Moroccan Supreme Court Confirms Child Return Order to Switzerland under the HCCH 1980 Child Abduction Convention

I. Introduction

It is not uncommon for scholars examining the interplay between the HCCH 1980 Child Abduction Convention and the legal systems of countries based on or influenced by Islamic Sharia to raise concerns about the compatibility of the values underlying both systems. While such concerns are not entirely unfounded and merit careful consideration, actual court practice can present a very different reality.

Morocco's engagement with the Hague Conventions, notably the HCCH 1980 Child Abduction Convention and the HCCH 1996 Child Protection Convention, provides a particularly illustrative example. As previously reported on this blog (see here, here and here), Moroccan courts have thus far demonstrated a clear willingness to engage constructively with the HCCH instruments, effectively dispelling – at least to a significant extent – concerns about the existence of a so-called "Islamic exceptionalism" as an obstacle to resolving parental child abduction cases. The case presented here provides yet another compelling example of how Moroccan courts interpret and apply the HCCH 1980 Child Abduction Convention in a manner consistent with Morocco's international obligations. This is particularly noteworthy given the presence of elements often cited as indicative of "Islamic exceptionalism."

Although the Supreme Court's ruling was issued over a year ago (*Ruling No. 198 of 25 April 2023*), it has only recently been made available, bringing the total number of Hague Convention cases to ***eight*** (based on my own count and the available information. For an outline of the other Hague Convention cases, see here). Its legal significance and broader implications therefore warrant special attention.

II. The facts

The case concerned a petition for a return order to Switzerland for a child (a girl, *in casu*) who had been wrongfully retained in Morocco by her father. Although the text of the decision lacks sufficient detail to fully clarify the circumstances of the case, it can be inferred from the Court's summary of facts that the child was approximately 8 years old at the time Moroccan courts were seized and that the father is likely a Moroccan national. However, the ruling does not provide details regarding the nationality (or religion) of the left-behind mother nor does it specify the time frame within which the application was made.

As previously noted, the legal proceedings were initiated by the public prosecutor, who petitioned for the return of the child to her habitual residence in Switzerland under the HCCH 1980 Child Abduction Convention. The petition followed an official communication from the Ministry of Justice to the Office of the Public Prosecutor.

In response, the father contested the petition on two main grounds. First, he challenged the standing of the public prosecutor to initiate the proceedings, arguing that the petition should have been filed by the Ministry of Justice in its role of Central Authority under the Convention. Second, he invoked the child's refusal to return to Switzerland, attributing her reluctance to emotional distress and physical abuse allegedly suffered while living with her mother. The father further asserted that the child had now settled into her new environment in Morocco, where she was continuing her education.

The Court of First Instance accepted the petition and ordered the return of the child to her habitual residence, a decision that was upheld on appeal. The father subsequently appealed to the Supreme Court.

Before the Supreme Court, the father reiterated his earlier arguments, particularly challenging the public prosecutor's standing to initiate such proceedings. He further invoked Article 12 of the HCCH 1980 Child Abduction Convention, arguing that the child was now settled in her new familial and educational environment. In addition, he asserted that the child suffered from emotional distress and anxiety due to alleged domestic violence she experienced while living with her mother. The father referred to reports and certificates issued by Moroccan medical and psychological institutions which were submitted as

evidence of the child's state of mind and her strong resistance to being returned to Switzerland. The father also argued that the mother had not effectively exercised custody rights at the time the child came to live with him, and contended that the mother had consented to the child's relocation.

III. The Ruling

In its *Ruling No. 198 of 25 April 2023*, the Moroccan Supreme Court rejected all the father's arguments and upheld the order for the child's return, providing the following reasoning:

Regarding the first argument, the Supreme Court referred to Article 11 of the HCCH 1980 Child Abduction Convention, which mandates contracting states to take urgent measures to secure the return of abducted children. The Court also cited Law No. 33.17, which transferred the Minister of Justice's responsibilities to the Public Prosecutor at the Supreme Court, in its capacity as Head Public Prosecutor Office. This transfer enables the public prosecutor to replace the Ministry of Justice in overseeing judicial proceedings and exercising appeals related to the cases falling under their competence.

As for the second argument, the Supreme Court emphasized that determining whether the exception in Article 12 of the HCCH 1980 Child Abduction Convention applies is a matter for the trial court to investigate based on the evidence presented. Based on the lower courts' finding, the Supreme Court concluded that the father's retention of the child, who had been living with her mother in Switzerland, where the mother had been granted sole custody, constituted wrongful retention and a violation of the mother's custody rights as stipulated by Swiss law. The Court also noted that the medical reports submitted did not provide evidence of mistreatment.

Finally, the Supreme Court found that the mother was actively exercising custody of her daughter, as confirmed by the Swiss court decision granting the appellant only visitation rights. The Court also dismissed the father's claims, particularly those regarding the risk of physical or psychological harm to the child, finding them unconvincing and unsupported by sufficient evidence.

IV. Comments

The Supreme Court's ruling is remarkable in many respects. It directly challenges the notion of "Islamic exceptionalism" in matters of custody and parental authority under the HCCH 1980 Child Abduction Convention. Under traditional interpretation of Islamic law, which underpins the Moroccan Family Code of 2004 – known as the *Mudawwana* – (notably article 163 to 186 on custody), the father's right to exercise legal guardianship (*wilaya*) over the child is often seen as prevailing over the mother's right to custody (*hadanah*). For instance, a mother may lose her custody rights if she relocates to a distant place, especially a forign country. Similarly, the environment in which the child is to be raised is considered a critical factor, with particular emphasis on whether the child will grow up in an *Islamic environment*. This concern is even more pronounced when the custodial mother is not Muslim and resides in a non-Muslim country (Cf. M. Loukili, "L'ordre public en droit international privé marocain de la famille" in N. Bernard-Maugiron and B. Dupret, *Ordre public et droit musulman de la famille* (Bruylant, 2012) 137, 155-157).

What is striking in this case is that the Supreme Court did not consider these "traditional" concerns at all. Instead, it focused solely on the legal framework established under the Hague Convention. The Court simply observed that the mother had been granted sole custody of the child and concluded that the wrongful retention of the child in Morocco constituted a violation of those rights. This finding justified the return order under the HCCH 1980 Child Abduction Convention.

