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

Guest post by Professor YEO Tiong Min, Yong Pung How Chair Professor of Law, Yong Pung How School of Law, Singapore Management University

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

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

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

Tort treated as taking place in Singapore

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

(a) was initiated or occurred in or from Singapore;

(b) is perceived by one or more persons in Singapore; or

(c) caused damage, loss or harm suffered in Singapore.

Limits to exclusion of liability

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

(a) it is inconsistent with Part 11 or 12;

(b) it purports to exclude or limit the jurisdiction of the courts of Singapore for a claim made under Part 11 or 12; or

(c) it purports to prevent a person from making a claim under Part 11 or 12.

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

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

(4) To avoid doubt, section 26(1) of the Electronic Transactions Act 2010 (which relates to the limitation of liability of network service providers) does

not apply in relation to any liability under the provisions of Part 12 or 13 in relation to the liability of an online service provider.

Section 101

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

The Singapore court has *in personam* jurisdiction over defendants who are served in Singapore, or who are served outside Singapore with the permission of the court. Permission for service out of jurisdiction may be granted when: (a) the claim has sufficient nexus with Singapore; (b) Singapore is the forum conveniens; and (c) there is a serious issue to be tried on the merits. Locating the tort in Singapore immediately secures a sufficient nexus with Singapore by reinforcing the tort gateway (which strictly only requires a tort to occur partially in Singapore), although sufficient nexus can already be established simply by invoking a power of the court under a Singapore statute (which will be the case here). Moreover, it triggers a presumption that Singapore is forum conveniens. This is not a legal presumption but a factual one arising from the likelihood of the location of the events, evidence and witnesses as well as the applicable law (more on this below) being of significance in the evaluation of the forum conveniens question. Thus, this presumption may not be a high hurdle to the defendant who wishes to object to the Singapore court exercising jurisdiction if the connections to Singapore are otherwise fragile. The legislative intention of the scope of protection of the administrative measures (ie, orders made by the Online Safety Commission) is clear: only Singapore citizens, permanent residents, and persons with a prescribed connection with Singapore (eg, legal migrant workers in

Singapore) can raise a complaint to the Commission. It is indicative, however, that even though there is no express limitation in the statutory tort provisions, the primary legislative target of protection by the tortious duties are people connected with Singapore. Forum conveniens becomes the critical tool for the Singapore court to sieve out cases with minimal connections with Singapore, in particular cases where a foreigner is opportunistically seeking to take advantage of the Singapore statute to make OSRAA tort claims against another foreign entity.

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

Insofar as the tort is located in Singapore, there remains the possibility of the flexible exception being invoked to apply the law of a foreign country with the closest connection to the parties and the tort, displacing Singapore law. The flexible exception will be invoked only in exceptional circumstances where the

connections with Singapore are so fortuitous that the application of the general rule of double actionability will lead to serious injustice to the parties. Thus, in most cases involving victims with connections in Singapore, the Singapore court is likely to have and exercise jurisdiction, and to apply OSRAA to the facts.

This is consistent with the intention of Parliament to protect residents of Singapore. The operation of section 101 appears to have the practical effect of imbuing the OSRAA torts with the character of overriding forum mandatory rules that will apply to all cases with specified connections to Singapore, albeit under the cloak of connecting factor design. This technique, rather than a straightforward forum mandatory rule approach, leaves a safety valve for the courts to apply foreign law in exceptional cases. Thus, the important work of drawing the limits to the extraterritorial reach of the OSRAA is left to the judiciary applying private international law, at both the jurisdictional (forum conveniens) and the choice of law (exception to double actionability) levels.

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

concept of locating a tort in a physical place appears increasingly out of touch with the realities of human interactions in the modern world.

Another possible interpretation of section 101 is that it sets out the connecting factors for a unilateral choice of law rule for the application of the OSRAA torts, displacing the common law multilateral approach to the extent that the statute applies. This will also lead to the application of Singapore domestic law once any connection in section 101 is found. However, there is no flexible exception in this statutory choice of law rule. The language of the provision does not direct the application of Singapore law; it modifies the meaning of the connecting factor of the place of the tort by replacing the common law test of the substance of the tort with a statutory test, a connecting factor which has been clearly established as part of Singapore private international law for torts. The statutory language is more consistent with legislative intention to ride on the common law multilateral choice of law approach, and there is nothing in the Parliamentary materials to suggest the contrary.

Section 102

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

the parties (as prescribed pursuant to section 102(3)).

The question arises whether Section 102 applies when the contract containing the relevant term excluding or limiting liability is governed by foreign law. Nothing in Section 102 expressly renders the provision to be an international or overriding mandatory rule that will apply irrespective of the relevance of foreign law by choice of law analysis. The concept of evasion has very limited application in Singapore private international law. A contract is governed by the law expressly or impliedly chosen by the parties provided the choice is legal, bona fide and not against public policy. In the absence of party choice, a contract is governed by the system of law objectively most closely connected with the contract. Circumvention has a residual role in contract choice of law where a choice of law by the parties may not be given effect to if the sole purpose of the choice is to evade the rules of the otherwise applicable foreign law (ie, a non-bona fide choice). This limitation has never been applied in Singapore law, as it is improbable that parties' choice has only a single and evasive purpose. In any event, the likely consequence is that the contract will be governed by the objective proper law rather than the law of the forum.

The choice of law approach to contractual defences against tortious liability lacks clarity under Singapore private international law. The general approach to the contractual exclusion or limitation of tort liability was advocated in O. Kahn-Freund, "Delictual Liabiity and the Conflict of Laws" (1968) 11 *Hague Recueil* 1 at 142-145 and endorsed in P.M. North, "Contract as a Tort Defence in the Conflict of Laws" (1977) 76 ICLQ 914 at 922 *et seq*: whether tort liability allows for exclusion or limitation at all is a question of *admissibility* of the contract defence which is a tort issue, while the *validity* of the contract term in question raises a contract issue. On the premise of Singapore law applying to the substantive tort liability, whether liability under the OSRAA can be limited or excluded raises a question of tort governed by Singapore law, so Section 102 is engaged as the applicable law to the issue. This is clearly the correct approach when it is a notice rather than a contract term that is the agent of exclusion or limitation. However, in the case of contractual exclusion or limitation, the applicable law of the contract is still relevant to govern the validity of the clause. This in turn raises the further characterisation question: do the conditions of validity under section 102 (reasonableness) raise questions of admissibility or validity? That they set limits to party autonomy might incline towards a contractual characterisation, but the

limits are dictated by policies in tort law. Arguably they go to the admissibility of the defence to the extent that they are designed to safeguard the principles of tort liability (Kahn-Freund, supra, at 144). On this view, foreign law has limited significance under section 102. The only role for foreign law would be to determine contractual validity *per se* (ie, whether subject to duress, misrepresentation, etc), and there is no need to resort to forum mandatory rule reasoning to apply section 102.

