays, additional costs, and, in some cases, the refusal to admit or give effect to such documents because the applicable formal requirements have not been satisfied. Indeed, in a number of African states, particularly civil law jurisdictions, proof of the authenticity of a foreign judgment is one of the requirements for its enforcement. This is particularly the case in countries including Benin, Burkina Faso, Burundi, the Democratic Republic of Congo (DRC), Rwanda, and Mozambique, where authenticity is an independent requirement for the enforcement of foreign judgments. In some other African countries, notably Cameroon, Gabon, Guinea, Mali, and Senegal, while authenticity is not listed among the requirements for the enforcement of foreign judgments, reference to it is included in the list of documents to be submitted in support of the application for enforcement. More importantly, available case law shows that, where the Apostille Convention is not applicable, authentication is likely to become an issue in many jurisdictions.

III. Examples of judicial practice - The Rwandan High Commercial Court's decision on the enforcement of a Congolese judgment

The difficulty stemming from the absence of a simplified method of authentication can be illustrated by a case decided by the High Commercial Court of Rwanda decided on 18 November 2021, which shows how formal authentication

requirements may become decisive in enforcement proceedings^(*).

() Many thanks to Boris Awa (Kigali Independent University ULK, Kigali, Rwanda) for kindly sharing the text of the decision*

1) Underlying facts

This case concerns the enforcement in Rwanda of a Congolese judgment. The background is rather complex, involving proceedings in both the DRC and Rwanda. It began with a successful action brought by X against his sister, Y, in the DRC, in which the court ordered Y to pay X a certain amount of money. X subsequently sought to enforce that judgment in Rwanda. Y opposed the enforcement on the ground that she had never been notified of the proceedings and had only become aware of the judgment when enforcement proceedings were initiated against her assets in Rwanda. The Rwandan courts, however, rejected her challenge and allowed the enforcement of the Congolese judgment (Judgment 1). Y then challenged the original judgment before the Congolese courts and succeeded in having it set aside in its entirety. She subsequently sought to enforce this second Congolese judgment in Rwanda so that the original judgment could no longer be enforced there.

2) Parties' allegations

X eventually challenged the enforcement of the second Congolese judgment on the ground, inter alia, that it did not satisfy the requirement of authenticity. Y argued that there was no issue as to the judgment's authenticity, since it bore the Congolese enforcement formula, certification by the Congolese Ministry of Foreign Affairs, certification by the Rwandan Embassy in the DRC, notarisation, certification by the Congolese Embassy in Rwanda, and authentication by the Rwandan Ministry of Foreign Affairs. According to Y, these certifications clearly established the authenticity of the judgment.

For his part, X argued that the copy of the judgment was not authentic because not all of its pages bore the required signatures and official stamps, as required

by the standard practice in Rwanda. In particular, he maintained that affixing signatures and stamps only to the last page of a judgment of more than ten pages did not satisfy the applicable legal requirements.

3) The Court's reasoning

The High Commercial Court refused to enforce the foreign judgment, holding that there was no proof that the chain of diplomatic certifications actually related to the judgment submitted for enforcement. In reaching this conclusion, the Court compared the judgment with another Congolese judgment in the case file (Judgment 1) and noted that every page of that judgment bore the complete chain of legalisation, including certification by the court, the Congolese Ministry of Foreign Affairs, the Rwandan Embassy, a Congolese notary, the Congolese Embassy in Rwanda, and the Rwandan Ministry of Foreign Affairs. The Court regarded this as the ordinary practice for Congolese judicial documents. Since the appellate judgment had not been authenticated in the same manner, it concluded that the applicant had failed to establish its authenticity.

IV. Insights

The Rwandan case is a good illustration of the practical difficulties associated with the traditional chain of legalization and authentication, particularly where questions arise as to whether the chain of authentications was physically attached to, and clearly identifiable with, the judgment itself. The decision illustrates the burden that the traditional system of diplomatic legalisation places on litigants. Had both Rwanda and the DRC been parties to the HCCH Apostille Convention, the lengthy chain of diplomatic and consular certifications that became the central issue in this case would likely have been replaced by a single Apostille certificate. This could have avoided the type of formal dispute that led to the refusal of exequatur.

The importance of authentication for the enforcement of foreign judgments is also illustrated by the available judicial practice in Mozambique, although the case law reflects a less rigorous approach. Indeed, according to the available decisions of the Mozambican Supreme Court, the authenticity of a foreign judgment is

generally verified through the process of legalisation required by Article 540 of the Code of Civil Procedure. Where the required legalisation is not included in the initial application, the Supreme Court generally allows the applicant to submit the necessary documents at a later stage (see eg the Mozambican Supreme Court, Ruling of 5 October 2011, in which the Mozambican Supreme Court held that an English judgment could not proceed to review (recognition and enforcement) because it had not been recognised or authenticated by the Mozambican consular authorities in the United Kingdom, as required by Article 540 of the Code of Civil Procedure. The Court accordingly invited the applicant to cure the defect, but the proceedings were later dismissed after the applicant failed to comply).

Such practices vividly illustrate why African States should give greater consideration to joining the 1961 Apostille Convention. The increasing movement of persons, investment, trade, and family relationships within Africa and beyond requires foreign public documents to be produced before domestic authorities and courts with growing frequency. Yet, the traditional system of diplomatic and consular legalisation remains cumbersome, costly, and prone to disputes over formal requirements, often delaying or even preventing the recognition of documents whose authenticity is not genuinely in doubt. By replacing this complex chain of authentications with a single Apostille certificate, the Convention enhances legal certainty, reduces costs and delays, and facilitates access to justice. Wider adherence to the Convention would therefore represent a significant step towards improving cross-border judicial cooperation and promoting legal and commercial integration, both within Africa and with the rest of the world.

This situation also highlights the important role that the HCCH should continue to play in promoting the Convention across Africa. Much has already been done, but further efforts are needed to encourage wider adherence to the Convention.

The enforcement of an advance on costs for substitute performance at the expense of a Russian debtor in German-French legal relations

This note has been co-authored with Dr. Samuel Vuattoux-Bock, LL.M. (Kiel). It is based on a legal expert opinion for White and Case LLP, Frankfurt. A more comprehensive version - in German - is forthcoming in the Zeitschrift für Internationales Wirtschaftsrecht (IWRZ).

I. Introduction

International enforcement regarding the performance of actions that may be taken by others pursuant to Section 887 of the German Code of Civil Procedure (ZPO) raises complex questions within the Brussels Ibis Regulation. These issues concern the correct classification of such enforcement measures, the legal status of a third-party debtor in the context of the enforcement of monetary claims, and potential grounds for refusing enforcement that may arise with respect to international jurisdiction and any defects in service of process. Currently, French courts are seized of the question as to whether a German judgment—in which the German creditor of a Russian debtor was awarded an advance on costs pursuant to Section 887(2) ZPO—can be fully enforced in France by means of a garnishment order directed against a French third-party debtor.

II. The facts of the case

The Creditor (C) is Germany's largest gas importer and supplies energy providers as well as major industrial customers nationwide with gas. Pursuant to long-term contracts, it sources a significant portion of its imports from the Debtor (D), a company belonging to a corporate group controlled by the Russian state. The agreed place of delivery in each instance was located in Bavaria. However, on June 14, 2022, D largely suspended its gas deliveries to C. On July 22, 2022, the Regional Court of Weiden ordered D to continue supplying C with gas for a further three months. The Regional Court rejected a motion filed by C seeking

authorization to have the existing contracts fulfilled by a third party of its choice. Following an immediate appeal lodged by C, the Higher Regional Court (OLG) of Nuremberg issued a ruling on September 12, 2022, authorizing C to have the performance owed by D—within the scope of fulfilling the contracts concluded between the parties—rendered by a third party of C’s choice at D’s expense; furthermore, pursuant to Section 887(2) ZPO, the Court ordered D to make an advance payment to cover the costs incurred in rendering said performance. Subsequently, on November 17, 2022, the Higher Regional Court of Nuremberg issued a certificate regarding this decision pursuant to Art. 53 of the Brussels Ibis Regulation, in which the order for the advance payment was classified as a decision on the substance of the matter (Field 4.6.1). On May 9, 2023, C initiated the garnishment of claims held by D against a French third-party debtor (F) in order to recover a partial amount of the advance payment owed by D. Notice of this attachment was served upon D on May 17, 2023, by means of a letter addressed to the competent authority of the Russian Federation, pursuant to the Hague Service Convention; a copy thereof was sent via registered mail with return receipt requested. On December 21, 2023, F filed a lawsuit against C before the Tribunal Judiciaire de Nanterre seeking the lifting of the measures taken against it. This lawsuit was dismissed on December 20, 2024. D subsequently lodged an appeal against this decision with the Cour d’appel de Versailles, which was granted on January 8, 2026. Cassation proceedings are currently pending before the Cour de Cassation.