Another noteworthy aspect of the ruling, which can also be observed in other Hague Convention cases, is that the Moroccan Supreme Court does not adhere rigidly to its traditional approach in assessing the admissibility of return orders requests or the revocation of the mother's custody rights. Under Moroccan private international law, family law issues in general, including matters of parental authority and custody, are generally governed by Moroccan law whenever one of the parties is Moroccan (Article 2(3) of the 2004 Family Code). Traditionally, Moroccan courts have often concluded that public policy is violated when Moroccan law is not applied or a foreign judgment diverges from Moroccan domestic family law regulation (Loukili, *op. cit.*, 150).

In the present case, however, the Supreme Court not only accepted that sole

custody was granted to the mother under Swiss law, but also it did so although the application of Moroccan law would have led to a different outcome. Indeed, the Supreme Court has consistently ruled that the mother's refusal to return with the children to Morocco deprived the father of his right to supervise and control the children under his legal guardianship (*wilaya*), thus justifying the father's claim to have the mother's custody rights revoked (Supreme Court, *Ruling of 21 June 2011*; *Ruling of 23 August 2011*). The Supreme Court took the same stance in a case involving child abduction, where the request for the return order, based on the French-Moroccan bilateral Convention of 1981 (article 25), was rejected on the ground that the issuing of such an order would contradict with Moroccan law on custody (Supreme Court, *Ruling of 15 October 2003*).

The Supreme Court's approach in Hague Convention cases, including the one commented on here, marks a notable departure from this traditional stance. Not only has the Court repeatedly affirmed the primacy of international conventions over domestic law—though this issue was not explicitly raised before the Court *in casu*, it can be inferred from the absence of references to Moroccan law on custody—but it also approvingly referred to the law of the child's habitual residence rather than Moroccan law, despite a literal reading of Article 2(3) of the *Mudawwana* suggesting otherwise.

The Supreme Court stance in dealing with the Hague Child Abduction cases reflects a growing willingness on the part of the Court to align its reasoning with international obligations and to prioritize the principles enshrined in the Hague Conventions over more restrictive domestic norms. In this sense, this approach challenges the perception of "Islamic exceptionalism" and highlights a progressive interpretation of Moroccan law within the framework of international child abduction cases.

Brazil's New Law on Forum

Selection Clauses: Throwing the Baby out with the Bathwater?

This post was written by Luana Matoso, a PhD candidate and research associate at Max Planck Institute for Comparative and International Private Law in Hamburg, Germany.

Brazil has changed its law on international forum selection clauses. In June this year, a new statutory provision came into force, adding, unexpectedly, new requirements for their enforceability. In this attempt to redistribute *domestic* litigation, the Brazilian legislator may well have thrown out the baby, *international* forum selection clauses, with the bathwater.

The Recognition of International Forum Selection Clauses Under Brazilian Law

International forum selection clauses are among the most controverted topics in Brazilian Private International Law. Although the positive effect of such clauses has been generally accepted in Brazil since 1942, their negative effects have been in center of the legal debate ever since. Until very recently, Brazilian courts would not enforce a clause that selected a foreign forum, arguing that parties could not, by agreement, oust the jurisdiction of Brazilian courts established by law — an approach quite similar to that adopted by U.S. courts prior to the landmark U.S. Supreme Court decision in *Bremen v Zapata Off-Shore Co.* (1972).

Brazilian courts seemed to follow suit in 2015, when — as a result of serious efforts by legal scholars — a provision explicitly recognizing the derogatory effect of forum selection clauses was included in the latest reform of the Brazilian Code of Civil Procedure (CCP). According to Art. 25 CCP, Brazilian courts do not have jurisdiction over claims in which the parties have agreed to the exclusive jurisdiction of a foreign forum. The provision references Art. 63 §§1-4 CCP, which sets out the requirements for national forum selection clauses. Thus, national and international forum selection clauses are subject to similar requirements for validity, including that the agreement must be in writing and relate to a particular transaction.

The New Amendment of June 2024: A Setback for Party Autonomy

What seemed settled since 2015 is now back in the center of debate. On June 4, 2024, the Brazilian National Congress passed a law amending Art. 63 CCP and creating additional requirements for forum selection clauses. According to the new wording of Art. 63 §1 CCP, a forum selection clause is valid only if the chosen court is "connected with the domicile or residence of one of the parties or with the place of the obligation."

Essentially, this new law significantly limits the autonomy of the parties in selecting a forum of their choice. Before the amendment there were no restrictions on the forum to be selected; now Brazilian courts will only enforce clauses in which the chosen forum is related to the dispute. In practice, the choice of a "neutral" forum in a third State will not be enforceable in Brazilian courts.

International Forum Selection Clauses: The Wrong Target?

The application of the new requirements also to international clauses may have resulted from an oversight on the part of the legislator. The explanatory memorandum accompanying the draft bill indicates that the main objective of the reform was to address a problem of domestic, not international, forum shopping. The document specifically cites the current congestion of the courts of the Federal District, the federal unit in which Brazil's capital, Brasília, is located. It is known for its efficient courts, which have increasingly received disputes that have no connection to the court other than a forum selection clause. Unlike common law jurisdictions, Brazilian courts may not decline jurisdiction based on *forum non conveniens*. Rather, forum selection clauses, if valid, will bind the jurisdiction of the chosen court. Describing this practice as "abusive" and "contrary to the public interest," the legislator sought to address this (domestic) issue.

The memorandum makes no mention of international forum selection clauses. Nevertheless, it seems clear that the amendment also applies to international forum selection clauses. The explicit reference of Art. 25 CCP to Art. 63 §1 leaves little room for an argument to the contrary.

The circumstances of this apparent oversight have led to strong criticism. Scholars have argued that the legislative process lacked publicity and public participation, especially from legal experts. The process was indeed fast-paced. Less than 14 months elapsed between the introduction of the draft bill and its enactment. After less than 10 months in the Chamber of Deputies, the bill was approved in the Senate under an emergency procedure and entered into force immediately after its publication on June 4, 2024.

And Now? First Clues in Recent Case Law

The implications of the new amendment for courts and parties remain unclear. First, is the new amendment applicable only to forum selection agreements concluded after its entry into force, on June 4, 2024, or for court proceedings commenced after that date? Second, what is a sufficient connection of the chosen court to "the domicile or residence of one of the parties or with the place of the obligation" under Art 63 §1 CCP?

