

Online Symposium on Recent Developments in African PIL (IV) - Party Autonomy, Genuine Connection, Convenience, Costs, Privity, and Public Policy: The Kenyan High Court on Exclusive Jurisdiction Clauses



*As part of the second online symposium on **recent developments in African private international law**, we are pleased to present the fourth contribution, kindly prepared by **Anam Abdul-Majid (Advocate and Head of Corporate and Commercial Department, KSM Advocates, Nairobi, Kenya)** and **Kitonga Mulandi (Lawyer, KSM Advocates, Nairobi, Kenya)**, on **Party Autonomy, Genuine Connection, Convenience, Costs, Privity, and Public Policy: The Kenyan High Court on Exclusive Jurisdiction Clauses***

I. Introduction

Kenya has emerged as a regional and global hub for the development of private international law, positioning it as one of Africa's leading jurisdictions through progressive judicial reasoning and landmark decisions. Kenyan jurisprudence has not only shaped domestic private international law but is also frequently relied upon by courts in other African jurisdictions, particularly East Africa, as persuasive authority. Given the consistent and dynamic evolution of this field by Kenyan courts, it is essential to take account of recent decisions that have engaged with and developed key private international law concepts.

One such relatively recent decision is *Maersk Kenya Limited v Multiplan Packaging Limited (Civil Appeal E181 of 2022) [2024] KEHC 8462 (KLR) (Civ) (8 July 2024) (Judgment)*, which engages with several core doctrines of private international law and therefore warrants closer analysis.

This case is significant for four interrelated reasons. First, it examines the limits of exclusive jurisdiction clauses in maritime contracts where both parties are Kenyan entities and the alleged breach occurred within Kenyan territory. Second, it clarifies the operation of the doctrine of privity of contract in the context of agency relationships under bills of lading, particularly by recognising that consignees who were not original contracting parties may nonetheless have standing to sue carriers on the basis of rights conferred by the carriage documents. Third, it articulates important public-policy considerations capable of overriding contractual forum-selection agreements, especially where such clauses would impose insurmountable barriers to access to justice, contrary to Article 48 of the Constitution of Kenya. Finally, the decision reinforces procedural discipline in jurisdictional challenges by holding that parties who enter an unconditional appearance and substantively participate in proceedings waive any subsequent right to contest the court's jurisdiction or to rely on an exclusive forum-selection clause.

II. Facts

The facts of the case centred on whether Kenyan courts had jurisdiction to hear and determine the dispute, notwithstanding that the contract forming the subject matter of the proceedings contained an exclusive jurisdiction clause conferring jurisdiction on the English High Court in London. The dispute arose out of a

maritime contract of carriage relating to the Respondent's shipment of cargo from Mombasa, Kenya, to Juba, South Sudan.

The contractual arrangement involved a composite mode of performance: sea carriage to Mombasa (the transit port), inland storage at Mombasa, and subsequent road transportation to the final destination in South Sudan. This contractual structure generated performance obligations across multiple jurisdictions. Under Kenyan customs regulations, goods in transit are subject to the provision of security bonds to ensure compliance with fiscal obligations. The Respondent's failure to meet this requirement triggered the dispute, ultimately leading to the Appellant's decision to trans-ship the goods to Dubai, acting on instructions from Maersk Egypt A/S.

The application was further complicated by a layered agency relationship. The shipper was alleged to be acting as an agent of the Respondent (the consignee), while the Appellant, Maersk Kenya Limited, acted as an agent of Maersk Egypt A/S, which itself acted as agent for another entity within the Maersk corporate structure. The Court characterised this arrangement as an "agents-of-agents" scenario, raising difficult questions of privity of contract and whether the Respondent, as consignee under the bill of lading, could maintain an action against Maersk Kenya Limited in the absence of direct contractual privity.

Although the Court acknowledged that no direct contractual agreement existed between the parties, it placed decisive weight on the fact that both parties were Kenyan companies and that the alleged breach occurred in Kenya. These connecting factors proved determinative in the Court's forum analysis. While recognising that Clause 26 of the Terms of Carriage constituted a standard-form English exclusive jurisdiction clause in maritime contracts also governed by English law, the Court nevertheless held that such a boilerplate provision could not operate to oust the jurisdiction of Kenyan courts. In the Court's view, the practical realities of the dispute disclosed no genuine connection to the English forum beyond the bare contractual designation.

III. Summary of the Judgment Delivered by the High Court of Kenya

This case is particularly relevant because it does not engage with a single isolated issue, but rather addresses a constellation of interrelated doctrines, each of which

contributes to greater doctrinal clarity in private international law.

Although the contract contained an exclusive jurisdiction clause, the Court found that the contractual arrangement comprised distinct segments, one of which concerned the transportation of the Respondent's cargo from Mombasa to Juba, South Sudan, with Mombasa functioning as a transit port for offloading and interim storage prior to onward road transportation. Owing to the Respondent's failure to pay the requisite bond-in-transit charges, the goods were subsequently trans-shipped to Dubai on the instructions of the first applicant.

The application was further grounded in complex agency relationships: the shipper was alleged to be acting as an agent of the Respondent, while the Appellant acted as an agent of Maersk Egypt A/S, which itself acted as agent for another entity within the corporate structure. The Court observed that there was no direct contractual agreement between the parties. Nevertheless, it placed decisive weight on the fact that both parties were Kenyan companies and that the alleged breach occurred within Kenya.

Against this background, the Court articulated several important principles:

- (a) where parties operate as “agents of agents”, they are properly characterised as third parties, with the consequence that no privity of contract exists between them;
- (b) there is no principled basis for two Kenyan companies to litigate their dispute in London in the absence of a genuine connecting factor to that forum;
- (c) disputes between Kenyan companies arising from breaches occurring in Kenya should, as a matter of public policy, be adjudicated by Kenyan courts;
- (d) Kenyan courts may override exclusive jurisdiction clauses where the circumstances of the dispute demonstrate that the matter ought properly to be heard in Kenya;
- (e) a party seeking to challenge territorial jurisdiction must do so at the earliest opportunity and must refrain from taking substantive steps in the proceedings. By entering an unconditional appearance, filing multiple affidavits, and applying for the release of the goods, the Appellant was held to have submitted to the Court's jurisdiction and thereby waived any subsequent right to contest it; and

- (f) contractual clauses purporting to oust the jurisdiction of Kenyan courts may be contrary to public policy unless there is a clear and substantive connection between the dispute and the chosen foreign forum. In the absence of such a connection, referral of a dispute of this nature to London was held to be unjustified.

IV. Comments

The judgment represents a sophisticated attempt to reconcile competing values in private international law, namely party autonomy and access to justice. Notably, the Court did not override the jurisdiction clause on the basis of abstract or generalised appeals to injustice; rather, it arrived at that conclusion through the following considerations:

(a) Presuming Validity of Clause 26:

The Court began from a presumption in favour of the validity and enforceability of exclusive forum-selection clauses. Its reasoning was that this presumption is at its strongest where: (1) the clause is negotiated by sophisticated commercial parties; (2) the designated forum has a genuine connection to the transaction; (3) the costs of litigating in that forum are proportionate to the value and nature of the dispute; and (4) the parties are subject to reciprocal obligations to litigate exclusively in the chosen forum. In such circumstances, the clause ought, in principle, to be enforced.

(b) Rebuttable Presumption:

The Court held that the presumption of validity attaching to exclusive forum-selection clauses may be rebutted where their enforcement would create insurmountable barriers to access to justice, particularly in the context of standard-form contracts concluded between parties of unequal bargaining power—a consideration that goes to the very root of genuine consent.

Applying this reasoning, the Court concluded that Clause 26 did not bind the

Respondent because it was not a party to the contract. Relying on the doctrine of privity of contract, the Court emphasised that the Respondent, as consignee, played no role in negotiating the shipping agreement between Maersk Line A/S and the shipper and could therefore not be bound by its forum-selection clause.

Crucially, the Court was careful to avoid conflating layered agency relationships—described as an “agents-of-agents” structure—with contractual privity. It rightly held that the Respondent, as consignee, could not be taken to have consented to the Terms of Carriage, which constituted a contract exclusively between the shipper and the carrier.

(c) Waiver of the Right to Enforce:

The Court’s finding of submission to jurisdiction through conduct is well grounded and consistent with established jurisprudence, which recognises that a party may waive its right to rely on a forum-selection clause, or otherwise submit to the court’s jurisdiction, by its conduct. In such circumstances, the forum-selection clause is rendered inoperative.

The Court’s conclusion that the Appellant’s entry of an unconditional appearance, coupled with the obtaining of interim relief for the release of the cargo, amounted to submission to jurisdiction is sound. This approach not only accords with the underlying rationale of the doctrine—namely, the protection of rights that have accrued to the opposing party—but also reinforces the principle that a party cannot be permitted to litigate on the basis of approbation and reprobation, a well-established cornerstone of equitable jurisprudence.

(d) Public Policy:

The enforcement of a forum-selection clause in a dispute valued at twenty million Kenyan shillings, where both parties are Kenyan companies, is untenable, unsound, and inconsistent with the underlying principles of private international law. Such an approach disregards a foundational premise of contract law: that parties enter into contractual arrangements with knowledge of, and consent to, their negotiated terms. In the context of exclusive jurisdiction clauses, this logic is

even more compelling, as the very purpose of such clauses is to secure a just, convenient, and—most critically—predictable framework for the resolution of disputes should they arise.

The Court's characterisation of the clause as contrary to "public policy" is not only difficult to reconcile with these long-standing principles but is also problematic in its reasoning. The Court's attempt to define the relevant public policy relies heavily on the Canadian decision in *Uber Technologies Inc v Heller*, using it to support the proposition that where the costs of litigating in the designated forum are disproportionate to the value of the claim, enforcement of the forum-selection clause would offend public policy.

This reasoning sits uneasily with settled authority in private international law, which makes clear that mere inconvenience—including administrative burden and litigation costs—does not, without more, amount to "strong cause" sufficient to displace an exclusive jurisdiction agreement freely entered into by the parties.

V. Conclusion

The Kenyan High Court's decision in *Maersk v Kenya Limited v Multiplan Packaging Limited* affirms several settled principles: the doctrine of privity of contract, the presumptive validity of exclusive jurisdiction clauses, and the consequence that a party may waive its right to rely on such a clause through submission to the court's jurisdiction. Yet the decision exposes a critical tension in the Court's reasoning. The dispute involved two Kenyan companies, a contract performed in Kenya, and the alleged breach occurring in Kenya, these connecting factors would ordinarily support the exercise of jurisdiction. The difficulty lies in the Court's use of public policy to displace the jurisdiction clause on the bases of cost and inconvenience.

This approach sits at odds with established authority. As articulated in *The Eleftheria* (1969) 1 Lloyd's L. R. 237 and subsequent authorities, inconvenience or increased litigation costs do not, without more, amount to 'strong cause', sufficient to displace an exclusive jurisdiction agreement freely entered into by parties. Further the Court's reliance on the Canadian decision in *Uber Technologies Inc v Heller*, upon which the Court premised its analysis, concerned very particular circumstances, of a consumer contract concluded between parties

of profound unequal bargaining power, with the central question being the validity of an arbitration agreement, a related but distinct legal concept for determination. The reliance on public policy in this context is problematic for three reasons: (1) the concept construed widely risks development into an indeterminate tool for judicial discretion; (2) the court has not articulated a coherent test for determining when or how cost and convenience may rise to the threshold to override clear contractual choices; and (3) the broad conception of public policy threatens the essential rationale behind exclusive jurisdiction clauses, being the predictability such offers parties to international commercial contracts and have become accustomed to expect. If jurisdiction clauses may be displaced on grounds of general convenience, parties can no longer rely on their contractual allocations of risk, and the very purpose of such clauses is defeated.

Ultimately, Maersk demonstrates that there ought to be greater comparative engagement and doctrinal grounding while balancing party autonomy and safeguarding access to justice.

Previous contributions:

1. **Online Symposium on Recent Developments in African Private International Law**, by *Béligh Elbalti & Chukwuma S.A. Okoli* (Introductory post)
 2. **Recognition and Enforcement of International Judgments in Nigeria**, by *Abubakri Yekini & Chukwuma Samuel Adesina Okoli*
 3. **The Recognition and Enforcement of Foreign Judgments within the CEMAC Zone**, by *Boris Awa*
 4. **Foreign Judgments in Mozambique through the Lens of the Enforcement of a Chinese Judgment: Liberal Practice in the Shadow of Statutory Rigidity**, by *Béligh Elbalti*
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Online Symposium on Recent Developments in African PIL (III) - Foreign Judgments in Mozambique through the Lens of the Enforcement of a Chinese Judgment: Liberal Practice in the Shadow of Statutory Rigidity



*As part of the second online symposium on **recent developments in African private international law**, we are pleased to present the third contribution, prepared by **Béligh Elbalti (The University of Osaka, Japan)**, on **Foreign Judgments in Mozambique through the Lens of the Enforcement of a Chinese Judgment: Liberal Practice in the Shadow of Statutory Rigidity**.*

I. Introduction

The purpose of this note is to briefly introduce the recognition and enforcement regime in Mozambique based on a recent case decided by the Mozambican Supreme Court (*Tribunal Supremo*).

It aims modestly to help fill a gap in legal literature. Indeed, scholarly work on

Mozambican private international law in general, and on the recognition and enforcement of foreign judgments in particular, remains extremely limited (For an overview on Mozambican private international law system, see D Moura Vicente, 'Mozambique' in J Basedow *et al.* (eds.), *Encyclopedia of Private International Law - Vol. III* (Elgar, 2017) 2354).

The note also seeks to shed light on recognition and enforcement practice in a country that has largely remained outside the radar of comparative law scholars and researchers.

It is hoped that this contribution will encourage more detailed and in-depth studies that do justice to a legal system which appears, despite some anachronistic aspects of its legal regime, to have one of the most liberal enforcement practices in Africa.

II. The Case

The case presented here concerns the enforcement in Mozambique of a Chinese judgment in a dispute involving two Chinese citizens resident in Mozambique. The underlying factual background may be summarized as follows.

