Bahraini Supreme Court on the Enforceability of a Foreign Judgment Ordering the Payment of Contingent Fees

I. Introduction

Contingency fee agreements are arrangements whereby lawyers agree with their clients to receive a percentage of the final awarded amount in terms of payment of legal services. Such payment typically depends upon the lawyer winning the case or reaching a settlement. The admissibility of contingency fee agreements varies from one jurisdiction to another, ranging from complete prohibition to acceptance. For example, in the MENA Arab region, jurisdictions such as Bahrain prohibit contingency fee arrangements (see below). However, in other jurisdictions such as Saudi Arabia, contingent fees are not only permitted but also have been described as established practice in the country (cf. *Mekkah Court of Appeal, Ruling No. 980/1439* confirming the Ruling of *Jeddah Commercial Court No. 676/1439 of 3 Rajab 1439 [20 March 2018]* considering that receiving a percentage of the awarded amount that ranges between 15% to 30% as "an established judicial and customary practice among lawyers").

With respect to the enforcement of foreign judgments, a crucial issue concerns whether a foreign award ordering the payment of contingent fees would be enforced abroad. In a country where contingent fees contracts are prohibited, the presence of such elements in foreign judgments is likely to affect their enforceability due to public policy considerations. The Bahraini Supreme Court (hereafter 'BSC') addressed this particular issue in what appears to be an unprecedented decision in the MENA region. The Court held that a foreign judgment ordering payment of contingent fees as agreed by the parties is contrary to public policy because contingency fee agreements are forbidden in Bahrain (*Supreme Court, Ruling No. 386/2023 of 20 February 2024*).

II. Facts

The case concerned an action for the enforcement of a Saudi judgment brought by X (a practicing lawyer in Saudi Arabia) against Y (the appellee, owner of a sole proprietorship, but no further indications as to Y's nationality, habitual residence or place of business were mentioned in the judgment).

According to the underlying facts as summarized by the Supreme Court, both X and Y agreed that X would represent Y in a case on a fee of 10% of the awarded amount (105,000 USD). As Y failed to pay, X brought an action in Saudi Arabia to obtain a judgment against Y requiring the latter's sole proprietorship to pay the amount. Later, X sought the enforcement of the Saudi judgment in Bahrain. The first instance court ordered the enforcement of the foreign judgment, but its decision was overturned by the Court of Appeal. There, X filed an appeal to the BSC.

Before the BSC, X argued that the Court of Appeal erred in its decision as it declared the (contingency fee) agreement between the parties null and void on public policy grounds because it violated article 31 of the Bahraini Attorneys Act (*qanun al-muhamat*), which prohibits such agreements. According to X, the validity of the agreement is irrelevant *in casu*, as the court's function was to examine the formal requirements for the enforcement of the Saudi judgment without delving in the merits of the case. Therefore, since the foreign judgment satisfies all the requirements for its enforcement, the refusal by the Court of Appeal to order the enforcement was unjustified.

III. The Ruling

The BSC rejected the appeal by ruling as follows:

"It stems from the text of the provisions of Articles 1, 2 and 7 of the [1995 GCC Convention on the Enforcement of Foreign Judgments] as ratified by Bahrain in [1996], and the established practice of this Court, that judgments of a GCC Member State rendered in civil, commercial, administrative matters as well as personal status matters that become final [in the State of origin] shall be enforced by the courts and competent judicial authorities of the other GCC Member States in accordance with the procedure set forth in [the] Convention if it was rendered by a court having jurisdiction according to the rules of international jurisdiction of the requested State or according to the provision of the present Convention. [In

this respect,] the role of the judicial authority of the requested State shall be limited to examination of whether the [foreign] judgment meets the requirement set forth in the Convention without reviewing the merits of the case. [However,] if it appears that the [foreign] judgment is inconsistent with the rules of Islamic Sharia, the Constitution or the public policy of the requested State, the [requested court] shall refuse to enforce the foreign judgment as a whole or in part.

Public policy is a relative (*nisbi*) concept that [can be interpreted] restrictively or broadly [as it varies with] time, place and the prevailing customs, and it [is closely linked in terms of] existence or not with public interest. It [public policy] encompasses the fundamental principles that safeguard the political system, conventional social agreements, economic rules and the moral values that underpin the structure of the society as an entity and public interest. [In addition,] although public policy is often embodied in legislative texts, however, it transcends these texts to form an overarching and independent concept. [Thus,] when a legislative text contains a mandatory or prohibitive rule related to those fundamental principles and aims at protecting public interest rather than individual interests, [such a rule] should not be disregarded or violated. [This is because, such a rule is] crucial for preserving the [public] interests associated to it and takes precedence over the individual interests with which it conflicts as it falls naturally within the realm of public policy, whose scope, understanding, boundaries and reach are determined in light of those essential factors of society so that public interest is prioritized and given precedence over the interests of certain individuals.

[This being said,] it is established that the judgment whose enforcement is sought in Bahrain ordered Y to pay X 105,000 USD as [contingent fees], which represent 10% of the amount awarded to Y. [It is also established that] the parties' [contingency fee] agreement, which was upheld and relied upon [by the foreign court] violates article 31 of the Attorneys Act, which prohibits lawyers from charging fees based on a percentage of the awarded amount. This provision is a mandatory one that cannot be derogated from by agreement, and judgments inconsistent with it cannot be enforced. Consequently, the [contingency fee] agreement upon which the [foreign] judgment to be enforced is based is absolutely void, [rendering] the [foreign] judgment deficient of one of the legally prescribed requirements for its enforcement. This shall not be considered a

review of the merits of the case but rather a [fundamental] duty of the judge to examine whether the foreign judgment meets all the requirements for its enforcement.

IV. Comments

1. General remarks

To the best of the author's knowledge, this is an unprecedented decision not only in Bahrain, but in the MENA region in general. In addition to the crucial issue of public policy (4), the reported case raises a number of interesting questions regarding both the applicable rules for the enforcement of foreign judgments (2) and *révision au fond* (3). (on the applicable rules in the MENA Arab jurisdictions including Bahrain, see Béligh Elbalti, "Perspectives from the Arab World", in M. Weller *et al.* (eds.), *The 2019 HCCH Judgments Convention – Cornerstones, Prospects, Outlook* (Hart, 2023) 182, 196, 199. On *révision au fond*, see *ibid*, 185. On public policy, see *ibid*, 188-190).

2. The Applicable rules

As the reported case shows, the enforcement of the Saudi judgment was examined on the basis of the 1995 GCC Convention, since both Bahrain and Saudi Arabia are Contracting States to it. However, both countries are also parties to a more general convention, the 1983 Riyadh Convention, which was also applicable (on these conventions with a special focus on 1983 Riyadh Convention, see Elbalti, *op. cit.*, 195-198). This raises a serious issue of conflict of conventions. However, this issue has unfortunately been overlooked by the BSC.

The BSC's position on this issue is ambiguous because it is not clear why the Court preferred the application of the 1995 GCC Convention over the 1983 Riyadh Convention knowing that the latter was ratified by both countries in 2000, i.e. *after* having ratified the former in 1996 (see Elbalti, *op. cit.* 196)! In any case, since the issue deserves a thorough analysis, it will not be addressed here (on the issue of conflict of conventions in the MENA region, see Elbalti, *op. cit.*, 200-201.

See also my previous post here in which the issue was briefly addressed with respect to Egypt).

3. Révision au fond

In the reported case, X argued that the decision to refuse the enforcement of the Saudi judgment on public policy grounds violated of the principle of prohibition of the review of the merits. The BSC rejected this argument. The question of how to consider whether a foreign judgment is inconsistent with public policy without violating the principle of prohibition of *révision au fond* is very well known in literature. In this respect, it is generally admitted that borderline should be that the enforcing court should refrain from reviewing the determination of facts and application of law made by the foreign court "as if it were an appellate tribunal reviewing how the "lower court" decided the case" (Peter Hay, *Advance Introduction to Private International Law and Procedure* (Edward Elgar, 2018) 121). Therefore, it can be said the BSC rightfully rejected X's argument since its assessment appears to be limited to the examination of whether the judgment, "*as rendered* [was] offensive" without "reviewing the way the foreign court arrived at its judgment" (cf. Hay, *op. cit.*, 121).

4. Public policy in Bahrain

i. Notion & definition. Under both the statutory regime and international conventions, foreign judgments cannot be enforced if they violate "public policy and good morals" in Bahrain. In the case reported here, the BSC provided a lengthy definition of public policy. To the author's knowledge, this appears to be the first case in which the BSC has provided a definition of public policy in the context of the enforcement of foreign judgments. This does not mean, however, that the BSC has never invoked public policy to refuse the enforcement of foreign judgments (see, e.g., *BSC, Appeal No. 611/2009 of 10 January 2011* in which a Syrian judgment terminating a mother's custody of her two daughters upon their reaching the age of 15, in application of Syrian law, was held to be contrary to Bahraini public policy). Nor does this mean that the BSC has never defined public

policy in general (see, e.g., in the context of choice of law, Béligh Elbalti & Hosam Osama Shabaan, "Bahrain – Bahraini Perspectives on the Hague Principles", in D. Girsberger et al. (eds.), *Choice of Law in International Commercial Contracts – Global Perspectives on the Hague Principles* (OUP, 2021) 429 and the cases cited therein).

What is remarkable, however, is that the BSC has consistently used for the definition of public policy in the context of private international law the same elements it uses to define public policy in purely domestic cases. This is particularly clear in the definition adopted by the BSC in the case reported here since it described public policy in terms of "ordinary mandatory rules" that the parties are not allowed to derogate from by agreement. It is worth noting in this regard that the BSC's holding on public policy appears, in fact, to have been strongly inspired by the definition given by the Qatari Supreme Court in a purely domestic case decided in 2015 (*Qatari Supreme Court, Appeal No. 348 of November 17, 2015*).

Defining public policy in the way the BSC did is problematic, as it is generally admitted that "domestic public policy" should be distinguished from public policy in the meaning of private international law (or as commonly referred to as "international public policy"). It is therefore regrettable that the BSC did not take into account the different contexts in which public policy operates.

ii. Public policy and mandatory rules. As mentioned above, the BSC associates public policy with "mandatory rules" in Bahrain, even though it recognizes that public policy could "transcend" these rules "to form an overarching and independent concept". This understanding of public policy is not in line with the widely accepted doctrinal consensus regarding the correlation between public policy and mandatory rules. This doctrinal consensus is reflected in the Explanatory Report of the HCCH 2019 Judgments Convention, which makes it clear that "it is not sufficient for [a state] opposing recognition or enforcement *to point to [its] mandatory rule of the law* […] that the foreign judgment fails to uphold. Indeed, this mandatory rule may be considered imperative for domestic cases but not for international situations." (Explanatory Report, p. 120, para. 263. Emphasis added). The Explanatory Report goes on to state that "[t]he public policy defence […] should be triggered *only* where such a mandatory rule reflects

a fundamental value, the violation of which would be manifest if enforcement of the foreign judgment was permitted" (*ibid.* emphasis added).

The BSC's holding suggests that it is sufficient that the foreign judgment does not uphold *any* Bahraini mandatory rule to justify its non-enforcement, without a sufficient showing of how that the mandatory rule in question "reflects a fundamental value, the violation of which would be manifest if enforcement of the foreign judgment was permitted". By holding as it did, the BSC unduly broadens the scope of public policy in a way that potentially undermines the enforceability of foreign judgments in Bahrain.

iii. Contingency fee arrangements and Bahraini Public Policy. As noted above (see Introduction), although contingency fee arrangements are prohibited in Bahrain, they are permitted in Saudi Arabia, where they appear to be widely used. From a private international law perspective, the presence of elements in a foreign judgment that are not permitted domestically does not in itself justify refusal of enforcement. In this sense, the non-admissibility of contingent fees in Bahrain should not in itself automatically lead to their being declared against public policy. This is because contingency fee arrangements should not be assessed on the basis of the strict rules applicable in Bahrain, but rather on whether they appear to be *manifestly* unfair or excessive in a way that violates "fundamental values" in Bahrain. Otherwise, the implications of the BSC's decision could be overreaching. For example, would Bahraini courts refuse to enforce a foreign judgment if the contingent fees were included as part of the damages awarded by the foreign court? Would it matter if the case has tenuous connection with forum (for example, the case commented here, there are no indication on the connection between Y and Bahrain, see (II) above)? Would the Bahraini courts apply the same solution if they had to consider the validity of the contingent fee agreement under the applicable foreign law? Only subsequent developments would provide answers to these questions.

V. Concluding Remarks

The case reported here illustrates the challenges of public policy as a ground for enforcing foreign judgments not only in Bahrain, but also in the MENA Arab

region in general. One of the main problems is that, with a few exceptions, courts in the region generally fail to distinguish between domestic public policy and public policy in the context of private international law (see Elbalti, "Perspectives from the Arab World", *op.cit.*, 189, 205, and the references cited therein). Moreover, courts often fail to establish the basic requirements for triggering public policy other than the inconsistency with the "fundamental values" of the forum, which are often referred to *in abstracto*. A correct approach, however, requires that courts make it clear that public policy has an exceptional character, that it has a narrower scope compared to domestic public policy, and that mere inconsistency with ordinary mandatory rules is not sufficient to trigger public policy. More importantly, public policy should also be assessed from the point of view of the *impact* the foreign judgment would have on the domestic legal order by looking at the *concrete effects* it would have if its recognition and enforcement were allowed. The impact of the foreign judgment, in this case, would largely depend on the intensity of the connection the case has with the forum.