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

Finally, international conventions may also be engaged in the application of Section 102. The Singapore Convention on Mediation (2018) is not relevant at this point because it only applies to the resulting settlement agreements and not to the validity or enforcement of mediation agreements. The Hague Convention on Choice of Court Agreements (2005) is unlikely to be activated by a choice of court agreement in this context because consumer contracts are out of scope.

Singapore did not make a reservation to exclude non-commercial cases in acceding to the New York Convention (1958), so it can apply. In the rare case that the Hague Convention should apply, and in a case where the New York Convention applies, recourse will likely be made to Singapore public policy to justify applying section 102 to determine whether the clause is null and void. Non-arbitrability arguments may be also invoked in the case of the New York Convention, but it is unlikely that Parliament intended to exclude arbitration of OSRAA tort disputes altogether given the possibility of upholding the clause within the bounds of Section 102. In any event, under Singapore private international law, arbitrability at the jurisdiction stage is governed by the law applicable to the arbitration agreement and the law of the seat (though non-arbitrability may also arise as a defence at the subsequent enforcement stage). For a foreign-seated arbitration agreement governed by foreign law, the only practical argument for the victim is that the agreement is null and void for contravention of the public policy of the forum. Statute can be a source of common law public policy. Whether Singapore public policy is actually contravened on the facts will however depend on the parameters in section 102.

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



I. The Apostille Convention

The HCCH has recently announced that "[o]n 9 July 2026, the *Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents* (1961 Apostille Convention) entered into force for the People's Democratic Republic of Algeria following the deposit of its instrument of accession on 5 November 2025." With Algeria's accession, the 1961 Apostille Convention now has 130 Contracting Parties, making it by far the most successful of all HCCH Conventions in terms of global participation.

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

2. The situation in Africa

However, a closer look at the list of Contracting Parties reveals that only 17 African States have so far ratified the Convention. These are, Algeria, Botswana, Burundi, Cabo Verde, Eswatini, Lesotho, Liberia, Malawi, **Mauritius, Morocco,**

Namibia, Rwanda, Sao Tome and Principe, Senegal, Seychelles, **South Africa and Tunisia** (countries in bold characters are HCCH Member States). In other words, only about 31% of the continent's 54 sovereign States currently benefit from the simplified authentication procedure established by the Apostille Convention. This is the lowest rate in the world, as the following table clearly shows (AI generated table):

Region	Contracting Parties	Total States	Coverage rate
Europe	46	46	**100.0%**
North America (incl. Central America & Caribbean)	20	23	**87.0%**
South America	12	12	**100.0%**
Oceania	9	14	**64.3%**
Asia	26	49	**53.1%**
Africa	17	54	**31.5%**
Total	**130**	**198**	**65.7%**

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

importantly, available case law shows that, where the Apostille Convention is not applicable, authentication is likely to become an issue in many jurisdictions.

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

The difficulty stemming from the absence of a simplified method of authentication can be illustrated by a case decided by the High Commercial Court of Rwanda decided on 18 November 2021, which shows how how formal authentication requirements may become decisive in enforcement proceedings[(*)].

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

1) Underlying facts

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

2) Parties' allegations

X eventually challenged the enforcement of the second Congolese judgment on

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

For his part, X argued that the copy of the judgment was not authentic because not all of its pages bore the required signatures and official stamps, as required by the standard practice in Rwanda. In particular, he maintained that affixing signatures and stamps only to the last page of a judgment of more than ten pages did not satisfy the applicable legal requirements.

3) The Court's reasoning

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

IV. Insights

The Rwandan case is a good illustration of the practical difficulties associated with the traditional chain of legalization and authentication, particularly where questions arise as to whether the chain of authentications was physically attached to, and clearly identifiable with, the judgment itself. The decision illustrates the burden that the traditional system of diplomatic legalisation places on litigants.

Had both Rwanda and the DRC been parties to the HCCH Apostille Convention, the lengthy chain of diplomatic and consular certifications that became the central issue in this case would likely have been replaced by a single Apostille certificate. This could have avoided the type of formal dispute that led to the refusal of exequatur.

The importance of authentication for the enforcement of foreign judgments is also illustrated by the available judicial practice in Mozambique, although the case law reflects a less rigorous approach. Indeed, according to the available decisions of the Mozambican Supreme Court, the authenticity of a foreign judgment is generally verified through the process of legalisation required by Article 540 of the Code of Civil Procedure. Where the required legalisation is not included in the initial application, the Supreme Court generally allows the applicant to submit the necessary documents at a later stage (see eg the Mozambican Supreme Court, Ruling of 5 October 2011, in which the Mozambican Supreme Court held that an English judgment could not proceed to review (recognition and enforcement) because it had not been recognised or authenticated by the Mozambican consular authorities in the United Kingdom, as required by Article 540 of the Code of Civil Procedure. The Court accordingly invited the applicant to cure the defect, but the proceedings were later dismissed after the applicant failed to comply).

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

This situation also highlights the important role that the HCCH should continue to play in promoting the Convention across Africa. Much has already been done, but

further efforts are needed to encourage wider adherence to the Convention.