The dispute appears to have arisen from a breach of contractual obligation. The applicant, X, initially tried to recover the debt in Mozambique by initiating execution proceedings against Y (the respondent) for payment of a sum of money (*ação executiva para pagamento de quantia certa*). However, the Mozambican court upheld the objections to execution (*embargos à execução*) filed by Y and dismissed the execution for lack of evidence prove the existence of an enforceable title or establishing the alleged debt.

X subsequently initiated civil condemnation proceedings (*processo de Condenação Civil*) in China, claiming damages for breach of contract, and obtained in his favor a judgment ordering Y to pay damages. Armed with a final Chinese judgment, X sought its enforcement in Mozambique by bringing an action for review and confirmation (*revisão e confirmação*).

Y challenged the review and confirmation of the foreign judgment on the grounds that there is an identity between the prior execution proceedings in Mozambique

and the confirmation proceedings. X replied that the two actions differed in terms of the legal effects sought (the execution proceedings concerned the compulsory payment of a debt and not concerned with the review and confirmation of a foreign judgment) and cause of action (the execution proceedings were based on the alleged existence of an enforceable title, whereas the confirmation proceedings were based on the existence of a foreign judgment requiring recognition and enforcement).

III. The Ruling

In deciding this issue, the Mozambican Supreme Court rules as follows (*Case No. 75/2024-C of 25 April 2025*).

The Court first cited the relevant provision of the CCP setting out the conditions for the recognition and enforcement of foreign judgments in Mozambique (Article 1096). Under that provision, a foreign judgment may be declared enforceable (confirmed) only if seven conditions are satisfied:

- a) the authenticity and intelligibility of the decision;
- b) the final and binding character of the judgment in the State of origin;
- c) the jurisdiction of the foreign court under Mozambican rules on conflicts of jurisdiction;
- d) the absence of *lis pendens* or *res judicata* arising from proceedings before Mozambican courts, unless the foreign court was first seized;
- e) proper service of the defendant;
- f) compliance with Mozambican public policy; and
- g) where the judgment is rendered against a Mozambican national, respect for Mozambican substantive law where applicable under Mozambican conflict-of-laws rules.

Then the Court moved to examine each of the above conditions, with a special focus on the legal issue raised by the parties, ruling as follows (detailed summary):

Mozambique applies a deliberation (delibação) system for the recognition of foreign judgments. Under this system, focus is placed on compliance with formal requirements laid down by Article 1096. There is therefore no review of

the merits, except with regard to a possible violation of public policy or domestic private law where the judgment was rendered against a Mozambican national (the so-called nationality privilege).

Regarding the requirement of authenticity and intelligibility, the judgment was duly legalized and raises no doubts as to its intelligibility.

Accordingly, the requirement of Article 1096(a) is satisfied

Regarding finality, this requirement is presumed to be satisfied in the absence of evidence to the contrary. Since the presumption was not rebutted, the requirement under Article 1096(b) is satisfied.

Regarding the jurisdiction of the foreign court, Mozambican law predominantly follows the bilateral (mirror-image) theory, according to which a foreign court is internationally competent if a Mozambican court would have had jurisdiction in comparable circumstances. The case concerned a contractual claim for damages. Under Mozambican rules of international jurisdiction, such claims fall within the jurisdiction of the courts of the place of performance of the obligation. As the obligation was to be performed in the State of origin, the foreign court was internationally competent for the purposes of Article 1096(c).

Accordingly, the requirement of Article 1096(c) is also satisfied.

Regarding the issue of res judicata disputed by the parties, this requirement aims to prevent contradictory effects within the Mozambican legal order by barring enforcement where a Mozambican court has already rendered a final decision on the same dispute, involving the same parties, claim, and cause of action, as that decided by the foreign court. For this purpose, the comparison for determining whether the res judicata exception exists is not between the action for the enforcement of the foreign judgment (action for review and confirmation) and another action brought before Mozambican courts. Rather, res judicata, for the purposes of recognition and enforcement of foreign judgments, results from a comparison between the action decided by the foreign court (which resulted in the judgment sought to be declared enforceable) and the action decided by Mozambican courts concerning the

same dispute. In the present case, although Y alleged the existence of res judicata based on earlier Mozambican proceedings, he failed to establish the required identity of parties, claim, and cause of action.

Accordingly, the requirement under Article 1096(d) is satisfied.

Regarding proper service, both the applicant and the respondent had the opportunity to participate in the foreign proceedings.

Accordingly, the requirement under Article 1096(e) is also satisfied.

Regarding public policy, the foreign judgment in question does not contravene Mozambican public policy principles, as civil liability for damage resulting from breach of legal transactions is an institution widely accepted in Mozambique.

Finally, with regard to the requirement under Article 1096(g), since both parties are Chinese nationals, the judgment was not rendered against a Mozambican national, the nationality privilege does not arise, rendering this provision inapplicable.

IV. Comments

The decision of the Mozambican Supreme Court is both interesting and significant in several respects, two of which are particularly noteworthy. First, it is interesting because it reproduces various elements discussed in literature, notably in an article published in 2022 by M. Muchanga,[i] who also serves as the President of the Mozambican Supreme Court (A M Muchanga, ‘Reconhecimento de Sentenças Estrangeiras em Matéria de Direito Privado na Ordem Jurídica Moçambicana’ 1 *O Embondeiro: Revista Dos Tribunais* (2022) 15).

The decision is also significant because it does not only clarify some general principles underlying the recognition and enforcement of foreign judgments in Mozambique (1), but also it sheds further light on the specific conditions applicable to their recognition and enforcement (2).

1. General Principles underlying the Recognition and Enforcement of Foreign Judgments in Mozambique

a) Applicable legal framework

Mozambican law in the field of the recognition and enforcement of foreign judgments, and private international law more generally, is not merely inspired by Portuguese law; it is, in fact, Portuguese law, extended to Mozambique when it was one of Portugal's overseas (*ultramar*) territories. Regarding the recognition and enforcement of foreign judgments, the relevant rules are contained in the Portuguese CCP of 1961 (*Código de Processo Civil*), whose application was extended to Mozambique in 1962 (Articles 1094-1101). This legal framework, inherited at independence in 1975, continues to govern the recognition and enforcement of foreign judgments in Mozambique. These rules are particularly significant given the extremely limited number of conventions concluded by Mozambique (e.g., the 1990 Mozambican-Portuguese Convention on Legal and Judicial Assistance), which, in practice, are generally not invoked by the courts, even in situations where international conventions would, in principle, apply.

b) Reciprocity not required

Recognition and enforcement in Mozambique do not depend on the existence of reciprocity. Judgments rendered in states where recognition and enforcement are themselves subject to a reciprocity requirement, such as China (Article 299 of the Chinese CCP), do not appear to encounter particular difficulties when enforcement is sought in Mozambique, as the present case clearly illustrates. Other cases show a similar practice, with judgments from countries requiring reciprocity (such as Germany and the UAE (Dubai)) being smoothly recognized and enforced in Mozambique.

It is also worth mentioning that the Supreme Court of Mozambique concluded in 2018 a Memorandum of Understanding (MoU) with the Supreme People's Court of the People's Republic of China, which, *inter alia*, aims to facilitate the

recognition and enforcement of judgments in both countries (Article 4). However, this MoU does not appear to have played any decisive role, either directly or indirectly, in the outcome of the present case.

c) Necessity for review and confirmation procedure

Giving effect to foreign judgments in Mozambique is based on the so-called *delibation* (*delibação*) system, i.e. a process of individualized review through which foreign judgments would be admitted or not to produce their legal effects in the forum, including *res judicata* effects (Muchanga, *op.cit.*, 21). This confirms, along with other relevant provisions in the CCP (Article 497(4), 1094(1)), that foreign judgment do not enjoy *de plano* effect (automatic recognition) in Mozambique.

d) No review of the merits

As a matter of principle, review of the merits is not permitted, and the case law of the Supreme Court is fairly consistent on this point. This principle, however, admits two notable exceptions, as indicated in the decision: public policy and the so-called nationality privilege (Muchanga, *op. cit.*, at 21). As the present case clearly illustrates, review of the merits is only exceptionally engaged on public-policy grounds. By contrast, review of the merits becomes more relevant in connection with the nationality privilege, notably in the application of Article 1096(g). Here again, as will be shown below, the case law of the Supreme Court is far from turning this requirement into an insurmountable hurdle, even where the foreign decision (including arbitral awards) is rendered against a Mozambican national.

2. Requirements for the Recognition and Enforcement in Mozambique

According to Article 1101 of the CCP, the court dealing with recognition and enforcement requests should not only examine *ex officio* certain requirements (notably those relating to authenticity, public policy, and the nationality privilege) but should also, on its own motion, refuse recognition and enforcement if, upon

examination of the case file, it appears that any of the other statutory requirements are not satisfied. For this reason, although the parties' submissions focused primarily on the fulfilment of one specific requirement, the Supreme Court nonetheless examined whether all the remaining conditions were met. This approach is consistent with the Court's established practice, which systematically undertakes a comprehensive review of all statutory requirements for recognition and enforcement.

Below is a brief overview of the recognition and enforcement requirements as set out in Article 1096 of the CCP, considered in light of the Supreme Court's practice.

a) Authenticity and intelligibility

The authenticity requirement relates essentially to the origin of the foreign judgment (Muchanga, *op. cit.*, at 25). Typically, authenticity is verified through the process of legalization in accordance with the applicable legal provisions (notably Article 540 of the CCP). Supreme Court case law shows that the Court often requests the party seeking enforcement to provide the necessary legalization when it is not included in the initial application. As for intelligibility, this concerns the clarity and comprehensibility of the foreign decision (Muchanga, *op. cit.*, at 26). Several Supreme Court decisions indicate that this requirement applies particularly to the operative part of the judgment.

b) Finality

In Mozambique, courts generally recognise and enforce only foreign judgments that are final under the law of the State of origin as repeatedly confirmed by the Supreme Court. Proof of the finality of the foreign judgment takes the form of a certificate attesting that the judgment has become final and binding under the law of the country of origin. However, as the present case shows, the Supreme Court considered that finality is presumed even in the absence of documentary evidence establishing it. This presumption may nevertheless be rebutted by the respondent through the submission of appropriate evidence.

c) Indirect jurisdiction.

One of the most important clarifications concerns the standard by which the jurisdictional requirement is to be assessed. Contrary to what has been suggested in some scholarly writings,[ii] the jurisdiction of the foreign court must be assessed by reference to Mozambican rules of direct jurisdiction, in the sense that a foreign court is regarded as competent if, in comparable circumstances, Mozambican courts would have assumed jurisdiction. This approach is commonly described as the bilateralisation of rules of direct jurisdiction, or – more widely known – the mirror-image principle (Muchanga, *op. cit.*, at 28).

d) *Res judicata* and *Lis pendens*, or Conflicting Judgments and Proceedings

In the context of the recognition and enforcement of foreign judgments, the defence of *lis pendens* applies where a foreign judgment was rendered while proceedings were still pending before Mozambican courts, whereas the defence of *res judicata* applies where a Mozambican court has already rendered a final and binding judgment on the same matter. In such cases, the foreign judgment may be denied recognition and enforcement, as its admission would either undermine Mozambican proceedings or judgments, or eventually result in two contradictory final judgments producing effects within the Mozambican legal order (Muchanga, *op. cit.*, at 30).

The application of both the *lis pendens* and *res judicata* defences requires identity between the foreign and domestic actions with respect to the parties, the claim, and the cause of action (Article 498(1) of the CCP). Accordingly, the *res judicata* defence was not admitted when the party resisting enforcement of a foreign divorce judgment awarding parental authority and alimony invoked the existence of a Mozambican judgment that had only declared the dissolution of the marriage.

The significance of the present case lies in the Supreme Court's clarification that the *res judicata* defence should be assessed based on a comparison between the action adjudicated by the foreign court and the action previously decided by Mozambican courts, rather than between the review-and-confirmation

proceedings and the local action.

e) Service and right to defence

While Article 1096(e) primarily refers to proper service, this provision is generally understood broadly to encompass not only the defendant's right to be duly informed of the proceedings but also the right to a genuine opportunity to be heard (Muchanga, *op. cit.*, at 31). This interpretation is confirmed by the present decision, in which the Supreme Court focused on the parties' opportunity to participate in the foreign proceedings. Case law shows that, in line with the wording of Article 1096(e), where Mozambican law dispenses with initial service, there is no need to verify whether the defendant was formally served. It also shows that defects or irregularities in service can be cured if the losing party actively participated in the proceedings before the foreign courts.

f) Public policy

In the present case, the Supreme Court found no violations of Mozambican public policy, understood in the literature as "international public policy" (*ordem pública internacional*), which concerns "the fundamental principles structuring the Mozambican legal order" (Muchanga, *op. cit.*, at 31-32). It is worth noting that, while the Supreme Court has recognized public policy as an exception to the principle prohibiting review of the merits, in other cases it has addressed public policy from the perspective of the effects (*efeitos*) of foreign judgments, which should not be intolerable for the Mozambican legal order.

g) Choice-of-law test or the privilege of nationality

This is one of the most emblematic requirements in the Mozambican enforcement regime inherited from Portuguese law. Under this provision, foreign judgments rendered against Mozambican nationals must not contravene Mozambican private law where, under Mozambican conflict-of-laws rules, Mozambican law would have applied. This is commonly known as the "privilege of nationality." (Muchanga, *op. cit.*, at 21, 31).

What is remarkable in Mozambican practice is that, despite the anachronistic nature of this requirement,[iii] it has played a relatively limited role. Case law shows that the privilege operates only if two conditions are met: (1) Mozambican law governs the dispute according to Mozambican conflict-of-laws rules; and (2) the judgment was rendered against a Mozambican national, i.e., the unsuccessful party in the foreign proceedings.

Accordingly, as the present decision shows, when the foreign judgment concerns only foreign parties, this provision does not apply. This approach is also extended to cases in which a foreign judgment cannot technically be regarded as rendered against a Mozambican national, such as non-contentious proceedings. In such situations, the Supreme Court has found the requirements of Article 1096(g) to be satisfied.