Three recent decisions provide a few clues. A district court in the county of Santos, São Paulo, addressed the temporal application of the rule in a decision of November 7, 2024, holding that the new amendment applies only to contracts concluded after June 4, 2024, since the selected forum and the enforceability of the clause have a significant impact on the parties' risk calculation when entering into the contract. Applying the law as of before the amendment, the court enforced a forum selection clause in a bill of lading that selected New York courts to hear the dispute, even though both parties to the contract were seated in Brazil.

On June 24, 2024, another decision, this time by a district court in the state of Ceará, enforced a jurisdiction clause in which the chosen forum had no direct connection with the dispute or the domicile of the parties. The dispute arose between a Brazilian seafood retailer and the Brazilian subsidiary of the global shipping company Maersk. Without even mentioning the new amendment, the court stayed proceedings on the basis of the forum selection clause contained in the bill of lading, which selected the courts of Hamburg, the German headquarters of Maersk's parent company, Hamburg Süd, as having jurisdiction over the dispute. This leaves open the question of whether, in the future, the choice of the seat of the parent company of one of the parties as the place of jurisdiction will constitute a sufficient connection as required by the new

amendment.

Another interesting decision was rendered on September 4, 2024, in the county of Guarulhos, also in the state of São Paulo, concerning a forum selection clause in a publishing contract between an author and a publisher, both domiciled in Brazil. The clause selected Lisbon, Portugal, as the forum for hearing the dispute. In enforcing the clause, the court stayed proceedings brought by the author in Brazil. Although the new amendment was not explicitly mentioned in the decision, the court's reasoning included the justification that the clause was enforceable since the contract provided that the title, which was the subject of the publishing contract, was also to be marketed in Portugal. This could be an indication that the place of performance of the contract establishes a sufficient connection with the "place of the obligation" pursuant to Art. 63 §1 CCP. Referring to Article 9 of the Law of Introduction to the Brazilian Civil Code, scholars argue that the place of conclusion of the contract may also satisfy this requirement.

Conclusion

Ultimately, the broader or narrower approach taken by the courts in interpreting the new requirements will determine the extent to which the amendment will restrict the parties' ability to choose where to litigate their disputes. Equally important for parties, as a factor of predictability, is the question of how consistent this interpretation will be among the various courts in Brazil. To date, I am not aware of any decision in which a Brazilian court has expressly refused to enforce a forum selection clause on the basis of the new wording of the law. How this will play out in practice remains to be seen.

This post is cross-posted at Transnational Litigation Blog.

Improving the settlement of

(international) commercial disputes in Germany

This post was written by Prof. Dr. Giesela Rühl, LL.M. (Berkeley), Humboldt University of Berlin, and is also available via the EAPIL blog.

As reported earlier on this blog, Germany has been discussing for years how the framework conditions for the settlement of (international) commercial disputes can be improved. Triggered by increasing competition from international commercial arbitration as well as the creation of international commercial courts in other countries (as well as Brexit) these discussions have recently yielded a first success: Shortly before the German government coalition collapsed on November 6, the federal legislature adopted the Law on the Strengthening of Germany as a Place to Settle (Commercial) Disputes (Justizstandort-Stärkungsgesetz of 7 October 2024)[1]. The Law will enter into force on 1 April 2025 and amend both the Courts Constitution Act (Gerichtsverfassungsgesetz – GVG) and the Code of Civil Procedure (Zivilprozessodnung – ZPO)[2] with the aim of improving the position of Germany's courts vis-à-vis recognized litigation and arbitration venues – notably London, Amsterdam, Paris and Singapore. Specifically, the new Law brings three innovations.

English as the language of proceedings

The first innovation relates to the language of court proceedings: To attract international disputes to German courts, the new Law allows the German federal states *(Bundesländer)*[3] to establish "commercial chambers" at the level of the regional courts *(Landgerichte)* that will offer to conduct proceedings in English from beginning to end if the parties so wish (cf. § 184a GVG). Before these chambers parties will, therefore, be allowed to file their briefs and all their statements in English, the oral hearings will be held in English and witnesses will be examined in English. In addition, commercial chambers will communicate with the parties in English and write all orders, decisions and the final judgment in English. Compared to the status quo, which limits the use of English to the oral hearing (cf. § 185(2) GVG) and the presentation of English-language documents (cf. § 142(3) ZPO) this will be a huge step forward.

The new Law, however, does not stop here. In addition to allowing the establishment of (full) English language commercial chambers at the regional court level it requires that federal states ensure that appeals against English-language decisions coming from commercial chambers will also be heard (completely) in English in second instance at the Higher Regional Courts *(Oberlandesgerichte)* (cf. § 184a(1) No. 1 GVG). The new Law also allows the Federal Supreme Court *(Bundesgerichtshof)* to conduct proceedings entirely in English (cf. § 184b(1) GVG). Unfortunately, however, the Federal Supreme Court is not mandated to hear cases in English (even if they started in English). Rather, it will be in the discretion of the Federal Supreme Court to decide on a case-by-case basis (and at the request of the parties) whether it will hold the proceedings in English – or switch to German (cf. § 184b GVG). The latter is, of course, unfortunate, as parties cannot be sure that a case that is filed in English (and heard in English at first and second instance) will also be heard in English by the Federal Supreme Court thus reducing incentives to commence proceedings in English in the first place. But be this as it may: it is to be welcomed that the German federal legislature, after long and heated debates, finally decided to open up the German civil justice system to English as the language of the proceedings.

Specialized "commercial courts" for high-volume commercial disputes

The second innovation that the new Law brings relates to the settlement of high-volume commercial cases (whether international or not). To prevent these cases from going to arbitration (or to get them back into the state court system) the new Law allows the German federal states to establish specialized senates at the Higher Regional Courts. Referred to as "commercial courts" these senates will be distinct from other senates in that they will be allowed to hear (certain) commercial cases in first instance if the parties so wish (cf. § 119b(1) GVG) thus deviating from the general rule that cases have to start either in the local courts (if the value in dispute is below € 5.000,00) or in the regional courts (if the value in dispute is € 5.000,00 or higher). In addition, commercial courts will conduct their proceedings in English (upon application of the parties) and in a more arbitration-style fashion. More specifically, they will hold a case management conference at the beginning of proceedings and prepare a verbatim record of the hearing upon application of the parties (cf. §§ 612, 613 ZPO). Commercial courts will, hence, be able to offer more specialized legal services as well as services that correspond to the needs and expectations of (international) commercial

parties.