III. Enforcement by Substitute Performance

The compulsory enforcement of claims requiring an act, toleration, or forbearance is governed under German law by Sections 887 et seq. ZPO. These provisions apply to all acts that do not relate to the settlement of a monetary claim, the surrender of a specific object, or the submission of a declaration of intent. Specifically, a distinction is drawn between actions that may be taken by others—to which Section 887 ZPO applies—and actions where this is not the case, the enforcement of which is governed by Section 888 ZPO. Actions may be taken by others if they can be performed not only by the debtor personally but also by a third party. This clearly applies to the gas deliveries at issue in the present case. In such instances, the creditor is not compelled to force the debtor personally to render the performance owed. Rather, pursuant to Section 887(1) ZPO, the creditor may apply to the court of first instance for authorization to have the act performed by a third party at the debtor’s expense. Concurrently, the creditor

may request that the debtor be ordered to make an advance payment to cover the costs that will be incurred in performing the act (Section 887(2) ZPO). In the case at hand, the OLG Nuremberg granted such an advance payment of costs to the creditor.

IV. A “judgment” within the meaning of Art. 2(a) of the Brussels *Ibis* Regulation

“Judgments” within the meaning of Art. 2(a) of the Brussels *Ibis* Regulation—as distinguished from mere enforcement measures—are characterized by the fact that they do not yet result in the final satisfaction of the creditor but rather still require compulsory enforcement. Already in 2009, the Federal Court of Justice (BGH) held that the granting of an advance on costs pursuant to Section 887(2) ZPO constituted a decision within the meaning of Art. 32 of the Brussels I Regulation, which could be recognized and enforced abroad. This view is further supported by the fact that the BGH compared the enforcement of fungible acts under Section 887(2) ZPO with the cross-border enforcement of coercive fines which today is governed by Art. 55 of the Brussels *Ibis* Regulation. Notwithstanding the position of Section 887(2) ZPO within German procedural law, it should be noted that the rule is structured identically to comparable obligations to make advance payments for substitute performance under substantive law (e.g., under the law of contracts for work and services). Such claims may, of course, be recognized and enforced pursuant to the Brussels *Ibis* Regulation. Moreover, in the well-known *Realchemie* case, the CJEU ruled that a decision imposing a coercive fine to enforce an obligation to act or to refrain from acting (Section 890 ZPO) may be enforced pursuant to the Brussels I Regulation. However, the distinction between Section 887(2) ZPO and Section 890 ZPO can, in individual cases, prove quite difficult. Particularly in the case of continuing obligations—such as the ongoing supply of parts or raw materials—the boundary between a substitutable act (Section 887 ZPO) and an obligation to refrain from acting (Section 890 ZPO) is fluid: depending on the wording of the operative part of the judgment, the same factual situation can be framed either as a positive obligation to perform or as an obligation to refrain from interrupting delivery, and enforced accordingly. This practical interchangeability of enforcement methods illustrates how inappropriate it would be to treat the resulting enforcement orders differently at the European level.

In addition, an argumentum a fortiori applies: since, according to the case law of the CJEU (*Realchemie*), an order imposing a coercive fine under Section 890 ZPO

-which constitutes merely a sanction without a compensatory function – qualifies as a “judgment” within the meaning of the Brussels *Ibis* Regulation, then this must apply all the more to an order for an advance on costs under Section 887(2) ZPO, because the latter decision is based on a judicial assessment of the anticipated costs of substitute performance and thus qualifies as a judgment on the merits unlike a mere coercive fine. It would therefore be inconsistent to characterize a decision imposing a coercive fine as an enforceable “judgment” within the meaning of Art. 2(a)(1) of the Brussels *Ibis* Regulation, while denying this classification for a decision ordering an advance payment pursuant to Section 887(2) ZPO.

Nor does Art. 2(a)(2) of the Brussels *Ibis* Regulation preclude the classification of this ruling as a “judgment”; this provision contains specific stipulations regarding the classification of provisional measures as judgments within the meaning of Chapter III of the Brussels *Ibis* Regulation. Pursuant to this provision, where a decision has been rendered without the defendant having been summoned, the decision embodying the measure must have been served on the defendant prior to enforcement. In this regard, it is important to emphasize that an order to pay an advance on costs does not constitute a mere ancillary ruling to the preceding provisional injunction, but rather a procedurally independent order to pay, possessing its own distinct substantive content. In particular, following the issuance of the decision regarding the advance payment, a distinct enforcement proceeding is conducted pursuant to Section 794(1) No. 3 ZPO in conjunction with Sections 803 et seq. ZPO; this proceeding adheres to the provisions governing the enforcement of monetary claims and is independent of the enforcement of the preliminary injunction.

Furthermore, in the present case, the French courts—with regard to the classification of the Nuremberg decision as a “judgment” within the meaning of Art. 2(a) of the Brussels *Ibis* Regulation—must observe the binding effect of the certificate issued pursuant to Art. 53 of the Brussels *Ibis* Regulation, in which the decision on the advance payment was characterized as a judgment on the substance (Field 4.6.1). Art. 53 of the Brussels *Ibis* Regulation provides that the court of origin shall issue a certificate to enable the enforcement of the judgment in the requested Member State. This certificate confirms that the judgment is enforceable and must be submitted to the courts of the requested Member State (see, in particular, Art. 37(2), Art. 42(1)(b), and Art. 43(1) of the Brussels *Ibis* Regulation). In this respect, the Cour d’appel de Versailles rightly held that the classification of the decision at issue as a judgment on the merits within the

meaning of Art. 2(a)(1) and Art. 39 of the Brussels *Ibis* Regulation may not be called into question by the French court. In order to clarify the binding nature of the Art. 53 certificate, the Federal Court of Justice recently referred this question to the CJEU. In light of the pertinent conclusions of the Advocates General in preceding cases, a positive answer is expected. As AG Bobek explained in the *Salvoni* case, “[t]he purpose of the Art. 53 Certificate is to authoritatively [!] state that the judgment is enforceable. [...] Whereas, in the system established by [the Brussels I Regulation], production of the certificate in question was not required, it became obligatory with the entry into force of [Brussels *Ibis*]. That is because the new regulation, doing away with the need for an exequatur, provides for a simplified procedure based on the principle that a decision issued in a Member State should be treated as if it had been issued in the Member State addressed.” And AG Pikamäe was even more explicit in the case of *J v H Limited*: “[I]t is common ground that the court of origin drew up and issued the certificate on the basis of its order of 20 March 2019, which therefore falls within the scope of Regulation No 1215/2012. Under these circumstances, there is indeed, a priori, an enforceable judgment given in a Member State within the meaning of Art. 2(a) and Art. 39 of Regulation No 1215/2012 that comes within the system of direct enforcement laid down in that regulation, a factual reality that is binding upon the court addressed.”

V. The Legal Status of the Third-Party Debtor in the Enforcement of Claims

Enforcement proceedings may also—particularly in cases of attachment of claims—involve third-party debtors. In this regard, the question arises as to whether such parties can avail themselves of the mechanisms provided by the Brussels *Ibis* Regulation for the refusal of the enforcement of a judgment. In this context, a distinction must be drawn between the refusal of recognition (Art. 45 Brussels *Ibis* Regulation) and the refusal of enforcement (Art. 46 Brussels *Ibis* Regulation). With regard to the refusal of enforcement of a foreign judgment, Art. 46 of the Brussels *Ibis* Regulation stipulates: “On the application of the person against whom enforcement is sought, the enforcement of a judgment shall be refused where one of the grounds referred to in Art. 45 is found to exist.” The German version of Art. 46 is even clearer, unequivocally speaking of “an application of the debtor” (“auf Antrag des Schuldners”). The wording of this provision thus excludes third-party debtors or other interested third parties. Consequently, based on a grammatical interpretation, standing to apply is vested

exclusively in the debtor—i.e., the person against whom enforcement is sought—or, where applicable, their legal successor.

The legislative history corroborates this interpretation. Already under Art. 43 of the Brussels I Regulation, all remedies that national procedural law made available to interested third parties against the authorization of enforcement were excluded. While the enactment of the Brussels *Ibis* Regulation did indeed abolish the requirement for exequatur—and thus the separate procedure for declaring a judgment enforceable in the requested Member State (Art. 39 of the Brussels *Ibis* Regulation)—this reform was intended solely to further facilitate and expedite the cross-border enforcement of claims (see Recital 26 Brussels *Ibis*). Conversely, this measure was not intended to expand the powers of third parties to invoke grounds for refusal of enforcement pursuant to Art. 46 of the Brussels *Ibis* Regulation. This is evidenced by the fact that a proposal submitted by the Spanish delegation—seeking to extend the scope of Art. 46 of the Brussels *Ibis* Regulation to cover “any interested party”—was not adopted during the legislative process.