Second, and most importantly, the privilege applies only when Mozambican law should have been applied under Mozambican choice-of-law rules. Accordingly, if the foreign law applied by the court of origin corresponds to the law that would be applicable under Mozambican rules, the privilege of nationality does not apply, even if the judgment is rendered against a Mozambican national. In these situations, the Supreme Court has frequently concluded that there is no inconsistency with Mozambican private law and that the requirement in Article 1096(g) is satisfied. The scope of this exception is considerable, notably in international commercial contracts, where party autonomy is generally recognized and fully upheld by Mozambican courts.[iv]

V. Concluding Remarks - Peculiarities of the Recognition and Enforcement Practice in Mozambique

As mentioned above, Mozambican law in the field of the recognition and enforcement of foreign judgments is of Portuguese origin. It therefore appears quite natural that Mozambican scholars, and even judges of the Mozambican Supreme Court, rely heavily on Portuguese case law and scholarly writings when interpreting and applying Mozambican law and the inherited Portuguese legal framework. This is more so given the scarcity of legal literature and scholarly writings in the field.

This state of affairs seems to justify the strong temptation to view the legal

framework in force in Mozambique – as well as in other Lusophone countries, particularly in Africa[v] – through Portuguese lenses, which may lead one to assume that Mozambican private international law is identical to that applicable (or formerly applicable) in Portugal (except of course where Portugal has since moved beyond the rules left in its former colonies).

This approach nevertheless suffers from some serious shortcomings. First, due to the over-reliance on Portuguese literature and case law, the solutions developed by the Mozambican Supreme Court remain largely unknown. Second, such reliance also risks superimposing an external legal perspective on Mozambican judicial and practical realities. By way of illustration, the Portuguese legal framework governing the recognition and enforcement of foreign judgments is often portrayed in literature as allowing, under certain circumstances, a review of the merits and control over the law applied by the foreign court.[vi] These features have frequently been criticized as constituting a “serious obstacle to the recognition of foreign judgments” in Portugal.[vii] It has indeed been observed that, in Portuguese practice, choice-of-law control operates so as to bar a significant number of enforcement cases.[viii] If one were to assume that a similar approach prevails in Mozambique, one would expect comparable obstacles to the recognition and enforcement of foreign judgments before Mozambican courts.[ix]

Available case law, however, presents a completely different picture. An examination of approximately 28 decisions of the Mozambican Supreme Court concerning the recognition and enforcement of foreign judgments between 2013 and 2025 shows that, excluding the few cases rejected on purely procedural grounds or subsequently withdrawn, the success rate of enforcement applications is remarkable: 100%.

Those cases also show that foreign judgments from various countries, including Germany, France, Spain, Portugal, England, South Africa, Australia, UAE (Dubai) and China, all were recognized and enforced, often without any particular difficulty, with the court sometimes simply enumerating the recognition and enforcement requirements and concluding that they were all satisfied. Moreover, although the nationality privilege is often examined in the Supreme Court’s decisions, the available cases indicate that it has not constituted a serious obstacle to the recognition and enforcement of foreign judgments.

These observations highlight the importance of consulting local case law rather

than relying solely on assumptions drawn from other jurisdictions. Careful study of domestic practice provides valuable insights for both legal scholars and practitioners,[x] and contributes to a more accurate understanding of how foreign judgments are recognized and enforced in practice, within their local legal context and environment.

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3. **The Recognition and Enforcement of Foreign Judgments within the CEMAC Zone**, by *Boris Awa*

[i] M. Muchanga, who also a university lecturer, has been involved in many of reported foreign judgments enforcement cases, including the one commented on here.

[ii] See eg, R F Oppong, 'Private International Law and the African Economic Community: A Plea for Greater Attention' 55 *International & Comparative Law Quarterly* (2006) 917, explaining that the 'international jurisdiction of the foreign court will...be recognized only when the court of the forum did not claim jurisdiction of its own over the subject-matter'. The formulation suggests that the indirect jurisdiction of the foreign court would be denied whenever the jurisdiction of the Mozambican courts is justified according to its own rules of direct jurisdiction.

[iii] See F K. Juenger, 'The Recognition of Money Judgments in Civil and Commercial Matters' 36 *AJCL* (1988) 34.

[iv] On the issue of the law applicable to commercial contracts in Mozambique, see R Dias and C F Nordmeier, 'Angola and Mozambique', in D Girsberger et al. (eds.), *Choice of Law in International Commercial Contracts: Global Perspectives*

on the *Hague Principles* (OUP, 2021) 265.

[v] Lusophone countries are countries or territories where Portuguese is an official language. African Lusophone countries include Mozambique, Angola, Cape Verde, Guinea-Bissau, São Tomé and Príncipe. Outside Africa they include, in addition to Portugal, Brazil, East Timor and Macau (China).

[vi] See eg S P. Baumgartner, 'How Well Do U.S. Judgments Fare in Europe?' 40 *The Geo. Wash. Int'l L. Rev.* (2008) 187, 228.

[vii] S P. Baumgartner, 'Understanding the Obstacles to the Recognition and Enforcement of U.S. Judgments Abroad' 45 *International Law and Politics* (2013) 978.

[viii] See C M D Da Silva, 'De la reconnaissance et de l'exécution des jugements étrangers au Portugal (hors du cadre de l'application des conventions de Bruxelles et de Lugano)', in G Walter and S P. Baumgartner (eds.), *Recognition and Enforcement of Judgments Outside the Scope of the Brussels and Lugano Conventions* (Kluwer Law International, 2000) 481.

[ix] See eg R Dias and C F Nordmeier, 'Private International Law of Contracts in Angola and Mozambique' 37 *Obiter* (2016) 138.

[x] In this sense also, A Boris, 'The Recognition and Enforcement of Foreign Judgments within the CEMAC Zone', on this blog.

From Deference to Objectivity: How Courts Are Rewriting the

Commercial Reservation



By Taimoor Raza Sultan, Stockholm University

Introduction

The 1958 New York Convention ('NYC') is widely regarded as international arbitration's most significant achievement. Having been ratified by over 160 states, , establishing a credible system of enforcement for arbitral awards. Yet the commercial reservation under Article 1(3), which allows the reserving state to limit the application of the '*Convention only to differences considered as commercial*' under its own national law, risks jeopardizing the uniformity of the convention. By domesticating the definition of commerciality, the reservation invites forum shopping and inconsistent enforcement.

The *CC/Devas (Mauritius) Ltd. v. Republic of India* brings this latent tension to the surface. Devas Multimedia secured awards totaling approximately \$111 million against India after Antrix Corporation (the commercial arm of the Indian Space Research Organization) terminated a 2005 satellite spectrum lease agreement. Antrix cited 'essential security interests' requiring the S-band spectrum for India's defense forces and strategic public services. Relying on its settled domestic jurisprudence, India maintained that the Convention was inapplicable to BIT arbitrations, on the basis that investor-State disputes differ in nature from commercial arbitrations and implicate issues of public international law.

Enforcement attempts across Australia, the United Kingdom, and Canada achieved significantly different results, particularly in their respective approaches to defining commerciality under the convention. Australia strictly deferred to India's view, while Canada applied an objective commercial lens. The UK court refused to decide the commercial reservation issue, instead ruling primarily that India's NYC ratification does not waive sovereign immunity under s.2(2) SIA 1978 (*para 98*). This article compares the Australian and Canadian approaches, then proposes a '*enforceability-focused objective standard*' to limit abuse while

preserving the reservation's purpose.

Australia's Deferential Approach

In *Republic of India v. CCDM Holdings, LLC* [2025] FCAFC 2, the Federal Court of Australia unanimously reversed the enforcement order issued by the primary judge, holding that India is immune under section 9 of the Foreign States Immunities Act 1985 as the enforcement of the award is limited by India's reservation under Article 1(3) of the Convention.

Furthermore, Article 1(3) creates a reciprocal obligation that even the non-reserving States like Australia must honor reservations declared by the reserving States in their mutual relationship (*para 65*). The court characterized the BIT dispute as arising from '*public international law*' rights between the investor and the sovereign, and certainly not constituting private commercial relationship (*para 81*). The Indian Cabinet's annulment decision was also motivated by the country's '*strategic requirements*', which reinforces the non-commercial nature of the transaction. It, therefore, concludes that India has not submitted to the jurisdiction of Australian courts under section 10(2) (*para 75*).

Crucially, the respondent did not adduce evidence to contest the non-commercial nature of the transaction (*para 76*). In the absence of proof of Indian law to the contrary, the court applied the presumption that foreign law is the same as Australian law (*Neilson v. Overseas Project* [2005] HCA 54). On that basis, the dispute was characterized as non-commercial under Australian law. The court made clear, however, that reliance on any different characterization under Indian law would have required specific proof of the content and application of Indian law to rebut the presumption (*para 77*). While this reflects a recognition of state sovereignty, the states could strategically reclassify market activities as policy-driven, which could frustrate investor expectations, undermining the pro-enforcement ethos of the New York Convention, and potentially deterring investment in reserving states like India.

Canada's Objective Approach

The Quebec Court of Appeal (COA) adopted a contrasting approach in *CC/Devas (Mauritius) Ltd v Republic of India* (2024 Quebec CA) by denying immunity to India under both the waiver and commercial activity exception of the State Immunity Act 1985 (sections 4 & 5), and permitted enforcement and asset

seizure.

The court primarily based its decision and analysis on the commercial activity under section 5. Contextually, the BIT essentially involved the commercial leasing of India's spectrum capacity which aimed at '*encouraging foreign investment*' and can be termed as a '*trade agreement*' (para 42). The court did not consider the annulment grounds of India's National Security Council materially relevant in the waiver determination. Instead, it focused more on economic substance, investment structure, and financial return of the deal. Such an approach also aligns more closely with the historically expansive interpretation of the commercial reservation under the New York Convention adopted by Indian courts. For instance, in *R.M. Investment and Trading Co. v. Boeing Co.* (1994), the court dealt with a state-level consultancy agreement for the sale of Boeing aircraft in India, and specifically remarked, '*the expression 'commercial' must be construed broadly having regard to the manifold activities which are part of international trade today*' (para 12). The Canadian court has interpreted the deal similarly, appreciating its commercial nature under current modalities of international trade.

The Canadian approach upholds the pro-enforcement approach of NYC, but it risks under-appreciating the plain language of Article 1(3), which mandates reference to the domestic law of the reserving State.

Towards an Enforceability-Focused Objective Standard

The Devas saga reveals that the central fault line is not whether Article 1(3) mandates reference to the law of the reserving State, it plainly does, but rather how enforcing courts ought to apply that mandate. Australia's highly deferential approach allows the reserving state's self-characterization, casting a BIT dispute as a subject of public law or invoking annulment as a matter of public policy, to determine the scope of the Convention's applicability. Canada's objective approach, by contrast, considers the substance of the transaction by analyzing what the parties actually accomplished, including the investment of capital through commercial structures in order to receive financial gain.

The courts could, instead, adopt a pro-enforcement objective standard test without entailing a departure from the application of reserving state's law. This approach requires the objective assessment of facts in answering the question of

whether the dispute arise from the State's market participation or exercise of core public authority? Courts may assess (i) the nature of act giving rise to the dispute, and (ii) nature of parties' relationship at the time the investment was made.

In *Devas*, Antrix had entered the satellite capacity market as a commercial counterparty. The subsequent BIT claim merely internationalized the consequences of that commercial decision. Indian courts have themselves consistently treated contracts involving state-owned enterprises as commercial in nature under the Arbitration and Conciliation Act 1996. Therefore, an objective standard gives effect to Article 1(3)'s reference to Indian law, while resisting post-dispute recharacterization of commercial conduct.

Conclusion

Such an objective approach is consistent with the pro-enforcement mandate of the Convention, supporting a narrow construction of the reservation, and aligns with a liberal understanding of commercial activity in contemporary business. Excessive deference risks abuse, whereas an objective approach promotes predictability allowing investors to structure transactions around identifiable commercial elements while preserving space for genuine exercises of sovereignty, such as taxation and non-market regulation.

Online Symposium on Recent Developments in African PIL (II) - The Recognition and Enforcement of Foreign Judgments within the

CEMAC Zone



*As part of the second online symposium on **recent developments in African private international law**, we are pleased to present the second contribution, kindly prepared by **Boris Awa (Kigali Independent University, Rwanda)**, on **The Recognition and Enforcement of Foreign Judgments within the CEMAC Zone**.*

I. Introduction

The Central African Economic and Monetary Community (CEMAC) is a regional intergovernmental organization comprising Cameroon, the Central African Republic, Chad, the Republic of Congo, Equatorial Guinea and Gabon. It was created by the Treaty establishing CEMAC on 16 March 1994 and revised in 2008 (Hereinafter referred to as the CEMAC Treaty). All CEMAC Member States also belong to the Organisation for the Harmonisation of Business Law in Africa (OHADA),^[i] which aims to harmonise business law among its Member States. OHADA is composed of 17 Member States, all with legal systems rooted in the civil law tradition.

As regional integration and the harmonization of laws in CEMAC deepened, issues related to the recognition and enforcement of judgments became more prominent than ever before. This came in handy through the entry into force of the Judicial

Cooperation Agreement of 28 January, 2004 (hereafter the “CEMAC Agreement”).[ii] Closely linked to the CEMAC Agreement are other multilateral initiatives, such as the General Convention on Judicial Cooperation in matters of Justice, 12 September 1961 in Tananarive (hereafter the “Tananarive Convention”)[iii], as well as bilateral treaties and domestic legislations of Member States, all of which are relevant in this context.

Against this background, we shall in turn discuss the conditions for the recognition of judgments under the laws of member States (II), under the relevant multilateral instruments, namely the Tananarive Convention and the CEMAC Agreement (III), and the hurdles that impede the recognition of foreign judgments under the CEMAC Agreement (IV).

II. Recognition and Enforcement under Domestic Legal Regimes

Most Member States in CEMAC have black letter laws on the recognition and enforcement of judgments. The table below outlines the relevant laws and provisions governing this area in each CEMAC Member State.