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

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

I. Introduction

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

II. The facts of the case

The Creditor (C) is Germany's largest gas importer and supplies energy providers as well as major industrial customers nationwide with gas. Pursuant to long-term

contracts, it sources a significant portion of its imports from the Debtor (D), a company belonging to a corporate group controlled by the Russian state. The agreed place of delivery in each instance was located in Bavaria. However, on June 14, 2022, D largely suspended its gas deliveries to C. On July 22, 2022, the Regional Court of Weiden ordered D to continue supplying C with gas for a further three months. The Regional Court rejected a motion filed by C seeking authorization to have the existing contracts fulfilled by a third party of its choice. Following an immediate appeal lodged by C, the Higher Regional Court (OLG) of Nuremberg issued a ruling on September 12, 2022, authorizing C to have the performance owed by D—within the scope of fulfilling the contracts concluded between the parties—rendered by a third party of C's choice at D's expense; furthermore, pursuant to Section 887(2) ZPO, the Court ordered D to make an advance payment to cover the costs incurred in rendering said performance. Subsequently, on November 17, 2022, the Higher Regional Court of Nuremberg issued a certificate regarding this decision pursuant to Art. 53 of the Brussels I*bis* Regulation, in which the order for the advance payment was classified as a decision on the substance of the matter (Field 4.6.1). On May 9, 2023, C initiated the garnishment of claims held by D against a French third-party debtor (F) in order to recover a partial amount of the advance payment owed by D. Notice of this attachment was served upon D on May 17, 2023, by means of a letter addressed to the competent authority of the Russian Federation, pursuant to the Hague Service Convention; a copy thereof was sent via registered mail with return receipt requested. On December 21, 2023, F filed a lawsuit against C before the Tribunal Judiciaire de Nanterre seeking the lifting of the measures taken against it. This lawsuit was dismissed on December 20, 2024. D subsequently lodged an appeal against this decision with the Cour d'appel de Versailles, which was granted on January 8, 2026. Cassation proceedings are currently pending before the Cour de Cassation.

III. Enforcement by Substitute Performance

The compulsory enforcement of claims requiring an act, toleration, or forbearance is governed under German law by Sections 887 et seq. ZPO. These provisions apply to all acts that do not relate to the settlement of a monetary claim, the surrender of a specific object, or the submission of a declaration of intent. Specifically, a distinction is drawn between actions that may be taken by others—to which Section 887 ZPO applies—and actions where this is not the case, the enforcement of which is governed by Section 888 ZPO. Actions may be taken

by others if they can be performed not only by the debtor personally but also by a third party. This clearly applies to the gas deliveries at issue in the present case. In such instances, the creditor is not compelled to force the debtor personally to render the performance owed. Rather, pursuant to Section 887(1) ZPO, the creditor may apply to the court of first instance for authorization to have the act performed by a third party at the debtor's expense. Concurrently, the creditor may request that the debtor be ordered to make an advance payment to cover the costs that will be incurred in performing the act (Section 887(2) ZPO). In the case at hand, the OLG Nuremberg granted such an advance payment of costs to the creditor.

IV. A "judgment" within the meaning of Art. 2(a) of the Brussels I*bis* Regulation

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

obligation to perform or as an obligation to refrain from interrupting delivery, and enforced accordingly. This practical interchangeability of enforcement methods illustrates how inappropriate it would be to treat the resulting enforcement orders differently at the European level.

In addition, an argumentum a fortiori applies: since, according to the case law of the CJEU (Realchemie), an order imposing a coercive fine under Section 890 ZPO –which constitutes merely a sanction without a compensatory function – qualifies as a "judgment" within the meaning of the Brussels I*bis* Regulation, then this must apply all the more to an order for an advance on costs under Section 887(2) ZPO, because the latter decision is based on a judicial assessment of the anticipated costs of substitute performance and thus qualifies as a judgment on the merits unlike a mere coercive fine. It would therefore be inconsistent to characterize a decision imposing a coercive fine as an enforceable "judgment" within the meaning of Art. 2(a)(1) of the Brussels I*bis* Regulation, while denying this classification for a decision ordering an advance payment pursuant to Section 887(2) ZPO.

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

Furthermore, in the present case, the French courts—with regard to the classification of the Nuremberg decision as a "judgment" within the meaning of Art. 2(a) of the Brussels I*bis* Regulation—must observe the binding effect of the certificate issued pursuant to Art. 53 of the Brussels I*bis* Regulation, in which the decision on the advance payment was characterized as a judgment on the substance (Field 4.6.1). Art. 53 of the Brussels I*bis* Regulation provides that the

court of origin shall issue a certificate to enable the enforcement of the judgment in the requested Member State. This certificate confirms that the judgment is enforceable and must be submitted to the courts of the requested Member State (see, in particular, Art. 37(2), Art. 42(1)(b), and Art. 43(1) of the Brussels I*bis* Regulation). In this respect, the Cour d'appel de Versailles rightly held that the classification of the decision at issue as a judgment on the merits within the meaning of Art. 2(a)(1) and Art. 39 of the Brussels I*bis* Regulation may not be called into question by the French court. In order to clarify the binding nature of the Art. 53 certificate, the Federal Court of Justice recently referred this question to the CJEU. In light of the pertinent conclusions of the Advocates General in preceding cases, a positive answer is expected. As AG Bobek explained in the Salvoni case, "[t]he purpose of the Art. 53 Certificate is to authoritatively [!] state that the judgment is enforceable. […] Whereas, in the system established by [the Brussels I Regulation], production of the certificate in question was not required, it became obligatory with the entry into force of [Brussels I*bis*]. That is because the new regulation, doing away with the need for an exequatur, provides for a simplified procedure based on the principle that a decision issued in a Member State should be treated as if it had been issued in the Member State addressed." And AG Pikamäe was even more explicit in the case of J v H Limited: "[I]t is common ground that the court of origin drew up and issued the certificate on the basis of its order of 20 March 2019, which therefore falls within the scope of Regulation No 1215/2012. Under these circumstances, there is indeed, a priori, an enforceable judgment given in a Member State within the meaning of Art. 2(a) and Art. 39 of Regulation No 1215/2012 that comes within the system of direct enforcement laid down in that regulation, a factual reality that is binding upon the court addressed."

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

Enforcement proceedings may also—particularly in cases of attachment of claims—involve third-party debtors. In this regard, the question arises as to whether such parties can avail themselves of the mechanisms provided by the Brussels I*bis* Regulation for the refusal of the enforcement of a judgment. In this context, a distinction must be drawn between the refusal of recognition (Art. 45 Brussels I*bis* Regulation) and the refusal of enforcement (Art. 46 Brussels I*bis* Regulation). With regard to the refusal of enforcement of a foreign judgment, Art. 46 of the Brussels I*bis* Regulation stipulates: "On the application of the person

against whom enforcement is sought, the enforcement of a judgment shall be refused where one of the grounds referred to in Art. 45 is found to exist." The German version of Art. 46 is even clearer, unequivocally speaking of "an application of the debtor" ("auf Antrag des Schuldners"). The wording of this provision thus excludes third-party debtors or other interested third parties. Consequently, based on a grammatical interpretation, standing to apply is vested exclusively in the debtor—i.e., the person against whom enforcement is sought—or, where applicable, their legal successor.