Finally, when interpreted systematically, this is also confirmed by an a contrario argument based on the wording of Art. 45 of the Brussels *Ibis* Regulation, given that it refers there not solely to the debtor, but to “any interested party”. Since Art. 46 of the Brussels *Ibis* Regulation was deliberately drafted more narrowly than Art. 45 of the Brussels *Ibis* Regulation with regard to standing to apply, it is impermissible to allow a third-party debtor to invoke the grounds for refusal of recognition under Art. 45 of the Brussels *Ibis* Regulation in the guise of national enforcement law. To do so would allow national enforcement law to frustrate the clear intention of the European legislature. In this respect, the principle remains that the procedure for the refusal of enforcement under the Brussels *Ibis* Regulation constitutes an autonomous and self-contained system. Consequently, Art. 46 of the Brussels *Ibis* Regulation precludes legal remedies that national law makes available to interested third parties against the authorization of enforcement.

VI. The International Jurisdiction of German Courts

A potential ground for refusing enforcement could arise under Art. 46 in conjunction with Art. 45(1)(e)(ii) of the Brussels *Ibis* Regulation. This would be the case under two conditions: First, international jurisdiction to decide an advance on costs (Section 887(2) ZPO) would have to derive from the exclusive jurisdiction established in Art. 24(5) of the Brussels *Ibis* Regulation; and second, that provision would have to preclude the recovery, in another Member State, of

an advance on costs awarded in Germany. However, the decision rendered pursuant to Section 887(2) ZPO does not, in itself, exert any coercive effect upon the debtor. According to the Federal Court of Justice, such an effect would be a prerequisite for classifying the advance order as an enforcement measure. Even in a purely domestic context, a decision regarding an advance on costs constitutes merely an enforceable judgment within the meaning of Section 794(1) No. 3 ZPO—one that is enforced, like an ordinary monetary claim, in accordance with Sections 803 et seq. ZPO. The exclusivity of international venues in the matters specified in Art. 24(5) of the Brussels *Ibis* Regulation applies invariably only to the adjudicatory proceedings, and not to the subsequent enforcement of a resulting judgment regarding a monetary claim. Furthermore, this would result in an objectively unjustified disparity in the treatment of obligations to advance costs, depending on whether such obligations are governed by substantive law (e.g., Section 637(3) of the German Civil Code – BGB) or by the respective procedural code (e.g., Section 887(2) ZPO).

VII. Effective Service

A further ground for refusing enforcement could arise from Art. 46 in conjunction with Art. 45(1)(b) of the Brussels *Ibis* Regulation. In this regard, the Versailles Court of Appeal based its reasoning on the following findings: The debtor D had not been formally summoned to appear before the Nuremberg Higher Regional Court; instead, this Court had dispensed with formal service via mutual legal assistance “for reasons of expediency” and had simply transmitted the documents by email on 9 September 2022; D had been granted a period of only three days (including a weekend) to submit a response, even though the matter involved a claim amounting to € 5.7 billion; and the certificate issued under Art. 53 of the Brussels *Ibis* Regulation noted that the decision had been rendered in default proceedings but left blank the field for the date of service of the document instituting the proceedings.

The CJEU has recognized that service by public notice, effected in accordance with national law, does not infringe Union law, provided that the requested court has satisfied itself that all inquiries required by the principles of diligence and good faith have been carried out to locate the defendant. This reasoning also applies to a situation where, despite the creditor and the court of origin knowing the debtor’s address, it is practically impossible to effect service in the debtor’s State due to a lack of cooperation from local authorities. This is the case where the court of origin has attempted to effect service on the debtor in accordance

with national and international law (specifically the Hague Service Convention) and where—as in the present case—the success of that service was thwarted by the authorities of the State that exercises legal and economic control over the debtor company. The effective protection of a creditor who has obtained a judgment enforceable within the EU against a debtor established in a third State would be disproportionately jeopardised if the mere refusal—potentially in bad faith—of a third State to effect service were to prevent any enforcement within the Union in a State other than that of the court of origin.

Moreover, since the debtor company had become aware of the content of the order in good time, it could also have lodged an objection based on a breach of the right to be heard pursuant to Section 321a ZPO. However, it failed to do so; consequently, refusal of enforcement on the grounds of a defect in service is precluded under Art. 46 in conjunction with Art. 45(1)(b), final clause, of the Brussels *Ibis* Regulation. According to established case law of the CJEU, this ground for refusal is excluded if the defendant could have challenged the decision in the State of origin but failed to do so. The concept of a legal remedy is to be interpreted autonomously and broadly; it encompasses any measure capable of subsequently affording the defendant the right to be heard, expressly including an application for restoration of the status quo ante.

VII. Summary

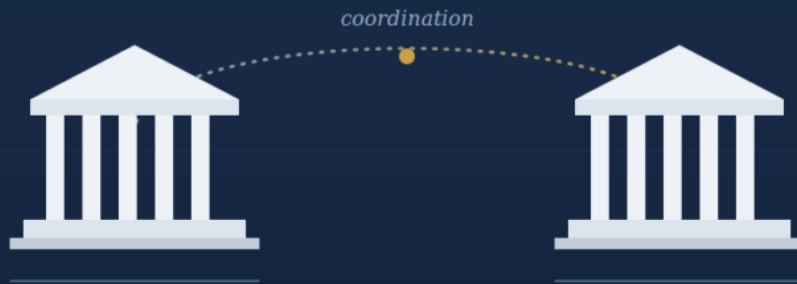
German judgments regarding the payment of an advance on costs for a substitute performance pursuant to Section 887(2) ZPO—much like decisions concerning cost advances based on substantive law—may be enforced abroad pursuant to Art. 39 Brussels *Ibis* Regulation; these constitute “judgments” within the meaning of Art. 2(a) Brussels *Ibis*. If the court of origin has certified, pursuant to Art. 53 Brussels *Ibis*, that the original decision falls within the scope of Art. 2(a) in conjunction with Art. 39 Brussels *Ibis*, the requested court is bound by that certification; this is likely to be confirmed by the CJEU in the reference proceedings initiated by the German Federal Court of Justice. The exclusive jurisdiction established under Art. 24(5) Brussels *Ibis* does not preclude the cross-border enforcement of a judgment regarding an advance on costs by means of the attachment of claims.

The fact that Art. 46 Brussels *Ibis* limits the standing to invoke grounds for refusal of enforcement solely to the debtor is based on a deliberate legislative decision to expedite the cross-border enforcement of claims. This underlying policy must not be undermined by third-party debtors invoking grounds for refusal of recognition

under Art. 45 Brussels *Ibis* while ostensibly acting under the guise of national enforcement law. This applies in particular to grounds for refusal intended solely to safeguard the principal debtor's right to be heard (Art. 45(1)(b) Brussels *Ibis*). Furthermore, when examining potential defects in service, it must be taken into account whether a third state has delayed or frustrated service requested by the creditor pursuant to the Hague Service Convention; this behaviour must not operate to the detriment of a creditor seeking to enforce, under the Brussels *Ibis* Regulation, a judgment regarding an advance on costs obtained within the EU. If the mere refusal of judicial assistance by a third state were to result in a judgment validly obtained in Germany being incapable of full enforcement in other EU Member States, the effectiveness of European enforcement law vis-à-vis debtors in third states would be at stake.

“Yes, in principle, but not quite there yet...” - Some Observations on the Public Consultation on the HCCH Draft Text of a Future Convention on Parallel Proceedings and Related Actions

HCCH JURISDICTION PROJECT



Parallel Proceedings

& Related Actions — the Public Consultation Responses

This post was written by Matthias Weller and Achim Czubaiko-Güntgen, both at the University of Bonn, Germany. Matthias is a Director of the Institute for German and International Civil Procedural Law. Achim is a PhD Student there who works on the HCCH Conventions on judicial cooperation in civil and commercial matters.

Recently, the Hague Conference on Private International Law (HCCH) published the responses to the public consultation issued in November 2025 (all available on [hcch.net](https://www.hcch.net) here). Whilst each of the 72 reports is valuable in its own right, when viewed collectively they also provide an insight in the general perception of the HCCH's *Jurisdiction Project*, as it is currently standing. We would like to take this opportunity to highlight certain aspects that are widely agreed upon, as well as others that still remain subject to further debate.