The Corporate Sustainability Due Diligence Directive: PIL and Litigation Aspects

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Introduction

After extensive negotiations, on 24 April 2024, the European Parliament approved the Corporate Sustainability Due Diligence Directive (CSDDD or CS3D) as part of the EU Green Deal. Considering the intensive discussions, multiple changes, and the upcoming elections in view, the fate of the Commission's proposal has been

uncertain. The Directive marks an important step in human rights and environmental protection, aiming to foster sustainable and responsible corporate behaviour throughout global value chains. Some Member States have incorporated similar acts already, and the Directive will expand this to the other Member States, which will also ensure a level playing field for companies operating in the EU. It mandates that companies, along with their associated partners in the supply chain, manufacturing, and distribution, must take steps to avoid, halt, or reduce any negative effects they may have on human rights and the environment. The Directive will apply to big EU companies (generally those with more than 1,000 employees and a worldwide turnover of more than EUR 450 000 000) but also to companies established under the law of a third country that meet the Directive's criteria (Article 2 CSDDD).

Among the CSDDD's key provisions is the rule on civil liability enshrined in Article 29. This rule states that companies shall be held liable for damages caused in breach of the Directive's provisions. Accompanying such a rule are also some provisions that deal with matters of civil procedure and conflict of laws, though as has been pointed out earlier on this blog by Kilimcioglu, Kruger, and Van Hof, the CSDDD is mostly silent on PIL. When the Commission proposal was adopted in 2022, Michaels and Sommerfeld elaborated earlier on this blog on the consequences of the absence of rules on jurisdiction in the CSDDD and referred to the Recommendation of GEDIP in this regard. The limited attention for PIL aspects in the CSDDD is does not mean that the importance of corporate sustainability and human rights is not on the radar of the European policy maker and legislator. In the context of both the ongoing evaluation of the Rome II Regulation and Brussels I-bis Regulation this has been flagged as a topic of interest.

This blog post briefly discusses the CSDDD rules on conflict of laws and (international) civil procedure, which underscore the growing importance of both in corporate sustainability and human rights agendas.

Conflict of laws and overriding mandatory provisions

The role of PIL in the agenda of business and human rights has increasingly received scholarly attention. Noteworthy works addressing this intersection include recent contributions by Lehmann (2020), as well as volumes 380 (Van Loon, 2016) and 385 (Marrella, 2017) of the *Collected Courses of The Hague*

Academy of International Law. Additionally, pertinent insights can be found in the collaborative effort of Van Loon, Michaels, and Ruiz Abou-Nigm (eds) in their comprehensive publication, The Private Side of Transforming our World (2021). From an older date is a 2014 special issue of Erasmus Law Review, co-edited by Kramer and Carballo Piñeiro on the role of PIL in contemporary society.

While the CSDDD contains only a singular rule on PIL, specifically concerning overriding mandatory provisions, it should be viewed in the broader EU discourse. The relevance of PIL for the interaction between business and human rights extends beyond this single provision, as evidenced by the Commission's active role in shaping this development. As indicated earlier, this is further indicated by studies on both the Rome II and Brussels I-bis Regulations, both of which delve into the complexities of PIL within the business and human rights debate. Thus, the CSDDD's rule should not be viewed in isolation, but as part of a larger, dynamic conversation on PIL in the EU.

The mentioned Rome II Evaluation Study (2021) commissioned by the Commission, summarised on this blog here, assessed Rome II's applicability to matters pertaining to business and human rights in detail. With regards to overriding mandatory provisions, the study outlines several initiatives at national level in the Member States that were discussed or approved to enact a mandatory corporate duty of care regarding human rights and the environment. Likewise, the Brussels I-bis Evaluation Study (2023) also examined how the Brussels I-bis applies to business and human rights disputes. Within the EU, establishing jurisdiction over EU-domiciled companies is straightforward under the Regulation, but it becomes complex for third-country domiciled defendants. Claims against such defendants are not covered by the Regulation, leaving jurisdiction to national laws, resulting in varied rules among Member States. *Forum necessitatis* and co-defendants rules may help assert jurisdiction, but lack harmonization across Europe. In this context, as explained by Michaels and Sommerfeld, while the CSDDD applies to certain non-EU firms based on their turnover in the EU (Article 2(2)), jurisdictional issues persist for actions against non-EU defendants in EU courts, with jurisdiction typically governed by national provisions. This could result in limited access to justice within the EU if relevant national rules do not establish jurisdiction.

As was mentioned above, the CSDDD is mostly silent on PIL. However, it does include a rule on overriding mandatory provisions enshrined in Article 29(7) and

accompanying Recital 90. This rule aims to ensure the application of the (implemented) rules of the CSSDD regardless of the *lex causae.* Under EU private international law rules, the application of overriding mandatory provisions is also enabled by Article 9 Rome I Regulation and Article 16 Rome II Regulation.

Article 29(7) CSDDD states that 'Member States shall ensure that the provisions of national law transposing' Article 29 CSDDD 'are of overriding mandatory application in cases where the law applicable to claims to that effect is not the national law of a Member State'. A similar provision to that effect can be found in the draft UN Legally Binding Instrument on business and human rights.

This means that the national laws transposing Article 29 CSDDD in their liability systems are applicable irrespective of any other conflict of law provisions in force. This rule also extends to the matters of civil procedure addressed below, as explicitly stated by Recital 90 CSDDD. On this matter, the potential for the CSDDD to become a dominant global regulatory force and overshadow existing and future national regulations, which is only beneficial if effectively prevents and remedies corporate abuses, has been highlighted. However, there is concern that it might mitigate the development of stronger regulatory frameworks in other countries (see FIDH, 2022).

Matters of civil procedure

The rules contained in the CSDDD that pertain to civil procedure are essentially laid down in Article 29(3). These rules on civil procedure naturally apply to both domestic cases and cross-border situations.

Firstly, Article 29(3)(b) CSDDD states that the costs of judicial proceedings seeking to establish the civil liability of companies under the Directive shall not be prohibitively expensive. A report published in 2020 by the EU Agency for Fundamental Rights (FRA) on 'Business and human rights – access to remedy' stressed that private individuals face significant financial risks when resorting to courts due to high costs such as lawyer fees, expert opinions, and potential liability for the opposing party's costs, particularly daunting in cases involving large companies. Suggestions for improvement include making litigation costs proportionate to damages, providing free legal representation through state bodies, and setting thresholds for the losing party's financial obligations, along with supporting civil society organizations offering financial and legal aid to

victims of business-related human rights abuses. Secondly, Article 29(3)(c) CSDDD provides the possibility for claimants to seek definitive and provisional injunctive measures, including summarily, of both a restorative or enforcing nature, to ensure compliance with the Directive. Lastly, Article 29(3)(d) and (e) CSDDD, respectively, outline rules on collective actions and disclosure of evidence, the latter two explained below.

Collective actions

The FRA report mentioned above emphasized that many legal systems in the EU lack effective collective redress mechanisms, leading to limited opportunities for claimants to seek financial compensation for business-related human rights abuses. Existing options often apply only to specific types of cases, such as consumer and environmental protection, with procedural complexities further restricting their scope. Article 29(3)(d) CSDDD ensures that collective action mechanisms are put in place to enforce the rights of claimants injured by infringements of the Directive's rules. This provision states that 'Member States shall ensure that […] reasonable conditions are provided for under which any alleged injured party may *authorise*' the initiation of such proceedings. In our view, if this provision is interpreted in a similar way as the alike-rule on private enforcement contained in Article 80(1) GDPR (which uses the synonym 'mandate'), then this collective action mechanism shall operate on an opt-in basis (see Pato & Rodriguez-Pineau, 2021). The wording of both provisions points to a necessity of explicit consent from those wishing to be bound by such actions. Recital 84 CSDDD further underscores this interpretation by stating that this authorisation should be 'based on the explicit consent of the alleged injured party'. Importantly, this is unrelated to the collective enforcement of other obligations, outside the scope of the CSDDD, that may impinge upon the types of companies listed in Article 3(1)(a) CSDDD, like those stemming from financial law and insurance law (e.g. UCITS Directive, EMD, Solvency II, AIFMD, MiFID II, and PSD2). All the latter are included in Annex I Representative Actions Directive (RAD) and therefore may be collectively enforced on an opt-out basis pursuant to Article 9(2) RAD (see Recital 84 CSDDD).

Furthermore, Article 29(3)(d) CSDDD grants the Member States the power to set conditions under which 'a trade union, non-governmental human rights or environmental organisation or other non-governmental organisation, and, in accordance with national law, national human rights' institutions' may be

authorized to bring such collective actions. The Directive exemplifies these conditions by mentioning a minimum period of actual public activity and a non-profit status akin to, respectively, Article 4(3)(a) and (c) RAD, as well as Article 80(1) GDPR.

In our view, the most relevant aspect of the collective action mechanism set by the CSDDD is that it provides for the ability to claim damages. Indeed, Article 29(3)(d) CSDDD allows the entities referred therein to 'enforce the rights of the alleged injured party', without making any exceptions as to which rights. This is an important recognition of the potentially pervasive procedural imbalance that can affect claimants' abilities to pursue damages against multinational corporations in cases of widespread harm (see Kramer & Carballo Piñeiro, 2014; Biard & Kramer, 2018; Buxbaum, *Collected Courses of The Hague Academy of International Law* 399, 2019).

Disclosure of evidence

Finally, Article 29(3)(e) CSDDD enacts a regime of disclosure of evidence in claims seeking to establish the civil liability of companies under the Directive. This provision, similar to Article 6 IP Enforcement Directive, Article 5 Antitrust Damages Directive, and Article 18 RAD, seeks to remedy the procedural imbalance of evidentiary deficiency, existent when there is economic disparity between the parties and unequal access to factual materials (see Vandenbussche, 2019).

When a claim is filed and the claimant provides a reasoned justification along with reasonably available facts and evidence supporting their claim for damages, courts can order the disclosure of evidence held by the company. This disclosure must adhere to national procedural laws. If such a disclosure is requested in a cross-border setting within the EU, the Taking of Evidence Regulation also applies.

Courts must limit the disclosure of evidence to what is necessary and proportionate to support the potential claim for damages and the preservation of evidence. Factors considered in determining proportionality include the extent to which the claim or defense is supported by available evidence, the scope and cost of disclosure, the legitimate interests of all parties (including third parties), and the need to prevent irrelevant searches for information.

If the evidence contains confidential information, especially regarding third parties, Member States must ensure that national courts have the authority to order its disclosure if relevant to the claim for damages. Effective measures must be in place to protect this confidential information when disclosed.

Outlook

The CSDDD regime on civil procedure described above largely follows the EU's 'silo mentality' (Voet, 2018) of enacting sectoral-based and uncoordinated collective action mechanisms tied to a specific area of substantive law, such as consumer law, non-discrimination law, and environmental law (e.g. UCTD, RED, UCPD, IED, EIAD, etc.). An important difference being, however, that this time the RAD is already in force and being implemented. On this matter, Recital 84 CSDDD states that Article 29(3)(d) CSDDD 'should not be interpreted as requiring the Member States to extend the provisions of their national law' implementing the RAD.

However, being the first EU-wide collective action mechanism and prompting historically collective action-sceptic Member States to adapt accordingly, it is conceptually challenging to posit that the RAD would not potentially influence regimes on collective actions beyond consumer law, including the CSDDD. In this context, it would not deviate significantly from current developments if some Member States opted for a straightforward extension of their existing and RAD-adapted collective action regimes to the CSDDD, though that demands caution to the latter's specificities and is not legally required.

Another aspect worthy of attention is how these collective actions would be funded. Since such actions may seek damages compensation for widespread harm under Article 29 CSDDD, they can become notably complex and, consequently, expensive. At the same time, a large number of injured persons can mean that these collective actions will ask for high sums in damages. These two factors combined make these collective actions an enticing investment opportunity for the commercial third-party litigation funding (TPF) industry. The CSDDD does not make any reservations in this regard, leaving ample room for Member States to regulate, or not, the involvement of commercial TPF. A report published in mid last year by Kramer, Tzankova, Hoevenaars, and Van Doorn by request of the Dutch Ministry of Justice and Security found that nearly all collective actions seeking damages in the Netherlands make use of commercial TPF. This

underscores the crucial role commercial TPF plays in financing such actions, significantly impacting access to justice.

Moreover, the complexities surrounding the integration of PIL into specialized legislation such as the CSDDD, the GDPR, and the anti-SLAPPs Directive reflect a tension between the European Parliament and the Commission. This tension revolves around the extent to which PIL should be addressed within specialized frameworks versus traditional EU legislation on PIL. So far, a clear direction in this regard is lacking, which will trigger further discussions and potential shifts in approach within the EU legislative landscape.

There and Back Again? – The unexpected journey of EU-UK Judicial Cooperation finally leads to The Hague

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Today marks a significant step towards the reconstruction of EU-UK Judicial Cooperation. As neither House of Parliament has raised an objection by 17 May 2024,[1] the way seems to be paved for the Government's ambitious plans to have the HCCH 2019 Judgments Convention[2] implemented and ratified by the end of June 2024.[3] For the first time since the withdrawal of the United Kingdom from the European Union (so-called *Brexit*) on 31 January 2020, a general multilateral instrument would thus once again be put in place to govern the mutual recognition and enforcement of judgments in civil and commercial matters across the English Channel.

We wish to take this opportunity to look back on the eventful journey that the European Union and the United Kingdom have embarked on in judicial cooperation since Brexit (I.) as well as to venture a look ahead on what may be expected from the prospective collaboration within and perhaps even alongside the HCCH system (II.).