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

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

VI. The International Jurisdiction of German Courts

A potential ground for refusing enforcement could arise under Art. 46 in conjunction with Art. 45(1)(e)(ii) of the Brussels I*bis* Regulation. This would be the case under two conditions: First, international jurisdiction to decide an advance on costs (Section 887(2) ZPO) would have to derive from the exclusive jurisdiction established in Art. 24(5) of the Brussels I*bis* Regulation; and second, that provision would have to preclude the recovery, in another Member State, of an advance on costs awarded in Germany. However, the decision rendered pursuant to Section 887(2) ZPO does not, in itself, exert any coercive effect upon the debtor. According to the Federal Court of Justice, such an effect would be a prerequisite for classifying the advance order as an enforcement measure. Even in a purely domestic context, a decision regarding an advance on costs constitutes merely an enforceable judgment within the meaning of Section 794(1) No. 3 ZPO—one that is enforced, like an ordinary monetary claim, in accordance with Sections 803 et seq. ZPO. The exclusivity of international venues in the matters specified in Art. 24(5) of the Brussels I*bis* Regulation applies invariably only to the adjudicatory proceedings, and not to the subsequent enforcement of a resulting judgment regarding a monetary claim. Furthermore, this would result in an objectively unjustified disparity in the treatment of obligations to advance costs, depending on whether such obligations are governed by substantive law (e.g., Section 637(3) of the German Civil Code – BGB) or by the respective procedural code (e.g., Section 887(2) ZPO).

VII. Effective Service

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

The CJEU has recognized that service by public notice, effected in accordance with national law, does not infringe Union law, provided that the requested court

has satisfied itself that all inquiries required by the principles of diligence and good faith have been carried out to locate the defendant. This reasoning also applies to a situation where, despite the creditor and the court of origin knowing the debtor's address, it is practically impossible to effect service in the debtor's State due to a lack of cooperation from local authorities. This is the case where the court of origin has attempted to effect service on the debtor in accordance with national and international law (specifically the Hague Service Convention) and where—as in the present case—the success of that service was thwarted by the authorities of the State that exercises legal and economic control over the debtor company. The effective protection of a creditor who has obtained a judgment enforceable within the EU against a debtor established in a third State would be disproportionately jeopardised if the mere refusal—potentially in bad faith—of a third State to effect service were to prevent any enforcement within the Union in a State other than that of the court of origin.

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

VII. Summary

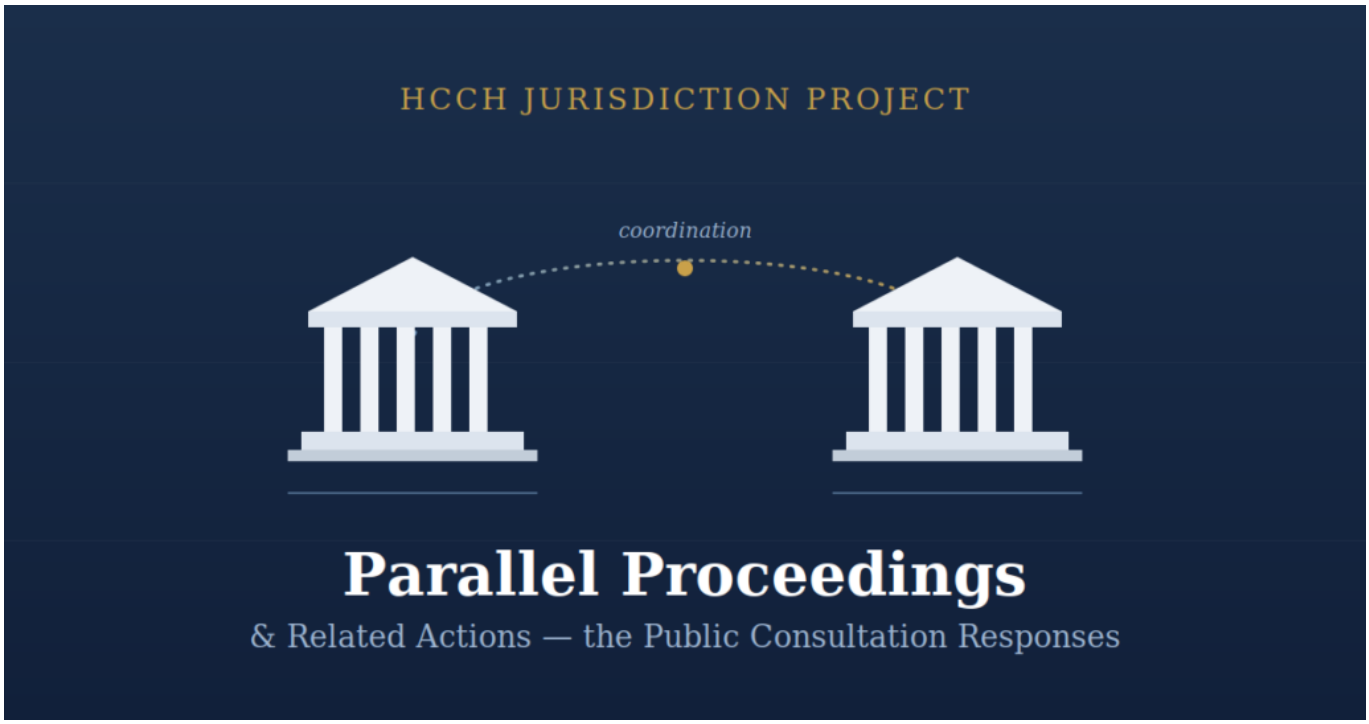
German judgments regarding the payment of an advance on costs for a substitute performance pursuant to Section 887(2) ZPO—much like decisions concerning cost advances based on substantive law—may be enforced abroad pursuant to Art. 39 Brussels I*bis* Regulation; these constitute "judgments" within the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

border enforcement of a judgment regarding an advance on costs by means of the attachment of claims.

The fact that Art. 46 Brussels I*bis* limits the standing to invoke grounds for refusal of enforcement solely to the debtor is based on a deliberate legislative decision to expedite the cross-border enforcement of claims. This underlying policy must not be undermined by third-party debtors invoking grounds for refusal of recognition under Art. 45 Brussels I*bis* while ostensibly acting under the guise of national enforcement law. This applies in particular to grounds for refusal intended solely to safeguard the principal debtor's right to be heard (Art. 45(1)(b) Brussels I*bis*).