I. Broad Overall Support for the Project (in principle)

In principle, the Draft Text received broad support (75% of the responses), but little to none unreserved approval. Roughly 14 submissions are clearly supportive (19.44%),^[1] whereas the majority of the positive responses (55.56%), while sharing the view that there is a need for a multilateral instrument on the coordination of concurrent court proceedings in general, nonetheless call for further substantive amendments to the Draft Text.^[2] In contrast, only seven contributions express serious skepticism towards the project (9.72%)^[3] with

seven responses being effectively opposed to its continuation (9.72%).^[4] Finally, six responses do not take a clear overall stance on the Draft Text (5.56%).^[5]

II. Consensual Points

1. Geographical Scope (Art. 1 (2) Draft Text)

Almost complete consensus prevailed against the adoption of habitual residency as a further criterion for the geographical scope in Art. 1 (2) Draft Text. It was widely perceived as unjustified, scope-narrowing and impractical. Both, the *Austrian Bar* and *CCBE*, draw the comparison with the difficulties of interpretation regarding the Centre of Main Interest (COMI) in the European Insolvency Regulation. Notably, however, the response from the *Doshisha University* (Japan) defends the requirement as “(1) enhancing the effectiveness and ratifiability of the Convention, and (2) ensuring the predictability for the defendant.”

We share the majority position: As with the HCCH 2019 Judgments Convention, an additional element of habitual residence should be dispensed with. Moreover, it would be counterproductive, as it could jeopardise the applicability of the Draft Text in relation to International Commercial Courts (ICC) as potential proponents of the HCCH Conventions, which regularly promote themselves as neutral dispute resolution centres for non-residents (SIDRA Report 2024, pp. 55 and 57 et seq.).

2. Alignment with HCCH 2019

There is also broad agreement that frictions with the HCCH 2019 Judgments Convention should be avoided, although views differ on the appropriate extent. For example, *Mrs. Justice Julia Dias* (High Court of England & Wales) warns that “any deviation from the Judgments Convention [creates] further complexity and scope for tactical litigation.” In the same vein, the submission from the *PIL Department of the Autonomous University of Madrid* reminds us that the possible future instrument would establish „un sistema internacional completo de Derecho procesal civil transfronterizo.” At the same time, *PEOPIL* states that “[i]t is vital that international legal instruments do not exclude vulnerable parties from the legal certainty that is afforded to commercial parties through international legal instruments and the Hague Convention regime”.

For our part, we read the consistency with the HCCH 2005 and 2019 Conventions as a strength, but consider some of the exclusions premature: in particular, the exclusions of intellectual property and consumer and employment matters should be reconsidered, so that the instrument does not fall short of the very situations in which conflicting decisions often arise. In addition, the jurisdictional filters of Art. 5 HCCH 2019 Judgments Convention cannot simply be transplanted into the framework of Art. 8 (2) Draft Text, but must rather be adapted to the new regulatory context that simultaneously assumes the perspective of two or more courts involved, e.g. through explicit rules on the burden of proof and applicable law for this assessment.

3. Addressing Anti-Suit Injunctions

Furthermore, a significant number of respondents strongly encourage the HCCH to address explicitly anti-suit injunctions in the management of concurrent proceedings under the Draft Text. Yet, while the *German Council on Private International Law* advocates for a complete ban of anti-suit injunctions between Contracting States, *Mr. Justice Andrew Henshaw* (Commercial Court of England & Wales), to the contrary, wants to preserve the ability of the courts to issue such injunctions as an “important means of protecting party autonomy”. As a more nuanced middle ground, the *EAPIL* proposes a provision under which anti-suit injunctions would be excluded only if they conflicted with specific treaty obligations, but would otherwise be permissible (for example, as a procedural remedy in the event that another court itself fails to fulfil its treaty obligations).

In our own response, we suggested an express exclusivity clause. The use of anti-suit injunctions reflects a deep mistrust in the administration of justice in foreign courts, which is unwarranted between the Contracting States, if not a kind of unilateral judicial “imperialism”. Hence, all Contracting States should be required to refrain from interfering with the functioning of the coordination mechanism – most notably through anti-suit injunctions – thereby putting an end to escalation circles (“ping pongs”) of ASIs, responding AASIs, and again responding AAASIs, which is reality already, and potentially AAAASIs and more in the future. Instead, we should strive for cooperation, perhaps even an adequate degree of mutual trust. A provision implementing such a policy could *inter alia* draw on Art. 13 (2) HCCH 2019 Judgments Convention and Principle 7.1 of the Leuven/London Principles.

4. More Precise Definitions of “Parallel Proceedings”/“Related Actions” (Art. 3 (1) Draft Text)

Perhaps the most frequently point highlighted in the responses concerns the definitions of “parallel proceedings” and “related actions”. Most commentators are concerned that the drafting of these terms is not precise enough to reliably fulfill their role as gateway questions for the application of the whole legal instrument. For instance, the *ASADIP* and *Özçelik* suggest the inclusion of a “triple identity test” that would also require the existence of the “same object”. With regard to the “same parties”, *Hess* points to the difficulties in the application of that narrow concept in collective redress proceedings. Meanwhile, *Knoll* stresses that a broad wording risks infringing on the privity of contract. Furthermore, the *Australasian Association of Private International Law (AAPrIL)* asks for more clarification on the expression of the “same subject matter”, explicitly, in contrast to the test on “relatedness” test provided for in Art. 3 (1) lit. b) Draft Text. More generally, the *Law Society of Scotland* and *Dasser/Oreiller* emphasise the benefits a formal body vested with the power of authoritative interpretation would bring to the uniform interpretation of the Draft Text.

Here, we agree with most of the arguments put forward. Although the decision to adopt the broader notion of ‘subject matter’ rather than that of the same ‘cause of action’ is to be welcomed, this undoubtedly requires substantial guidance in a future Explanatory Report – potentially, and cautiously, inspired by the case law of the CJEU (*Gubisch*, C-144/86) – so that domestic courts do not simply fall back on the national concepts with which they are familiar. However, given the ambiguities surrounding the interpretation of these gateway terms, we would go one step further and recommend at least considering replacing the specific frameworks for ‘parallel proceedings’ and ‘related actions’ with an umbrella scheme for ‘concurrent proceedings’ (see below in more detail).

III. Contentious Aspects

1. Need for a Special Instrument

Some respondents strongly advise against the adoption of an international instrument at all. This sentiment appears to be particularly strong with respondents from common law jurisdictions. For example, *Fentiman* casts serious

doubts on whether the issue of concurrent proceedings truly poses a pertinent problem in practice, and argues that, in these rare cases, the provisions existing in national legal systems are more effective than a uniform legal instrument. In this regard, *Rt. Hon. Lord Hamblen of Kersey* (UK Supreme Court) perceives an “increased incentive for parties to instigate tactical litigation”. Complementary, *Dias* expresses the opinion that “all states have their own rules [...] which seem to operate perfectly well in practice”. But commentators from civil law countries, e.g. *Castro* (Mexico) and *Dasser/Oreiller* (Switzerland), also question whether the volume of cases warrants the implementation of a complex instrument. Despite his/her general support for the Draft Text, the *Judge from Korea* also raises the questions whether the project should not better take the form of a protocol to the HCCH 2019 Judgments Convention.

In our view, a binding multilateral instrument is needed precisely to hedge in unilateralistic “weapons” – anti-suit injunctions and torpedo actions – that currently drive unproductive satellite litigation in cross-border disputes. We do, however, share the concern that the practical relevance of the issue should be significant enough to justify yet another HCCH Jurisdiction Convention.

2. Limitation to Contracting States Only (Art. 1 (1) Draft Text)

Some of the respondents also voiced strong criticism regarding the scope of application. *Fentiman* points to the “incoherent and unacceptable outcome” that the Convention resolves any conflict of jurisdiction “as one between the Contracting States alone [...] without reference to the claim of the non-Contracting State to be the preferable forum”. In addition, *Henshaw* cautions that “[b]ecause the Convention would apply only where parallel proceedings exist in Contracting States, it would be liable to result in proliferation of litigation”.

In our view, both points of criticism are valid: The second aspect relates primarily to the decision against not to regulate direct grounds of jurisdiction. Nonetheless, a responsible party can still make use of the proposed framework by proactively bringing about a situation of double pendency with another, presumably more appropriate court, thus enabling at least a second-best solution in this regard. The first aspect appears reasonable in the light of the ‘forum non conveniens’ doctrine, which takes into account all potential jurisdictions universally, but is nevertheless applied in a unilateral manner by the court seised. In contrast, the

Draft Text strives for the implementation of a common cooperative mechanism that probably requires some degree of reciprocity. Furthermore, the Draft Text, so far, relates only to positive conflicts of jurisdiction. Hence, the courts are not prohibited from declining jurisdiction in favour of a Non-Contracting State under their own rules of procedure.