It is unfortunate, however, that the German legislature was afraid that the commercial courts would be flooded with (less complex) cases – and, therefore, decided to limit their jurisdiction to disputes with a value of more than € 500.000,00 (cf. § 119b(1) GVG). As a consequence, only parties with a high-volume case will have access to the commercial courts. This is problematic for several reasons: First, it is unclear whether a reference to the value of the dispute is actually able to distinguish complex from less complex cases. Second, any fixed threshold will create unfairness at the margin, as disputes with a value of slightly less than € 500.00,00 will not be allowed to go to the commercial courts. Third, requiring a minimum value can lead to uncertainty because the value of a dispute may not always be clear *ex ante* when the contract is concluded. Fourth, a fixed threshold may create the impression of a two-tier justice system, in which there are "luxury" courts for the rich and "ordinary" courts for the poor. And, finally, there is a risk that the commercial courts will not receive enough cases to build up expertise and thus reputation. Against this background, it would have been better to follow the example of France, Singapore, and London and to open commercial courts for all commercial cases regardless of the amount in dispute. At the very least, the legislature should have set the limit much lower. The Netherlands Commercial Court, for example, can be used for any disputes with a value higher than € 25,000.00.

Better protection of trade secrets

The third innovation, finally, concerns the protection of trade secrets. However, unlike the other innovations the relevant provisions are not limited to certain chambers or senates (to be established by the federal states on the basis of the new Law), but apply to all civil courts and all civil proceedings (cf. § 273a ZPO). They allow the parties to apply for protection of information that qualifies as a trade secret within the meaning of the German Act on the Protection of Trade Secrets (Gesetz zum Schutz von Geschäftsgeheimnissen – GeschGehG). If the court grants the application, all information classified as a trade secret must be kept confidential during and after the proceedings (cf. §§ 16 Abs. 2, 18 GeschGehG). In addition, the court may restrict access to confidential information at the request of a party and exclude the public from the oral hearing (§ 19 GeschGehG). The third innovation, thus, account for the parties' legitimate interests in protecting their business secrets without unduly restricting the public

nature of civil proceedings, which is one of the fundamental pillars of German civil justice. At the same time, it borrows an important feature from arbitration. However, since the new rules are concerned with the protection of trade secrets only, they do not guarantee the confidentiality of the proceedings as such. As a result, the parties cannot request that the fact that there is a court case at all be kept secret.

Success depends on the federal states

Overall, there is no doubt that the new Law is to be welcomed. Despite the criticism that can and must be levelled against some provisions, it will improve the framework for the resolution of high-volume (international) commercial disputes in German courts. However, there are two caveats:

The first caveat has its root in the Law itself. As it places the burden to establish commercial chambers and commercial courts on the federal states, the extent to which it will be possible for civil court proceedings to be conducted entirely in English and the extent to which there will be specialized senates for high-volume commercial disputes will depend on whether the federal states will exercise their powers. In addition, the practical success of the Law will also depend on whether the federal states will make the necessary investments that will allow commercial chambers and commercial courts to strive. For example, they will need to make sure that commercial chambers and commercial courts are staffed with qualified judges who have the necessary professional and linguistic qualifications and ideally also practical experience to settle high-volume (international) commercial disputes. In addition, they will have to ensure that judges have sufficient time to deal with complex (national and international) cases. And, finally, federal states will have to ensure that sufficiently large and technically well-equipped hearing rooms are available for the kind of high-volume disputes that they seek to attract. Should federal states not be willing to make these kinds of investments commercial chambers and commercial courts will most likely be of limited use.

The second caveat concerns the likely success of the new Law with regards to *international* disputes. In fact, even if the federal states implement the new Law in a perfect manner, i.e. even if they establish a sufficient number of commercial chambers and commercial courts and even if they make the investments described above, it seems unlikely that German courts will become sought-after venues for the settlement of international commercial disputes. This is because

the German civil justice system has numerous disadvantages when compared with international commercial arbitration. In addition, the attractiveness of German courts suffers from the moderate reputation and poor accessibility of German substantive law. Both problems will not disappear with the implementation of the new Law.

Against this background, the new Law holds the greatest potential for *national* high-volume commercial disputes. However, it should not be forgotten that these kinds of disputes represent only a small fraction of the disputes that end up before German courts each year. In order to really strengthen Germany as a place to settle dispute, it would, therefore, be necessary to address the problems that these cases are facing. However, while the (now former) Federal Minister of Justice made promising proposals to this effect in recent months, the collapse of the German government coalition in early November makes is unlikely, that these proposals will be adopted any time soon. In the interest of the German civil justice system as a whole, it is, therefore, to be hoped that the proposals will be reintroduced after the general election in early 2025.

[1] Gesetz zur Stärkung des Justizstandortes Deutschland durch Einführung von Commercial Courts und der Gerichtssprache Englisch in die Zivilgerichtsbarkeit (Justizstandort-Stärkungsgesetz) vom 7. Oktober 2024, Bundesgesetzblatt (Federal Law Gazette) 2024 I Nr. 302.

[2] Note that both the translations of the GVG and the ZPO do not yet include the amendments introduced through the new Law discussed in this post.

[3] The German civil justice system divides responsibilities between the federal state *(Bund)* and the 16 federal states *(Bundesländer)*. While the federal state is responsible for adopting unified rules relating to the organization of courts as well as the law of civil procedure (Art. 74 No. 1 of the Basic Law), the federal states are responsible for administering (most) civil courts on a daily basis (Art. 30 of the Basic Law). It is, therefore, the federal states that organize and fund most civil courts, appoint judges, and manage the court infrastructure.

New Zealand Court of Appeal allows appeal against anti-enforcement injunction

Introduction

The New Zealand Court of Appeal has allowed an appeal against a permanent anti-suit and anti-enforcement injunction in relation to a default judgment from Kentucky, which the plaintiff alleged had been obtained by fraud: *Wikeley v Kea Investments Ltd* [2024] NZCA 609. The Court upheld the findings of fraud. It also did not rule out the possibility of an injunction being an appropriate remedy in the future. However, the Court concluded that an injunction could only be granted as a step of last resort, which required the plaintiff to pursue its right of appeal against the Kentucky judgment.