Furthermore, when examining potential defects in service, it must be taken into account whether a third state has delayed or frustrated service requested by the creditor pursuant to the Hague Service Convention; this behaviour must not operate to the detriment of a creditor seeking to enforce, under the Brussels I*bis* Regulation, a judgment regarding an advance on costs obtained within the EU. If the mere refusal of judicial assistance by a third state were to result in a judgment validly obtained in Germany being incapable of full enforcement in other EU Member States, the effectiveness of European enforcement law vis-à-vis debtors in third states would be at stake.

"Yes, in principle, but not quite there yet…" – Some Observations on the Public Consultation on the HCCH Draft Text of a Future Convention on Parallel Proceedings and Related Actions



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

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

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

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

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

II. Consensual Points

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

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

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

2. Alignment with HCCH 2019

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

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

3. Addressing Anti-Suit Injunctions

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

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

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

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

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

III. Contentious Aspects

1. Need for a Special Instrument

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Outlook

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

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

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

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

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

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

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

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

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



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

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

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

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

The English Court Proceedings

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

appeal.

The Indian Execution Proceedings

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

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

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

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

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

Issue I: Was the English Summary Judgment "On the Merits"?

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

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

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

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

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

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

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

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

Issue II: The FERA Angle; Adjudication vs Enforcement

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

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

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

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

The Takeaways from *Messer Greisheim*

1. **Summary and default judgments travel poorly across borders.** A foreign judgment valid in its home jurisdiction could fail the Section 13(b) "merits" test in India only if the foreign court did not substantively engage with a defendant's documented, triable defences. Foreign claimants strategising for default-to-summary judgments (switching from default judgment to summary judgment to improve enforceability) are alerted to the risk of failure. However, *Messer Greisheim* rejected the idea of inherent suspicion against summary judgments, the Court held that a 13(b) hit applies only when the record of the case establishes an unfair truncation of a legitimate dispute.

40. At the same time, the jurisdiction to grant summary judgment is not intended to convert the proceeding into a "mini-trial", but rather to enable cases where there is no real prospect of success to be disposed of summarily.

1. **Contemporaneous corporate records can defeat a foreign decree at the enforcement stage**, even years later.
2. **Foreign exchange regulatory permissions regulate *execution*, not *adjudication*.** The judgment offers welcome clarity that conditional RBI approvals do not operate as a permanent shield against liability. They instead govern the timing and quantum of actual remittance once a decree is to be executed, a sensible accommodation between access to justice and India's exchange-control regime.

Conclusion

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

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

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

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

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



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

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

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

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

Centre-of-Interests Jurisdiction

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

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

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

> *be consulted instantly by an unlimited number of users throughout the world, irrespective of any intention on the part of the person who placed it as regards its consultation beyond that person's Member State of establishment and outside of that person's control […].*
>
> *[45] Those considerations do not apply to the broadcasting of audiovisual content on television. Such broadcasting is not, in principle, available instantly and worldwide, but is regionalised, limited to the geographical area in which the television signal is received.*

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

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

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

Mosaic Jurisdiction

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

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

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

Conclusion

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

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



I. Introduction

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

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

II. The Case

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

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

[(*)] *Article 296 reads as follows:*

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

III. The Ruling

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

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

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

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

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

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

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

IV. Comments

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

here.

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

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

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

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

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

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

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

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PRC Double Interest neither Double nor Penal: Australian

Courts Clear Its Name When Enforcing Chinese Judgments



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

[ABSTRACT]

Recent Australian case law clarifies that the "double interest" mechanism in the People's Republic of China (hereafter 'PRC') monetary judgments functions as a compensatory post-judgment interest framework rather than an unenforceable penalty. This consolidates Australia's position as a highly attractive and creditor-friendly forum for enforcing Chinese judgments. See Zhengzhou Lvdu Real Estate Group Co v Shu [2024] NSWSC 58 (6 February 2024), Fu v Pang [2025] VSC 597 (16 September 2025), and Shanghai Chenggong Industrial Co Ltd v Zhihua Chen [2025] NSWSC 1112 (27 October 2025).

Key takeaways:

- *Australian courts have astutely recognized that PRC "double interest"*

does not actually double the contractual rate, but operates as an additional statutory post-judgment rate (0.0175% per day) to compensate for delayed performance.

- *Across three recent decisions, Australian courts in New South Wales and Victoria firmly ruled that Article 264 interest under China's Civil Procedure Law is not penal, as it aims to compensate rather than punish, and it vindicates a private right and lacks a state-enforced punitive purpose.*
- *The willingness to enforce this Article 264 interest mechanism was significantly enhanced by its functional equivalence to Australia's own post-judgment interest rules under the UCPR.*

In recent decades, Australia has increasingly become a top creditor-friendly jurisdiction for PRC judgment creditors. In just two years (2024-2025), six Chinese judgments have been recognized and enforced by Australian courts,[i] mainly in two states – New South Wales and Victoria.

Like in other common jurisdictions, as previously reported, the grounds that judgment debtors frequently use in challenging such recognition and enforcement in Australia are denial of procedural fairness and natural justice, often arising from the service of process in Chinese court proceedings. See *Zhou v Jing* [2023] NSWSC 214 (procedural fairness); *Yin v Wu* [2023] VSCA 130 (natural justice).

Related Posts:

- *A Chinese Judgment Denied Enforcement by Court of NSW Australia, Due to Defective Service by Post?*
- *A Chinese Judgment Denied Enforcement in Australia, As "Public Announcement" against Natural Justice?*

More interestingly, Australian courts have been dealing with a newish defense in a series of three recent cases – *Zhengzhou Lvdu Real Estate Group Co v Shu* [2024] NSWSC 58 (6 February 2024), *Fu v Pang* [2025] VSC 597 (16 September 2025), and *Shanghai Chenggong Industrial Co Ltd v Zhihua Chen* [2025] NSWSC

1112 (27 October 2025). The common issue at heart is whether the "double interest", an element commonly seen in PRC monetary judgments, is penal, and hence renders the judgments wholly or partially unenforceable in Australia.

As misleading as the term "double interest" may appear, the way Australian courts endeavor to understand a term absolutely unique in a foreign country is admirable. The courts not only correctly pointed out that "double interest" is a misnomer, as it has nothing to do with "double", but also concluded that such "double interest" is not penal in nature.