3. Reworking of the List of Connections (Art. 8 Draft Text)

Few provisions attract such diverse and polarized comments than the list of connections in Art. 8 Draft Text. As this is a “complex provision covering two full pages” that also “entails a double-check of jurisdiction”, *Hess* advocates its complete deletion in favour of a more streamlined version of the mechanism in Art. 9 and 10 Draft Text. Furthermore, *McIntosh* and *Pitel* reject the underlying assumption that a listed connection makes a court the more appropriate forum. Meanwhile, the *Canadian Bar Association* notes that the connection requirements constitute a clear departure from the real and substantial connection test for court to assume jurisdiction. Similarly, *Teo* (Singapore) and *Henshaw*, believe that the list “should certainly be wider”.

For our part, we would retain the list but reconceive its function. The ‘bases for proceedings’ in Art. 8 (2) Draft Text could be drafted to revive *Arthur von Mehren’s* model of a ‘mixed convention’, operating as a ‘white list’ of admissible grounds. Such an approach would remain consistent with the HCCH 2019 Judgments Convention if the catalogue of ‘bases for proceedings’ in Article 8(2) of the draft text were attributed the presumptive effect of being an ‘appropriate jurisdiction’ for the dispute, which could then be rebutted if the parties or the foreign court proved that their jurisdiction was also or even ‘clearly more appropriate’.

4. Determination Framework of the “More Appropriate Court” (Art. 9 Draft Text)

Given that the HCCH itself explicitly recognised the need to ask which of the two mechanisms for determining the more appropriate court was preferred, it is not surprising that the responses differ significantly. First, a plurality leans towards primarily giving the determination to the court first seised, whilst the other courts are reserved the option to depart from that determination under certain conditions at a later stage [Approach 1]. Proponents of this view, such as *Gomaa*

and *Tsirat*, underline legal certainty and the avoidance of forum shopping as their reasons. Second, a smaller group prefers to allow any court to primarily carry out that determination while the court first seised is not required to deal with this question at any time [Approach 2]. Among others, the *Pontifical Catholic University of Rio de Janeiro* considers this approach to be more consistent with the principle of sovereign equality of States. Scholars from the *Dalian Maritime University* (China) also warn that the criteria are “very likely to be ‘localized’ interpreted by domestic courts”. Third, a substantial part consider both approaches flawed, as they either embed an ‘irrational’ preference for the court first seised or permit continued parallel determinations. The *Law Reform Institute* (USA) also stresses that the first approach creates tactical incentives to file suit in a slow forum. For these reasons, the *EAPIL* proposes a hybrid approach that combines the strong features of both approaches.

Our own position comes down clearly in favour of the first approach. In our view, it is crucial to the success of the instrument that the courts involved be encouraged to discuss the situation of parallel proceedings pro-actively, and the passive role assigned to the court first seised under the second approach would be detrimental to precisely that objective. On this reading, the court first seised would not enjoy any priority of outcome, but merely the advantage of being the first to give its opinion on the ‘more appropriate court’ – a benchmark with which the other courts would then have to contend. That court should, however, expressly retain the option of concluding that allowing the concurrent proceedings to continue is in the best interests of the administration of justice, subject to a certain threshold so as to prevent its misuse as a simple way out.

IV. Outlook

The HCCH Council on General Affairs and Policy (CGAP) has deliberately decided to make the future of the *Jurisdiction Project* contingent on the outcome of the public consultation (as reported on *col.net* here). In our opinion, the responses received show that there is still considerable interest from various parts of the world in continuing the project, whilst also indicating that the Draft Text still requires in-depth discussion and substantial amendments before it is finalised. At present, the overall sentiment can probably best be described as: “Yes, in principle, but not quite there yet...”

[1] See Submission by *María Susana Najurieta* (University of Buenos Aires - Argentina), Question 13.2: “No todas las normas, pero una buena parte de ellas mejorarían el status quo”; Submission by the *Austrian Bar* (ÖRAK - Austria), Question 14: “in most instances, a step towards enhancing legal certainty, predictability, and access to justice”; Submission by *Mohamed Gomaa* (Ministry of Justice - Egypt), Question 13.2: “Yes, significantly.”; Submission by the *German Council on Private International Law* (PIL Council - Germany), para. 10: “limitations of the existing EU rules highlight the advantages of a multilateral instrument” (Authors: Martin Gebauer, Wolfgang Hau); Submission by *Odín Alberto Guillén Leiva* (National Autonomous University - Honduras), Question 13.1: “La intención de la Convención está bien plasmada y desarrollada en el proyecto”; Submission by *Teresa Sergi* (Attorney at Law - Italy), Question 14: “it is hoped that the Draft Text will be implemented”; Submission by *Takasugi Naoshi/Choi Jaewon/Kawato Yuriko/Shinohara Rena/Yamamoto Taiga* (Doshisha University - Japan), Question 13.1: “[T]his draft Convention ensures legal clarity”; Submission by *M.F.J.N. (Tijn) van Osch* (IAJ/UIM - The Netherlands), Question 1.1: “I think it is a good and honest effort”; Submission by the *Nigerian Group on Private International Law* (NGPIL - Nigeria) (Authors: Onyoja Momoh, Chukwuma Okoli, Abubakri Yekini, Pontian Okoli, Chukwudi Ojiegbe); Submission by the *Judge from Panama I* (Judge - Panama), Question 13.2: “El Proyecto ayudaría porque ofrece una metodología más clara para identificar el tribunal más apropiado, favorece la coordinación entre tribunales, y refuerza la predictibilidad para las partes”; Submission by *Rosa Lima* (High Judicial Council - Portugal), Question 1.1: “Very positive opinion”; Submission by *Lai Lai-Kuan* (Private International Law Association - Taiwan), Question 1.2: “This integrated approach, which incorporates diverse national legislative practices, is a highly commendable model for international legislation”; Submission by *Gennadii Tsirat* (Attorney at Law/National University of Kyiv - Ukraine), Question 13.1: “The rules provided for in the Draft should achieve the goals of the future instrument.”; Submission by *Eduardo Vescovi* (Universidad de la República - Uruguay), Question 14: “Corresponde en primer lugar felicitar a la Conferencia de la Haya por el abordaje de un tema de importancia primordial, y cada vez más frecuente en la realidad actual”.

[2] See Submission by the *American Association of Private International Law*

(ASADIP – Americas); Submission by *IntLaw LLP* (Argentina); Submission by *María Blanca Noodt Taquela/Carolina Daniela Iud* (University of Buenos Aires – Argentina); Submission by *Australasian Association of Private International Law* (AAPrIL – Australasia); Submission by *Burkhard Hess* (University of Vienna – Austria/Germany); Submission by *Dorothee Vermeiren* (Clifford Chance LLP – Belgium); Submission by *Lotte Vanfraechem* (Business lawyer – Belgium); Submission by the *Brazilian Federal Judge* (Judge – Brazil); Submission by *Nadia de Araujo/ Daniela Vargas/ Lauro Gama/Theophilo Miguel/Lidia Spitz* (Pontifical Catholic University of Rio de Janeiro – Brazil); Submission by *Dalian Maritime University* (DMU – China); Submission by *Chinese legal professional* (Legal professional – China); Submission by *Guojian Xu* (Shanghai University of Political Science and Law – China); Submission by *Du Tao* (East China University of Political Science and Law – China); Submission by the *Council of Bars and Law Societies of Europe* (CCBE – Europe); Submission by the *European Association of Private International Law* (EAPIL – Europe); Submission by *Philippine Blajan/Sandrine Clavel/Fabienne Jault-Seseke* (Paris-Saclay University/UVSQ – France); Submission by *Matthias Weller* (University of Bonn – Germany); Submission by *Stephan Madaus* (Martin-Luther-University Halle-Wittenberg – Germany); Submission by *Hungarian Judge* (Judge – Hungary); Submission by *David Knoll* (AYR – Israel); Submission by *Gaetano Vitellino* (Università Carlo Cattaneo – Italy); Submission by *Vilnius University / MOTIEKA* (Lithuania); Submission by *María Virginia Aguilar* (Practitioner – Mexico); Submission by *Aarushi Sahrawat* (Practitioner – Netherlands); Submission by *Vesna Lazic* (Utrecht University / T.M.C. Asser Institute – Netherlands); Submission by the *(Anonymous) Judge from Panama II* (Judge – Panama); Submission by *Associação Ius Omnibus* (AIO – Portugal); Submission by *Korean Judge* (Judge – Korea); Submission by *Iuliana Boghez* (Legal adviser – Romania); Submission by *Vladimir Kostsov/Ivan Zinovich/Mikhail Galperin* (ICLRC – Russia); Submission by the *Faculty of Advocates* (FOA – Scotland); Submission by *Alan K Koh/Shouyu Chong* (Nanyang Technological University/University of Leeds – Singapore); Submission by *Marcus Teo* (NUS – Singapore); Submission by the *Department of Private International Law, Autonomous University of Madrid* (UAM – Spain) (Members: Pilar Dominguez Lozano, María Jesús Elvira Benayas, Laura García Gutiérrez, Francisco José Garcimartín Alférez, Iván Heredia Cervantes, José Ignacio Paredes Pérez, Elena Rodríguez Pineau, Elisa Torralba Mendiola y Jaime Vázquez Garcia); Submission by *Gülüm Özçelik* (Bilkent University – Türkiye); Submission by *Law Reform Institute* (NPO Organisation – United States); Submission by *Stutee Nag*

(Cross-Border Family Law practitioner - United States); Submission by *William Sullivan* (Practitioner - United States); Submission by *Eugenio Hernández-Bretón/Claudia Madrid Martínez/José Antonio Briceño Laborí* (Academia - Venezuela); Submission by *Tung Xuan Le* (Legal researcher - Vietnam).