I. From Brexit to The Hague (2016-2024)

When the former Prime Minister and current Foreign Secretary *David Cameron* set the date for the EU referendum on 23 June 2016, this was widely regarded as

just a political move to ensure support for the outcome of his renegotiations of the terms of continued membership in the European Union.[4] However, as the referendum results showed 51.9% of voters were actually in favour of leaving,[5] it became apparent that *Downing Street* had significantly underestimated the level of voter mobilisation achieved by the *Vote Leave* campaign. Through the effective adoption of their alluring "take back control" slogan, the Eurosceptics succeeded in framing European integration as undermining Britain's sovereignty – criticising *inter alia* a purportedly dominant role of the Court of Justice (CJEU) – while simultaneously conveying a positive sentiment for the United Kingdom's future as an autonomous country[6] – albeit on the basis of sometimes more than questionable arguments.[7]

http://www.voteleavetakecontrol.org/why_vote_leave.html

Whatever the economic or political advantages of such a repositioning might be (if any at all), it proved to be a severe setback in terms of judicial cooperation. Since most – if not all – of the important developments with respect to civil and commercial matters[8]in this area were achieved within the framework of EU Private International Law (PIL) (e.g. Brussels Ibis, Rome I-II etc.), hopes were high that some of these advantages would be preserved in the subsequent negotiations on the future relationship after Brexit.[9] A period of uncertainty in forum planning for cross-border transactions followed, as it required several rounds of negotiations between EU Chief Negotiator *Michel Barnier* and his

changing UK counterparts (*David Frost* served for the final stage from 2019-2020) to discuss both the Withdrawal Agreement[10] as well as the consecutive Trade and Cooperation Agreement (TCA).[11] While the first extended the applicability of the relevant EU PIL Regulations for proceedings instituted, contracts concluded or events occurred during the transition period until 31 December 2020,[12] the latter contained from that point onwards effectively no provision for these matters, with the exception of the enforcement of intellectual property rights.[13] Thus, with regard to civil judicial cooperation, the process of leaving the EU led to – what is eloquently referred to elsewhere as – a "sectoral hard Brexit".[14]

With no tailor-made agreement in place, the state of EU-UK judicial cooperation technically fell back to the level of 1973 before the UK's accession to the European Communities. In fact, – in addition to the cases from the transition period – the choice of law rules of the Rome I and Rome II-Regulations previously incorporated into the domestic law, remained applicable as so-called *retained EU law* (REUL) due to their universal character (*loi uniforme*).[15] However, this approach was not appropriate for legal acts revolving around the principle of reciprocity, particularly in International Civil Procedure.[16] Hence, a legal stocktaking was required in order to assess how *Brexit* affected the status of those pre-existing multilateral conventions and bilateral agreements with EU Member States that had previously been superseded by EU law.

First, the UK Government has been exemplary in ensuring the "seamless continuity" of the HCCH 2005 Choice of Court Convention throughout the uncertainties of the whole withdrawal process, as evidenced by the UK's declarations and *Note Verbale* to the depositary Kingdom of the Netherlands.[17] The same applies *mutatis mutandis* to the HCCH 1965 Service Convention, to which all EU Member States are parties, and the HCCH 1970 Evidence Convention, which has only been ratified so far by 23 EU Member States. Second, some doubts arose regarding an *ipso iure* revival of the original Brussels Convention of 1968,[18] the international treaty concluded on the occasion of EU membership and later replaced by the Brussels I Regulation when the EU acquired the respective competence under the Treaty of Amsterdam.[19] Notwithstanding the interesting jurisprudential debate, these speculations were effectively put to a halt in legal practice by a clarifying letter of the UK Mission to the European Union.[20] Third, there are a number of bilateral agreements with

EU Member States that could be reapplied, although these can hardly substitute for the Brussels regime, which covers most of the continental jurisdictions.[21] This is, for example, the position of the German government and courts regarding the German-British Convention of 1928.[22]

It is evident that this legal patchwork is not desirable for a major economy that wants to provide for legal certainty in cross-border trade, which is why the UK Government at an early stage sought to enter into a more specific framework with the European Union. First and foremost, the *Johnson Ministry* was dedicated to re-access the Lugano Convention[23] which extended the Brussels regime to certain Member States of the European Free Trade Association (EFTA)/European Economic Area (EEA) in its own right.[24] Given the strong resentments *Brexiteers* showed against the CJEU during their campaign this move is not without a certain irony, as its case law is also crucial to the uniform interpretation of the Lugano Convention.[25] Whereas Switzerland, Iceland and Norway gave their approval, the European Commission answered the UK's application in the negative and referred to the HCCH Conventions as the "framework for cooperation with third countries".[26] What some may view as a power play by EU bureaucrats could also fairly be described as a necessary rebalancing of trust and control due to the comparatively weaker economic and in particular judicial integration with the United Kingdom *post-Brexit*.[27] At the very least, the reference to the HCCH reflects the consistent European practice in other agreements with third countries.[28]

Be that as it may, if *His Majesty's Government* implements its ratification plan as diligently as promised, the HCCH 2019 Judgments Convention may well be the first new building block in the reconstruction what has been significantly shattered on both sides by the twists and turns of *Brexit*.

II. (Prospective) Terms of Judicial Cooperation

Even if the path of EU-UK Judicial Cooperation has eventually led to The Hague, there is still a considerable leeway in the implementation of international common rules.

Fortunately, the UK Government has already put forward a roadmap for the HCCH 2019 Judgments Convention in its responses to the formal consultation carried out from 15 December 2022 to 9 February 2023[29] as well as the

explanatory memorandum to the Draft Recognition and Enforcement of Judgments Regulations 2024.[30] Generally speaking, the UK Government wants to implement the HCCH Convention for all jurisdictions of the United Kingdom without raising any reservation limiting the scope of application. Being a devolved matter, this step requires the Central Government to obtain the approval of a Northern Ireland Department (*Roinn i dTuaisceart Éireann*) and the Scottish Ministers (*Mhinistearan na h-Alba*).[31] Furthermore, this approach also implies that there will be no comparable exclusion of insurance matters as under the HCCH 2005 Convention.[32] However, the Responses contemplated making use of the bilateralisation mechanism in relation to the Russian Federation upon its accession to the Convention.[33]

Technically, the Draft Statutory Instrument employs a registrations model that has already proven successful for most recognition and enforcement schemes applicable in the UK.[34] However, registration within one jurisdiction (e.g. England & Wales) will on this basis alone not allow for recognition and enforcement in another (e.g. Scotland, Northern Ireland), but is rather subject to re-examination by the competent court (e.g. Court of Session).[35] This already constitutes a significant difference compared to the system of automatic recognition under the Brussels regime. Moreover, the draft instrument properly circumvents the peculiar lack of an exemption from legalisation in the HCCH 2019 Convention by recognizing the seal of the court as sufficient authentication for the purposes of recognition and enforcement.[36] It remains to be seen if decisions of third states "domesticated" in the UK under the common law *doctrine of obligation* will be recognized as judgments within the European Union. If the CJEU extends the position taken in *J. v. H Limited* to the HCCH 2019 Judgments Convention, the UK may become an even more attractive gateway to the EU Single Market than expected.[37] Either way, the case law of the CJEU will be mandatory for 26 Contracting States and thus once again play – albeit not binding – a dominant role in the application of the HCCH legal instrument.

As far as the other legal means of judicial cooperation are concerned, the House of Lords does not yet appear to have given up on accession to the Lugano Convention.[38] Nevertheless, it seems more promising to place one's hopes on continued collaboration within the framework of the HCCH. This involves working towards the reconstruction of the remaining foundational elements previously present in EU-UK Judicial Cooperation by strengthening the HCCH *Jurisdiction*

Project and further promoting the HCCH 1970 Evidence Convention in the EU.

III. Conclusion and Outlook

After all, the United Kingdom's withdrawal from the European Union has dealt a serious blow to judicial cooperation across the English Channel. A look back at the history of *Brexit* and the subsequent negotiations has revealed that the separation process is associated with an enormous loss of trust. Neither could the parties agree on a specific set of rules under the TCA, nor was the European Union willing to welcome the United Kingdom back to the Lugano Convention.

Against this background, it is encouraging to see that both parties have finally agreed on the HCCH as a suitable and mutually acceptable forum to discuss the future direction of EU-UK Judicial Cooperation. If *Brexit* ultimately brought about a reinvigorated commitment of the United Kingdom to the HCCH Project, this might even serve as an inspiration for other States to further advance the Hague Conference's ambitious goal of global judicial cooperation. Then the prophecies of the old songs would have turned out to be true, after a fashion. Thank goodness!

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[1] HL Int. Agreements Committee, 11th Report of 8 May 2024 "Scrutiny of international agreements: 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters" (HL Paper 113), para. 1. According to sec. 20 (1) (a) and (2) of the Constitutional Reform and Governance Act 2010 (c. 25) is a treaty not ratified unless a Minister of the Crown has laid a copy before parliament for a period of 21 sitting days.

[2] Convention on the recognition and enforcement of foreign judgments in civil or commercial matters (HCCH 2019 Judgments Convention) of 2 July 2019, UNTS I-58036 and Tractatenblad 2024, 42 (Verdragsnr. 013672).

[3] Civil Procedure Rule Committee, Minutes of 1 December 2023, para. 28

[4] See *inter alia*, *Mason*, "How did UK end up voting to leave the European Union?", The Guardian of 24 June 2016; *Boffey*, "Cameron did not think EU referendum would happen, says Tusk", The Guardian of 21 January 2019; *Duff*,

“David Cameron’s EU reform claims: If not ‘ever closer union’, what?”, Blogpost of 26 January 2016 on Verfassungsblog | On Matters Constitutional; *von Lucke*, “Brexit oder: Die verzockte Demokratie”, Blätter 8/2016, 5 et seq.

[5] UK Electoral Commission, “23 June 2016 referendum on the UK’s membership of the European Union”, Report of September 2016, p 6.

[6] Compare *Haughton*, “Ruling Divisions: The Politics of Brexit”, Perspectives on Politics 19 (2021), 1258, 1260; *Özlem Atikcan/Nadeau/Bélanger*, “Framing Risky Choices: Brexit and the Dynamics of High-stakes Referendums”, p. 44.

[7] E.g. *Rankin*, “Is the leave campaign really telling six lies?”, The Guardian of 7 June 2016.

[8] This finding might look different for International Family Law, according to *Beaumont*, “Private International Law concerning Children in the UK after Brexit: Comparing Hague Treaty Law with EU Regulations”, Child & Fam. L. Q. 29 (2017), 213, 232: “In all these matters students, practitioners and judges will be grateful to have fewer operative legal regimes post-Brexit”.

[9] For example, on this blog *Fitchen*, “Brexit: No need to stop all the clocks”, Blogpost of 31 January 2020 or *Lutzi*, “Brexit: The Spectre of Reciprocity Evoked Before German Courts”, Blogpost of 13 December 2020.

[10] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (Withdrawal Agreement) of 24 January 2020, OJ EU CI 384/1.

[11] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (TCA) of 30 December 2020, OJ EU L 149/10.

[12] Art. 126 of the Withdrawal Agreement.

[13] Compare Chapter 3: Art. 256-273 of the TCA.

[14] *Bert*, “Judicial Cooperation in Civil Matters: Hard Brexit After All?”, Blogpost of 26 December 2020 on Dispute Re§olution Germany.

[15] Sec. 3 (1) European Union (Withdrawal) Act 2018, Chapter 16/2018, sec. 10, 11 The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019, SI 2019/834; For the current status of the Retained EU Law, see House of Commons Library "The end of REUL? – Progress in reforming retained EU law", Research Briefing No.°09957 of 2 February 2024 (author: *Leigh Gibson*).

[16] Implicitly *Dickinson*, "Realignment of the Planets – Brexit and European Private International Law", IPRax 2021, 213, 217 et seq.

[17] See Notes Verbales of the United Kingdom to the Kingdom of the Netherlands in its capacity as depositary of the HCCH 2005 Judments Convention from 28 December 2018 to 28 September 2020 in the Treaty Database.

[18] Convention on jurisdiction and the enforcement of judgments in civil and commercial matter (Brussels Convention) of 27 September 1968, OJ EU L 229/31; See e.g. *Rühl*, "Judicial Cooperation in Civil and Commercial Matters after Brexit: Which Way Forward?", ICLQ 67 (2018), 99, 104 et seq.

[19] Art. 73m of the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts of 2 October 1997, OJ EU C 340/1.

[20] UK Mission to the European Union, Letter to the Council of the European Union of 29 January 2021, NO 17/2021.

[21] See, for example, the Agreement on the continued Application and Amendment of the Convention between the Government of the United Kingdom and the Government of Norway providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters singed at London on 12 June 1961, SI 2020 No. 1338.

[22] Convention on the Facilitation of Legal Proceedings in Civil and Commercial Matters between His Majesty and the President of the German Reich of 20 March 1928; RGBl. 1928 II Nr. 47; for the position of the German Government, please refer to German Federal Government "Response to the parliamentary enquiry on judicial cooperation in civil matters with the United Kingdom post-Brexit", BT-Drucks. 19/27550 of 12 March 2021, p. 3, for a recent decision of the German Judiciary, see Higher Regional Court of Cologne, Decision of 2 March 2023, I-18 U

188/21, paras. 60 et seq.

[23] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention) of 30 October 2007, OJ EU L 339/3.

[24] With the notable exception of Liechtenstein.

[25] Art. 64 Lugano Convention as well as the Protocol concerning the interpretation by the Court of Justice of 3 June 1971, OJ EU L No°204/28.

[26] For the consent of the other Contracting State (except Denmark), see Swiss FDFA, "Communications by the depositary with respect to the application of accession by the United Kingdom", Notification of 28 April 2021, 612-04-04-01 – LUG3/21; for the rejection of the EU Commission, Note Verbale to the Swiss Federal Council of 22 June 2021 and, "Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention", COM(2021) 222 final of 4 May 2021, pp. 3 et seq. However, this decision was not without criticism, for example by the Chair-Rapporteur of the OHCHR Working Group on the issue of human rights and transnational corporations and other business enterprises in a letter to the EU Commission of 14 March 2024.