For the avoidance of doubt, the so-called "double interest" refers to the double part debt interest of the "Article 264 interest" (also known as "double part debt interest of delayed performance interest" (迟延履行利息的加倍部分债务利息 / *chiyan lvxing lixi de jiabei bufen zhaiwu liyi*), the interests payable under Article 264 of China's 2023 Civil Procedure Law (CPL) (formerly numbered Article 253 of 2017 CPL, Article 260 of 2021 CPL), which applies in in circumstances where a judgment debtor fails to pay the judgment debt within the period as specified in a judgment.

The method to calculate the Article 264 interest is governed by the 2014 Interpretation by China's Supreme People's Court (SPC) on Several Issues concerning the Applicable Law for Calculating the Interest of Debt on Delayed Performance in Enforcement Procedures" (hereinafter the "SPC Interpretation").[ii] Article 1 of the SPC Interpretation provides that Article 264 interest – delayed performance interest (the debt interest during the period of delayed performance)- is composed of the 'general debt interest' and the 'double part debt interest', the former (if any) is specified by the judgment, and the latter is calculated via the formula as follows: Double part of debt interest = the outstanding monetary debt of the debtor other than general debt interest specified by effective legal document x 0.00175 per day x delayed performance period.

"Double Interest" Not Double

The term "double interest" is "something of a misnomer", indicated the Supreme Court of New South Wales (the "NSW Supreme Court") in *Zhengzhou Lvdu Real*

Estate Group Co v Shu, a case where a judgment of Zhengzhou Intermediate People's Court of Henan Province (hereinafter the "Zhengzhou Judgment") for RMB 318,827,295.13 was ruled enforceable.

Like a koala bear is not a bear, the double interest is not double. By nature, it is an "additional" interest, in addition to general debt interest specified by judgment (if any), when the judgment debt was not paid within the period specified in the judgment.

In the Zhengzhou Judgment, the judgment debtors – both the borrower and the guarantor- were found liable for the all the payment obligations, i.e. 1) to repay to the lender (judgment creditor) the principal of the loan in the amount of CNY 170 million and its interest (based on principal of CNY 170 million, calculated on an annual interest rate of 12% for the period between 12 June 2019 and 11 May 2020; and calculated on an annual interest of 18% for the period from 12 May 2020 until the date when the debt is fully repaid) within ten days after this judgment takes effect; and 2) to pay the Article 264 interest, if the payment obligation is not performed within the period specified in this judgment, which is "within ten days after this judgment took effect on 20 September, 2020" (at [42]-[43]).

Clearly, Article 264 (formerly Article 253 of 2017 CPL) does not double the interest rate provided for under the Loan Agreement (which was 12% per annum from the date of the advance until the date of maturity, and then 18% per annum from the date of default until repayment). Instead, there is "double" interest only in the sense that, from the date when the judgment debt was required to be paid until the date of actual payment, there is a second interest rate applicable, in addition to the contractual interest rate of 18% which was found to apply in the Zhengzhou Judgment (at [65]).

Given the calculation method above, Article 264 Interest is calculated based on "the "outstanding monetary debt of the debtor other than general debt interest specified by effective legal document" is, in this case, the amount of the principal (CNY 170 million). The rate of Article 264 interest is a statutory rate, set at 0.0175% per day (around 6.3875% per annum). The "delayed performance period" starts from 29 September 2020 (ten days after this judgment took effect on 9 September) until repayment.

“Double Interest” Not Penal

In *Zhengzhou Lvdu Real Estate Group Co v Shu,* the NSW Supreme Court considered whether “Double Interest” could be regarded penal in nature, but did not reach any determination, given that “it is the Defendant who bears the burden of showing that any element of the Zhengzhou Judgment is penal in nature and that “no evidence and no submissions have been advanced to this effect” (at [68]).

Similarly, in *Fu v Pang*, the Victoria Supreme Court reviewed an application to enforce a Chinese judgment of Qingxiu District People’s Court of Nanning City, Guangxi Zhuang Autonomous Region, and this time, the defendant did seek to persuade the court that the double interest was penal in nature.

With detailed reasoning, however, the Victoria Supreme Court rejected the defendant’s submission and concluded it is not penal, ruling that

“there is no public interest element. The double part interest arises out of the exercise of a private right and it has no connection with the state, nor is the plaintiff here acting as a common informer. There is no basis on which it can be concluded that the payment of the extra interest component is imposed for public purposes to punish the defendant for non-compliance with the judgment, rather than being an additional compensation for the plaintiff for the detriment of being kept out of the judgment sum.” (at [30])

Just one month later, in *Shanghai Chenggong Industrial Co Ltd v Zhihua Chen*, where two PRC judgments were enforced, the NSW Supreme Court reached the same conclusion. In this case, the double interest is the only issue that the defendant disputed, and the court held firmly that Article 264 interest is not penal.

As the NSW Supreme Court revealed, the question at heart is the purpose and nature of Article 264 interest: “does it punish for non-compliance with Court orders, or is it more appropriately considered a legislated post-judgment interest rate?” (at [18]) The court opined the correct answer is the latter.

To start with, it is not akin to a contractual penalty by any comparison. There are also no authorities decided after *Schnable v Lui* [2002] NSWSC 15 that punitive

damages will always be considered penal in Australian law. In other words, punitive damages are not necessarily penal.

More importantly, Article 264 interest aims "to compensate, and not to punish", because Article 264 is triggered where there is late or deferred payment, and it is "appropriate to compensate a plaintiff for being held out of money, just the way the Uniform Civil Procedure Rules (UCPR) provides for post-judgment interest on judgment debts". (at [31])

Comments

Not long after, by following the same stance on the "non-penal" nature of Article 264 interest in *Shanghai Chenggong Industrial Co Ltd v Zhihua Chen*, the same court, the NSW Supreme Court, enforced a PRC judgment of Zhangjiagang People's Court of Jiangsu Province for RMB 24,256,223.86 and interest in *Kai Yuan v Jian Hua Zhou* [2025] NSWSC 1469 (5 December 2025).

By clearing the name of "double interest", the series of recent Australian court decisions have pointed out that the double interest is not double, but additional; and its purpose is to compensate, rather than to punish.