The background to the case is set out in a previous post on this blog (see also here). In summary, the case involved allegations of "a massive worldwide fraud" perpetrated by the defendants — a New Zealand company (Wikeley Family Trustee Ltd), an Australian resident with a long business history in New Zealand (Mr Kenneth Wikeley), and a New Zealand citizen (Mr Eric Watson) — against the plaintiff, Kea Investments Ltd (Kea), a British Virgin Islands company owned by a New Zealand businessman. Kea alleged that the US default judgment obtained by WFTL was based on fabricated claims intended to defraud Kea. Kea claimed tortious conspiracy and sought a world-wide anti-enforcement injunction, which was granted by the High Court, first on an interim and then on a permanent basis. Wikeley, the sole director and shareholder of WFTL, appealed to the Court of Appeal.

The Court of Appeal allowed the appeal against the grant of the injunction. At the same time, it upheld the High Court's declarations that the Kentucky default judgment was obtained by fraud and that it was not entitled to recognition or enforcement in New Zealand. It also upheld the High Court's damages award (for

legal costs incurred in overseas proceedings in defence of the tortious conspiracy).

The judgment

There are two points from the judgment that I want to focus on here: the Court's emphasis on comity, and the relevance of fraud as a basis for an anti-enforcement injunction.

Comity

An entire section of the judgment is dedicated to the concept of comity, which the Court relied on as a guiding principle. The Court said that it was necessary "to confront, head on, the appropriateness, in comity terms, of an order which … in substance, is addressed to United States courts and which could, at least in theory, provoke countermeasures, with the result that no legal system will be able to administer justice" (at [167]). Drawing on work by Professor Andrew Dickinson, the Court confirmed that comity was not simply "a matter of judicial collegiality" (at [164]). In the international system, comity was like "the mortar which cements together a brick house" (citing Judge Wilkey in *Laker Airways Ltd v Sabena Belgian World Airlines* 731 F 2d 909 (DC Cir 1984) at 937).

Anti-suit and anti-enforcement injunctions had the effect of interfering with comity, because they interfered with "the interests of a foreign legal system in administering justice within its own territory" (at [164]). Drawing again on Dickinson's work, the Court said that anti-suit/enforcement injunctions "push[ed] at the boundaries of … the global system of justice" (at [166]). The Court disagreed (at [189]) with the High Court's observation that the injunction "may even be seen as consistent with the requirements of comity", insofar as the injunction had the effect of restraining a New Zealand company from abusing the process of the Kentucky court to perpetuate a fraud. The United States courts were "unlikely to look for or need the protection of New Zealand courts" and were "well capable of identifying fraud and ensuring no reward flows from it" (at [189]).

Extreme caution was necessary, therefore, before exercising the power to grant an anti-suit/enforcement injunction (at [176]). Comity required "the court to

recognise that, in deciding questions of weight to be attached to different factors, different judges operating under different legal systems with different legal policies may legitimately arrive at different answers" (at [177]). Anti-enforcement injunctions were especially rare and were "characterised by particularly careful assessments of whether the relief sought is truly necessary and consistent with comity" (at [180]).

Because of these concerns, an anti-enforcement injunction should be "a measure of last resort" (referring again to Dickinson, at [185]). This meant that the Court in this case had to "at least await the outcome of the appeal process [in Kentucky] before considering whether to issue an anti-suit or anti-enforcement judgment" (at [186]).

Fraud as a distinct category?

In the anti-enforcement context, some scholars have treated fraud as a distinct category of case that may justify the grant of an injunction: see, most recently, Hannah L Buxbaum and Ralf Michaels "Anti-enforcement injunctions" [2024] 56 NYU Journal of International Law and Politics 101 at 110-111, citing *Ellerman Lines Ltd v Read* [1928] 2 KB 144 (CA) in support. The Queensland Supreme Court also relied on *Ellerman Lines* when granting relief in aid of the New Zealand interim orders (*Kea Investments Ltd v Wikeley (No 2)* [2023] QSC 215 at [178]–[188], with the Queensland Court of Appeal upholding the reasoning in *Wikeley v Kea Investments Ltd* [2024] QSC 201).

The Court of Appeal's reasoning casts doubt on the existence of fraud as a distinct category. In [176], the Court adopted Dickinson's "convenient collection" of the following four categories that may justify anti-suit relief (see fn 157): that "the foreign court has acted or is likely to act in excess of its jurisdiction under international law, in violation of the requirements of natural justice, otherwise in a manner manifestly incompatible with New Zealand's fundamental policies, or that its proceedings are likely significantly and irreversibly to interfere with the administration of justice in New Zealand".

On the facts of the present case, the Court thought that the category of natural justice was most relevant. The Court considered it "almost inevitable" that, had the New Zealand court been in the Kentucky court's position, it would have set aside the default judgment, on the basis that the proceeding had not been drawn

to Kea's attention and sufficiently substantial grounds of defence had been made out (at [182]). The Court said that, in these circumstances, "[a]t least if the judgment were final, with all appeal rights exhausted and against a New Zealand entity … a New Zealand court might well consider that, despite its respect for the United States courts, a sufficiently fundamental policy issue was engaged – *one ultimately based in principles of natural justice and fair hearing rights* – that an anti-suit or anti-enforcement order should issue" (at [183], emphasis added).

What is more, the Court distinguished the case from *Ellerman Lines Ltd v Read* [1928] 2 KB 144 (CA) on the basis "there was no contractual jurisdiction clause that the New Zealand Court was seeking to enforce" (at [187]). It expressed "caution" about the proposition that the pursuit of the Kentucky proceedings should be injuncted because the proceeding was fraudulent and therefore "inherently unconscionable", referring to criticism by Dickinson that the language of unconscionability is "a vestige of an earlier monotheistic society [which] no longer performs any useful role and obscures the real reasons for granting injunctions" (at [190]). A conclusion by the New Zealand court that the Kentucky proceeding was vexatious or oppressive had "the capacity to look patronising from the perspective of the United States – something which in comity terms should be avoided" (at [191]). The issue of fraud could be addressed by the United States court, "with all of the advanced legislative and common law apparatus available to it to do justice between the parties" (at [191]).

On the other hand, the Court clarified that it was not suggesting that "it would *never* be appropriate for a New Zealand court to issue a worldwide anti-enforcement order" (at [188], emphasis in original).

Comments

The Court's detailed engagement with comity is heartening for anyone who is concerned about the destabilising effects of anti-suit/enforcement injunctions on the international system. Yet the reasoning is also underpinned by tension.