[27] For these arguments see EU Commission, "Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention", COM(2021) 222 final of 4 May 2021, p. 3 and European Parliamentary Research Service (EPRS), "The United Kingdom's possible re-joining of the 2007 Lugano Convention" Briefing PE 698.797 of November 2021 (author: *Rafa? Ma?ko*), pp. 3 et seq. For a theoretical foundation, see *M. Weller*, " 'Mutual Trust': A Suitable Foundation for Private International Law in Regional Integration Communities and Beyond", RdC 423 (2022), 37, 295 et seq.

[28] See e.g. Art. 24 of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other par, OJ EU No°L 161/3: "The Parties agree to facilitate further EU-Ukraine judicial cooperation in civil matters on the basis of the applicable multilateral legal instruments, especially the Conventions of the Hague Conference on Private International Law in the field of international Legal Cooperation and Litigation as well as the Protection of Children". Until recently, the regulation of judicial cooperation

specifically in and for extra-EU trade relations appeared to be aout of sight, see *M. Weller*, "Judicial cooperation of the EU in civil matters in its relations to non-EU States – a blind spot?", in Alan Uzelac/Rhemco van Rhee (eds.), Public and Private Justice (PPJ) 2017: The Transformation of Civil Justice, Intersentia 2018, pp. 63 et seq.

[29] UK Ministry of Justice, The Hague 2019 – Response to Consultation of 23 November 2023 ("Responses").

[30] Draft Statutory Instruments 2024 No. XXX Private International Law: The Recognition and Enforcement of Judgments (2019 Hague Convention etc.) Regulations 2024 ("Draft Guidelines"). The competence to make regulations in that respect is based on sec. 2 (1) of the Private International Law (Implementation of Agreements) Act 2020 (c. 24). According to sec. 2 (11) read in conjunction with sched. 6 paras. 4 (2) (a) and (d) draft regulations need to be laid before parliament for approval of each House by a resolution.

[31] Sec. 2 (12) Private International Law (Implementation of Agreements) Act 2020 (c. 24); see also Letter from the Scottish Minister for Victims and Community Safety of 19 March 202 regarding the "UK SI Notification – The Recognition and Enforcement of Judgments (2019 Hague Convention etc) Regulations 2024".

[32] See Response, para. 51; a similar discussion took place regarding "mixed litigation issues", where only certain elements are within the scope of the HCCH 2019 Judgments Convention.

[33] Responses, para. 53.

[34] See *inter alia* the Administration of Justice Act 1920, Chapter 81/1920 (Regnal. 10 & 11 Geo 5) or the Foreign Judgments (Reciprocal Enforcement) Act 1933, Chapter 13/1933 (Regnal. 23 & 24 Geo 5.

[35] Sec. 15 Draft Guidelines and Draft Explanatory Memorandum, para. 5.5.5.

[36] Sec. 12 Draft Guidelines; *Garcimartin/Saumier*, HCCH 2019 Judgments Convention: Explanatory Report, para. 307.

[37] See CJEU, Judgment of 7 April 2022, *J. v. H. Limited*, C-568/20, para. 47. However, there is a certain chance that this case law will be corrected in the

upcoming revision process of the Brussels Ibis-Regulation, see e.g. *Hess/Althoff/Bens/Elsner/Järvekülg*, "The Reform of the Brussels Ibis Regulation", MPI Luxembourg Research Paper Series N.°2022 (6), proposal 15.

[38] HL Int. Agreements Committee, 11th Report of 8 May 2024 "Scrutiny of international agreements: 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters" (HL Paper 113), para. 17: "Many stakeholders have called for the Government to continue its efforts to join the Lugano Convention in addition to ratifying Hague 2019. We agree that the Government should do so."

Way Out West? Understanding The CISG's Application in Australia

In 2009, Associate Professor Lisa Spagnolo observed – based upon her census of Australia's CISG case law at that time – that the Convention was effectively 'in the Australian legal outback'. For those unfamiliar with Australia's geography, most of its population is concentrated on the continent's eastern coast. Australia's outback extends, amongst other places, across much of Western Australia. With that geographic imagery in mind, one might not be surprised to hear that a recent decision of the County Court of Victoria – in Australia's east – overlooked the Vienna Sales Convention's application.

Abu Dhabi Supreme Court on the

Applicability of Law on Civil Marriage to Foreign Muslims

I. Introduction

Recent developments in the field of family law in the UAE, in particular the adoption of the so-called "Civil Marriage Laws", have aroused interest, admiration, curiosity, and even doubt and critics among scholars and practitioners of family law, comparative law and private international law around the world.[1] First introduced in the Emirate of Abu Dhabi,[2] and later implemented at the federal level,[3] these "non-religious" family laws, at least as originally enacted in Abu Dhabi, *primarily* intend to apply to foreign non-Muslims.[4] The main stated objective of these laws is to provide foreign expatriates with a modern and flexible family law based on "principles that are in line with the best international practices" and "close to them in terms of culture, customs and language".[5] One of the peculiar feature of these laws is that their departure from the traditional family law regulations and practices in the region, particularly in terms of gender equality in pertinent matters such as testimony, succession, no-fault divorce and joint custody.[6]

Aside from the (critical) judgment that can be made about these laws, their application raises several questions. These include, *inter alia*, the question as to whether these laws would apply to "foreign Muslims", and if yes, under which conditions. The decision of the Abu Dhabi Supreme Court (hereafter "ADSC") reported here (*Ruling No. 245/2024 of 29 April 2024*) shed some light on this ambiguity.

II. The Facts:

The case concerns a unilateral divorce action initiated by the husband (a French-Lebanese dual national, hereafter "X") against his wife (a Mexican-Egyptian dual national, hereafter "Y"). Both are Muslim.

According to the facts reported in the decision, X and Y got married in the Emirate of Abu Dhabi on 11 September 2023, apparently in accordance with the

2021 Abu Dhabi Law Civil Marriage Law[7] although some aspects of the Islamic tradition regarding marriage appear to have been observed.[8] On 6 November 2023, X filed an action for no-fault divorce with the Abu Dhabi Civil Family Court (hereafter ADCFC) pursuant to the 2021 Abu Dhabi Law Civil Marriage Law using the prescribed form.[9] Y contested the divorce petition by challenging the jurisdiction of the court. However, the ADCFC admitted the action and declared the dissolution of the marriage. The decision was confirmed on appeal.

Y then appealed to the ADSC primarily arguing that the Court of Appeal had erred in applying the 2021 Abu Dhabi Law Civil Marriage Law to declare the dissolution of the marriage because both parties were Muslim. Y's main arguments as summarized by the ADSC are as follows:

1. The Abu Dhabi courts lacked international jurisdiction because she was foreigner and did not have a place of residence in Abu Dhabi and that her domicile was in Egypt,
2. The Court of Appeal rejected her argument on the ground that X had a known domicile in Abu Dhabi,
3. Both parties were foreign Muslims and not concerned with the application of the 2021 Abu Dhabi Law Civil Marriage Law knowing that the marriage fulfilled all the necessary requirement for Islamic marriage and was concluded with the presence and the consent of Y's matrimonial guardian (her brother *in casu*).

III. The Ruling

The ADSC accepted the appeal and ruled that the ADCFC was not competent to hear the dispute, stating as follows:

"Pursuant to Article 87 of the [2022 Federal Act on Civil Procedure, hereafter "FACP"], challenges to the court's judicial jurisdiction or subject matter jurisdiction may be raised by the courts *sua sponte* and may be invoked at any stage of the proceedings. On appeal, Y argued that the court lacked subject matter jurisdiction to hear the case because she was Muslim […] and a dual national of Mexico and Egypt, while X was also a Muslim […] and holder of French and Lebanese nationalities.

[However,] the Court of Appeal rejected Y's arguments and confirmed its jurisdiction based on Articles 3 and 4 of [the Procedural Regulation]; [although] the opening of Article 3 relied on [by the court] states that "the court is competent to hear civil family matters for non-Muslim foreigners regarding civil marriage, divorce and their effects". In addition, Article 1(1) of Federal Legislative Decree No. 41/2022 states that "The provisions of the present Legislative Decree shall apply to non-Muslim citizens of the UAE and to foreign non-Muslims residing in the UAE, unless they invoke the application of their own law in matters of marriage, divorce, succession, wills and establishment of filiation."

[Given that] it was judicially established by the parties' acknowledgement that they were Muslim, the Court of Appeal violated the Law No. 14/2021, as amended by Law No. 15/2021, and its Procedural Regulation [No. 8/2022], as well as Federal Legislative Decree No. 41/2022 by upholding the appealed decision without ascertaining the religion of the parties and ruling as it did, [therefore its decision] must be reversed".

IV. Comments

The main legal question referred to the ADSC concerned the applicability of the 2021 Abu Dhabi Civil Marriage Law and its Procedural Regulation to foreign Muslims. The ADSC answered the question in the negative, stating that the ADCFC was not competent to declare the dissolution a marriage between foreign Muslims. Although the case raises some interesting issues regarding the international jurisdiction of the ADCFC, for the sake of brevity, only the question of the applicability of the 2021 Abu Dhabi Civil Marriage Law will be addressed here.

1. Unlike the 2022 Federal Civil Personal Status, which explicitly states that its provisions "apply to *non-Muslim UAE citizens*, and to *non-Muslim foreigners* residing in the UAE" (article 1, emphasis added), the law in Abu Dhabi is rather ambiguous on this issue.

i. It should be indicated in this respect that, the 2021 Abu Dhabi Civil Marriage Law, which was originally enacted as "The Personal Status for *Non-Muslim Foreigners* in the Emirate of Abu Dhabi" (Law No. 14/2021 of 7 November 2021,

emphasis added) clearly limited its scope of application to foreign non-Muslims. This is also evident from the definition of the term "foreigner" contained in the former article 1 of the Law, according to which, the term (foreigner) was defined as "[a]ny male or female *non-Muslim* foreigner, having a domicile, residence or place of work in the Emirate." Former article 3 of the Law also defined the scope of application of the Law and limited only to "foreigners" in the meaning of article 1 (i.e. non-Muslim foreigners). Therefore, it was clear that the Law, in its original form, did not apply to "foreign Muslims" in general.[10]

ii. However, only one month after its enactment (and even before its entry into force), the Law was amended and renamed "The Law on Civil Marriage and its Effects in the Emirate of Abu Dhabi" by the Law No. 15/2021 of 8 December 2021. The amendments concerned, *inter alia* the scope of application *rationae personae* of the Law. Indeed, the Law No. 15/2021 deleted the all references to "foreigners" in the Law No. 14/2021 and replaced the term with a more neutral one: *"persons covered by the provisions of this Law [al-mukhatabun bi hadha al-qanun]"*. This notion is broadly defined to include both "foreigners" (without any particular reference to their religious affiliation) and "*non-Muslim* citizens of the UAE" (New Article 1).

Article 5 of the Procedural Regulation provides further details. It defines the terms "persons covered by the provisions of this Law" as follows:

1. Non-Muslim [UAE] citizens.
2. A foreigner who holds the nationality of a country that *does not primarily apply the rules of Islamic Sharia in matters of personal status* as determined by the Instruction Guide issued by the Chairman of the [Judicial] Department […] (emphasis added).

The wording of article 5(2) is somewhat confusing, as it can be interpreted in two manners:

(i) if read *a contrario,* the provision would mean that foreigners, irrespective to their religion (including non-Muslims), would *not* be subject to the 2021 Abu Dhabi Civil Marriage Law and its Procedural Regulation if they hold the nationality of a country that *does* "primarily apply the rules of Islamic Sharia in matters of personal status". As a result, family relationships of Christian Algerian or Moroccan, for example, would not be governed by the 2021 Abu Dhabi Civil

Marriage Law and its Procedural Regulation. However, this interpretation seems to be in opposition with the very purpose of adopting the Law, which, in its own terms, applies to non-Muslim UAE citizens.

(ii) Alternatively, the word "foreigner" here could be understood to mean "*Muslim* foreigners", but only those who hold the "the nationality of a country that does *not* primarily apply the rules of Islamic Sharia in matters of personal status". As a result, the family relationships of Muslim Canadian, French, German or Turkish (whether Tunisian would be included here is unclear) would be governed by the Law.

The latter interpretation seems to be prevalent.[11] In addition, the Abu Dhabi Judicial Department (ADJD)'s official website (under section "Marriage") presents even a broader scope since it explains that "civil marriage" is open to "anyone, *regardless of their religion*" including "*Muslims*" "as long as they are not UAE citizens".

iii. The situation becomes more complicated when the parties have multiple nationalities especially when, as in the reported decision, one is from of a predominantly Muslim country and the other from a non-Muslim country. Here, article 5 of the Procedural Regulation provides useful clarifications. According to paragraph 2 *in fine*, the nationality to be taken into account in such situation is the one used by the parties according to their [status] of residence in the UAE. If interpreted literally, family law relationships of foreign Muslims who, in addition to their nationality of a non-Muslim country, also hold a nationality of a country whose family law is primarily based on Islamic Sharia (as in the reported decision) would be governed by the 2021 Abu Dhabi Civil Marriage Law and its Procedural Regulation if, according to their status of residence, they use the nationality of their non-Muslim country nationality.

iv. In the case commented here, the parties have dual nationality (French/Lebanese, Mexican/Egyptian). Although the parties are identified as "Muslim", they appear to have used the nationality of their non-Muslim countries.[12] Accordingly, contrary to the ADSC's decision, it can be said that the 2021 Abu Dhabi Civil Marriage Law and its Procedural Regulation were applicable in this case.