At the end of the day, it is practically difficult to ascertain the purpose behind remedies ordered in foreign judgments. The "compensate or punish" question matters so much that taking on one side over the other can render the part containing such interest either enforceable or unenforceable. There seems to be no room for a mixed purpose, which might as well be a third way of interpretation (if taking into account the views of China's legislature and judiciary).[iii]

Moreover, behind the "compensate or punish" question lies a further question that has yet to be fully tested: what 'penal' actually means in the rule against enforcement of a foreign penal law, when discussing the relevant jurisprudence regarding recognition and enforcement of foreign judgments.

One thing is clear though: when evaluating a foreign concept like PRC "double interest", the existence of a similar domestic mechanism—such as Australia's statutory post-judgment interest under the UCPR—makes the concept far easier for local courts to understand and accept. Conversely, courts in jurisdictions like

Hong Kong, which lack such a domestic equivalent, may find it much more challenging to conceptualize and enforce.[iv]

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[i] See *Zhengzhou Lvdu Real Estate Group Co v Shu* [2024] NSWSC 58, *Fujian Rongtaiyuan Industrial Co Ltd v Zhan* [2024] NSWSC 1318, *Yangpu Huigu Pharmaceutical Corporation Limited v He* [2025] NSWSC 28, *Fu v Pang* [2025] VSC 597, *Shanghai Chenggong Industrial Co Ltd v Zhihua Chen* [2025] NSWSC 1112, *Kai Yuan v Jian Hua Zhou* [2025] NSWSC 1469.

[ii] Interpretation by China's Supreme People's Court on Several Issues concerning the Applicable Law for Calculating the Interest of Debt on Delayed Performance in Enforcement Procedures, Fa Shi (2014) No. 8, 7 July 2014.

[iii] See Legislative Affairs Commission of the Standing Committee of the National People's Congress (ed.), *Explanation of the Civil Procedure Law of the People's Republic of China* (Beijing: Law Press China, 2nd edition, 2012), p. 590; Civil Law Office of the Legislative Affairs Commission of the Standing Committee of the National People's Congress (ed.), *Explanations of Articles, Legislative Rationale, and Relevant Provisions of the Civil Procedure Law of the People's Republic of China* (Beijing: Peking University Press, 2nd edition, 2012), p. 398; and the Official from the Enforcement Bureau of the Supreme People's Court Answers Reporters' Questions, *People's Court Daily,* 31 July 2014, available at https://www.chinacourt.cn/article/detail/2014/07/id/1354917.shtml.

[iv] See *Hung Fung Enterprises Holdings Ltd v The Agricultural Bank of China* [2012] HKCA 251, *Foshan Nanhai Branch of Industrial and Commercial Bank of China Ltd v Foshan Ruifeng Petroleum and Chemical Fuel Co Ltd* [2019] 2 HKLRD 478, *Tianjin Financial Investment Services Group v Jinan Muhe Enterprise Management Co Ltd & Ors* [2025] HKCFI 6182, *Industrial Bank Co., Ltd., Ningbo Branch v Ningbo Baifeng Mineral Processing Co., Ltd. & Ors* [2026] HKCFI 2455, and *Letui (Shanghai) Cultural Communication Co., Ltd. v. Shenzhen Mega Combine Technology Co.,Ltd & Ors* [2026] HKCFI 3204.

The AIFC Court, Gazprom v Naftogaz and the Emergence of a New Conduit Jurisdiction Debate

This post is written by Dr. Nicolás Zambrana-Tévar LLM(LSE) PhD(Navarra), Associate Professor School of Law KIMEP

Introduction

In May 2026, the Court of First Instance of the Astana International Financial Centre (AIFC) recognised and enforced a Swiss ICC arbitral award rendered in favour of Naftogaz against Gazprom. The award arose out of the disputes between the parties concerning the transit of Russian gas through Ukraine after the start of the war.

The decision was followed by public comments from Kazakhstan's Minister of Justice. According to press reports, the Minister stated that the award would not be enforced in Kazakhstan because neither Gazprom nor Naftogaz were participants in the AIFC and because the dispute had no connection to the Centre. He further suggested that the AIFC should not become a "transit platform" for the enforcement of foreign decisions unrelated to its activities.

The controversy raises an interesting private international law question that extends well beyond the particular dispute between Gazprom and Naftogaz. Can the AIFC Court function as a conduit jurisdiction for the recognition of foreign arbitral awards and their subsequent enforcement in Kazakhstan, i.e. outside the AIFC?

The Jurisdictional Problem

The AIFC occupies a unique constitutional position. Established in 2018, it operates under a separate common-law framework within Kazakhstan and possesses its own court system staffed by international judges. Article 13(2) of the

AIFC Constitutional Statute on the AIFC expressly provides that the AIFC Court is not part of the judicial system of the Republic of Kazakhstan.

The difficulty is that the Constitutional Statute does not expressly address whether the AIFC Court may recognise foreign arbitral awards that have no connection to the Centre.

The Court relied principally on Article 45(1) of the AIFC Arbitration Regulations, which provides that: "An arbitral award, irrespective of the State or jurisdiction in which it was made, shall be recognised as binding within the AIFC." The Court also relied on Article 40(3) of the AIFC Court Regulations, which refers to the enforcement of "other judgments and arbitration awards".

Whether these provisions actually confer jurisdiction to recognise foreign arbitral awards remains debatable. The AIFC Constitutional Statute itself is largely silent on the matter. The dispute therefore raises a classic question of institutional competence: can jurisdiction be inferred from subordinate regulations where the constitutional instrument neither expressly grants nor expressly excludes it?

The New York Convention Argument

One possible justification for the Court's approach lies in Kazakhstan's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

The AIFC is located within the territory of Kazakhstan. Under Article 29 of the Vienna Convention on the Law of Treaties, treaties bind the entire territory of a state unless a contrary intention appears. Nothing in Kazakhstan's ratification of the New York Convention suggests that the Convention does not apply within the territory of the AIFC.

Article III of the Convention requires contracting states to recognise foreign arbitral awards. However, the Convention itself does not allocate jurisdiction among domestic courts. It does not specify whether recognition must be sought before an ordinary state court, a specialised commercial court or a court located within a financial centre. It may therefore be argued that once Kazakhstan created the AIFC Court and granted it powers relating to arbitration, the Court became one of the institutions through which Kazakhstan fulfils its Convention obligations.

The contrary argument is equally plausible. Kazakhstan may comply fully with the Convention while reserving recognition proceedings to its ordinary courts. The Convention requires recognition; it does not dictate which court must provide it.