Jurisdiction	Code/Act	Provision
Cameroon	Law No 2007/001 of 19 April 2007 to Institute a Judge in Charge of Litigation Related to the Execution of Judgements and lay down Conditions for the Enforcement in Cameroon of Foreign Court Decisions, Public Acts and Arbitral Awards	Articles 5-9
Gabon	Civil Code (1972)	Articles 71-77
	Civil Procedure Code (1977)	Articles 967-971
Tchad	N/A	N/A

Central African Republic	Code of Civil Procedure (1991)	Articles 469-471
Equatorial Guinea	Spanish Civil Procedure Code (1881)	Articles 951-958
The Republic of Congo	Code of Civil, Commercial, Administrative and Financial Procedure (1983) (CCCAFP).	Articles 298-310

It emerges that five of the six CEMAC Member States have codified provisions on the recognition and enforcement of judgments. Moreover, the conditions for the recognition and enforcement of judgments in three Member States (namely, Cameroon, Gabon and Central African Republic) are similar. These include indirect jurisdiction, the right of defence, inconsistent judgments, public policy and finality. On the other hand, Congolese law provides no formal conditions for the recognition and enforcement of foreign judgments. In the Republic of Congo, the judgment debtor must seize the court that would have had subject matter jurisdiction to hear the claim, to render the foreign judgment executory in the Republic of Congo (art. 298 of the CCCAFP).

Apart from the aforementioned requirements for recognition and enforcement common to CEMAC member states, only Gabonese law (article 75 of the Civil Code) recognizes reciprocity as a condition for the enforcement of foreign judgments.

III. Recognition and Enforcement under the Applicable International Instruments

Two principal legal instruments govern the recognition and enforcement of judgments in the CEMAC zone: the 1961 Tananarive Convention and the 2004 CEMAC Agreement.

1. The Tananarive Convention

The Tananarive Convention presents the first efforts towards the harmonisation of judgment enforcement in francophone Africa. This convention mirrors the zeal to set up a common legal regime among Francophone African countries on judgement enforcement immediately after obtaining their independence.

The Tananarive Convention provides five (5) conditions for the enforcement of judgments in contentious and non-contentious decisions in civil and commercial matters under the treaty. These conditions are set out in article 30 and include:

- (1) competent court according to the rules set out in the Convention (art. 38),
- (2) the decision was rendered following the laws on conflict of law applicable in the state of where enforcement is sought,
- (3) the judgment has, under the law of the state of origin, acquired the force of *res judicata* and is capable of enforcement
- (4) the right of defence must have been respected and
- (5) the judgment is not contrary to public order in the state where enforcement is sought, and does not conflict with a final judicial decision rendered in that State.

2. The CEMAC Agreement

The CEMAC Agreement is the first legal instrument establishing a unified legal framework for the enforcement of judgments within the CEMAC zone. Based on the principle of supremacy of community legislation over national laws, it follows that the CEMAC Agreement sits above local legislations in the hierarchy of legal norms. Thus, the legislation to be applied by the courts for the recognition and enforcement of judgments within the zone should be derived from CEMAC law – namely, the CEMAC Agreement – rather from local legislations.

There are five (5) conditions for the recognition and enforcement of judgments under the CEMAC Agreement. These requirements are set out in article 14 of the Agreement which states that the judgement must satisfy the following conditions:

- (1) the decision emanates from a competent court of the country where it was rendered

- (2) the decision is not contrary to case law in the member state where enforcement is sought,
- (3) the decision has acquired the force of *res judicata*
- (4) the judgment was rendered in a fair trial that guarantees the equitable presentation of parties, and
- (5) the judgement is in conformity with public policy in the member state where enforcement is sought.

3. Brief Comparative Overview of the Two Instruments

While the conditions for allowing enforcement under the CEMAC Agreement may appear similar to those provided under the Tananarive Convention, several differences exist. Substantively, the Tananarive Convention allows the control of the law applied in the state where enforcement is sought, but this is not the case with the CEMAC Agreement. Also, while the CEMAC Agreement provides for the determination of the competent court based on the law of the rendering state, the Tananarive Convention provides controlling criteria for the determination of competent court in article 38 based on the type of civil or commercial dispute. Procedurally, under the CEMAC Agreement, the judgment creditor, by a petition (*requête*), seizes the president of the court in the place where enforcement is sought, provided that the court would have had subject matter jurisdiction to hear the dispute (art. 16). Under the Tananarive Convention, the request for enforcement is brought, by petition (*requête*), before the president of the court of first instance or a corresponding jurisdiction at the place where enforcement is sought (art. 32).

It is worth noting that article 37 of the CEMAC Agreement abrogates treaties, bilateral agreements, and conventions among CEMAC members states insofar as they are contrary to the CEMAC Agreement. Thus, the Tananarive Convention ceases to be a source of law for purposes of the recognition and enforcement of judgments within the CEMAC zone to the extent that its provisions conflict with the CEMAC Agreement.

IV. Hurdles Besetting the Recognition of Foreign Judgments within the CEMAC Zone

1. Fragmentation of laws

The CEMAC region is characterized by the coexistence of multiple applicable legal frameworks governing the recognition and enforcement of foreign judgments, including domestic laws, bilateral conventions, multilateral conventions (notably the CEMAC Agreement and the Tananarive Convention). This raises questions as to the rationale for the continued conclusion of bilateral treaties on the recognition and enforcement of judgments, given that the enforcement regimes found under various instruments in the region are sometimes similar, with few differences.

2. Judicial neglect of the CEMAC Agreement

Given the superiority of CEMAC law over local legislation, the enforcement of judgments within the CEMAC zone should be governed by the CEMAC Agreement rather than by the domestic laws of the Member States. In practice, however, courts in several CEMAC Member States have not consistently adhered to this principle. Instead, judges often resort to domestic legislation with which they are more familiar when dealing with the recognition and enforcement of judgments from member states within the CEMAC zone.

This approach has received judicial endorsement. In a number of cases decided by Cameroonian courts. One such example is *La succession Levy représentée par ses administrateurs, sieurs Levy Jesus Cyril et Levy Ishaï, commerçants demeurant à Bangui en République Centrafricaine*, which concerned the recognition and enforcement in Cameroon of a judgment from the High Court in Bangui (Central African Republic) attributing letters of administration (*administrateurs*) to the plaintiffs. In that case, the court applied Cameroonian domestic law rather than the CEMAC Agreement (*Court of First Instance Douala-Bonanjo, Ordonnance of 31 January 2019 (Unreported)*).

A similar approach was followed in *Dame Tchagang Edo Ovono N'do Eyebe, Sieur*

Sandjong Mezui Verdier C/ Monsieur le Greffier en Chef du TPI Douala Bonanjo, where a Gabonese judgment appointing the plaintiff as the heir and successor of the deceased Gabonese national was recognised and enforced in Cameroon on the basis of domestic law, in disregard of the CEMAC Agreement (*Court of First Instance Douala-Bonanjo, Ordonnance N°42 of 19 February 2019 (Unreported)*). Needless to say that the judgments referred to above are, in principle, legally flawed, as they disregard the hierarchy of norms established by the CEMAC Treaty.

Also, despite the fact that article 37 of the CEMAC Agreement abrogates treaties, conventions among others among member states which are contrary to the CEMAC Agreement, some courts in Chad continue to use the Tananarive Convention against the CEMAC Agreement. The Chadian case of *Etat du Cameroun, Représenté par Monsieur le Ministre des Finances C/ Fotso Yves Michel* mirrors this example where the Chadian High Court of Ndjamenā enforced a judgment from the Supreme Court of Cameroon in Chad using the Tananarive Convention thereby disregarding the CEMAC Agreement (*High Court of Ndjamenā, Repertoire No 78/2024 of 23 July 2024 (Unreported)*).

Several factors may explain this state of affairs. One particularly relevant in our view relates to is the scarcity of sufficient legal literature, with a regional or community-law focus on the recognition and enforcement of foreign judgments within the CEMAC zone. Conflict of law scholarship in the region continues to place predominant emphasis on domestic private international law, often overlooking the relevant community-law framework. As a result, judges are deprived of adequate doctrinal guidance, and developments in CEMAC law in this field often go unnoticed.

V. Conclusion

The reception and application of the rules governing the mutual recognition and enforcement of judgments within the CEMAC zone is not uniform. While some judges in Cameroon disregard the CEMAC Agreement and apply domestic legislation in enforcing judgments rendered from CEMAC member states, others in Chad continue to rely on the Tananarive Convention. As a result, despite of its twenty-one years (21) of existence, the CEMAC Agreement has – to the author's

best knowledge – yet to be effectively tested in judicial practice. This situation stems from the complexity of the applicable legal frameworks – domestic, bilateral, multilateral and regional integration frameworks – which operate concurrently.

Against this backdrop, it is recommended that academics within the CEMAC zone engage more actively with regional case law, increase scholarly output, and help raise the visibility of legal developments in the region. Such efforts would provide judges with doctrinal guidance and foster the development of private international law in the region in line with international standards and best practices.

Previous contributions:

1. Online Symposium on Recent Developments in African Private International Law, by *Béligh Elbalti & Chukwuma S.A. Okoli* (Introductory post)

2. Recognition and Enforcement of International Judgments in Nigeria, by *Abubakri Yekini & Chukwuma Samuel Adesina Okoli*

[i] For an overview from the perspective of models of trust management in private international, see Matthias Weller, “‘Mutual Trust’: A Suitable Foundation for Private International Law in Regional Integration Communities and Beyond?” 423 *Collected Courses* (2022) 203

[ii] On CEMAC and the 2004 CEMAC Agreement, see Weller, *op. cit.*, 184 ; E-A T. Gatsi, ‘L’espace judiciaire commun CEMAC en matière civile et commerciale’ 21 *Uniform Law Review* (2016) 101.

[iii] Ratified by 12 African States including, Cote d’Ivoire, Benin, Burkina-Faso, Madagascar, Mauritania, Niger, Senegal and all the CEMAC Member States, except for Equatorial Guinea. This is likely because Equatorial Guinea had its independence seven years after the adoption of the Convention. On this Convention, see Weller, *op. cit.*, 199.

Article V(1)(e) of the 1958 New York Convention in Light of a Decision of the Turkish Court of Cassation

Posted on behalf of Erdem Küçüker, an attorney-at-law registered at the Istanbul Bar Association and a private law LL.M student at Koç University. Mr. Küçüker specializes in commercial arbitration, arbitration-related litigation and commercial litigation, and acts as secretary to arbitral tribunals.

Article V of the 1958 New York Convention (“NYC”) lists the grounds of non-enforcement of a foreign arbitral award. Accordingly, Article V(1)(e) provides that when “[t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made” the award’s enforcement may be refused.

In 2024, the Turkish Court of Cassation quashed the lower courts’ decision that declared an International Centre for Dispute Resolution of the American Arbitration Association (“ICDR”) award as enforceable, stating that the courts should have further investigated whether the award is final, enforceable and binding (Court of Cassation, 11th Civil Chamber, Docket No: E. 2022/5986, Decision No: K. 2024/2257, Date: 20.03.2024). This article explains the decision of the Turkish Court of Cassation and comments on the final, enforceable and binding character of an arbitral award in relation to Article V(1)(e) of the NYC.

Decisions of the Lower Courts and the Court of Cassation

The underlying dispute relates to the enforcement of an ICDR award with the seat located in the United States. In the arbitral award, the three respondents were ordered to pay a certain amount to the claimant. The claimant sought the enforcement of this arbitral award in Türkiye.

In the First Instance Court proceedings, the respondents did not submit an answer to the statement of claim. The court noted, amongst others, that (i) all documents in the arbitration, including the award, were validly notified to respondents, (ii) the award is final as per Article 30 of the ICDR Arbitration Rules (“Rules”), (iii) there is no means of appeal against the award, (iv) the respondents did not argue for the denial of the enforcement request. Thus, the court granted the enforcement of the award.

The respondents appealed this decision by claiming that they did not duly receive notification on the arbitration proceedings. However, the Regional Court of Appeal, as the second instance court, agreed with the first instance court that the respondents were duly notified on the proceedings and the award. The Regional Court of Appeal also held that it is the respondent who bears the burden of proof to establish that the award is not final or non-binding. It further incorporated the findings of the first instance court and stated that the award is final and binding according to the Article 30 of the Rules. The Regional Court of Appeal thereby dismissed the appeal on the first instance court decision.

Following the final appeal by the respondents, the case was brought before the Turkish Court of Cassation (“Court”). The Court initially referred to Articles 60-61 of the Turkish Private International Law Act numbered 5718 (“TPILA”) and noted that to enforce a foreign arbitral award, the latter should be final and this requirement shall be considered by the court *ex officio*. The Court concluded that the finality of the award was not clearly established, based on the information available in the case file. Thus, the Court revoked the lower courts’ decision, holding that the lower court shall render a decision following a further investigation as to whether the award is final, enforceable and binding.

Comments

Article V(1)(e) of the NYC provides that:

“Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that [...] [t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made”.

Accordingly, this provision lists three grounds for the refusal of the enforcement of a foreign arbitral award, which are (i) the non-binding character of the award, (ii) the setting aside of the award and (iii) the suspension of the enforcement of the award. NYC provides that these should be established by the party against whom the enforcement is sought.

In relation to the first of the said grounds, an award shall be deemed to be binding if there is no possibility of appeal on merits. Parties can freely characterize an arbitral award as binding between them. This can be made through an explicit agreement in the arbitration clause. The parties can also refer to arbitration rules or laws, which govern that the arbitral award shall be binding. If the parties have such an agreement, the award shall gain binding character in the sense of Article V(1)(e) of the NYC.

In relation to the *enforceable character* of the award, an arbitral award shall be deemed as enforceable, once it is rendered unless the arbitration agreement/rules/laws provide otherwise. Some jurisdictions provide remedies against the award, in which case the competent authority may decide to suspend an award's enforcement.

In terms of the *final character*, an award shall be deemed as final if, (i) there are no possible remedies foreseen against the award or parties waived to resort to such remedies, or (ii) parties initiated these remedies and these are rejected. Notably, for this ground, the NYC considers whether the award is set aside or not.

In the underlying dispute, the principle question discussed is whether the award was final, enforceable and binding on the parties. Before analysing the binding, enforceable and final character of an award it should be noted that in the present case the Court's application of TPILA to revoke the lower courts' decision was systematically wrongful. Türkiye and the USA (i.e., the seat of arbitration) are parties to the NYC. As per Article 90(5) of the Constitution of the Republic of Türkiye and Article 1(2) of the TPILA, the provisions of the NYC prevail over the TPILA. Thus, the author considers that the Court should have applied the provisions of the NYC, instead of the TPILA.