2. In addition to the religion of the parties, the 2021 Abu Dhabi Civil Marriage Law and its Procedural Regulation determine other situations in which the Law applies.

i. These include, with respect to the effect of the marriage and its dissolution, the case where *"the marriage is concluded in accordance with"* the Law and its provisions (Article 3 of the 2021 Abu Dhabi Civil Marriage Law;[13] Article 5(4) of the Procedural Regulation).[14] The application of this rule does not seem to be dependent on the religion of the parties concerned. Consequently, since the marriage *in casu* was concluded pursuant to the provisions of the 2021 Abu Dhabi Civil Marriage Law,[15] its dissolution should *logically* be governed by the provisions of the same Law.

ii. However, it must be acknowledged that such a conclusion is not entirely self-evident. The confusion stems from the ADJD's official website (under section "Divorce") which states as a matter of principle that, normally, "anyone who obtained a Civil Marriage through the ADCFC" is entitled to apply for divorce in application of the 2021 Abu Dhabi Civil Marriage Law. However, the same website indicates that "[f]or applicants holding citizenship of a *country member of the Arab League countries* [sic], an official document proving the religion of the party may be required" when they apply for divorce" (emphasis added).[16] Although the ADSC made no reference to the Arab citizenship of the parties in its decision, it appears that it adheres to the idea of dissociation between *the conclusion* and the *dissolution* of marriage in dispute involving Muslims. In any case, one can regret that the ASDC missed the opportunity to examine the rule on dual nationality under article 5(2).

Concluding Remarks

1. To deny the jurisdiction of the ADCFC, the ASDC relied on article 3 of the Procedural Regulation, which the Court quoted as follows: "The [ADCFC] is competent to hear civil family matters for *foreign non-Muslims* in relation to civil marriage, divorce and its effects (emphasis added)." The problem, however, is that the ADSC *conveniently* omitted key words that significantly altered the meaning of the provision.

The provision, properly quoted, reads as follows: "The [ADCFC] is competent to

hear civil family matters for *foreigners or non-Muslim citizens* in relation to civil marriage, divorce and its effects (emphasis added)." In other words, article 3 does not limit the scope of application of the Law and its Regulation exclusively to "foreign non-Muslims" as outlined above.

2. Moreover, it is quite surprising that the ADSC also referred to Article 1 of the 2022 Federal Civil Personal Status in support of its conclusions, i.e. that the taking of jurisdiction by the ADFCF "violated the law". This is because it is accepted that the 2022 Federal Civil Personal Status does not apply to Abu Dhabi.[17] In addition, some important differences exist between the two laws such as age of marriage which fixed at 18 in the 2021 Abu Dhabi Civil Marriage Law (article 4(1)), but raised to 21 in the 2022 Federal Civil Personal Status (article 5(1)).[18] The combined (mis)application of 2021 Abu Dhabi Civil Marriage Law and the 2022 Federal Civil Personal Status appears opportunistic and reveals the ADSC's intention to exclude *contra legem* foreign Muslims (or at least those who are binational of both a Muslim and Non-Muslim countries) from the scope of application of 2021 Abu Dhabi Civil Marriage Law and its Procedural Regulation.

[1] see on this blog, Lena-Maria Möller, "Abu Dhabi Introduces Personal Status for non-Muslim Foreigners, Shakes up Domestic and International Family Law". See Also, *idem*, "One Year of Civil Family Law in the United Arab Emirates: A Preliminary Assessment", 37 *Arab Law Quarterly* (2023) 1 ff. For a particularly critical view, see Sami Bostanji, "Le droit de statut personnel au service de l'économie de marché! Reflexoins autour de la Loi n°14 en date de 7 novembre 2021 relative au statut personnel des étrangers non-musulmans dans l'Emirat d'Abou Dhabi" *in Mélanges offerts en l'honneur du Professeur Mohamed Kamel Charfeddine* (CPU, 2023) 905 ff.

[2] Law No. 14/2021 of 7 November 2021 on the "Personal Status for Non-Muslims" as modified by the Law No. 15/2021 of 8 December 2021 which changed the Law's title to "Law on Civil Marriage and its Effects" (hereafter "2021 Abu Dhabi Civil Marriage Law") and its Procedural Regulation issued by the Resolution of the Chairman of the Judicial Department No. 8/2022 of 1 February 2022, hereafter the "2022 Procedural Regulation"

[3] Federal Legislative Decree No. 41/2022 of 3 October 2022 on "Civil Personal Status" (hereafter "2022 Federal Civil Personal Status") and its Implementing Regulation issued by the Order of the Council of Ministers No. 1222 of 27 November 2023.

[4] See below IV(1)(i). On the difference between the 2021 Abu Dhabi Law Civil Marriage Law the 2022 Federal Civil Personal Status on this particular point, see below IV(1).

[5] Article 2 of the 2021 Abu Dhabi Law Civil Marriage Law.

[6] Article 16 of the 2021 Abu Dhabi Law Civil Marriage Law; article 4 of the 2022 Federal Civil Personal Status.

[7] The text of the decision is not clear on this point. Some comments online explain that the marriage was concluded pursuant to 2021 Abu Dhabi Civil Marriage Law.

[8] The text of the decision particularly mentions the presence and consent of Y's matrimonial guardian (*wali*), which is a necessary requirement for the validity of marriage between Muslims, but not a requirement under the 2021 Abu Dhabi Civil Marriage Law.

[9] The ADCFC, which was established specifically to deal with family law matters falling under the purview of the 2021 Abu Dhabi Civil Marriage Law, holds subject-matter jurisdiction in this regard.

[10] cf. Möller, "Abu Dhabi Introduces Personal Status for non-Muslim Foreigners" *op. cit.*

[11] For an affirmative view, see Möller, "One Year of Civil Family Law in the United Arab Emirates", *op. cit.*, 7.

[12] Some comments online explain that the marriage was concluded using foreign passports with no-Arabic names and no indication of the parties' religion.

[13] On the problems of interpretation of this provision, see Möller, "One Year of Civil Family Law in the United Arab Emirates", *op. cit.*, 7.

[14] The Procedural Regulation further expands the scope of application of the

Civil Marriage Law to cover cases where "the marriage was concluded abroad in a country whose family law is not primarily based on Islamic Sharia as determined by Abu Dhabi authorities" (Article 5(3)) and in any other case determined by the Chairman of the Judicial Department and about which an order is issued (Article 5(5)).

[15] See *supra* n (7).

[16] However, this rule appears to be devoid of any legal basis.

[17] Möller, "One Year of Civil Family Law in the United Arab Emirates", *op. cit.*, 2.

[18] For a comparision, see Möller, "One Year of Civil Family Law in the United Arab Emirates", *op. cit.*, 13-15.

Advocate General in Case Mirin (C-4/23): Refusal of recognition of a new gender identity legally obtained in another Member State violates the freedom of movement and residence of EU citizens

The following case note has been kindly provided by *Dr. Samuel Vuattoux-Bock*, LL.M. (Kiel), University of Freiburg (Germany).

On May 7, 2024, Advocate General Jean Richard de la Tour delivered his opinion in the case C-4/23, *Mirin*, concerning the recognition in one Member State of a

change of gender obtained in another Member State by a citizen of both States. In his opinion, Advocate General de la Tour states that the refusal of such a recognition would violate the right to move and reside freely within the Union (Art. 21 TFEU, Art. 45 EU Charter of Fundamental Rights) and the right of respect for private and family life (Art. 7 EU Charter of Fundamental Rights).

1. Facts

The underlying case is based on the following facts: a Romanian citizen was registered as female at birth in Romania. After moving with his family to the United Kingdom and acquiring British citizenship, he went through the (medically oriented) gender transition process under English law and finally obtained in 2020 a "Gender Recognition Certificate" under the Gender Recognition Act 2004, confirming his transition from female to male and the corresponding change of his forename. As the applicant retained his Romanian nationality, he requested the competent Romanian authorities (Cluj Civil Status Service) to record the change on his birth certificate, as provided for by Romanian law (Art. 43 of Law No. 119/1996 on Civil Status Documents). As the competent authority refused to recognize the change of name and gender (as well as the Romanian personal numerical code based on gender) obtained in the United Kingdom, the applicant filed an action before the Court of First Instance, Sector 6, Bucharest. The court referred the case to the CJEU for a preliminary ruling on the compatibility with European law (Art. 21 TFEU, Art. 1, 20, 21, 45 of the Charter of Fundamental Rights) of such a refusal based on Romanian law. In particular, the focus is on the Cluj Civil Status Office's demand that the plaintiff initiates a new judicial procedure for the change of gender in Romania. The plaintiff sees in this request the risk of a contrary outcome to the British decision, as the European Court of Human Rights ruled that the Romanian procedure lacks clarity and predictability (ECHR, *X. and Y. v. Romania*). In addition, the Romanian court asked whether Brexit had any impact on the case (the UK proceedings were initiated before Brexit and concluded during the transition period).

2. Opinion of the Advocate General

Advocate General de la Tour gave his opinion on these two questions. Regarding the possible consequences of Brexit, de la Tour drew two sets of conclusions from

the fact that the applicant still holds Romanian nationality. First, an EU citizen can rely on the right to move freely within the European Union with an identity document issued by his or her Member State of origin (a fortiori after Brexit). Second, the United Kingdom was still a Member State when the applicant exercised his freedom of movement and residence. As the change of gender and first name was acquired, the United Kingdom was also still a Member State. EU law is therefore still applicable as the claimant seeks to enforce in one Member State the consequence of a change lawfully made in another (now former) Member State.

On the question of the recognition of a change of first name and gender made in another Member State, Advocate General de la Tour argues that these issues should be treated differently. The fact that the first name may be sociologically associated with a different sex from the one registered should not be taken into account as a preliminary consideration for recognition (no. 61). He therefore answers the two questions separately. Already at this point, de la Tour specifies that the relevant underpinning logic for this type of case should not be the classical recognition rules of private international law, but rather the implementation and effectiveness of the freedom of movement and residence of EU citizens (nos. 53-55).

a) Change of first name

With regard to the change of the first name, de la Tour states (with reference to the *Bogendorff* case) that the refusal to recognize the change of the first name legally acquired in another Member State would constitute a violation of the freedoms of Art. 21 TFEU (no. 58). Since the Romanian Government does not give any reason why recognition should not be granted, there should be no obstacle to automatic recognition. The Advocate General considers that the scope of such recognition should not be limited to birth certificates but should be extended to all entries in a civil register, since a change of first name, unlike a change of surname, does not have the same consequences for other family members (nos. 63-64).

b) Change of gender

With regard to gender change, Advocate General de la Tour argues for an analogy with the Court’s case-law on the automatic recognition of name changes, in

particular the *Freitag* decision. Gender, like the name, is an essential element of the personality and therefore protected by Art. 7 of the Charter of Fundamental Rights and Art. 8 ECHR. The jurisprudence on names (in particular *Grunkin and Paul*) shows that the fact that a Member State does not have its own procedure for such changes (according to de la Tour, this concerns only 2 Member States for gender changes) does not constitute an obstacle to the recognition of a change lawfully made in another Member State (nos. 73-74). Consequently, de la Tour sees the refusal of recognition as a violation of the freedoms of Art. 21 TFEU, because the existence of a national procedure is not sufficient for such a refusal (no. 81). Furthermore, the Romanian procedure cannot be considered compatible with EU law, as the judgment of the European Court of Human Rights *X. and Y. v. Romania* shows that it makes the implementation of the freedoms of Art. 21 TFEU impossible or excessively difficult (No. 80). Nevertheless, there is nothing to prevent Member States from introducing measures to exclude the risk of fraudulent circumvention of national rules, for example by making the existence of a close connection with the other Member State (e.g. nationality or residence) a condition (nos. 75-78).

Unlike the change of first name, the change of gender affects other aspects of personal status and may have consequences for other members of the family (e.g. the gender of the parent on a child's birth certificate before the transition) or even for the exercise of other rights based on gender differentiation (e.g. marriage in States that do not recognize same-sex unions, health care, retirement, sports competition). Imposing rules on the Member States in these areas (in particular same-sex marriage) would not be within the competence of the Union (no. 94), so Advocate General de la Tour proposes a limitation to the effect of recognition in the Member State of origin. If the change of gender would have an effect on other documents, the recognition should only have an effect on the person's birth certificate and the documents derived from it which are used for the movement of the person within the Union, such as identity cards or passports. The Advocate General himself points out that this solution would lead to unsatisfactory consequences in the event of the return of the person concerned to his or her State of origin (no. 96), but considers that the solution leads to a "fair balance" between the public interest of the Member States and the rights of the transgender person.

3. Conclusion

In conclusion, Advocate General de la Tour considers that the refusal to recognize in one Member State a change of first name and gender legally obtained in another Member State violates the freedoms of Art. 21 TFEU. The existence of an own national procedure could not justify the refusal. Drawing an analogy with the Court's case-law on change of name, the Advocate General recommends that the change of first name should have full effect in the Member State of origin, while the change of gender should be limited to birth certificates and derived documents used for travel (identity card, passport).

Although the proposed solution may not be entirely satisfactory for the persons concerned, as it could still cause difficulties in the Member State of origin, the recognition in one Member State of a change of first name and sex made in another Member State should bring greater security and would underline the mutual trust between Member States within the Union, as opposed to third countries, as demonstrated by the recent decision of the Swiss Federal Tribunal concerning the removal of gender markers under German law

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The Kenyan Supreme Court holds that Scottish Locus Inspection Orders must be Examined by the Kenyan Courts for Recognition and Enforcement in Kenya

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We would like to thank Joy Chebet, Law Student at Kenyatta University, for her research assistance and comments. We would also like to thank Professor Beligh Elbalti for his critical comments on the draft blogpost.

I. INTRODUCTION

Kenya is one of the countries that make up East Africa and is therefore part of the broader African region. As such, developments in Kenyan law are likely to have a profound impact on neighbouring countries and beyond, consequently warranting special attention.