First, the Court seemed to eschew fraud as a distinct basis for the award of an anti-enforcement injunction, while accepting the appropriateness of determining whether the foreign proceeding was fraudulent (and granting declaratory relief to that effect). If the Court is willing to entertain a claim that the pursuit of a foreign

proceeding forms part of a tortious conspiracy, why should this not provide a potential basis for an injunction (as opposed to, say, natural justice)?

This potential contradiction had flow-on effects for the scope of the Court's orders, because the Court refused to discharge the appointment of interim liquidators of WFTL. Interim liquidators had been appointed after attempts by the defendant to assign the benefit of the Kentucky default judgment from WFTL to a United States entity, to "insulate" WFTL from "any New Zealand judgment" (at [43]). The Court considered that the appointment of interim liquidators was "for valid domestic reasons by ensuring assets available to satisfy any New Zealand judgment remained under the control of New Zealand parties" and that it was "unaffected by discharge of the anti-suit and anti-enforcement injunctions" (at [196], [211](e)). The Court acknowledged that the interim liquidators could face pressure to enforce the Kentucky default judgment "in order to meet the New Zealand judgment debt and costs awards against WFTL – this despite the judgments of the High Court and this Court finding claims under the Coal Agreement to be fraudulent and made pursuant to conspiracy" (at [201]). The Court did not "at this stage express any view about how the principles of international comity might respond to that particular scenario" (at [201]). Why is it a "valid domestic reason" to protect the satisfaction of a New Zealand judgment for damages that were incurred in defending the foreign fraudulent proceeding, but it is not a "valid domestic reason" to prevent enforcement of a judgment that is the result of such a fraudulent proceeding?

Second, while the injunction had the potential to interfere with comity, it was also, arguably, a tool for dialogue. The Court of Appeal was clear that the injunction could not be understood as "an act of comity"; and it thought it was unlikely that the Kentucky court would want or would need the help of the New Zealand Court. At the same time, it would be strange if the Kentucky court did not take account of the finding of fraud, or the concerns about natural justice. In this way, the Court of Appeal's decision to treat the injunction as a last resort, and to require the plaintiff to pursue an appeal in Kentucky, may be seen as part of an unfolding dialogue between the courts that would not have happened – and would not have been possible – without the potential of anti-enforcement relief. At the very least, the decision will serve as a pointer to the Kentucky court that the default judgment has cross-border implications and gives rise to a risk of conflicting orders.

Third, the Court seemed to characterise the plaintiff's decision to bring proceedings in New Zealand as a strategic move, noting that "WFTL's New Zealand registration and its status as a trustee of a New Zealand trust provided a jurisdictional leg up with which to challenge enforcement [of the Kentucky default judgment]" (at [194]). This characterisation sits uncomfortably with the Court's acceptance that the Kentucky proceeding – including the defendants' choice of Kentucky as a forum – was itself based on fraudulent fabrications. It is one thing to conclude that the plaintiffs should have persevered in Kentucky by pursuing their appeal there, on the basis that a foreign court must be left to control its own proceedings. It is another to say that the plaintiff, by turning to the New Zealand court for help, was using WFTL's registration in New Zealand as a "jurisdictional leg up" (cf also the Court's discussion in [183] that there would be a potential case for an anti-enforcement injunction if the default judgment was in breach of a New Zealand entity's rights to natural justice – that is, if *the plaintiff* was a New Zealand entity). Where a New Zealand entity is used as a vehicle for fraud, the New Zealand court may have a legitimate interest – or even a responsibility – to stop the fraud, albeit that an injunction is a measure of last resort.

Fourth, the Court of Appeal distinguished *Ellerman Lines* on the basis that the latter case involved an English jurisdiction clause. This reasoning suggests that anti-suit/enforcement relief may be an appropriate response to foreign proceedings brought in breach of a New Zealand jurisdiction clause, but that it may not be an appropriate response to foreign fraudulent proceedings between strangers. Why is it worse to suffer a breach of a jurisdiction clause, than to be dragged into a random foreign court on the basis of a fraudulent claim (including a forged jurisdiction clause in favour of the foreign court)? The Court did not address this question. The Court also did not address – but noted, in a different part of the judgment – the question whether a breach of a jurisdiction clause should justify injunctive relief as a matter of course (see footnote 158). Clearly, the Court did not think that this question was relevant to its decision to distinguish *Ellerman Lines,* but a more detailed discussion would have been helpful, to ensure the coherent development of the court's power to grant anti-suit/enforcement injunctions.

Abu Dhabi Court of Cassation on Civil Family Law and Muslim Foreigners: Has the Tide Turned?

Written by Lena-Maria Möller,

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The recent introduction of a civil family law regime in the United Arab Emirates – the first of its kind in the region – has attracted considerable attention, both on this blog and beyond.[1] A key unresolved issue has been the law's applicability in Abu Dhabi, particularly regarding access for Muslim foreigners to the emirate's newly established Civil Family Court. Scholars and legal practitioners navigating this new framework have long observed a surprising discrepancy, if not an ideological tension, between the law's drafters and those interpreting it, especially at the higher court level. Central to this divergence has been whether Abu Dhabi's *Law on Civil Marriage and Its Effects* (Law No. 14/2021 of 7 November 2021, as subsequently amended) and its *Procedural Regulation* (Chairman Resolution No. 8/2022 of 1 February 2022) apply exclusively to non-Muslims or extend also to Muslim foreigners who are citizens of non-Muslim jurisdictions. A recent judgment by the Abu Dhabi Court of Cassation in late October affirmed jurisdiction over Muslim foreigners with dual French-Moroccan nationality, marking a potential shift in personal jurisdiction. This ruling may expand access to a legal framework devoid of religious underpinnings for many Muslim expatriates in the UAE.

The Legal Framework

The civil family law regime in the UAE comprises three main legislative components. With the exception of Abu Dhabi, which pioneered a separate non-religious legal framework in late 2021, the *Federal Civil Personal Status Code* (Law No. 41/2022 of 3 October 2022) governs matters of marriage, divorce, child custody, and inheritance exclusively for non-Muslim citizens and non-Muslim

foreigners. The law's scope is explicitly outlined in Article 1, which clearly differentiates based on religious affiliation rather than nationality.