Regarding the determination of the binding, enforceable and final character of an award, the lower courts relied on Article 30 of the Rules (2014 version), which provides under its paragraph 1 that:

“Awards shall be made in writing by the arbitral tribunal and shall be final and binding on the parties. [...] The parties shall carry out any such award without delay and, absent agreement otherwise, waive irrevocably their right to any form of appeal, review, or recourse to any court or other judicial authority, insofar as such waiver can validly be made. [...]”.

Starting with the *binding character*, in the present case, the parties had agreed in the arbitration agreement that the Rules shall be applicable in the arbitration proceedings. As stated above, Article 30 of the Rules provide that the award shall be binding on the parties. Consequently, in the author’s view, unlike the Court’s findings, this gives the award the binding character and the respondents did not establish the contrary.

In terms of the *enforceable character*, the respondents did not seem to argue that the award’s enforcement is suspended. Thus, the author considers that the award is enforceable as well.

For the *final character*, Article 30 of the Rules, as agreed between the parties, provide that the award shall be final and the parties waive any form of appeal against the award. The validity of such waiver can be further discussed in light of the applicable law. Notwithstanding this, as explained above, the NYC places emphasis on whether the award is set aside, and it is the respondent who carries such burden of proof. In the case at hand, respondents neither argued that they brought a setting aside action against the award nor that the latter was set aside. Thus, the author is of the view that the final character of the award was also established in the case at hand, unlike the ruling of the Court.

To summarize, the author initially finds that the Court’s application of the TPILA, instead of the NYC, was systematically wrongful in light of the Turkish Constitution Article 90. Additionally, the lower courts’ decision on the award’s binding and enforceable character was rightful, which, in the author’s view, did not require any further investigation. In terms of the finality of the award, the lower courts’ reliance to the arbitration rules may be debated; however, since the respondents did not prove that the award was set aside, the author argues that the award should have been regarded as final and binding on this final ground as well.

For further discussions on the topic, see also: Erdem Küçüker, *‘Binding and Final*

Character of Arbitral Awards in the Enforcement of Foreign Arbitral Awards in Türkiye – Recurring Need for Clarity’, Daily Jus Blog, 4 November 2025 (available at:

<https://dailyjus.com/world/2025/11/binding-and-final-character-of-arbitral-awards-in-the-enforcement-of-foreign-arbitral-awards-in-turkiye-recurring-need-for-clarity>).

Online Symposium on Recent Developments in African PIL (I) - Recognition and Enforcement of International Judgments in Nigeria



*As previously announced, we are launching the second online symposium on **recent developments in African private international law**. As part of this symposium, a series of blog posts addressing various aspects of recent*

developments in African private international law will be published on this platform over the coming days.

*We open the series with a blog post by Abubakri Yekini (Senior Lecturer in Law at the University of Manchester) and Chukwuma Samuel Adesina Okoli (Assistant Professor in Commercial Conflict of Laws at the University of Birmingham and Senior Research Associate at the Centre for Private International Law in Emerging Countries at the University of Johannesburg), focusing on **the recognition and enforcement of international judgments in Nigeria**.*

1. Introduction

Questions surrounding the recognition and enforcement of judgments have become increasingly prominent in Nigeria, both in academic writing and in practice (Yekini, 2017; Okoli and Oppong, 2021; Olawoyin, 2014; Adigun, 2019; Bamodu, 2012; Olaniyan, 2014; Amucheazi et al, 2024; PN Okoli, 2016). This development is not surprising. Nigerian individuals, companies, and public authorities are now routinely involved in disputes with cross-border elements, whether arising from international trade, investment, migration, or human rights litigation.

Nigeria operates a common law system governed by a written Constitution. The Constitution carefully allocates governmental powers among the three branches of government. Section 6 vests judicial power in the courts, while section 4 assigns legislative power to the National Assembly and State Houses of Assembly. Courts therefore play a central role in the interpretation and development of the law, but always within clearly defined constitutional limits. The Constitution and statutes enacted by the legislature form the bedrock of domestic law.

This constitutional structure has direct implications for the status of international law in Nigeria. Section 12 of the Constitution makes it clear that treaties and other international legal instruments do not become part of Nigerian law merely because Nigeria has signed or agreed to them at the international level. For such instruments to have domestic force, they must be enacted by an Act of the National Assembly. This position has long been settled and repeatedly affirmed by the courts (see *Abacha v Fawehinmi* (2000) NGSC 3).

Private international law in Nigeria largely remains judge-made, inherited from

English common law as part of the received English law. Within this framework, courts have articulated principles governing when foreign judgments may be recognised, when they may be enforced, and when enforcement must be refused (*Toepfer Inc of New York v. Edokpolor* (1965) All NLR 301; *Macaulay v RZB of Austria* (2003) 18 NWLR (Pt. 852) 282; *Mudasiru & Ors v. Onyearu & Ors* (2013) LPELR; *GILAR Cosmetics Store v Africa Reinsurance Corporation* (2025) LPELR-80701 (SC)).

Alongside these common law principles, there are two principal statutory regimes dealing with the recognition and enforcement of foreign judgments (*Willbros West Africa Inc v Mcdonnel Contract Mining Ltd* (2015) All FWLR 310, 342). The statutory registration scheme is governed by the Reciprocal Enforcement of Judgments Act 1922 (“1922 Ordinance”) and the Foreign Judgments (Reciprocal Enforcement) Act 1960 (“1960 Act”), but the latter is not yet in force (*Macaulay v RZB of Austria* (2003) 18 NWLR (Pt. 852) 282; *Ekpenyong v. A.G and Minister of Justice of the Federation* (2022) LPELR-57801(CA)). These frameworks have traditionally been applied to judgments of courts established under the laws of foreign states.

More recently, Nigerian courts have been confronted with judgments of international and regional courts created by treaty, most notably the ECOWAS Court of Justice (*CBN v Gegenheimer & Anor* (2025) LPELR-81477 (CA)). These courts are not courts of foreign states in the ordinary sense. Their jurisdiction derives from agreements between states, and they operate within legal systems that exist alongside, rather than within, national judicial structures. The fact that the ECOWAS Court sits in Abuja does not alter this position; it is not part of the Nigerian judicature as enumerated under section 6(5) of the Constitution.

Judgments of international courts therefore raise questions that are different in kind from those posed by judgments of foreign national courts. International courts increasingly hear cases involving Nigerian parties and Nigerian institutions. Claimants who succeed before such bodies understandably would seek to enforce their judgments before Nigerian courts, particularly where the international legal framework does not provide a direct enforcement mechanism.

It is against this background that this short article examines the recognition and enforcement of international court judgments in Nigeria. It does so by situating recent judicial developments within Nigeria’s existing constitutional and legal

framework and by questioning whether current approaches are consistent with the limits imposed by that framework.

2. The Existing Enforcement Frameworks in Nigerian Law

There are two main mechanisms for recognition and enforcement of foreign judgments in Nigeria. A brief overview of these mechanisms is necessary to appreciate the kinds of judgments Nigerian law already recognises and, equally importantly, those it does not.

a. Common law enforcement of foreign judgments

At common law, a foreign judgment may be enforced in Nigeria by bringing an action on the judgment itself. The judgment is treated as creating an obligation, often described as a debt, which the judgment creditor may seek to recover (*Toepfer Inc of New York v. Edokpolor* (1965) All NLR 301; *Willbros West Africa Inc v McDonnell Contract Mining Ltd* (2015) All FWLR 310, 342). Over time, Nigerian courts have identified conditions that must be satisfied before this route is available. These include whether the foreign court had jurisdiction over the judgment debtor, whether the judgment is final and conclusive, and whether it was obtained in circumstances consistent with basic requirements of fairness (Yekini; Okoli and Oppong)).

This common law route has always been limited in scope. It was developed to deal with judgments of foreign national courts operating within recognised state legal systems. Its underlying assumptions are rooted in territoriality and sovereignty. Jurisdiction at common law is assessed through concepts such as presence, residence, or submission within the territory of a sovereign state (*Adams v. Cape Industries plc* [1990] Ch. 433). Service of process, which founds the jurisdiction of the foreign court, is itself an exercise of sovereign authority.

The common law therefore assumes a relationship between two national legal orders: the foreign court that issued the judgment and the Nigerian court asked to give it effect. International courts do not fit easily within this framework. They are not organs of any single state. Their authority derives from treaties through

which states agree to submit particular categories of disputes to an international judicial body. The legal force of their judgments exists, first and foremost, at the international level. Whether such judgments can have domestic effect depends on how each state structures the relationship between its domestic law and international obligations.

Some commentators have suggested that common law principles could be extended to accommodate international court judgments (Adigun, 2019). Others have acknowledged this possibility while also highlighting the uncertainties it would create (Oppong and Niro, 2014). Whatever the merits of these arguments, the critical point for present purposes is that the common law enforcement of judgments was never designed with international courts in mind. Extending it in this direction would require courts to resolve questions for which the common law offers no clear answers. Which international courts would qualify? Would ratification of the relevant treaty be sufficient, or would domestication be required? What defences would be available, and whose public policy would apply? (Oppong and Niro).

In the absence of legislative guidance, courts would be left to answer these questions on an ad hoc basis. That would place courts in the position of deciding which international obligations should have domestic force and on what terms. In Nigeria's constitutional framework, that is a role more properly reserved for the legislature. Unlike jurisdictions where courts are constitutionally mandated to engage in continuous development of the common law, Nigerian courts have traditionally exercised caution, particularly where the subject matter is affected by express constitutional provisions such as section 12 (cf Art 39(2) of the Constitution of the Republic of South Africa, 1996; *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) where the South African Constitutional Court enforced a judgment of the Southern African Development Community Tribunal against Zimbabwe by developing the common law regime. See also the Zimbabwean case of *Gramara (Private) Ltd v Government of the Republic of Zimbabwe*, Case No: X-ref HC 5483/09 (High Court, Zimbabwe, 2010).

b. Statutory regimes for foreign judgments

The limitations of the common law action on a judgment have long been

recognised. Because the judgment creditor must commence fresh proceedings, jurisdiction must be established against the judgment debtor, and procedural obstacles may delay or frustrate enforcement (Yekini, 2017; Okoli and Oppong). To address these concerns, Nigerian law provides for statutory registration of foreign judgments in defined circumstances.

Two principal statutes govern this area. The first is the Reciprocal Enforcement of Foreign Judgments Ordinance 1922, Cap. 175, Laws of the Federation of Nigeria, 1958 ("1922 Ordinance"). This statute applies on a reciprocal basis to judgments from a limited number of jurisdictions, including the United Kingdom Ghana, Sierra Leone, The Gambia, Barbados, Guyana, Grenada, Jamaica, Antigua and Barbuda, St Kitts & Nevis, St Lucia, St Vincent, Trinidad & Tobago, Newfoundland (Canada), New South Wales and Victoria (Australia). Its scope is narrow and largely historical, but it remains in force.

The second is the Foreign Judgments (Reciprocal Enforcement) Act 1960, Cap. F35, Laws of the Federation of Nigeria, 2004 ("1960 Act"). The Act was intended to replace the 1922 Ordinance and to provide a more comprehensive framework for reciprocal enforcement. It proceeds on the basis of reciprocity. Judgments from foreign countries may be registered and enforced only where the Minister of Justice is satisfied that reciprocal treatment will be accorded to Nigerian judgments and issues an order designating the relevant country and its superior courts (section 3(1)(a)).

Although Nigerian courts have, in practice, permitted registration under the 1960 Act notwithstanding the absence of formal designation (*Kerian Ikpara Obasi v. Mikson Establishment Industries Ltd* [2016] All FWLR 811), the structure of the Act would still not accommodate international courts judgments. It is concerned with judgments of courts of foreign states. It does not purport to regulate the enforcement of decisions of international courts created by treaty. The requirement of designation reflects a deliberate choice to tie enforcement to prior executive action i.e designation, rather than leaving the matter to judicial discretion. A similar conclusion was reached by the Ghanaian court in *Chude Mba v The Republic of Ghana*, Suit No HRCM/376/15 (decided 2 February 2016), where the applicant sought to enforce an ECOWAS Court judgment in Ghana. The court noted that "the ECOWAS Community Court is not stated as one of the courts to which the legislation applies" (see Oppong, 2017) for a fuller discussion of the case).

c. Treaty-based enforcement

Beyond these reciprocal regimes, Nigerian law recognises that international judgments may be enforceable where the National Assembly has chosen to give direct effect to international obligations through legislation. Arbitration provides the clearest illustration.

Nigeria signed the ICSID Convention in 1965 and enacted the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act in 1967 to give domestic effect to its obligations. That Act provides that ICSID awards are enforceable as if they were judgments of the Supreme Court of Nigeria. The result is a clear and mandatory enforcement regime that leaves little room for doubt or judicial improvisation. A similar approach is reflected in the Arbitration and Mediation Act 2023, which governs the recognition and enforcement of international arbitral awards more generally.

These examples reflect the dualist framework set by the Constitution. Where international obligations are intended to produce direct domestic effects, legislation provides the necessary legal authority. The legislature defines the scope of enforcement and the procedures to be followed. Courts are then required to apply the law as enacted. Therefore, it is crystal clear that Nigerian law has always treated the enforcement of judgments as a matter requiring domestic legal framework. This provides the backdrop against which the enforcement of international court judgments must be assessed.

3. CBN V. Gegenheimer & Anor (2025) LPELR-81477(CA) - The Nigerian Case

In May 2025, the Nigerian Court of Appeal had the opportunity, for the first time as far as we are aware, to engage directly with the question of the enforcement of international court judgments in Nigeria. The case arose from a monetary judgment of ₦63,650,925.00 and USD 10,000 made by the ECOWAS Court of Justice against Nigerian authorities following a successful human rights claim. The judgment creditor subsequently approached the Federal High Court to register and enforce that award, which ultimately led to garnishee proceedings

against funds held by the Central Bank of Nigeria.

For present purposes, the central issue was whether Nigerian courts had jurisdiction to enforce a judgment of the ECOWAS Court. More specifically, one of the complaints before the Court of Appeal was whether the 1st Respondent had complied with the conditions precedent for the enforcement of the ECOWAS judgment, notwithstanding the requirements stated in section 4 of the 1960 Act, particularly the requirement relating to the conversion of foreign currency into Naira, and whether the judgment could be enforced in the absence of express domestic legislation authorising such enforcement.