In the recent case of *Ingang'a & 6 others v James Finlay (Kenya) Limited* (Petition 7 (E009) of 2021) [2023] KESC 22 (KLR), the Kenyan Supreme Court dismissed an appeal for the recognition and enforcement of a locus inspection order issued by a Scottish Court. The Kenyan Supreme Court held that 'decisions by foreign courts and tribunals are not automatically recognized or enforceable in Kenya. They must be examined by the courts in Kenya for them to gain recognition and to be enforced' [para 66]. In its final order, the Court recommended that in Kenya:

'The Speakers of the National Assembly and the Senate, the Attorney-General, and the Kenya Law Reform Commission, attended with a signal of the utmost urgency, for any necessary amendments, formulation and enactment of statute law to give effect to this judgment and develop the legislation on judicial assistance in obtaining evidence for civil proceedings in foreign courts and tribunals.'

This Case is highly significant, because it extensively addresses the recognition and enforcement of foreign judgments in Kenya and the principles to be considered by the Kenyan Courts. It is therefore a Case that other African countries, common law jurisdictions, and further parts of the globe could find invaluable.

II. FACTS

The Case outlined below pertained to the enforcement of a foreign judgment/ruling in Kenya, specifically, a Scottish ruling. As a brief overview, the Appellants were individuals who claimed to work for the Respondent, the latter being a company incorporated in Scotland. However, their place of employment was Kenya, namely, Kericho. The nature of the claim consisted of work-related injuries, attributed to the Respondent's negligence due to the Appellants' poor working conditions at the tea estates in Kericho. The claim was filed before the courts in Scotland, where inspection orders were sought by the Appellants and granted by the Courts. The purpose of the locus inspection order was to collect evidence by sending experts to Kenya and submit a report which can be used by the Scottish court to determine the liability of the Respondent. However, the respondent fearing compliance with the Scottish locus inspection order, sought an order from Kenyan Court to prevent the execution of the locus inspection order in Kenya, leading to a petition being filed by the Appellants before the Employment and Labour Relations Court in Kenya.

Nevertheless, the trial court ruled against the Appellants and stated that the enforcement of foreign judgments in Kenya, especially interlocutory orders, required Kenyan judicial aid to ensure that the foreign judgments aligned with Kenya's public policy. This was further affirmed by the Court of Appeal, which expressed the same views and reiterated the need for judicial assistance in enforcing foreign judgments and rulings in Kenya. The Court of Appeal held that decisions issued by foreign courts and tribunals are not automatically recognised or enforceable in Kenya and must be examined by the Kenyan courts to gain recognition and be enforced.

The matter was then brought before the Supreme Court of Kenya.

III. SUMMARY OF THE JUDGMENT BEFORE THE SUPREME COURT OF KENYA

With regard to the enforcement of foreign judgments, the Supreme Court had to determine 'whether the locus inspection orders issued by the Scottish Court could be executed in Kenya without intervention by Kenyan authorities.'

However, the Appellants argued that the locus inspection orders were self-executing and did not require an execution process. Instead, inspection orders

only required the parties' compliance. Conversely, the Respondents argued that any decision not delivered by a Kenyan court should be scrutinised by the Kenyan authorities before its execution.

In its decision, the Supreme Court relied on the principle of territoriality, which it referred to as a 'cornerstone of international law' [para 51], and further elaborated on the importance of sovereignty. Based on the principle of territoriality, while upholding the principle of sovereignty, the Supreme Court stated that the 'no judgment of a Court of one country can be executed *proprio vigore* in another country' [para 52]. The Supreme Court's view was that the universal recognition and enforcement of foreign decisions leads to the superiority of foreign nations over national courts. It likewise paves the way for the exposure of arbitrary measures, which are then imposed on the residents of a country against whom measures have been taken abroad. In its statements, the Supreme Court concreted the decision that foreign judgments in Kenya cannot be enforced automatically, but must gain recognition in Kenya through acts of authorisation by the Judiciary, in order to be enforced in Kenya.

The Supreme Court grounded the theoretical basis for enforcing foreign judgments in Kenyan common law as comity. It approved the US approach (*Hilton v Guyot*) to the effect that: 'The application of the doctrine of comity means that the recognition of foreign decisions is not out of obligation, but rather out of convenience and utility' [para 59]. The Court justified comity as:

'prioritizing citizen protection while taking into account the legitimate interests of foreign claimants. This approach is consistent with the adaptability of international comity as a principle of informed prioritizing national interests rather than absolute obligation, as well as the practical differences between the international and national contexts.' [para 60]

The Kenyan Supreme Court further established the importance of reciprocity and asserted that the Foreign Judgements (Reciprocal Enforcement) Act 2018 was the primary Act governing foreign judgments. The Court recognised that as a constituent country of the United Kingdom, Scotland is a reciprocating country under the Foreign Judgments (Reciprocal Enforcement) Act. However, the orders sought did not fall under the above Act, as locus inspection orders are not on the list of decisions that are expressly mentioned in the Act. Moreover, locus inspection orders are not final orders. Thus, the Supreme Court's position was

that the locus inspection orders could not fall within the ambit of the Foreign Judgments (Reciprocal Enforcement) Act, and the trial court and the Court of Appeal were incorrect in extending the application of the Act to these orders.

Consequently, the Supreme Court highlighted the correct instrument to be relied on for the above matter. It was the Supreme Court's position that although the Civil Procedure Act does not specifically establish a process for the judicial assistance of orders to undertake local investigations, the same process as for judicial assistance in the examination of witnesses could be imitated for local investigation orders. Thus, the Supreme Court stated that:

'The procedure of foreign courts seeking judicial assistance in Kenya for examination of witnesses was the same procedure to be followed for carrying out local investigations, examination or adjustment accounts; or to make a partition. That procedure was through the issuance of commission rogatoire or letter of request to the High Court in Kenya seeking assistance. That procedure was not immediately apparent. The High Court and Court of Appeal were wrong for extending the spirit of the beyond its application as that was not the appropriate statute that was applicable to the instant case.' [para 26]

The process is therefore as under the Sections 54 and 55 of the Civil Procedure Act, Order 28 of the Civil Procedure Rules, as well as the Practice Directions to Standardize Practice and Procedures in the High Court made pursuant to Section 10 of the Judicature Act. It entails issuing a commission rogatoire or letter of request to the Registrar of the High Court in Kenya, seeking assistance. This would then trigger the High Court in Kenya to implement the Rules as contained in Order 28 of the Civil Procedure Rules, 2010 [92 – 99].

IV. COMMENTS

An interesting point of classification in this case might be whether this was simply one of judicial assistance for the Kenyan Courts to implement Scottish locus inspection orders in its jurisdiction. Seen from this light, it was not a typical case of recognising and enforcing foreign judgment. Nevertheless, the case presented before the Kenyan Courts, including the Kenyan Supreme Court was premised on recognition and enforcement of foreign judgments.

The Kenyan Supreme Court has settled the debate on the need for foreign judgments to be recognised in Kenya before they can be enforced. The Court also settled that owing to the principle of finality, interim orders could not fall within the Foreign Judgments (Reciprocal Enforcement) Act. It is owing to this principle of finality that the Supreme Court refused to extend the application of the Act to local investigation orders, but rather proceeded to tackle the latter in the same manner as under the Civil Procedure Act and Civil Procedure Rules.

The Supreme Court was correct in establishing that recognition is necessary before foreign judgments can be enforced in Kenya. The principles upon which the Supreme Court came to this conclusion were also correct since territoriality and sovereignty dictate the same. The Supreme Court set a precedent that the Civil Procedure Act and the Civil Procedure Rules are the correct instruments to be relied upon in issuing orders for local investigations, in contrast to the position of the Court of Appeal, which placed local investigations in the ambit of the Foreign Judgments (Reciprocal Enforcement) Act. The Supreme Court adopted its position based on section 52 of the Civil Procedure Act, which empowers courts to issue commission orders and lists local investigations under commission orders.

This decision is crucial, because not only did the Supreme Court lay to rest any confusion over what should constitute the applicable law for local investigations, it also sets down the procedure for foreign courts seeking judicial assistance in Kenya with regard to all four commission orders, as under the Civil Procedure Act. The Civil Procedure Act is the primary Act governing civil litigation in Kenya, while the Civil Procedure Rules 2010 are the primary subsidiary regulations for the same. Commission orders under this Act are divided into four as highlighted above: examination of witnesses, carrying out local investigations, examination or adjustment accounts, or making a partition.

This decision thus did not only tackle orders of local investigation but concluded the process for all four commission orders as highlighted above. In doing so, it established a uniform process for all four of the commission orders, in accordance with the Primary Act and Rules governing civil litigation in Kenya. Although it may appear that the Supreme Court has stretched the application of the Civil Procedure Rules, 2010 in the same way that the Court of Appeal stretched the application of the Foreign Judgments (Reciprocal Enforcement) Act; the Civil Procedure Rules, 2010 are more relevant, given that the rules touch on these four commission orders and are tackled in turn, in the same category, under the Civil

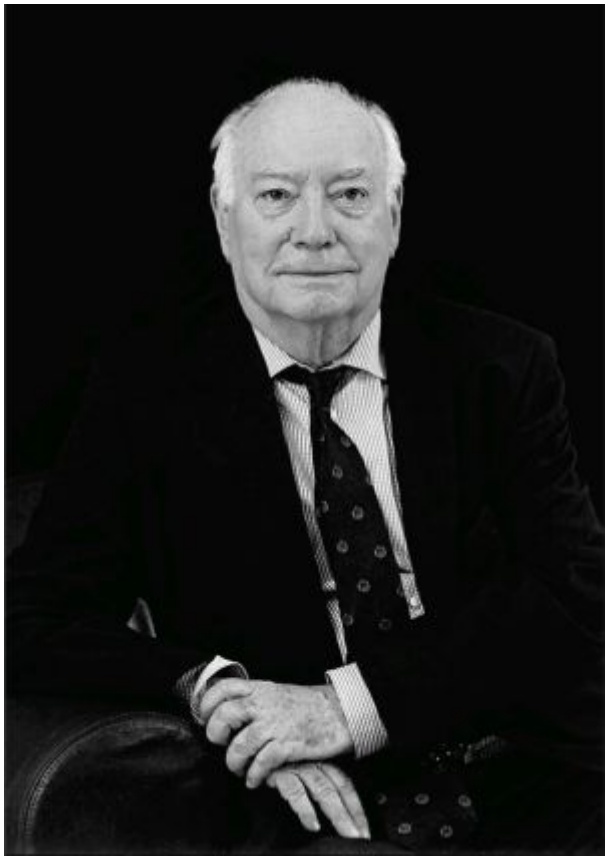
Procedure Rules, 2010. Moreover, while it is true that there is currently a gap in the law as the process for local investigations has not been outlined in the same way that it has been for examination of witnesses, by parity of reasoning the Supreme Court's reasoning fits, and the logic behind adopting the same process is laudable.

Another interesting aspect of the Supreme Court's decision is the endorsement of the US approach of comity as the basis of recognising and enforcing foreign judgments in Kenyan common law. This is indeed a radical departure from the common law approach of the theory of obligation, which prevails in other Commonwealth African Countries. In an earlier Case, the Kenyan Court of Appeal in Jayesh Hasmukh Shah vs Navin Haria & Anor [para 25 – 26] adopted the US principle of comity to recognise and enforce foreign judgments. The principle of comity also formed the sole basis of enforcing a US judgment in Uganda in Christopher Sales v Attorney General, where no reciprocal law exists between the state of origin and the state of recognition. Consequently, it is safe to say that some East African judges are aligning more with the US approach of comity in recognising and enforcing foreign judgments at common law, while many other common law African countries continue to adopt the theory of obligation.

An issue that was not explicitly directed to the Kenyan Supreme Court was that this was a business and human rights case, and one involving the protection of weaker parties. This may have provoked policy reasons from the Court that would have been very useful in developing the law as it relates business and human rights issues, and protection of employees in cross-border matters.

On a final note, the robust reasoning of their Lordships must be commended in this recent Supreme Court decision, given that it adds significant value to the jurisprudence of recognising and enforcing foreign judgments in the Commonwealth as a whole, in East Africa overall, and particularly in Kenya. The comparative approach adopted in this judgment will also prove to be edifying to anyone with an interest in comparative aspects of the recognition and enforcement of foreign judgments globally.

In Memoriam Erik Jayme (1934-2024)



With great sadness did we receive notice that *Erik Jayme* passed away on 1 May 2024, shortly before his 90th birthday on 8 June. Everyone in the CoL and PIL world is familiar with and is probably admiring his outstanding and often path-breaking work as a global scholar. Those who met him in person were certainly overwhelmed by his humour and humanity, by his talent to approach people and engage them into conversations about the law, art and culture. Anyone who had the privilege of attending lectures of his will remember his profound and often surprising and unconventional views, paths and turns through the subject matter, often combined with a subtle and entertaining irony.

Erik Jayme was born in Montréal, as the son of a German Huguenot of French origin and a Norwegian. The parents had married in Detroit before a protestant

priest. What else if not a profound interest in cross-border relations, different cultures and languages as well as bridging cultural differences and, ultimately, Private International Law could have been the result? “There was no other way“, as he put it once. His father, *Georg*, born on 10 April 1899 in Ober-Modau in South Hesse of Germany, passed away on 1 January 1979 in Darmstadt, later became a professor of what today would probably be called chemical engineering, with great success, on cellulose production technologies at the University of Darmstadt. His passion for collecting Expressionist and 19th century art undoubtedly served as an inspiration for *Erik* to later devote himself to art, art history and finally art law. During his youth, as *Erik* mentioned once, he would use his (exceptionally broad) knowledge on art and any aspect of culture that crossed his mind to draw his tennis partners into sophisticated and demanding conversations on the court. Perhaps not least with a view to his father’s expectations, *Erik* decided to study law at the University of Munich, but added courses in art history to his curriculum. He liked to recall, how he approached the world-famous art historian, *Hans Sedlmayr*, to ask him whether he might allow him to attend his seminars, despite being (“unfortunately“) a law student. Sedlmayr replied that *Spinoza* had been wise to be grinding optical lenses to earn a living, and in light of a similar wisdom that the applicant showed, he was accepted.