The earlier local legislation in Abu Dhabi, Law No. 14/2021 of 7 November 2021, initially applied only to non-Muslim foreigners but was soon amended, by Law No. 15/2021 of 15 December 2021, to significantly broaden its scope. Most notably, the terms 'foreigner' and 'non-Muslim foreigner' were replaced by 'persons covered by the provisions of this law,' a concept further clarified in Article 5 of the Procedural Regulations. Under these provisions, the law applies to civil marriage, its effects, and all civil family matters for:

1. Non-Muslim UAE citizens, and
2. Foreign nationals from countries 'that do not primarily apply Islamic Sharia in personal status matters,' as determined by the Instruction Guide issued by the Chairman of the Abu Dhabi Judicial Department. For dual citizens, the nationality associated with their UAE residency prevails.

Additionally, the law also applies to marriages concluded in countries that do not primarily apply Islamic Sharia in personal status matters, as outlined in the Instruction Guide (which has yet to be issued), as well as to all marriages conducted under the provisions on civil marriage.

The latter two cases are particularly broad, potentially also covering Muslim citizens who married abroad, yet they are rarely cited by the courts. Judicial discussions tend to focus on paragraph 2 of Article 5, which addresses foreigners from specific non-Muslim jurisdictions. The situation is further complicated by the fact that Law No. 14/2021 also includes jurisdictional provisions and scope-of-application rules, which remain equally ambiguous.[2]

Article 1 of Law No. 14/2021 defines 'persons covered by the law' as 'the foreigner or non-Muslim citizen, whether male or female.' Unfortunately, the Arabic version of this definition is open to multiple interpretations. This ambiguity arises because the adjective 'non-Muslim,' placed after the word 'citizen' and set off by commas, could be read as referring either solely to citizens or to both foreigners and citizens. As a result, debates over the phrasing of this definition are a frequent element in pleadings before the Abu Dhabi Civil Family Court.

Moreover, in its amended form, Article 3 of Law No. 14/2021 stipulates that if a marriage has been concluded in accordance with this law, it shall apply with

respect to the effects of the marriage and its dissolution. A narrow interpretation of this clause would deny jurisdiction whenever the parties did not marry before the Abu Dhabi Civil Family Court, even if they are non-Muslim foreigners married in a civil ceremony elsewhere. However, it seems clear that the drafters did not intend to exclude this core target group from the law's jurisdiction. Similarly, it is difficult to imagine that jurisdiction would be automatically assumed in cases involving Arab Muslims – even GCC citizens – who married in a civil ceremony in Abu Dhabi, where the Civil Family Court currently allows civil marriages for all but Muslim citizens of the UAE.

The ambiguity of these clauses grants considerable discretion to the courts, and current case law on personal jurisdiction for Muslim foreigners does not yet indicate a consistent approach or prevailing interpretation. For this reason, the recent judgment by the Abu Dhabi Court of Cassation may indeed mark a turning point in the application of civil family law in Abu Dhabi.

Previous Case Law

To date, the most significant ruling by the Abu Dhabi Court of Cassation regarding personal jurisdiction over Muslim foreigners was issued in late April 2024. As discussed on this blog, the judgment denied a French-Lebanese husband and his estranged Mexican-Egyptian wife access to the Abu Dhabi Civil Family Court due to their shared Muslim faith. Initially, the Civil Family Court accepted jurisdiction and, at the husband's request, dissolved the couple's brief marriage, a decision that was upheld on appeal. However, the Court of Cassation overturned this ruling, determining that the Civil Family Court lacked jurisdiction based on the parties' religious affiliation.

This case also highlights the inconsistent, and at times contradictory, approach of the Abu Dhabi Court of Appeal on this issue. The same panel of judges has sometimes upheld jurisdiction in cases involving foreign Muslims, while in other instances, it has denied the application of Law No. 14/2021. The available case law suggests that factors such as whether the individuals are Muslim by birth or by conversion, hold dual citizenship – including that of an Arab country – or have disputed religious affiliations do not consistently influence the court's jurisdictional decisions.

The Abu Dhabi Civil Family Court generally takes the broadest view of jurisdictional rules, generally affirming that Muslim foreigners may access the court. This stance persists despite frequent jurisdictional challenges by opposing parties in cases involving Muslims, who typically argue that the Muslim Personal Status Court is the proper forum for such disputes. Recently, such arguments have increasingly referenced the Federal Civil Personal Status Code and its exclusive jurisdiction over non-Muslims, a claim likely bolstered by the Court of Cassation's April 2024 ruling, which disregarded the widely accepted view that the Federal Civil Personal Status Code does not apply in Abu Dhabi.

The Abu Dhabi Court of Cassation Judgment of 30 October 2024

The case decided by the Abu Dhabi Court of Cassation in late October involved a French-Moroccan Muslim couple who had married in a civil ceremony in France. Their marriage was dissolved by the Abu Dhabi Civil Family Court in June 2023 at the husband's request. The wife contested this ruling, arguing that the court lacked both territorial jurisdiction – since their last shared residence was in Dubai – and personal jurisdiction, given their shared Muslim faith. She further contended that ongoing proceedings before the Dubai Personal Status Court, along with a pending divorce case in France, should have precluded the Abu Dhabi Civil Family Court from issuing a ruling. The Abu Dhabi Court of Appeal upheld the divorce decision, leading her to appeal to the emirate's highest court.

From a personal jurisdiction perspective, the Court of Cassation's judgment is notable for its textbook-like analysis of what constitutes the effective citizenship of dual nationals. Unlike previous cases before both the Court of Cassation and the Court of Appeal, which largely overlooked this aspect of Article 5(2) of Law No. 14/2021, this ruling explicitly concludes that the parties' French citizenship takes precedence, as it is the nationality tied to their residency in the UAE. The judgment also addresses the fact that the parties married in a civil ceremony in France, invoking Article 5(3) of Law No. 14/2021. The court explains that, since France does not 'primarily apply Islamic Sharia in personal status matters,' the conditions of Article 5(3) are also met.

By confirming personal jurisdiction over the parties based on both Article 5(2) and Article 5(3) of Law No. 14/2021, the judgment marks a turning point in two

key respects. First, it establishes the requirement to determine the effective nationality of dual citizens, affirming that no nationality, including that of an Arab-Muslim country, takes precedence unless it is linked to UAE residency. Second, by considering the type and location of the marriage, the court asserts that, from the moment a marriage is concluded, couples effectively select a legal framework – religious or civil/secular – that will govern the marriage's effects and potential dissolution, and that this choice must be honored in any subsequent legal proceedings. Although this perspective may be open to challenge, it provides greater clarity and legal certainty for foreigners of all faiths residing in the UAE.