The Court of Appeal answered these questions in the affirmative. In doing so, it reasoned as follows:

It is of common knowledge that the ECOWAS Court of Justice, established in 1991 and located in Abuja, hears cases from West African States, including Nigeria. It was created pursuant to Articles 6 and 15 of the Revised Treaty of ECOWAS. Its organisational framework, functioning, powers, and applicable procedures are set out in Protocol A/P1/7/91 of 6 July 1991; Supplementary Protocol A/SP21/01/05 of 19 January 2005; Supplementary Protocol A/SP.2/06/06 of 14 June 2006; Regulation of 3 June 2002; and Supplementary Regulation C/Reg.2/06/06 of 13 June 2006. In other words, its jurisdiction covers Nigeria. Accordingly, the argument by learned counsel for the Appellant that Nigeria did not domesticate the ECOWAS Court Treaty, Protocol, and Supplementary Protocols is lame.

The Court further observed that the ECOWAS Court Protocol, particularly the 1991 Protocol as amended by the 2005 Supplementary Protocol, establishes the ECOWAS Community Court of Justice as the principal legal organ of ECOWAS, outlines its mandate, jurisdiction, functioning, and procedures, grants it competence over human rights violations within member states, and allows individuals to approach the Court directly without exhausting local remedies.

The Court also upheld the trial court's conclusion that non-compliance with section 4(3) of the 1960 Act does not rob the court of jurisdiction to enforce the judgment.

What appears clear from the decision is that the ECOWAS judgment was effectively registered and enforced on the basis of the ECOWAS Supplementary Protocol A/SP21/01/05 of 19 January 2005, Supplementary Protocol A/SP.2/06/06 of 14 June 2006, Regulation of 3 June 2002, and Supplementary Regulation C/Reg.2/06/06 of 13 June 2006, with a passing reference to the 1960 Act to indicate that the judgment nothing under the Act robs the court off its jurisdiction.

That reasoning is difficult to sustain. The first difficulty lies in the Court's treatment of domestication. The fact that Nigeria has accepted the jurisdiction of the ECOWAS Court answers the international question of competence; it does not answer the domestic question of enforcement. Jurisdiction determines whether the Court may hear a case and issue a judgment at the international level. It does not determine whether that judgment can be enforced within Nigeria. These are distinct matters. In a dualist constitutional system, the latter inquiry depends on the existence of domestic law authorising enforcement.

The Court did not identify any Nigerian statute that performs this function. Instead, it relied on the existence of ECOWAS instruments themselves. This approach blurs the distinction between international obligation and domestic law. It assumes that once Nigeria is bound internationally, domestic courts may act without further domestication. That assumption runs directly against Nigeria's constitutional structure, particularly section 12 of the Constitution.

Equally problematic is the suggestion that the physical location of the ECOWAS Court in Abuja makes any legal difference. International courts frequently sit within the territory of member states without becoming part of the host state's judicial system. The ECOWAS Court is not a Nigerian court, at least within the meaning of section 6 of the 1999 Constitution, and its judgments are not Nigerian judgments. Treating them as such because the Court sits in Abuja has no legal foundation. Jurisdiction at the international level determines whether a court may hear a case; it does not determine whether its judgment can be executed against assets or institutions within Nigeria. Physical location is therefore irrelevant. A court may sit in Abuja and still operate entirely outside the Nigerian legal system, as is the case with the ECOWAS Court.

The second difficulty concerns the Court's reference to the 1960 Act. The proceedings proceeded as though the ECOWAS judgment could be situated within

Nigeria's foreign judgment enforcement regime. Yet, as discussed earlier, the Act was designed to deal with judgments of courts of foreign states and operates on the basis of reciprocity. The ECOWAS Court does not, and could not realistically, fall within that category. It is not a court of a foreign country, and it has never been designated under the Act. One would therefore have expected the Court to be explicit that the Act does not apply to the judgment in question. Instead, citing provisions of the Act in determining whether the trial court had jurisdiction risks creating the impression that the statutory regime is equally applicable to questions arising from the enforcement of international court judgments. This is an impression that is difficult to reconcile with the structure of the legislation.

This critique should not be misunderstood. It is not a denial of Nigeria's international obligations, nor is it an argument that successful claimants before international courts should be left without remedies. The point being made is that domestic courts must act within the established legal framework, particularly in an area where foreign judgments do not have direct force of law except as permitted by statute or common law.

Ghanaian courts have consistently emphasised the country's dualist constitutional structure, under which international and regional judgments are not binding domestically unless the underlying treaty or enforcement framework has been incorporated into Ghanaian law by legislation. In *Republic v High Court (Commercial Division), ex parte Attorney General and NML Capital Ltd* Civil Motion No. J5/10/2013 (unreported), the Supreme Court held that, in the absence of domestic legislation giving effect to the United Nations Convention on the Law of the Sea ("UNCLOS"), orders of the International Tribunal for the Law of the Sea were not binding on Ghana, notwithstanding Ghana's international obligations. Similarly, in *Chude Mba v Republic of Ghana* (*supra*), where enforcement of an ECOWAS Community Court judgment was sought, the High Court confined its analysis strictly to the statutory regime, namely the Courts Act 1993, the High Court (Civil Procedure) Rules 2004, and the Foreign Judgments and Maintenance Orders (Reciprocal Enforcement) Instrument 1993, and concluded that enforcement was unavailable because the regime depends on reciprocity and presidential designation of the foreign court, which were absent. Notably, in both instances the courts did not consider the common law regime for the recognition or enforcement of foreign or international judgments, treating the issue as one governed exclusively by statute and constitutional principles of

dualism.

A similar outcome was reached in a very recent case in *Anudo Ochieng Anudo v Attorney General of the United Republic of Tanzania*, where the High Court of Tanzania declined to register and enforce a judgment of the African Court on Human and Peoples' Rights, holding that such judgments fall outside the scope of Tanzania's Reciprocal Enforcement of Foreign Judgments Act (Cap. 8 of the Laws of Tanzania, 2019). The court, *inter alia*, ruled that the Act applies only to judgments of foreign superior courts designated by ministerial notice and does not extend to international or regional courts established by treaty, including the African Court. Because the applicant anchored his claim exclusively on the Act and did not plead constitutional or international law as an independent basis for enforcement, the court held itself bound by the pleadings and precedent confirming that African Court judgments cannot be enforced under the statutory regime absent express legislative authorisation.

The decision of the Court of Appeal in *CBN v Gegenheimer*, with respect, is therefore a misnomer, as it lacks a solid legal foundation within Nigeria's existing constitutional and statutory framework. Whether judgments of international courts ought to be enforceable in Nigeria is ultimately a question for the legislature. Until such laws are enacted, courts should be cautious about assuming powers they have not been granted.

4. Conclusion

It is clear that judgments of international courts are not enforceable in Nigeria in the absence of specific legal framework permitting their enforcement. The position is well illustrated by the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act 1967 and, more recently, the Arbitration and Mediation Act 2023, both of which demonstrate how Nigeria gives domestic effect to international obligations when it intends to do so.

The common law route is ill-suited to international court judgments. It was developed for judgments of foreign state courts and rests on assumptions of territorial jurisdiction and sovereignty that do not translate easily to treaty-based international courts. Extending it in this direction would leave courts to determine, without legislative guidance, which international judgments are

enforceable and on what terms.

The decision in *CBN v Gegenheimer* is distinctive because it concerns the ECOWAS Court, a regional court whose jurisdiction Nigeria has accepted and whose role in access to justice is well recognised. Even so, acceptance of jurisdiction at the international level does not resolve the domestic enforcement question. Section 12 of the Constitution remains a barrier to direct enforcement in the absence of domestication. For that reason, the decision may yet face serious difficulty if the issue reaches the Supreme Court.

Beyond the ECOWAS context, it is difficult to see how judgments of other international courts could presently be enforced in Nigeria without similar legislative intervention. If international court judgments are to have domestic effect, the solution lies not in judicial improvisation, but in clear legislative action.

Online Symposium on Recent Developments in African Private International Law



It is not uncommon for African and foreign scholars of private international law (PIL) to lament the current state of the field in Africa. Until the early years of the 21st century, PIL was widely regarded, often with little hesitation, as ‘a neglected and highly underdeveloped subject in Africa’.[i] Professor Forsyth famously described it as a ‘Cinderella subject, seldom studied and little understood’.[ii] This limited scholarly attention is reflected, for instance, in the treatment of African PIL in the Hague Academy courses, which include only 4 courses specifically devoted to PIL in Africa, the most recent of which dates back to 1993.[iii] Since then, a number of pleas for greater attention to PIL in Africa,[iv] as well as calls for enhanced cooperation with African countries to ensure better involvement and inclusiveness,[v] have been voiced.[vi]

The last fifteen years, however, have witnessed a noticeable increase in scholarly interest and institutional engagement with PIL in Africa. This is reflected first in the growing body of academic publications,[vii] and the emergence of initiatives aimed at articulating and strengthening an African perspective on the discipline. These include, among others, the publication of the African Principles on the Law Applicable to International Commercial Contracts, and the organization of a series of online workshops on ‘Private International Law in Africa’.

At the institutional level, since 2011, 6 African States have become Members of the HCCH, with Namibia and Rwanda joining respectively in 2021 and 2025, bringing the total number of African HCCH Member States to 9. The recent opening of a regional office for Africa in Morocco further underscores the growing institutional presence and engagement of the HCCH on the African

continent.

More importantly, 33 years after the last Hague Academy Course devoted to PIL in Africa, the subject will once again be addressed within the framework of the Hague Academy. In the forthcoming Summer Courses, Prof. Richard Oppong will indeed deliver a course on the 'Internationalism in Anglophone Africa's Commercial Conflict of Laws' This undoubtedly marks a significant milestone in the renewed visibility and recognition of PIL on the African continent.

There is, however, one aspect that remains relatively underemphasised: the rich and diverse, yet still understudied, body of African case law on PIL. This 'hidden treasure' demonstrates a simple, but often overlooked, fact: Africa is deeply connected to the rest of the world. From Chinese and Brazilian judgments being recognised in Mozambique, to Indonesian and Texan judgments being considered by courts in Uganda, or Canadian judgments sought to be enforced in Egypt; from Malawian courts applying the doctrine of *forum non conveniens* to many other remarkable decisions across the continent, African courts are actively engaging with transnational legal issues, including international jurisdiction and applicable law in employment contracts, the validity of foreign marriages, and cases of international child abduction. This case law also reveals the challenges faced by courts across the continent, which are often called upon to deal with complex issues using outdated or inadequate legal frameworks. Far from confirming the widespread perception of a stagnating field, judicial practice in Africa shows that important, and often fascinating, developments are taking place across the continent, developments that deserve far greater scholarly attention and engagement. Only through sustained scholarly engagement, by studying, commenting on, and comparing judicial approaches, and by highlighting shortcomings in existing legal frameworks and practices, can Africa develop a strong and distinctive voice in the field of PIL.

This is precisely the purpose of the present online symposium. Building on an established tradition of this blog, Conflictoflaws.net will host the **second online symposium** on African private international law.[viii] The main objective of the symposium is to shed light on selected aspects of recent developments in private international law in Africa. A number of scholars known for their active commitment to the development of private international law on the African continent have kindly agreed to comment on some of these cases or to share their views on what, in their opinion, best illustrates the diversity of private

international law in Africa.

The symposium will run over the coming days and will feature contributions addressing a wide range of themes and African jurisdictions. These include the following:

1. **Chukwuma Okoli (University of Birmingham) and Abubakri Yekini (University of Manchester, Uk)**, on the recognition and enforcement of international court judgments in Nigeria
2. **Béligh Elbalti (The University of Osaka, Japan)**, on the enforcement of a Chinese judgment in Mozambique
3. **Boris Awa (Kigali Independent University, Rwanda)**, on the recognition and enforcement of foreign judgments in the CEMAC region
4. **Solomon Okorley (University of Johannesburg, South Africa)**, on the application of the 1980 HCCH Convention in South Africa
5. **Anam Abdul-Majid (Advocate and Head of Corporate and Commercial Department, KSM Advocates, Nairobi, Kenya) and Kitonga Mulandi (Lawyer, KSM Advocates, Nairobi, Kenya)**, on choice of court agreements in Kenya
6. **Theophilus Edwin Coleman (University at Buffalo School of Law, New York)**, on proof of foreign law and fragility of foreign marriages in Ghanaian courts
7. **Elisa Rinaldi (University of Pretoria, South Africa)**, on Cross-border employment, contract and delictual liability merge in the South Africa

As aptly pointed out by Professor Oppong, ‘there is a need for greater international engagement with African perspectives on [PIL]. There is also a need to attract more people to researching and writing on the subject in Africa.’[ix] In line with these observations, we likewise hope that this initiative ‘will contribute to both greater international engagement with, and increased participation in, private international law in Africa’.[x] Therefore, we encourage readers, in Africa and elsewhere, to actively engage with this initiative by sharing their views or by highlighting other developments of which they are aware. We also hope that this initiative will encourage researchers in Africa and beyond to make fuller use of the available resources and case law, and to comment on them, whether in the form of blog posts or scholarly contributions in academic journals.

This platform remains open and welcoming to such contributions.

[i] Richard F. Oppong, 'Private International Law in Africa: The Past, Present, and Future' 55 *AJCL* (2007) 678.

[ii] Christophe F. Forsyth, *Private International Law – The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (5th ed., Juta, 2012) 46-47.

[iii] Abd-El-Kader Boye, 'Le statut personnel dans le droit international privé des pays africains au sud du Sahara: conceptions et solutions des conflits de lois: le poids de la tradition négro-africaine personnaliste', 238 *Recueil des Cours* (1993) ; U U. Uche, 'Conflict of Laws in a Multi-Ethnic Setting: Lessons from Anglophone Africa', 228 *Recueil des Cours* (1991) ; Salah El Dine Tarazi, *La solution des problèmes de statut personnel dans le droit des pays arabes et africains* 159 *Recueil des Cours* (1978) ; and Ph. Francescakis, 'Problèmes de droit international privé de l'Afrique noire indépendante', 112 *Recueil des Cours* (1964).

[iv] Richard F. Oppong, 'Private International Law and the African Economic Community: A Plea for Greater Attention' 55 *ICLQ* (2006) 911.