[3] See Submission by *Stephen Pitel* (Western University - Canada); Submission by the *Canadian Bar Association* (Canada); Submission by *Leonel Pereznieta Castro* (Retired academic - Mexico); Submission by *Maura McIntosh* (Herbert Smith Freehills Kramer - United Kingdom); Submission by *Academic* (Academia - United Kingdom); Submission by *Sir Andrew Henshaw* (Commercial Court of England and Wales - United Kingdom); Submission by *Sarah Garvey/Sarah Shearman* (Mayer Brown International LLP - United Kingdom).

[4] See Submission by *Janet Walker* (Osgoode Hall Law School- Canada), Question 13.3: "The race to judgment might merely be replaced by a race to the courthouse."; Submission by *Pan-European Personal Injury Lawyers* (PEOPIL - Netherlands), Question 13.3: "We are concerned by the scope for tactical and satellite litigation which would be introduced by this Convention"; Submission by *Felix Dasser/Sébastien Oreiller* (University of Zurich/Homburger - Switzerland), Question 14 (3): "In sum, the project should be discontinued. We are surprised and frankly dismayed that such notoriously inefficient common-law concepts should be adopted for a global convention. The Hague Conference should know better."; Submission by *Richard Fentiman* (University of Cambridge - United Kingdom), Question 14: "The avoidance of parallel proceedings may be an issue which is inevitably best left to national law."; Submission by *Julia Dias* (High Court of England and Wales - United Kingdom), Question 13.1: "The draft convention seems to be a solution in search of a problem."; Submission by the *Rt. Hon. Lord Hamblen of Kersey* (UK Supreme Court - United Kingdom), Question 13.2: "Regrettably I am of the view that the convention would not improve the status quo and potentially be to its detriment"; Submission by *Stewarts Law LLP* (United Kingdom), Question 13.2: "[W]e do not think the proposed Convention would improve the status quo."

[5] Submission by *Chinese Judge* (Judge - China); Submission by *SUN Jin* (Legal professional - Hong Kong SAR); Submission by *Family Law Bar Association* (England and Wales - United Kingdom); Submission by *Law Society of Scotland* (United Kingdom).

Judgment Mobility Rules in India's Private International Law Regime: No place for a revision au fond?



This post was kindly prepared by Sai Ramani Garimella, Associate Professor, Faculty of Legal Studies, South Asian University.

A judgment-creditor is often concerned about the enforcement of foreign court orders, and that concern is not completely misplaced in India. The Supreme Court's decision in *Messer Griesheim v Goyal MG Gases* is a useful illustration of the law governing the enforcement of foreign court orders and of the discussion of their finality and binding nature. Twenty-three years after the underlying loan transaction, and after much litigation, the Court has finally closed the chapter, refusing to enforce a 2006 English court's summary judgment for roughly USD 5.8 million. Along the way, it has also clarified two recurring questions that often come up whenever a foreign money decree is sought to be executed in India:

- (i) When does a summary or “leave to defend” judgment qualify as a judgment “on the merits” under Section 13(b) of the CPC, and
- (ii) What is the real effect of a conditional RBI/foreign-exchange approval on the enforceability of a decree?

A JV was contracted between a German company, Messer Griesheim GmbH (hereinafter, Messer Griesheim) and Goyal MG Gases (hereinafter, Goyal), an Indian company engaged in the industrial gases business, in 1995. To fund capital expenditure, Goyal arranged an External Commercial Borrowing (ECB) of USD 7 million from Citibank, London, with Messer Griesheim standing as guarantor. The Foreign Exchange Regulation Act, 1973 (FERA), required both the Government of India and the Reserve Bank of India (the Central Bank) to approve borrowing and guarantees. The RBI’s approval letter dated 3 September 1997 imposed conditions, amongst others, that “in case of invocation of guarantee, no liability whatsoever will extend to the Indian company.” When Goyal defaulted, Citibank invoked the guarantee in 2001, and Messer Greisheim paid USD 4.78 million. It then sought reimbursement from Goyal by way of contractual subrogation. Goyal refused, asserting that the payment had been adjusted against its own unrelated claims against Messer (arising from alleged breaches of the JV and non-compete arrangements), claims it said were worth roughly Rs. 500 crore. Unable to recover amicably, Messer Greisheim sued in England.

The English Court Proceedings

1. 2003: Messer Greisheim obtained an *ex parte default judgment* after Goyal failed to appear.
2. Ill-advised on the difficulty of enforcing such orders in India, Messer Greisheim applied to have it set aside and sought a summary judgment instead.
3. Goyal responded that it had genuine defences, including three alleged oral side-agreements under which Messer Greisheim had supposedly agreed not to seek recourse against Goyal or to absorb the loan liability as part of a settlement.
4. On 7 February 2006, the English Court rejected Goyal’s defences as lacking a “real prospect of success” and entered summary judgment for approximately USD 5.8 million, plus interest and costs. Goyal did not

appeal.

The Indian Execution Proceedings

Messer Greisheim applied to the Indian court for execution of the said order under Section 44A of the Code of Civil Procedure, 1908. The journey through the Indian courts was itself convoluted:

1. The Single Judge of the Delhi High Court (2013) held the judgment enforceable.
2. The Division Bench (2014) of the DHC ruled against jurisdiction as per the requirements of Section 44A.
3. The judgment-creditor appealed to the Supreme Court, which held that the DHC ***possessed*** jurisdiction in its original civil capacity and sent the matter back for a decision on the merits.
4. On remand, the DHC's Division Bench finally refused enforcement, holding that the English court's order violated Section 13 of the CPC, both for failing to be a judgment "on the merits" and for disregarding the RBI's conditional approval.
5. On appeal, the Supreme Court agreed with the Division Bench of DHC (though for partly different reasons), bringing the saga to a close.

The Statutory Framework: Section 13 read with Section 44A, CPC

Under Section 44A CPC, an order from the competent court of a "reciprocating territory" (the UK is one such) can be applied for execution before a district court in India. However, such enforcement may be denied if it is hit by the exceptions listed in CPC, S 13: absence of jurisdiction, judgment not on merits, incorrect view of international law or refusal to recognise Indian law, violation of natural justice, fraud, or a claim founded on breach of Indian law.

The Supreme Court reaffirmed that these exceptions must be construed narrowly, in keeping with the principle of comity of courts; such a narrow construction may not be interpreted as against scrutiny at all.

Issue I: Was the English Summary Judgment “On the Merits”?

Pivoting upon jurisprudence from the Privy Council (*Daniel Thomas Keymer v P. Viswanatham Reddi* (AIR 1916 PC 121) and *L. Oppenheim and Co. v. Hajee Mahomed Haneef Sahib* (AIR 1922 PC 120)) as well as Indian decisions such as *International Woollen Mills v Standard Wool (UK) Ltd*, *Middle East Bank v Rajendra Singh Sethia* (AIR 1991 CAL 335), and *K.M. Abdul Jabbar v Indo-Singapore Traders Pvt Ltd*. (1980 SCC OnLine Mad 186) the Supreme Court held that a judgment entered merely because a defendant was refused leave to defend, without any real investigation into the rival contentions, cannot be treated as a judgment “on the merits” within Section 13(b).

Significantly, the Court did not treat “summary judgment” as a dirty word. It referred to the English law on summary judgment (Civil Procedure Rules 24.2, and the decisions in *Easyair v Opal Telecom* and *Swain v Hillman*). The Court noted that the English law required the defence to lead evidence of **only** a “**realistic**,” not a “fanciful,” prospect of success, and that a court should hesitate to finally decide a case without trial wherever a fuller investigation of the facts could affect the outcome. The point of the analysis was not that English procedure is somehow defective, but that this *very test*, properly applied to Goyal’s defences, should have led to a trial rather than summary disposal.