An Exequatur of an Exequatur?

The dispute also raises a more traditional private international law concern.

If a Swiss arbitral award is recognised by the AIFC Court and the resulting AIFC judgment is then enforced elsewhere in Kazakhstan, one might ask whether this effectively amounts to an "exequatur of an exequatur". Scholars have long expressed reservations about attempts to circulate recognition judgments relating to arbitral awards. Such practices may circumvent the grounds for refusal contained in Article V of the New York Convention by converting an arbitral award into a court judgment before seeking enforcement elsewhere.

Whether that objection applies here depends in part on how one characterises the relationship between the AIFC and Kazakhstan. Although the AIFC forms part of Kazakhstan's territory, it possesses a distinct legal system and separate courts. Therefore it is, properly speaking "another jurisdiction", if not another state.

Lessons from Dubai and Abu Dhabi

The most illuminating comparison comes from the Gulf financial centres, which the AIFC openly tries to emulate.

The Dubai International Financial Centre (DIFC) Courts have long been associated with the concept of a conduit jurisdiction. Under the DIFC framework, parties have sought recognition of foreign judgments and arbitral awards before the DIFC Courts even where neither the parties nor the dispute had any connection to the DIFC. Once recognised, the resulting DIFC judgment could potentially be enforced through the ordinary Dubai courts.

The leading authorities include *X1 and X2 v Y1 and Y2* and *Banyan Tree Corporate Pte Ltd v Meydan Group LLC*. In both cases, the DIFC Courts adopted a broad understanding of their recognition jurisdiction.

The Abu Dhabi Global Market (ADGM) followed a different path. Following legislative reforms in 2020, it became clear that the ADGM Courts could not be used as a conduit jurisdiction for the recognition of foreign judgments and

arbitral awards. Abu Dhabi thus deliberately rejected a model that Dubai had largely embraced.

The AIFC now appears to stand somewhere between these two approaches. Unlike the DIFC legislation, the AIFC framework contains no clear statement granting recognition jurisdiction over foreign arbitral awards irrespective of any connection to the Centre. Unlike the ADGM legislation, however, it contains no express prohibition.

Conclusions

The Minister's remarks announcing that the AIFC Court judgement would not be enforced in Kazakhstan may be understood as reflecting a legitimate policy concern: whether an international financial-centre court should be used to bypass ordinary domestic recognition procedures. Yet, they also concern a matter that is arguably for the courts themselves to determine. The Constitutional Statute repeatedly emphasises the independence of the AIFC Court and grants it exclusive authority to interpret AIFC law.

The broader issue therefore concerns institutional design rather than merely arbitration enforcement. If Kazakhstan does not wish the AIFC Court to function as a conduit jurisdiction, the appropriate solution may be legislative clarification. Conversely, if the AIFC is intended to replicate aspects of the DIFC model, greater certainty regarding its recognition jurisdiction would be desirable.

Montana Supreme Court Decides International Child Custody Case

The Uniform Child Custody Jurisdiction and Enforcement Act, which has been enacted by every U.S. state, discourages forum shopping in child custody disputes by assigning subject-matter jurisdiction to the court located in the "home state" of the child. In *Allen v. Allen*, decided on April 21, 2026, the Montana Supreme Court had to determine whether the child's "home state" was Montana or the

Netherlands. This case shines an important spotlight on the importance of *timing* in international child custody disputes. The left-behind parent's likelihood of success is strongly correlated with how quickly her or she acts to vindicate their legal rights.

Facts

Jonathan Edward Allen (Father) and Petronella Gerline (Van Oosterom) Allen (Mother) were married in Colorado in 2009. Father is a United States citizen. Mother is a dual citizen of the United States and the Netherlands. Their child (R.A.A.) was born in 2015. In 2020, the family moved from Colorado to Montana.

In August 2023, after Father and Mother began having marital difficulties, Mother and R.A.A. relocated to the Netherlands. In February 2024, Mother filed a petition for divorce and custody with the District Court of Central Netherlands (Netherlands District Court).

In January 2025, Father filed a petition with the District Court of The Hague seeking the return of R.A.A. pursuant to the Hague Convention on the Civil Aspects of International Child Abduction. This petition was denied. Although the court held that R.A.A. had been wrongfully removed from the United States, the court reasoned that the one-year automatic return period had passed and that R.A.A. had become settled in her new environment in the Netherlands. This decision was affirmed on appeal.

In September 2025, Father filed an Emergency Motion for Temporary Custody and Petition for Permanent Parenting Plan in Montana state court. That court dismissed the petition on the grounds that it lacked subject-matter jurisdiction. Specifically, it held that it lacked the power to adjudicate the dispute because Montana was no longer the "home state" of R.A.A. Father, acting pro se, appealed to the Montana Supreme Court.

Analysis

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) assigns exclusive subject-matter jurisdiction to courts located in the child's "home state" when it comes to matters relating to child custody. The "home state" is "the state in which a child lived with a parent or a person acting as parent for at least 6

consecutive months immediately before the commencement of a child custody proceeding." The UCCJEA specifically provides that courts "shall treat a foreign country as if it were a state of the United States" for purposes of resolving these disputes.

On the facts presented in *Allen v. Allen*, the Montana Supreme Court correctly held that it lacked subject-matter jurisdiction to consider Father's emergency motion. Mother and R.A.A. relocated to the Netherlands in August 2023. Six months later—in February 2024—R.A.A.'s home state shifted to the Netherlands. The Dutch courts—not the Montana courts—now had exclusive subject-matter jurisdiction to resolve custody disputes involving R.A.A. Father did not file his motion in Montana until September 2025, which was nineteen months too late.

Conclusion

If Father had filed his suit in Montana before February 2024, he could have shown that Montana was R.A.A.'s "home state" because the child had not yet resided in the Netherlands for six months. The suit was, however, not filed until September 2025.

If Father had filed suit in the Netherlands before August 2024, he could have argued that R.A.A. should be returned to the United States pursuant to the Hague Convention on the Civil Aspects of International Child Abduction because the child had not yet resided in the Netherlands for a year. The suit was, however, not filed until January 2025.

The takeaway of *Allen v. Allen* is the need for speed in international child custody cases. The timelines baked into the relevant laws and treaties mandate that the left-behind parent move quickly to assert their rights. If they are slow off the mark, they be forced to litigate in foreign courts under less favorable legal rules.