[v] Richard F. Oppong, 'The Hague Conference and the Development of Private International Law in Africa: A Plea for Cooperation' 8 *YPIL* (2006) 189.

[vi] Orji Agwu Uka, 'A call for the wider study of Private International Law in Africa: A Review of Private International Law In Nigeria', on this blog; Chukwuma Okoli, 'Private International Law in Africa: A Comparative Lessons', on this blog.

[vii] Jan Neels, 'List of Publications on South African Private International Law as from 2020', on this blog; Chukwuma Okoli, 'Private International Law in Africa: A Comparative Lessons', on this blog.

[viii] The first online symposium organized on this blog was devoted to Private international law in Nigeria. The symposium features interesting contributions by

Chukwuma S. A. Okoli and Richard Oppong, Anthony Kennedy, Richard M. Mlambe, Abubakri Yekini and Orji Agwu Uka.

[ix] Richard F. Oppong, 'Private International Law Scholarship in Africa (1884-2009)' 58 *AJCL* (2010) 326.

[x] Oppong, *Ibid.*

The Titanium Brace Tightens: Rome II and Director Liability after Wunner



By Luisa Cassar Pullicino and Krista Refalo, Ganado Advocates

In the preliminary reference Case C-77/24 *Wunner* (the Titanium Brace case), the CJEU was asked to determine whether a damages claim brought by a consumer directly against company directors for losses suffered from unlicensed online gambling fell within the scope of the Rome II Regulation (Regulation (EC) No 864/2007), or whether it was excluded under Article 1(2)(d) as a “*non-contractual obligation arising out of the law of companies*”.

The practical stakes were considerable. If Rome II applied, Article 4(1) would designate the law of the place where the damage occurred — which, for online gambling losses, would normally be the habitual residence of the consumer. If excluded, the applicable law would instead be determined by national conflict-of-laws rules, typically, the *lex societatis*.

1. Facts and Reference

The case arose from losses suffered by an Austrian consumer who participated in online games of chance offered by Titanium Brace Marketing Limited, a Maltese-registered online gambling company that did not hold a licence under Austrian gambling law. Following the company's insolvency, the consumer brought an action for damages directly against two former directors, alleging that they were personally liable for having allowed or caused the unlicensed offering of gambling services in Austria.

The Austrian Supreme Court referred questions to the CJEU concerning: first, whether such a claim is excluded from the scope of Rome II under Article 1(2)(d); and secondly, if Rome II applies, how the applicable law should be determined.

2. The Court's Reasoning: A Functional Interpretation of Article 1(2)(d)

2.1 Structural vs Functional approach

The Court reaffirmed that the exclusion in Article 1(2)(d) is not confined to 'structural aspects' of companies, but must be interpreted functionally, by reference to the nature of the obligation giving rise to liability. Drawing on its earlier case law, including *BMA Nederland*, the Court held that the decisive question is whether the non-contractual obligation arises from reasons specific to company law or external to it.

Where a director's liability flows from obligations "*incumbent on them owing to the creation of the company or to their appointment and linked to the management, operation or organisation of the company*", it is considered a company law matter, and is excluded from Rome II.

By contrast, where liability arises from the breach of an obligation external to the company's affairs, the exclusion does not apply.

2.2 Application to unlicensed online gambling

Applying that test, the CJEU held that Article 1(2)(d) does not cover actions seeking to establish the tortious liability of company directors for breaches of national prohibitions on offering games of chances to the public without the requisite license. The Court reasoned that the directors' alleged liability did not

arise from company law. The claim was based on an alleged infringement of a general statutory prohibition under Austrian gambling law, applicable to ‘*any person*’ offering games of chance without a licence. As such, the action did not concern the internal relationship between the company and its directors, but the breach of a regulatory norm protecting the public.

The consequence was that the action fell within the scope of Rome II, with the applicable law determined in accordance with Article 4.

3. The Consequence: Consumer Habitual Residence as the Applicable Law

The consequence of the ruling is significant. In online gambling cases, the “*place where the damage occurs*” will often coincide with the habitual residence of the consumer, since that is where participation in the gambling activity takes place and where the financial loss is suffered.

As a result, any action for damages brought directly against a director will, in principle, be governed by the law of the consumer’s residence, regardless of where the company is incorporated, where the directors reside, or where the relevant management decisions were taken.

Following the preliminary ruling, the case will now be remitted to the Austrian court which is responsible for applying the CJEU’s guidance and determining whether the directors actually incur liability under applicable Austrian law.

4. Analysis

4.1 A Tense Separation of Office and Obligation

The Court’s distinction between obligations “*specific to company law*” and obligations “*external*” to it may be potentially difficult to sustain in this context.

A director’s decision to offer online gambling services in a Member State without holding the requisite licence is not a general act performed *erga omnes*. It is a paradigmatic management decision, taken precisely because the individual holds the office of director and exercises control over the company’s commercial strategy. The duty to ensure regulatory compliance in market entry is closely bound up with corporate governance and risk allocation, particularly in highly regulated sectors such as gambling.

The Court relies on the fact that the prohibition is framed as a general rule applicable to “any person”. However, in practice, only those directing the activities of the undertaking are capable of infringing the prohibition in the manner alleged.

4.2 The generic ‘duty of care’ analogy

The Court relies heavily on the distinction drawn in earlier case law between:

- a specific duty of care owed by directors to the company (company law), and
- a generic duty of care *erga omnes* (tort law).

However, this analogy sits uneasily with regulatory breaches in highly regulated sectors such as gambling. Unlike ordinary negligence, compliance with licensing regimes is inseparable from corporate governance. Treating such obligations as “external” significantly limits the operation of Article 1(2)(d) in regulated industries.

5. Consumer Protection Without a Consumer Contract?

The ruling confirms the applicability of Rome II while, in substance, applying the consumer-protective logic of Article 6 of the Rome I applicable to contractual obligations:

51. In the present case, those requirements militate also in favour of designating the place where the player is habitually resident as the place where the alleged damage occurred...

The CJEU justifies the approach as analogous to the determination of the ‘place where the harmful event occurred or may occur’ in Article 7(2) of Regulation No 1215/2012 for the purposes of jurisdiction. However, this approach may risk encroaching on the distinction between contract and tort that has traditionally been treated as structurally decisive in EU private international law.

There are several preliminary rulings delineating the parameters of the ‘place where the damage occurred’ for the purposes of Article 4(1) of Rome II, and yet the CJEU saw fit to propose a specific sub-connecting factor within the umbrella of Article 4(1), for claims brought by the players of games offered by gambling

companies. The sub-connecting factor identified essentially reproduces the one in Article 6 of Rome I for consumer claims in contract: the habitual residence of the consumer.

The outcome may be defensible from a consumer-protection perspective, but it raises questions of doctrinal coherence and legal certainty. Once the Court characterises the claim as non-contractual, the consequences of that classification should follow. Consumer protection under Article 6 Rome I is not triggered by consumer status alone, but by participation in a consumer contract meeting specific conditions. Its rationale – derogation from general connecting factors in favour of the consumer’s habitual residence – is inseparable from the existence of a contractual relationship with a professional acting in the course of its business. Rome II, by contrast, contains no equivalent consumer-specific rule, suggesting a deliberate legislative choice not to extend such protection to non-contractual obligations. Applying that logic here might have prompted closer engagement with the reliance on a conflict rule whose rationale depends on the existence of a contract in the absence of one.

6. Veil-Piercing Through Conflict-of-Laws

While the Court insists that the imputation of liability is a matter for the applicable tort law rather than the *lex societatis*, the choice-of-law outcome itself has unmistakable substantive consequences.

By designating the consumer’s habitual residence as the applicable law, the Court enables claimants to:

- bypass the insolvent company,
- sue directors personally, and
- subject them to a foreign legal system with which their corporate conduct may have only an indirect connection.

This functionally might be compared to a form of veil-piercing, where the corporate shield of separate juridical personality is not pierced by substantive company law doctrines, but by re-characterising managerial conduct as ‘external’ to company law for the purposes of Rome II. The result may be an expansion of directors’ personal exposure as a by-product of the determination of applicable law.

7. Conclusion

The judgment in *Wunner* undoubtedly strengthens consumer protection and curtails the avoidance of host-state gambling controls through cross-border structuring. Yet it does so by drawing a distinction that is debatable. Do directors decide whether the company should hold a licence as private individuals, or as corporate officers?

Treating these decisions as external to company law risks blurring the boundary between corporate responsibility and personal liability, and in doing so, transforms Rome II from a neutral conflict-of-laws instrument into a powerful substantive lever. Whether this functional carve-out can be confined to gambling cases, or will spill over into other regulated sectors, remains an open and important question.

Directors of gaming companies should therefore carefully assess their personal and corporate risk profile when deciding which jurisdictions to offer online games in, as jurisdictional and applicable law rules may result in implications well beyond traditional frameworks.

‘Salami-slicing’ and Issue Estoppel: Foreign Decisions on the Governing Law

One of the requirements for issue estoppel is identity of issue. However, the process of ‘refining down’ or ‘salami-slicing’^[1] is not always clear. The argument that the issue is different because the two courts would arrive at different conclusions on the governing law is increasingly being utilised as a litigation strategy. If the first court applied its choice of law rules to determine that the governing law of the claim is Utopian law, would an issue estoppel arise over this decision in the second court if under the second court’s choice of law rules, Ruritanian law is the governing law? The answer depends on whether the ‘slice’ is

thick or thin. Is the relevant issue 'What law governs the dispute or issue?' or 'What law is identified by our (forum) choice of law rules to govern the dispute or issue?'

For example, there is considerable difference in tort choice of law rules. Some jurisdictions apply the double actionability rule.[2] Most jurisdictions adopt the *lex loci delicti* or *lex loci damni* rule,[3] with differences on how the relevant *locus* is identified and whether a flexible exception in favour of the law of closer connection is present. Party autonomy is also permitted in certain jurisdictions.[4] Thus, in tort claims, the issue could be framed in different ways: eg, 'what is/are the law(s) governing the tort?', 'what is the *lex loci delicti*?', 'where in substance did the tort arise?', or 'where was direct damage suffered'? It will be obvious that only the first, broad, framing of the issue, or, in other words, a 'thick' slice, will result in there being identity of issue. In essence, the question is: does a difference in choice of law rules matter for issue estoppel purposes?

The Hong Kong Court of Final Appeal in *First Laser v Fujian Enterprises (Holdings) Co Ltd*[5] took the view that an issue estoppel can arise over a foreign decision on the governing law of the dispute. However, there is a suggestion in the Singaporean Court of Appeal decision of *Gonzola Gil White v Oro Negro Drilling Pte Ltd* that a difference in the two laws is relevant.[6] Arguably, the Court's views were limited to the specific situation where the Singaporean court as the second court would have arrived at Singaporean law after application of Singaporean choice of law rules. This is because the Singaporean court views it as part of its constitutional responsibilities to safeguard the application of Singaporean law.[7] If this is correct, it is doubtful that the same approach would be adopted by at least the English courts, as English courts are prepared accord preclusive effect to a judgment of a foreign court even where that foreign court had made an error on English law in its judgment.[8]

The English Court of Appeal in *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)*[9] held that no issue estoppel will arise over a question involving forum international public policy. This is entirely explicable as each country's public policy differs. It has also been suggested that no estoppel arises over an issue which is subject to a forum overriding mandatory rule.[10] Decisions on sensitive matters which give rise to comity considerations should also be excluded.[11]

The question is whether decisions on the governing law merit the same treatment.

It is argued that for most private law claims, a foreign decision on the governing law of the dispute or on a specific issue in the claim is generally capable of giving rise to an issue estoppel. A contrary conclusion would disregard the policies underlying estoppel and allow forum shopping. However, some choice of law categories – eg, choice of law for consumer contracts or employment contracts, or for environmental torts – are underpinned by public policy considerations. For these special choice of law categories, it is suggested that the forum court retains the prerogative to decide on the issue of the governing law for itself, despite a prior foreign decision on the same point. In other words, a narrow ‘slice’ is appropriate.

The same broad-narrow question arises in other contexts. It could arise in the jurisdictional context: would the first court’s decision on the applicability of the personal equities exception for the *Mocambique* rule give rise to an estoppel in subsequent proceedings in a different court? What about a decision on which court is *forum (non) conveniens*? How about arbitration, where the balance of competing considerations may lie differently compared to international litigation? For example, should an issue estoppel arise over a foreign decision on subject-matter arbitrability?[12] Is it relevant if the first court decided this issue at the pre-award stage or at the post-award stage pursuant to proceedings to enforce an arbitral award? Does it matter if the first court is the court of the seat?[13]

These, and other questions, are considered in the open access article Adeline Chong, ‘Salami-Slicing’ and Issue Estoppel: Foreign Decisions on the Governing Law’, *International and Comparative Law Quarterly* (FirstView).

[1] *Desert Sun Loan v Hill* [1996] 2 All ER 847, 859 (Evans LJ).

[2] Eg, Singapore: *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 (Singapore

CA); Hong Kong: *Xiamen Xinjingdi Group Co Ltd v Eton Properties Ltd* [2020] 6 HKC 451; Japan: Act on General Rules for Application of Laws (Act No 78 of 2006), art 22.

[3] Eg, Rome II Reg, art 4(1).

[4] Eg Rome II Reg, art 14; Swiss Federal Code on Private International Law, art 132.

[5] [2013] 2 HKC 459 (HKCFA).

[6] [2024] 1 SLR 307 [87] (Singapore CA).

[7] Ibid [78]-[79].

[8] *Good Challenger Navegante SA v MetalExportImport SA*, (The “Good Challenger”) [2003] EWCA Civ 1668, [54]-[55]. See also *Godard v Grey* (1870) LR 6 QB 139.

[9] [2012] EWCA Civ 855.

[10] *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 [55] (Singapore CA).

[11] See the reference to ‘matters of high policy’ in *Yukos* [2012] EWCA Civ 855 [151].

[12] *Diag Human SE v Czech Republic* [2014] EWHC 1639 (Comm) [58].

[13] See *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 (Singapore CA).

The Conflict-of-Law Rules in the UAE’s New Civil Transactions Act: Yet Another Missed Opportunity!