The Court found that Goyal’s defences were not fanciful:

1. There were contemporaneous statutory documents, board-approved Balance Sheets for FY 2001-02 and FY 2002-03, and Minutes of Board Meetings recording that Goyal owed nothing to Messer and that the loan repayment had instead been adjusted against Goyal’s own claims. These were signed by Messer Greisheim’s own nominee director, Mr Winfrid Schmidt, who had also seconded the relevant resolutions. Under Sections 194, 210, 211, and 215 of the Companies Act, 1956, such board-approved financial statements carry presumptive evidentiary value.
2. An e-mail dated 20 February 2003, in which Goyal disputed the claimed liability, did not appear to have been placed before or weighed by the English Court at the summary stage.
3. Goyal’s defence rested on disputed oral agreements, exactly the kind of

factual controversy that, in the Court's view, calls for cross-examination and a full trial rather than summary adjudication.

Importantly, the Supreme Court was careful to state that it was not adjudicating the merits of these defences itself; it addressed only whether they crossed the threshold of being “triable.” Having found that they did, the Court held that denying Goyal leave to defend amounted to a denial of fair trial, attracting both Section 13(b) (not on merits) and Section 13(d) (violation of natural justice) of the CPC. This alone was sufficient to dismiss the appeal and refuse enforcement.

86. [...] The adjudication by way of summary judgment in the presence of bona fide triable issues renders the judgment one not delivered on merits within the meaning of Section 13(b).

The Court also revisited the Indian “leave to defend” jurisprudence under CPC, Order XXXVII (*IDBI Trusteeship v Hubtown*; *B.L. Kashyap v JMS Steels*), reiterating that denial of leave to defend is meant to be the exception, reserved for cases where the defence is frivolous or vexatious — not the default response to a contested claim.

Issue II: The FERA Angle; Adjudication vs Enforcement

1. Section 47(1)/(2): A contract that evades FERA cannot be enforced, but a contract conditioned on obtaining RBI/Government permission is not itself invalid merely because permission is pending.
2. Section 47(3): This provision states that *nothing* prevents legal proceedings from being brought in India to recover sums otherwise due; however, “no steps shall be taken for the purpose of enforcing any judgment or order” except to the extent permitted by the RBI/Central Government.

The Court interpreted Section 47 as creating a clear two-stage scheme:

1. **Stage 1-Adjudication:** Courts may determine liability and order a decree without any prior RBI clearance. There is no bar on access to justice at this stage.
2. **Stage 2-Enforcement:** Before the execution of such a decree under Order XXI CPC, the RBI/Government permission becomes a precondition.

The Court held that the 1997 RBI condition operated as a regulatory precondition to execution, not a substantive defence that extinguishes the underlying liability. To that limited extent, the Court reversed the Division Bench's reasoning on this specific point of law.

The Takeaways from *Messer Greisheim*

1. **Summary and default judgments travel poorly across borders.** A foreign judgment valid in its home jurisdiction could fail the Section 13(b) "merits" test in India only if the foreign court did not substantively engage with a defendant's documented, triable defences. Foreign claimants strategising for default-to-summary judgments (switching from default judgment to summary judgment to improve enforceability) are alerted to the risk of failure. However, *Messer Greisheim* rejected the idea of inherent suspicion against summary judgments, the Court held that a 13(b) hit applies only when the record of the case establishes an unfair truncation of a legitimate dispute.
40. At the same time, the jurisdiction to grant summary judgment is not intended to convert the proceeding into a "mini-trial", but rather to enable cases where there is no real prospect of success to be disposed of summarily.
1. **Contemporaneous corporate records can defeat a foreign decree at the enforcement stage**, even years later.
2. **Foreign exchange regulatory permissions regulate *execution*, not *adjudication*.** The judgment offers welcome clarity that conditional RBI approvals do not operate as a permanent shield against liability. They instead govern the timing and quantum of actual remittance once a decree is to be executed, a sensible accommodation between access to justice and India's exchange-control regime.

Conclusion

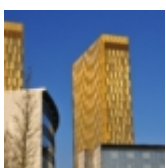
Does the Indian law appear to allow a merits examination, a *revision au fond*? *Messer Greisheim* answered that in the negative. It was observed that by relying

strictly on a summary procedure to dismiss a genuinely triable defence, the English court bypassed a full trial on the merits. A reading of CPC, S 13, indicates that Indian courts are **prohibited** from conducting a *revision au fond*.

- The executing court cannot act as an appellate court.
- It cannot re-examine the substantive facts, reweigh the evidence, or substitute its own view on the merits for that of the foreign judge.

Messer Griesheim is ultimately a cautionary tale about procedure trumping substance. Messer Greisheim may have had a sound claim under the loan agreement's subrogation clause. But by obtaining a summary judgment that bypassed Goyal's triable defences instead of testing them at trial, it ended up with a decree that, twenty years and several rounds of litigation later, wasn't enforceable in India. For foreign judgment creditors eyeing Indian assets, the lesson is unambiguous: a decree obtained without the Indian defendant being allowed a genuine opportunity to contest disputed facts is a fragile asset in the Indian execution courts, however efficiently it may have been obtained abroad. Section 13(b) thus speaks loud and clear – such summary judgment becomes suspect when it appears to have been entered solely to bypass a highly contested matter. Courts in India can review the record, as *Messer Greisheim* observed, *only* to identify whether the decision related to a summary procedure was indeed based upon sound reasons and wasn't aimed at truncating an otherwise triable dispute.

Nothing to See Here: The CJEU's Decision in Case C-232/25 Idziski



Earlier today, the Court of Justice rendered its decision in Case C-232/25 *Idziski*, essentially confirming its previous case law, combined with a restrictive reading

of its infamous decision in Joint Cases C-509/09 and C-161/10 *eDate*.

The facts of the case (which was given the entirely fictitious name *Idziski*) are eerily similar to those of the Court's 2021 decision in Case C-800/19 *Mittelbayrischer Verlag*. Just like in that earlier case, they involved a claim by Polish claimants against a German media outlet regarding the correction of, and damages for, the publication of content that allegedly violated their personality rights, including their national dignity. Only two elements of the facts were different: first, the content complained of was broadcasted on television, in addition to being published online; second, the claimants were (1) a private person who was part of a Polish military unit during World War II, which the German broadcaster had allegedly portrayed as 'anti-Semitic and nationalistic and as having collaborated with the Nazis in the Holocaust', and (2) an association bringing together members of that unit.

After two decisions against the defendants (to varying degrees), the Polish Supreme Court had submitted two questions relating to the international jurisdiction of the Polish courts.

Centre-of-Interests Jurisdiction

First, the court wanted to know whether the claimants could rely on Art 7(2) Brussels Ia in the interpretation developed by the CJEU in *eDate* to establish the (full) jurisdiction of the Polish courts as the courts of the claimants' centre of interests, even with regard to the content broadcasted on television and even though neither of the claimants had been named in the broadcast.

Dismissing the claimants' argument that any distinction between online content and a TV broadcast would be largely meaningless given how much the lines between the two formats have blurred, the CJEU reaffirms the narrow scope of the centre of interests criterion (see already *eDate*, [48]), which remains only available with regard to online content:

[44] That said, the television broadcast of audiovisual content in several Member States must be distinguished from the dissemination of such content on the internet. The placing online of content on a website is to be distinguished, generally, from the regionalised distribution of media in that it is intended, in principle, to ensure the ubiquity of that content. That content may

be consulted instantly by an unlimited number of users throughout the world, irrespective of any intention on the part of the person who placed it as regards its consultation beyond that person's Member State of establishment and outside of that person's control [...].

[45] Those considerations do not apply to the broadcasting of audiovisual content on television. Such broadcasting is not, in principle, available instantly and worldwide, but is regionalised, limited to the geographical area in which the television signal is received.

Regarding the fact that neither of the two claimants had been mentioned by name in the broadcast in question, which could be seen as falling short of the requirement for centre-of-interests jurisdiction developed in *Mittelbayrischer Verlag*, namely that the content complained of must contain 'objective and verifiable elements which make it possible to identify, directly or indirectly, [the claimant] as an individual', the CJEU draws a distinction between the two claimants. The first claimant did not pass the threshold of identifiability as the broadcast

[54] [...] does not make it possible to identify individually the applicants in the main proceedings inasmuch as it is a work of fiction which recounts the conduct of a group of soldiers – members of unit X – without it being possible to ascertain the true identity of the members depicted in the series.

The second claimant, however, whose members were all part of that group of soldiers, passed the test and could thus bring a claim at its centre of interests, as far as the online publication of the series is concerned.

Mosaic Jurisdiction

As a second question, the referring court also inquired (again – see also Cases C-194/16 *Bolagsupplysningen* and C-251/20 *Gtflix Tv*) about the extent to which jurisdiction could be based on the mosaic approach to Art. 7(2) Brussels Ia. Indeed, for all claims of the first claimant as well as for the claims of the second claimant regarding the TV broadcast, jurisdiction could only be based on the fact that the content had been made available in Poland, which traditionally only creates jurisdiction for a proportion of the overall harm. In *Bolagsupplysningen*,

the CJEU had essentially restricted this type of jurisdiction to damage awards.