In 1961, at the age of 27, *Erik Jayme* delivered his doctoral thesis on „Spannungen bei der Anwendung italienischen Familienrechts durch deutsche Gerichte“ (“Tension in the application of Italian family law by German courts“).[1] While clerking at the court of Darmstadt, *Erik Jayme* published his first article in this field, inspired by a case in which he was involved. International family and succession law as well as questions of citizenship became a focus of his academic research and publications for decades, including his Habilitation in 1971 on „Die Familie im Recht der unerlaubten Handlungen” (“The Family in Tort Law“),[2] in particular with a view to relations connected with Italy. This may show early traces of what became more apparent later: More than others, *Erik Jayme* took the liberty to make use of law, legal research and academia to build his own way of life (that should definitely include Italy), inspired by seemingly singularities in a concrete case that would be seen as a sign for something greater and thus transformed into theories and concepts, enriched by a dialogue with concepts from other fields such as art history. Is this way of producing creativity also the source of what later rocked the private international law of South America: the

« diálogo das fontes como método »?[3] His research on *Pasquale Stanislao Mancini*,[4] later combined with studies on *Anton Mittermaier*,[5] *Giuseppe Pisanelli* [6] and *Emerico Amari* [7] as well as on *Antonio Canova* [8] were received as leading works on conceptual developments in the fields of choice of law, international civil procedural law, comparative law as well as international art and cultural property law, and over time, *Erik Jayme* became one of the world leading and most influential scholars in the field. The substantial contribution *Erik Jayme* provided to the work of The Hague Academy of International law, was perfectly summarized in *Teun Struycken's* « Hommage à Erik Jayme » delivered in 2016 on behalf of the Academy's Curatorium:[9]

> « Vous n'avez cessé de souligner que les systèmes de droit ne s'isolent pas de la société humaine, mais s'y imbriquent. Ils sont même des expressions de la culture des sociétés. La culture s'exprime aussi et surtout dans les beaux arts. »

Speaking of art and cultural property law: It seems to be the year of 1990 when *Erik Jayme* published for the first time a piece in this field, namely a short conference report on what has now become an eternal question: „Internationaler Kulturgüterschutz: lex originis oder lex rei sitae" ("Protection of international cultural property: lex originis or lex rei sitae").[10] In 1991, his seminal work on „Kunstwerk und Nation: Zuordnungsprobleme im internationalen Kulturgüterschutz" ("Artwork and nation: Problems of attribution in the international protection of cultural property")[11] appeared as a report for the historical-philosophical branch of the Heidelberg Academy of Sciences where he traced back the notion of a "home" (« une patrie ») of an artwork to *Antonio Canova*'s activities as the Vatican's diplomate at the Congress of Vienna where *Canova*, a sculptural artist by the way, succeeded in bringing home the cultural treasures taken by *Napoléon Bonaparte* from Rome to Paris (into the newly built Louvre) back to Rome (into the newly built Museo Chiaramonti), despite the formal legalisation of this taking in the Treaty of Tolentino of 1797. "This is where the notion of a lex originis was born". Still in 1991, the *Institut de Droit International* concluded under the leadership of *Erik Jayme*, in its Resolution of Basel « La vente internationale d'objets d'arts sous l'angle de la protection du patrimoine culturel » in its Art. 2: « Le transfert de la propriété des objets d'art – appartenant au patrimoine culturel du pays d'origine du bien – est soumis à la loi de ce pays » . Much later, in 2005, when I had the privilege of travelling with him

to the Vanderbilt Law School and the Harvard Law School for presentations of ours on „Global claims for art“, he further developed his vision of a work of art as quasi-persons who should be conceived as having their own cultural identity,[12] to be located at the place where the artwork is most intensely inspiring the public and thus is “living“. From there it was only a small step to calling for a *guardian ad litem* for an artwork, just as for a child, in legal proceedings. When *Erik Jayme* was introduced to the audiences in Vanderbilt and Harvard, the academic hosts would usually present him, in all their admiration, as “a true Renaissance man“. I would believe that he felt more affiliated to the 19th century, but this might not necessarily exclude the perception of him as a “Renaissance man“ from a transatlantic perspective, all the more as there seems to be no suitable term in English for the German „Universalgelehrter“ (literally: “universal scholar”).

This is just a very small fraction of Erik Jayme’s amazingly wide-ranging, rich and influential scholarly life and of his extraordinarily inspiring personality. Many others may and should add their own perspectives, perhaps even on this blog. We will all miss him, but he will live on in our memories!

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[1] *Jayme*, Spannungen bei der Anwendung italienischen Familienrechts durch deutsche Gerichte, Gieseking 1961 (LCCN 65048319).

[2] *Jayme*, Die Familie im Recht der unerlaubten Handlungen, Metzner 1971 (LCCN 72599373).

[3] *Jayme*, « Identité culturelle et intégration: le droit international privé postmoderne », *Recueil des Cours* 251 (1995), 259 (Recueil des cours en ligne).

[4] See e.g. *Jayme*, Pasquale Stanislao Mancini : internationales Privatrecht zwischen Risorgimento und praktischer Jurisprudenz, Gremer 1990 (LCCN 81116205).

[5] *Jayme*, „Italienische Zustände“, in: Moritz/Schroeder (eds.), Carl Joseph Anton Mittermaier (1787-1867) – Ein Heidelberger Professor zwischen nationaler Politik und globalem Rechtsdenken“, Regionalkultur 2009, pp. 29 et seq.

[6] See e.g. *Jayme*, « Giuseppe Pisanelli fondatore della scienza del diritto processuale civile internazionale », in: Cristina Vano (eds.), Giuseppe Pisanelli – Scienza del processo – cultura delle leggi e avvocatura tra periferiae nazione, Neapel 2005, pp. 111 *e seguenti* (LCCN 2006369541).

[7] See e.g. *Jayme*, « Emerico Amari: L'attualità del suo pensiero nel diritto comparato con particolare riguardo alla teoria del progresso », in: Fabrizio Simon (ed.), L'Identità culturale della Sicilia risorgimentale, Atti del convegno per il bicentenario della nascita di Emerico Amari e di Francesco Ferrara, in Storia e Politica – Rivista quadrimestrale III, N.°2/2011, pp. 60 *e seguenti*.

[8] See e.g. *Jayme*, Antonio Canova (1757-1822) als Künstler und Diplomat: Zur Rückkehr von Teilen der Bibliotheca Palantina nach Heidelberg in den Jahren 1815 und 1816, Heidelberg 1994 (LCCN 95207445).

[9] *V.M. Struycken*, « Hommage à Erik Jayme », Session du Curatorium du 15 janvier 2016 à Paris (disponible ici: https://www.hagueacademy.nl/2016/02/hommage-a-dr-erik-jayme/?lang=fr).

[10] *Jayme*, „Internationaler Kulturgüterschutz: lex originis oder lex rei sitae", IPRax 1990, 347.

[11] *Jayme*, Kunstwerk und Nation: Zuordnungsprobleme im internationalen Kulturgüterschutz, C. Winter 1991.

[12] See e.g. *Jayme*, "Gobalization in Art Law: Clash of Interests and International Tendencies", Vand. J. Int. L. 38 (2005), 927, 938 *et seq*.

Application of Singapore's new rules on service out of jurisdiction:

Three Arrows Capital and NW Corp

Application of Singapore's new rules on service out of jurisdiction: *Three Arrows Capital* and *NW Corp*

The Rules of Court 2021 ('ROC 2021') entered into force on 1 April 2022. Among other things, ROC 2021 reformed the rules on service out of jurisdiction (previously discussed here). Order 8 rule 1 provides:

'(1) An originating process or other court document may be served out of Singapore with the Court's approval if it can be shown that the Court has the jurisdiction or is the appropriate court to hear the action.

…

(3) The Court's approval is not required if service out of Singapore is allowed under a contract between the parties.

…'

A handful of decisions on the application of Order 8 rule 1 have since been delivered; two are discussed in this post. One of them considers the 'appropriate court' ground for service out of jurisdiction provided in Order 8 rule 1(1) and touches on the location of cryptoassets; the other is on Order 8 rule 1(3).

Service out under the 'appropriate court' ground

Cheong Jun Yoong v Three Arrows Capital[1] involved service out of jurisdiction pursuant to the 'appropriate court' ground in Order 8 rule 1(1). As detailed in the accompanying Supreme Court Practice Directions ('SCPD'), a claimant making an application under this ground has to establish the usual common law requirements that:

'(a) there is a good arguable case that there is a sufficient nexus to Singapore;

(b) Singapore is *forum conveniens*; and

(c) there is a serious issue to be tried on the merits of the claim.'[2]

For step (a), the previous Order 11 gateways have been transcribed as a non-

exhaustive list of factors.[3] This objective of this reform was to render it 'unnecessary for a claimant to scrutinise the long list of permissible cases set out in the existing Rules in the hope of fitting into one or more descriptions.'[4] As *Three Arrows* illustrates though, old habits die hard and the limits of the 'non-exhaustive' nature of the jurisdictional gateways remains to be tested by litigants. The wide-reaching effect of a previous Court of Appeal decision on the interpretation of gateway (n) which covers a claim brought under statutes dealing with serious crimes such as corruption and dug trafficking and 'any other written law' is also yet to be grasped by litigants.[5]

In *Three Arrows*, the first defendant ('defendant') was a British Virgin Islands incorporated company (BVI) which was an investment fund trading and dealing in cryptocurrency. It was under liquidation proceedings in the BVI; its two liquidators were the second and third defendants in the Singapore proceedings. The BVI liquidation proceedings were recognised as a 'foreign main proceeding' in Singapore pursuant to the UNCITRAL Model Law on Cross-Border Insolvency as enacted under Singapore law.[6] The claimant managed what he alleged was an independent fund called the 'DC Fund' which used the infrastructure and platform of the defendant and its related entities. After the defendant decided to relocate its operations to Dubai, the claimant incorporated Singapore companies to take over the operations and assets of the DC Fund. Not all of the assets had been transferred to these new companies at the time the defendant went into liquidation. The claimant's case was that the DC Fund assets remaining with the defendant were held on trust by the defendant for the claimant and other investors in the DC Fund and were not subject to the BVI liquidation proceedings. The Liquidators in turn sought orders from the BVI court that those assets were owned by the defendant and subject to the BVI Liquidation proceedings.

The claimant relied on three gateways for service out of jurisdiction: gateway (a) where relief is sought against a defendant who is, inter alia, ordinarily resident or carrying on business in Singapore; gateway (i) where the claim is made to assert, declare or determine proprietary rights in or over movable property situated in Singapore; and gateway (p) where the claim is founded on a cause of action arising in Singapore.

On gateway (a), the defendant was originally based in Singapore before shifting operations to Dubai a few months before the commencement of the BVI Liquidation proceedings. The claimant attempted to argue that residence for the

purposes of gateway (a) had to be assessed at the time when the company was 'alive and flourishing'.[7] This was rightly rejected by the court, which observed that satisfaction of the gateway depended on the situation which existed at the time application for service out of jurisdiction was filed or heard. On gateway (p), it was held that there was a good arguable case that the cause of action arose in Singapore because the trusts arose pursuant to the independent fund arrangement between the parties which was negotiated and concluded in Singapore. All material events pursuant to the arrangement took place when the defendant was still based in Singapore and the defendant's investment manager was a Singapore company.

It is perhaps the court's analysis of gateway (i) which is of particular interest as it deals with a nascent area of law. Are cryptocurrencies 'property' and if so, where are they located?

The court confirmed earlier Singapore decisions that cryptocurrencies are property.[8] It held:

'Given the fact that a cryptoasset has no physical presence and exists as a record in a network of computers …. It best manifests itself through the exercise of control over it.'[9]

Between a choice of the identifying the *situs* as the domicile or residence of the person who controls the private key linked to the cryptoasset, the court preferred residence as being the 'better indicator of where the control is being exercised.'[10] Seemingly drawing from the position in relation to debts, one of the reasons for preferring residence was that this was where the controller can be sued.[11] The court was also concerned that there may be difficulties in identifying domicile.[12] On the facts, the controller was one of the Singapore incorporated companies set up by the claimant and the claimant was in turn the sole shareholder of that company. Both the company and claimant were resident in Singapore and thus gateway (i) was satisfied.

On the other requirements for service out with permission of the court under the 'appropriate court' ground, the court was persuaded that there was a serious issue to be tried on the merits and that connecting factors indicated Singapore was *forum conveniens*. The defendants' application to set aside the order granting permission to serve out of jurisdiction and to set aside service of process on them

thus failed. The Appellate Division of the Singapore High Court has recently refused permission to appeal against the first instance decision.[13]

It bears pointing out that the same issue of ownership of the assets of the DC Funds was before the BVI court in the insolvency proceedings. The first instance court was unmoved by the existence of parallel proceedings in the BVI, as the BVI proceedings were at a very early stage and hence were not a significant factor in the analysis on *forum conveniens*.[14] However, as mentioned above, the BVI insolvency proceedings had been recognised as a 'foreign main proceeding' by the Singapore court. Under Article 21 of the UNCITRAL Model Law on Cross-Border Insolvency, relief granted pursuant to such recognition can include staying actions concerning the 'debtor's property'.[15] While the very issue in the Singapore action is whether the assets of the DC Funds are indeed the 'debtor's property',[16] staying the action will clearly be in line with the kinds of relief envisaged under Article 21. Under the Model Law, the issue of *forum conveniens* should take a back seat as the emphasis is on cross-border cooperation to achieve an optimal result for all parties involved in an international insolvency.