I. Introduction

On 1 January 2026, the Legislative Decree No. 25/2025 promulgating a new Civil Transactions Act (hereafter 'NCTA') entered into force. The NCTA repeals and replaces the former Federal Civil Transactions Act of 1985 (hereafter 'the 1985 Act'). The adoption of the NCTA forms part of the State's broader and ongoing effort to comprehensively update and modernize its legal system, an effort that has already touched major legislative instruments, including, among many others, the 2022 Civil Procedure Act, the 2024 Personal Status Act, the 2023 Competition Act, and the 2022 Commercial Transactions Act.

Since the 1985 Act contained a codified set of conflict-of-laws rules, its replacement necessarily entails a re-examination of the UAE's private international law framework and, at least in principle, the introduction of new or revised choice-of-law provisions. Against this background, this note offers a preliminary and necessarily tentative assessment of the modifications introduced by the NCTA. It focuses on the main features of the new law in relation to choice-of-law regulation, highlighting both the changes introduced and the limits of the reform.

II. The Choice-of-Law System under the 1985 Act and its Evolution

1. Choice of Law Rules under the 1985 Act

It is worth recalling that the first codification of conflict-of-laws rules in the UAE

was introduced in 1985 as part of the 1985 Act. This codification consisted of 29 provisions (Arts. 10–28), incorporated into the Preliminary Part of the Act. In both structure and substance, the UAE codification closely followed the Egyptian model. Remarkably, despite the 37 years separating the two codifications, most of the Egyptian rules were retained almost unchanged. Some divergences nevertheless existed. For instance, while renvoi is entirely excluded under Egyptian law (Art. 27 of the Egyptian Civil Code), it is permitted under the 1985 Act only where it leads to the application of UAE law (Art. 26 of the 1985 Act).

The codification was relatively simple, comprising general choice-of-law rules structured by reference to broad legal categories, dealing in particular with status and capacity (Art. 11); marriage, its effects, and dissolution (Arts. 12–14); maintenance (Art. 15); guardianship and other measures for the protection of persons with limited capacity and absentees (Art. 16); succession and wills (Art. 17); real rights (Art. 18); contractual obligations (Art. 19); non-contractual obligations (Art. 20); and procedure (Art. 21).

The codification also included general provisions governing characterization (Art. 10); the priority of international conventions (Art. 22); general principles of private international law (Art. 23); national law (Art. 24); multi-jurisdictional legal systems (Art. 25); renvoi (Art. 26); public policy (Art. 27); and the application of UAE law in cases where the content of the applicable foreign law cannot be ascertained (Art. 28).

2. The 2020 Reform

It was not until 2020 that the choice-of-law rules were partially reformed through the Legislative Decree No. 30/2020, which amended certain provisions of the 1985 Act. This reform was not comprehensive but instead targeted four key areas.

First, the rule on substantive and formal validity of marriage was amended to replace the former connecting factor based on the *lex patriae* of each spouse with the *lex loci celebrationis* (Art. 12).

Second, the rule on personal and patrimonial effects of marriage and its dissolution based on the *lex patriae* of the husband was similarly abandoned in favor of the *lex loci celebrationis*.

Third, Article 17, relating to succession and wills, was revised to allow *professio juris* for both the substantive and the formal validity of wills. As regards the former, the will is governed by the law chosen by the testator, failing which the *lex patriae* of the deceased at the time of death applies. As for formal validity, *professio juris* now operates as an additional alternative connecting factor.

Finally, the reform addressed public policy. For reasons that remain unclear, Article 27 expressly limited the operation of the public policy exception by excluding matters traditionally associated with personal status – such as marriage, divorce, filiation, maintenance, guardianship, succession, and wills – from its scope, despite the fact that these matters are generally regarded as having a strong public policy character (Art. 3).

Other provisions, however, were left unchanged, notwithstanding the fact that many of them are outdated and no longer reflect contemporary developments in private international law, in particular the persistence of traditional connecting factors such as the common domicile of the contractors and the *locus contractus* in contractual matters or double actionability rule for non-contractual obligations. More fundamentally, the reform failed to address the interaction between the conflict-of-laws rules contained in the 1985 Act and the provisions delimiting the scope of application of the 2005 Personal Status Act, which was subsequently replaced by the 2024 Personal Status Act. This unresolved issue of articulation continues to generate significant legal uncertainty (for an overview, see my previous posts [here](#)).

III. The New Reform under the NCTA

It was therefore with genuine enthusiasm that the reform of the existing legal framework was awaited, particularly in light of the ongoing efforts to modernize the UAE legal system and align it with international standards. However, while the reform does present some positive aspects (1), it is with considerable regret that the NCTA appears to have devoted only very limited attention to the modernization of the UAE conflict-of-laws regime (2).

This assessment is grounded in two main observations:

First, the existing system has largely been maintained with only some minor

changes, including changes in wording.

Second, the very limited modifications that were introduced reflect a legislative approach that, at best, appears insufficiently informed by contemporary developments in private international law.

1. Positive Aspects of the Reform

Three main positive aspects can be identified:

The first concerns the clear affirmation of party autonomy as a guiding principle in contractual matters. Under the 1985 Act, although party autonomy was formally recognized, its formulation tended to present it as an exception rather than as a genuine principle. This shortcoming has now been remedied in the NCTA. The new provision expressly states that “*contractual obligations, as to both form and substance, are governed by the law expressly chosen by the parties.*” In addition, the NCTA abolishes the place of conclusion of the contract as an objective connecting factor applicable in the absence of a choice of law by the parties, thereby moving away from a traditional and often criticized criterion.

Second, the questionable rule allowing the application of UAE law when one of the parties has multiple nationalities is now abandoned. According to the new rule, in case a person has multiple nationalities, the law of nationality under which that person entered the UAE would apply.

The third important modification concerns public policy. As noted above, the 2020 reform introduced considerable confusion and ambiguity in the application of the public policy exception by unduly restricting its scope and excluding matters that have traditionally been regarded as falling within public policy. The NCTA addresses this difficulty by removing the limitation introduced in 2020 and by restoring the public policy exception to its more general function within the UAE conflict-of-laws system.

Another modification of particular significance should also be highlighted, although it must be acknowledged that its practical impact may be more symbolic than substantive. This concerns the abandonment, in the current reform, of any explicit reference to Islamic Sharia in the context of public policy, even though

such a reference, which appeared in the original provision in 1985, was expressly maintained in the 2020 reform. This omission marks a notable shift in legislative technique and appears to signal a move toward a more neutral formulation of public policy, at least at the level of statutory language.

The removal of the explicit reference to Islamic Sharia may thus be understood as part of a broader trend toward the modernization and internationalization of the UAE's private international law framework. This interpretation is further supported by the redefinition of the role of Islamic Sharia as a formal source of law under the NCTA. Indeed, whereas former Article 1 of the 1985 Act set out a detailed hierarchy of rules prioritizing specific schools of jurisprudence (most notably the Maliki and Hanbali schools), the new Article 1 of the NCTA adopts a more open-ended formulation, granting judges greater discretion to select "the solution that is most appropriate in light of the interests at stake," without specifying any particular school of reference. A similar approach was adopted in the 2024 reform of the Personal Status Act.

2. Limits of the Reform and Persisting Issues

Notwithstanding the positive aspects identified above, the reform also presents a number of significant shortcomings. These concern both certain newly introduced provisions, whose design or content raises serious difficulties, and important issues that the legislature chose not to address or appears to have overlooked altogether. Taken together, these weaknesses considerably limit the extent to which the reform can be regarded as a genuine modernization of the UAE conflict-of-laws regime.

a) New Solutions Introduced in the NCTA

i) The Conflict-of-Law rule in Matters of Marriage and its Dissolution: The Further Extension of the Scope of the Nationality Privilege

As noted above, prior to the entry into force of the NCTA, the *lex loci*

celebrationis governed the substantive and formal validity of marriage (Art. 12), as well as its personal and patrimonial effects and its dissolution (Art. 13). Marriages concluded between foreigners, or between a foreigner and a UAE citizen, could also be recognized as valid in form if they complied with the formalities of the place of celebration, or if they respected the formal requirements prescribed by the law of each of the spouses (Art. 12). The application of these rules was, however, subject to an important exception: they did not apply if one of the parties was a *UAE citizen at the time of the marriage*, except with respect to capacity (Art. 14).

First, it should be noted that the NCTA failed to resolve the inconsistency between Articles 12 and 14. While Article 12 allows the formal validity of marriages concluded by UAE citizens abroad to be governed by the *lex loci celebrationis*, Article 14 removes this possibility by subjecting all matters relating to the formation of marriage, its effects, and its dissolution exclusively to UAE law when one of the parties is a UAE citizen.

Second, and more importantly, the NCTA extends the scope of the exception in a problematic manner. Under the new rules, the exception now applies not only to persons who were UAE citizens at the time of the marriage, but also to those who *subsequent to their marriage acquired UAE citizenship, and retained that citizenship up to the time the action is brought*.

On its face, this rule raises two main concerns. First, it introduces retrospective effects by applying UAE law to marriages concluded before the acquisition of citizenship. This potentially affects the validity, formalities, and effects of marriages that were lawfully concluded under foreign law. Second, it may create uncertainty in cross-border matrimonial relations, as spouses who acquire UAE nationality after marriage could inadvertently subject themselves to UAE law even if all formal and substantive requirements were originally satisfied abroad. Such an extension of the nationality privilege, while it may be of very limited practical relevance, represents a questionable departure from traditional conflict-of-law principles based on the ideas of acquired rights, and the respect of the legitimate expectations of the parties.

ii) The Conflict-of-Law rule in Contractual Matters

Despite the positive aspects noted above, the new rule suffers from significant shortcomings. These shortcomings relate, first and foremost, to the scope and the regime of party autonomy. In particular, the provision remains silent on several crucial issues: whether the chosen law must have any connection with the parties or the contract; whether an initial choice of law may be modified at a later stage; and whether techniques such as *dépeçage* or the choice of non-State law are permissible. All these uncertainties undermine the effective operation of party autonomy and weaken legal certainty.

Second, in the absence of a choice of law by the parties, the NCTA not only retains the outdated reference to the parties' common domicile as the primary objective connecting factor, but also introduces a new connecting factor whose application is likely, in practice, to lead systematically to the application of UAE law. Under the new rule, where there is neither a choice of law nor a common domicile, the contract is governed by the law of the State in which the *principal obligation* is to be performed. Unlike the traditional test of the "characteristic obligation", which typically leads to the identification of a single governing law presumed to have the closest connection with the contract, the notion of "principal obligation" is inherently problematic in the field of choice of law. This is because bilateral contracts, which constitute the main instruments of international trade, by their very nature involve more than one principal obligation, such as the delivery of goods and the payment of the price in a contract of sale. As a result, in contracts involving a UAE party, whether as obligor or obligee, the performance of at least one principal obligation will often take place in the UAE, thereby triggering the systematic and largely indiscriminate application of UAE law. Even if the term "principal obligation" is understood as referring to the "characteristic obligation," the new provision departs from the general approach adopted in leading recent codifications by designating the place of performance (*locus solutionis*) of that obligation, rather than the more widely accepted and more predictable connecting factor of the habitual residence of the party performing the characteristic obligation.

Of course, the parties may seek to avoid this difficulty by choosing the law applicable to their contract. However, given the very weak status of foreign law in the UAE, where it is treated as a mere question of fact, and the considerable hurdles imposed on the parties in establishing its content in judicial practice, the practical relevance of party autonomy is largely illusory. This assessment is once

again confirmed by several recent Supreme Court decisions in which the law chosen by the parties was not applied on the grounds that the chosen law was not ascertained as required (see Dubai Supreme Court, Appeal No. 720 of 13 August 2025; Appeal No. 1084 of 22 October 2025; Appeal No. 1615 of 23 December 2025). The same difficulties arise in family law matters, as discussed in a previous post, but they are identical in substance in civil and commercial cases as well.

b) Persisting Issues

Notwithstanding the few positive developments highlighted above, the conflict-of-laws rules incorporated in the NCTA largely preserve the traditional Egyptian model introduced into the region in 1948. As a result, they remain significantly disconnected from contemporary developments and comparative trends in private international law and fail to fully reflect the principles increasingly adopted in other jurisdictions to address the needs of cross-border transactions, family relations, and international commercial practice. The reform also preserved a traditionally rigid approach, leaving little room for flexibility and excluding exception clauses that would allow courts to depart from the designated applicable law in favor of a more closely connected one. In particular, the NCTA does not introduce tailored conflict rules designed to reflect the specific characteristics of certain legal relationships. This omission is especially noticeable with regard to protective regimes for weaker parties, including employees and consumers. Unlike many modern conflict-of-laws systems, the NCTA does not limit the role of party autonomy in these contexts, nor does it provide specific choice-of-law rules for employment or consumer contracts. Similar shortcomings can be observed in the absence of specialized rules governing particular categories of torts or addressing specific aspects of family relationships.

Finally, as was already the case following the 2020 reform, the NCTA fails to resolve the longstanding and fundamental issue concerning the articulation between the rules delimiting the scope of application of the Personal Status Act and the choice-of-law rules set out in the NCTA. This problem has become even more acute with the recent introduction of “civil personal status” legislation at both the federal level and the local level in the Emirate of Abu Dhabi, thereby further complicating the overall normative landscape (for an overview see my

previous posts [here](#) and [here](#)).

IV. Some Concluding Remarks

Taken as a whole, while the adoption of the NCTA could have provided an opportunity to undertake a thorough and forward-looking reform of the UAE's private international law framework by drawing inspiration from the most recent developments in the field and from general trends observed in comparative law. Such a reform would have helped consolidate the UAE's position and ambitions as a leading hub not only for international finance and business transactions, but also as a melting pot of multiple nationalities living harmoniously within its territory. However, the reform ultimately falls short of this ambition. It largely preserves an outdated structure and introduces only limited, and at times problematic, adjustments. Moreover, the reform does nothing to address the strong *homeward trend* observed in judicial practice, which significantly limits the practical relevance of choice-of-law rules. This trend is particularly evident in personal status legislation and in the very weak status accorded to foreign law. In this respect, the NCTA represents a missed opportunity to align the UAE's conflict-of-laws regime with modern comparative standards and to enhance legal certainty, predictability, and coherence in an increasingly international legal environment.