In *Idziski*, the CJEU simply reiterates its earlier decisions (see [63]). In particular, it confirms that mosaic jurisdiction remains unavailable for any kind of injunction requiring the defendant to display specific information before the series (both online and on TV) – a remedy, of course, with limited chance of being enforced in Germany anyway (for reasons explained here).

Conclusion

Ultimately, the CJEU simply reaffirms its previous case law. While any *revirement de jurisprudence* in that area would have been highly surprising, especially after the decision in *Gtflix Tv*, the decision may well be seen as another indication that the area is ripe for legal reform.

Refusal to Enforce in Egypt of a Californian (U.S.) Judgment for Lack of Reciprocity: What Has Gotten into the Egyptian Supreme Court?



I. Introduction

Sometimes, reading court decisions leaves a strange sense of confusion, especially when the decision rendered not only contradicts a well-established line of case law, but also when the court, in the very same decision, reveals internal contradictions. Several months ago, I critically discussed on this blog a rather unusual decision of the Egyptian Supreme Court (محكمة النقض/*maḥkamat an-naqḍ*), in which the enforcement of a Canadian judgment was denied on the ground that reciprocity had not been established with Canada. In my comments on that decision, I expressed “significant concerns” regarding the incoherent manner in which reciprocity was addressed by the Supreme Court.

Well, surprises never end, and reciprocity strikes back in a new case, with an even more puzzling effect, as the shift signalled in the previous decision appears to be confirmed in the case commented on here. This new position of the Supreme Court is hardly reassuring. The manner in which the Court addressed such a controversial issue suggests a troubling move towards an increasingly stringent and confusing approach, which consists in affirming that the establishment of reciprocity does not depend on the existence of a treaty with the rendering State on the one hand, while nevertheless denying reciprocity on that very ground on the other.

II. The Case

The case concerns an action brought by X (the judgment creditor) seeking the enforcement in Egypt of an American judgment rendered in its favor by a California court, ordering Y (the judgment debtor) to pay a certain sum of money, together with interest, costs, and attorneys' fees. The court of first instance granted the application and declared the Californian judgment enforceable in Egypt, with the exception of the portion awarding interest at a rate of 10%. That decision was subsequently upheld on appeal.

Dissatisfied with the outcome, Y lodged an appeal before the Egyptian Supreme Court arguing that the Californian judgment had been declared enforceable without establishing the existence of legislation in the rendering State allowing the enforcement of Egyptian judgments, as required by the principle of legislative reciprocity (مبدأ التبادل التشريعي / *mabda' at-tabādul at-tashrī'ī*) and actual reciprocal treatment (المعاملة الفعلية بالمثل / *al-mu'āmala al-mithliyya bil-mithl*) between the two States with respect to the enforcement of judgments, in accordance with to Article 296 of the Egyptian Code of Civil and Commercial Procedure (ECCCP)^(*).

^(*) Article 296 reads as follows:

Foreign judgments and decisions may be declared enforceable under the same conditions as those laid down by the law of the rendering State for the enforcement therein of Egyptian judgments and decisions.

III. The Ruling

In its *decision of 20 January 2026*, the Court admitted the appeal, ruling as follows (a detailed summary with modifications):

First, the Court recalled – as is usually the case – the general applicable framework.

It noted that, pursuant to Article 296 of the ECCCP, the legislature has adopted the principle of reciprocity or mutual treatment (مبدأ المعاملة بالمثل أو التبادل / *mabda' al-mu'āmala bil-mithl aw at-tabādul*), meaning that foreign judgments shall be

treated in Egypt in the same way as Egyptian judgments are treated in the rendering State. In this respect, *the legislature has only required legislative reciprocity* (التبادل التشريعي / *at-tabādul at-tashrī'ī*), *as opposed to diplomatic reciprocity* (التبادل الدبلوماسي / *at-tabādul ad-diblūmāsī*), *which is established by a treaty or convention* (emphasis added).

The Court further recalled that it is required, courts are required to verify *ex officio* that the condition of legislative reciprocity is satisfied [...].

Notwithstanding this premise, the Court went on to censure the lower court's reasoning, considering that, in the present case, the court of the appealed decision had declared enforceable the Californian judgment after finding, - by reference to Articles 1713 and 1714 of the California Code of Civil Procedure, that mutual legislative treatment [legislative reciprocity (التبادل التشريعي / *at-tabādul at-tashrī'ī*)] was sufficiently established to satisfy the reciprocity requirement (شرط المعاملة بالمثل / *shart al-mu'āmala bil-mithl*) between Egypt and the State of California.

However, according to the Supreme Court, by deciding as it did without determining *whether any convention exists between Egypt and the United States of America concerning the enforcement of judgments providing for reciprocity or mutual treatment*, the lower court failed to provide a legal basis for its decision under Article 296 of the ECCCCP (emphasis added).

IV. Comments

To my knowledge, this is the second decision in which a foreign judgment was refused enforcement in Egypt solely on the basis of a lack of reciprocity (on the earlier case, see my comments here). In both cases, the Supreme Court ruled almost exactly in the same manner and quashed the lower courts' decisions admitting reciprocity with the rendering State on the ground that the judges failed to show whether there exists a convention between Egypt and the rendering State dealing with the enforcement of judgments that embodies the principle of reciprocity. This position is hardly consistent with the principle affirmed by the Court according to which what matters is legislative reciprocity, not diplomatic reciprocity established by treaty or convention. The comments made on the previous case regarding this aspect are therefore fully applicable

here.

What is particularly remarkable, however, is the position taken by the lower courts, which appears to be fully in line with the traditional approach of the Egyptian Supreme Court. Adhering to the principle of legislative reciprocity as traditionally developed (on this practice, see my comments [here](#)), the lower courts seem to have concluded that reciprocity existed with the State of California after comparing the enforcement requirements applicable there with those applicable in Egypt. This point is important, as it also shows that, in the view of the lower courts, where judgments emanate from federal States such as the United States, reciprocity should be assessed by reference to the particular State in which the judgment was rendered. The Supreme Court, by contrast, appears to have rejected this approach, placing decisive weight on the existence of a convention between Egypt and the United States.

In any event, the recent developments concerning reciprocity in two successive cases rendered by different panels of the Supreme Court in Egypt are indicative of a shift away from a principle of reciprocity that requires a comparative analysis of the enforcement requirements under the law of the State of origin and under Egyptian law (legislative reciprocity), towards an approach that makes the existence of an international convention a prerequisite for its establishment. This new approach raises the threshold against the enforcement of foreign judgments to a considerable degree, as it would be sufficient for the judgment debtor to argue that reciprocity is not established whenever there is no treaty with the rendering State, bearing in mind that Egypt has concluded a little over 20 conventions, mostly with Arab countries with which it has already concluded regional conventions, and only around 10 with non-Arab countries, including some EU Member States (Germany, Romania, Italy, France, Cyprus, Hungary, Poland) as well as Turkey, Russia, and China. Should such a development be confirmed in future cases, this would mean that judgments rendered in roughly 88% of countries worldwide would be denied enforcement in Egypt.

This backward development stands in striking contrast to recent trends in comparative law, notably in China, where a considered shift has taken place from a traditionally restrictive approach (on this traditional approach, see my comments [here](#)), towards a more moderate approach that places emphasis on *de jure* reciprocity, presumptive reciprocity, and other forms that do not necessarily depend on the existence of a formally concluded treaty between China and the

rendering State (see the illustrative cases discussed on this blog [here](#) and [here](#)). A comparatively more liberal approach has also been followed in Tunisia, where Tunisian courts now consider that, in the absence of an international convention, reciprocity must be presumed and that it is for the party contesting this presumption to provide evidence of its non-existence. (for details, see Bélig Elbalti, “La réciprocité en matière d’exequatur: Quoi de nouveau? Observations sous l’arrêt de la Cour de cassation n° 6608 du 13 mars 2014” *Arab Law Quarterly* (2025) online-first publication).

The Egyptian Supreme Court would do well to draw lessons from such comparative developments and reconsider both its position and the negative signal this sends; otherwise, the consequences may prove drastic for holders of Egyptian judgments, which may be denied recognition and enforcement in States requiring reciprocity.

(□) Related posts on this blog on the recognition and enforcement of foreign judgments in Egypt:

- Reciprocity and the Enforcement of Foreign Judgments in Egypt - A Critical Assessment of a Recent Supreme Court Decision
- Enforcing Foreign Judgments in Egypt: A Critical Examination of Two Recent Egyptian Supreme Court Cases
- Egyptian Supreme Court on the Enforcement of Foreign Judgments - Special Focus on the Service Requirement