Service out pursuant to a contractual agreement

In *NW Corp Pte Ltd v HK Petroleum Enterprises Cooperation Ltd*,[17] the contract between the claimant and defendant, who were Singapore and Hong Kong-incorporated companies respectively, contained this clause:

'This Agreement shall be governed by and construed in accordance with the English law [sic]. Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by Singapore court [sic] without recourse to arbitration and to service of process by registered mail …'

The claimant served process on the defendant in Hong Kong by way of registered post to the defendant's last known address and purportedly pursuant to Order 8 rule 1(3) ROC 2021. The issue whether the service was validly effected arose when the defendant sought to set aside the default judgment that was subsequently approved by the Singapore High Court Registry. The defendant argued that Order 8 rule 1(3) required that the agreement name not only a method of service but also specify a location out of Singapore where service could take place. The Assistant Registrar ('AR') disagreed, holding that this would be

too narrow an interpretation of Order 8 rule 1(3). Pointing to the more relaxed modes of service permitted under the ROC 2021[18] in comparison with the predecessor ROC 2014,[19] the AR stated that there was no suggestion in Order 8 rule 1(3) or in the definitions provided elsewhere which suggested that both method and place of service had to be specified in a jurisdiction clause in order for a claimant to avail itself of service out without permission of the court. The AR was of the view that an agreement could come within Order 8 rule 1(3) so long as it provided for service of originating process of the Singapore courts on a foreign defendant.

The reasoning was as follows. First, Order 8 rule 1(3) was a deviation from the orthodox principles that the Singapore court's jurisdiction was territorial in nature and service on a defendant abroad ordinarily required permission of court. If a foreign defendant agreed that jurisdiction of the court can be founded over them by way of service of originating process, that service necessarily included service out of Singapore. Thus, to come within Order 8 rule1(3), the agreement merely required the foreign defendant to consent to the jurisdiction of the court to be founded over them by way of service of originating process. Secondly, the phrase used in Order 8 rule 1(3) was service 'out' of Singapore, rather than service 'outside' Singapore. Only the latter phrase, in the AR's view, connoted that service of process at a location other than Singapore was required.

On the first rationale, the Singapore court's *in personam* jurisdiction over a defendant is founded on service of process.[20] This is the case ordinarily, with or without the defendant's agreement. If the defendant expressly agrees that this can be done, this could be used to counter a subsequent challenge by the defendant to the existence of jurisdiction of the Singapore court, but it is difficult to see how, without more, an agreement to accept service of Singapore process takes the defendant outside the orthodox territorial framework of the Singapore court's jurisdiction. Surely only the defendant's agreement to service of Singapore process abroad, rather than merely agreement to service of Singapore process, would provide justification for the deviation from orthodox principles? The AR seemed to be suggesting that it is implicit that a foreign defendant, by agreeing to accept service of Singapore process, also consents to service of process out of Singapore, but the second rationale proffered renders any implicit agreement moot as, on the AR's view, Order 8 rule 1(3) does not require the defendant to agree to accept service abroad. However, the legal difference

between ‘out’ and ‘outside’ is elusive, as ‘service out of jurisdiction’ is uncontroversially understood to refer to service on a defendant who is abroad and thus not within the territorial jurisdiction of the court.

A parallel provision to Order 8 rule 1(3) can be found in the Singapore International Commercial Court Rules 2021 (‘SICC Rules’). Permission of the SICC is likewise not required where the defendant is party to a ‘written jurisdiction agreement’ for the SICC or ‘service out of Singapore is allowed under an agreement between the parties.’[21] Order 8 rule 1(3) is missing the first option. However, it would be unlikely for the parties to have agreed on ‘service out of Singapore’ without first having agreed on a Singapore choice of court agreement. Despite this slight oddity, the intention of the drafters is clearly to liberalise the service out(side) of jurisdiction rules. Whether the intention was to liberalise it as much as was held in *NW Corp* is, however, debatable.

[1] [2024] SGHC 21.

[2] SCPD 2021 para 63(2).

[3] SCPD 2021 para 63(3).

[4] Civil Justice Commission Report, Chapter 6, p 16 (29 December 2017).

[5] *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 (CA). The point is explained here.

[6] Insolvency, Restructuring and Dissolution Act 2018 s 252 and Third Schedule.

[7] [2024] SGHC 21 [46].

[8] *CLM v CLN* [2022] 5 SLR 273; *Bybit Fintech Ltd v Ho Kai Xin* [2023] 5 SLR 1748.

[9] [2024] SGHC 21 [60]

[10] [2024] SGHC 21 [63].

[11] [2024] SGHC 21 [63].

[12] [2024] SGHC 21 [63].

[13] *Three Arrows Capital Ltd v Cheong Jun Yoong* [2024] SGHC(A) 10.

[14] [2024] SGHC 21 [82].

[15] Insolvency, Restructuring and Dissolution Act 2018, Third Schedule, Art 21(1)(a).

[16] The respondent was clearly the legal owner; the question was whether the assets belonged beneficially to the applicant.

[17] [2023] SGHCR 22.

[18] ROC 2021 O7 r2(1)(d).

[19] ROC 2014 O10 r3.

[20] Supreme Court of Judicature Act 1969 s16(1)(a). The court also has jurisdiction if the defendant had submitted to the jurisdiction of the court (s16(1)(b)), but submission is normally used to counter a jurisdictional objection by the defendant; in the ordinary course of things, service of process must first take place.

[21] SICC Rules 2021 O5 r6(2).

No role for anti-suit injunctions under the TTPA to enforce exclusive jurisdiction agreements

Australian and New Zealand courts have developed a practice of managing trans-Tasman proceedings in a way that recognises the close relationship between the countries, and that aids in the effective and efficient resolution of cross-border disputes. This has been the case especially since the implementation of the Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement,

which was entered into for the purposes of setting up an integrated scheme of civil jurisdiction and judgments. A key feature of the scheme is that it seeks to "streamline the process for resolving civil proceedings with a trans-Tasman element in order to reduce costs and improve efficiency" (Trans-Tasman Proceedings Act 2010 (TTPA), s 3(1)(a)). There have been many examples of Australian and New Zealand courts working to achieve this goal.

Despite the closeness of the trans-Tasman relationship, one question that had remained uncertain was whether the TTPA regime allows for the grant of an anti-suit injunction to stop or prevent proceedings that have been brought in breach of an exclusive jurisdiction agreement. The enforcement of exclusive jurisdiction agreements is explicitly protected in the regime, which adopted the approach of the Hague Convention on Choice of Court Agreements in anticipation of Australia and New Zealand signing up to the Convention. Section 28 of the Trans-Tasman Proceedings Act 2010 (NZ) and s 22 of the Trans-Tasman Proceedings Act 2010 (Cth) provide that a court must not restrain a person from commencing or continuing a civil proceeding across the Tasman "on the grounds that [the other court] is not the appropriate forum for the proceeding". In the secondary literature, different opinions have been expressed whether this provision extends to injunctions on the grounds that the other court is not the appropriate forum due to the existence of an exclusive jurisdiction agreement: see Mary Keyes "Jurisdiction Clauses in New Zealand Law" (2019) 50 VUWLR 631 at 633-4; Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, 2020) at [2.445].

The New Zealand High Court has now decided that, in its view, there is no place for anti-suit injunctions under the TTPA regime: *A-Ward Ltd v Raw Metal Corp Pty Ltd* [2024] NZHC 736 at [4]. Justice O'Gorman reasoned that the TTPA involves New Zealand and Australian courts applying "mirror provisions to determine forum disputes, based on confidence in each other's judicial institutions" (at [4]), and that anti-suit injunctions can have "no role to play where countries have agreed on judicial cooperation in the allocation and exercise of jurisdiction" (at [17]).

A-Ward Ltd, a New Zealand company, sought an interim anti-suit injunction to stop proceedings brought against it by Raw Metal Corp Pty Ltd, an Australian company, in the Federal Court of Australia. The dispute related to the supply of shipping container tilters from A-Ward to Raw Metal. A-Ward's terms and

conditions had included an exclusive jurisdiction clause selecting the courts of New Zealand, as well as a New Zealand choice of law clause. In its Australian proceedings, Raw Metal sought damages for misleading and deceptive conduct in breach of the Competition and Consumer Act 2010 (Cth) (CCA). A-Ward brought proceedings in New Zealand seeking damages for breach of its trade terms, including the jurisdiction clause, as well as an anti-suit injunction.

O'Gorman J's starting point was to identify the different common law tests that courts had applied when determining an application to the court to stay its own proceedings, based on the existence (or not) of an exclusive jurisdiction clause. While *Spiliada* principles applied in the absence of such a clause, *The Eleftheria* provided the relevant test to determine the enforceability of an exclusive jurisdiction clause: at [16]. The alternative to a stay was to seek an anti-suit injunction, which, however, was a controversial tool, because of its potential to "interfere unduly with a foreign court controlling its own processes" (at [17]).

Having set out the competing views in the secondary literature, the Court concluded that anti-suit injunctions were not available to enforce jurisdiction agreements otherwise falling within the scope of the TTPA, based on the following reason (at [34]):

1. The term "appropriate forum" in ss 28 (NZ) and s 22 (Aus) of the respective Acts could not, "as a matter of reasonable interpretation", be restricted to questions of appropriate forum in the absence of an exclusive jurisdiction agreement. This was not how the term had been used in the common law (see *The Eleftheria*).
2. The structure of the TTPA regime reinforced this point, because it is on an application under s 22 (NZ)/ s 17 (Aus), for a stay of proceedings on the basis that the other court is the more appropriate forum, that a court must give effect to an exclusive jurisdiction agreement under s 25 (NZ)/ s 20 (Aus).
3. Sections 25 (NZ) and 20 (Aus) already provided strong protection to exclusive choice of court agreements, and introducing additional protection by way of anti-suit relief "would only create uncertainty, inefficiency, and the risk of inconsistency, all of which the TTPA regime was designed to avoid".
4. The availability of anti-suit relief would "rest on the assumption that the courts in each jurisdiction might reach a different result, giving a

parochial advantage". This, however, would be "inconsistent with the entire basis for the TTPA regime – that the courts apply the same codified tests and place confidence in each other's judicial institutions".

5. Australian case law (*Great Southern Loans v Locator Group* [2005] NSWSC 438), to the effect that anti-suit injunctions continue to be available domestically as between Australian courts, was distinguishable because there was no express provision for exclusive choice of court agreements, which is what "makes a potentially conflicting common law test unpalatable".
6. Retaining anti-suit injunctions to enforce exclusive jurisdiction agreements would be inconsistent with the concern underpinning s 28 (NZ)/ s 22 (Aus) about "someone trying to circumvent the trans-Tasman regime as a whole".
7. The availability of anti-suit relief would defeat the purpose of the scheme to prevent duplication of proceedings.
8. More generally, anti-suit injunctions "have no role to play where countries have agreed on judicial cooperation in the allocation and exercise of jurisdiction".

The Court further concluded that, even if the TTPA did not exclude the power to order an anti-suit injunction, there was no basis for doing so in this case in relation to Raw Metal's claim under the CCA (at [35]). There was "nothing invalid or unconscionable about Australia's policy choice" to prevent parties from contracting out of their obligations under the CCA, even though New Zealand law (in the form of the Fair Trading Act 1986) might now follow a different policy. The TTPA regime included exceptions to the enforcement of exclusive jurisdiction agreements. Here, A-Ward seemed to have anticipated that, from the perspective of the Australian court, enforcement of the New Zealand jurisdiction clause would have fallen within one of these exceptions, and the High Court of Australia's observations in *Karpik v Carnival plc* [2023] HCA 39 at [40] seemed to be consistent with this. The "entirely orthodox position" seemed to be that the Federal Court in Australia "would regard itself as having jurisdiction to determine the CCA claim, unconstrained by the choice of law and court" (at [35]).

Time will tell whether Australian courts will agree with the High Court's emphatic rejection of anti-suit relief under the TTPA as being inconsistent with the cooperative purpose of the scheme. The parallel debate within the context of the

Hague Choice of Court Convention – which does not specifically exclude anti-suit injunctions – may be instructive here: Mukarrum Ahmed "Exclusive choice of court agreements: some issues on the Hague Convention on choice of court agreements and its relationship with the Brussels I recast especially anti-suit injunctions, concurrent proceedings and the implications of BREXIT" (2017) 13 Journal of Private International Law 386. Despite O'Gorman J's powerful reasoning, her judgment may not be the last word on this important issue.

From a New Zealand perspective, the judgment is also of interest because of its restrained approach to the availability of anti-suit relief more generally. Even assuming that the Australian proceedings were, in fact, in breach of the New Zealand jurisdiction clause, O'Gorman J would not have been prepared to grant an injunction as a matter of course. In this respect, the judgment may be seen as a departure from previous case law. In *Maritime Mutual Insurance Association (NZ) Ltd v Silica Sandport Inc* [2023] NZHC 793, for example, the Court granted an anti-suit injunction to compel compliance with an arbitration agreement, without inquiring into the foreign court's perspective and its reasons for taking jurisdiction. O'Gorman J's more nuanced approach is to be welcomed (for criticism of *Maritime Mutual*, see here on The Conflict of Laws in New Zealand blog).

A more challenging aspect of the judgment is the choice of law analysis, and the Court's focus on the potential concurrent or cumulative application of foreign and domestic statutes (at [28]-[31], [35]). The Court said that, to determine whether a foreign statute is applicable, the New Zealand court can ask whether the statute applies on its own terms (following *Chief Executive of the Department of Corrections v Fujitsu New Zealand Ltd* [2023] NZHC 3598, which I criticised here on The Conflict of Laws in New Zealand blog, also published as [2024] NZLJ 22). It is not entirely clear how this point was relevant to the issue of the anti-suit injunction. The Judge's reasoning seemed to be that, from the New Zealand court's perspective, the Australian court's application of the CCA was appropriate as a matter of statutory interpretation and/or choice of law, which meant that the proceedings were not unconscionable or unjust (at [35]).