Outlook

For the sake of legal certainty, it is to be hoped that the Abu Dhabi Court of Cassation will maintain its newly established position. The latest interpretation appears the most plausible, particularly in light of Article 5(2) of the Procedural Regulations. Nevertheless, the current provisions on jurisdiction still leave room for ambiguity regarding the law's exact scope of application, warranting clarification through reform, given the contradictory case law to date.

First, Article 5 should be revised, including paragraph (3), to specify the court's jurisdiction over anyone who has entered into a civil marriage. For instance, a rule is needed for cases where a couple has married in both a religious and a civil ceremony. Additionally, the Chairman's Instruction Guide, or at least a clear list of Muslim jurisdictions whose citizens are excluded from the law's scope, is urgently needed. It is essential to clarify whether the provision applies equally to Arab Muslims or GCC nationals without dual citizenship who have concluded a civil marriage in a non-Muslim jurisdiction. Second, refining the Arabic versions of Law No. 14/2021 and the Procedural Regulations is crucial to avoid multiple interpretations, such as whether the law applies to 'non-Muslim foreigners and citizens' versus 'foreigners and non-Muslim citizens.' Finally, with recent legislative changes allowing foreign, non-Arabic-speaking lawyers to appear before the Abu Dhabi Civil Family Court, consistent and official English translations of all relevant statutes are absolutely necessary. Current translations available through various official channels are fragmented and occasionally ambiguous.

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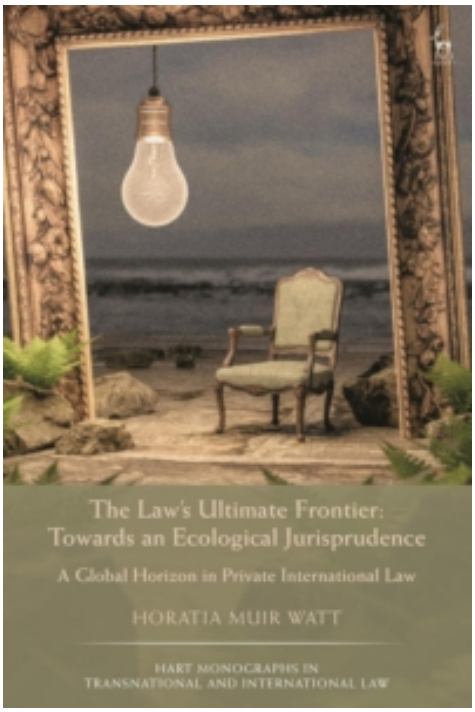
[1] See on this blog, Béligh Elbalti, Abu Dhabi Supreme Court on the Applicability of Law on Civil Marriage to Foreign Muslims, idem, The Abu Dhabi Civil Family Court on the Law on Civil Marriage – Applicability to Foreign Muslims and the Complex Issue of International Jurisdiction, and Lena-Maria Möller, Abu Dhabi Introduces Personal Status for non-Muslim Foreigners, Shakes up Domestic and International Family Law. See also, idem, One Year of Civil Family Law in the United Arab Emirates: A Preliminary Assessment, 38 Arab Law Quarterly (2024), 219-234.

[2] It should be noted here that with the introduction of Law No. 14/2021, a dedicated Civil Family Court was established in Abu Dhabi. Family matters falling within the scope of Law No. 14/2021 are exclusively adjudicated in this court, which applies only the civil family law statutes and no other domestic or foreign legislation. Consequently, questions of the court's jurisdiction and the law's scope of application are closely intertwined, if not mutually dependent.

Book review: H. Muir Watt's The Law's Ultimate Frontier: Towards an Ecological Jurisprudence – A Global Horizon in Private International Law (Hart)

(*Written by E. Farnoux and S. Fulli-Lemaire, Professors at the University of Strasbourg)*



Horatia Muir Watt (Sciences Po) hardly needs an introduction to the readers of this blog. The book published last year and reviewed here constitutes the latest installment in her critical epistemological exploration of the field of private international law. More specifically, the book builds upon previously published fundamental reflections on the methods of private international law already initiated (or developed) in her previous general course (in French) at the Hague Academy of International Law (*Discours sur les méthodes du droit international privé (des formes juridiques de l'inter-altérité)*), as well as on the contemporary relevance of private international law ("Private International Law Beyond the Schism"). Numerous other works, naturally, also come to mind when reading this book (see among many others, ed. with L. Bíziková, A. Brandão de Oliveira, D. Fernandez Arroyo*, Global Private International Law : adjudication without frontiers*; *Private International Law and Public law*).

The publication of a book on the field that this blog deals with would be enough to justify it being flagged for the readers' attention. We feel, however, that its relevance to our academic pursuits warrants more than a mere heads-up and, while it would be unreasonable (and risky) to try to summarize the content of this engrossing and complex book in a blog friendly format, we would like to make a few remarks intended to encourage the readers of this blog to engage with this innovative and surprising work.

The book's program

It should be made clear from the outset that, maybe contrary to what the title "Towards an Ecological Jurisprudence" may suggest *prima facie*, the book does not engage primarily with the emergence and evolution of positive environmental law, even in a private international law perspective (although the double-entendre may be deliberate, because, as we will see, the book is animated by a deeply-rooted, and understandable, environmental angst). First, because the book is not

particularly concerned with *positive law* (what is also referred to as *lex* or "Law I" in the book) as such but, in a more theoretical thrust, with the idea of the law (our "normative universe", *nomos*, also called *ius* or "Law II"). Second, because the word "ecological" is used here in a much deeper and broader sense, that immediately encapsulates the ambition of the book: it refers to the ability to make room and accept "alterity" in all its shapes: humanity, foreign cultures and other life (and non-life) forms or "ecosphere", i.e. all the ecosystems and their interactions. It conveys a sense of connection of the self with others and its surroundings, philosophically as well as environmentally. Consequently, the "Ecological Jurisprudence" that the author wishes to help bring about is not a particular development in environmental law but a much more thorough modification of our understanding of law and legality.

The book rests on the premise that European or Western modernity (in all its aspects, philosophical, social, and scientific) has created (or aggravated) a series of severances between humankind and the surrounding world (as well as, it seems, within humankind). Law (as all things cultural) has not been immune from this divorce (quite the contrary), and modern legality has shaped our relationship to alterity, both human and natural. In short, Law has become an exercise in alienation (alienation from the self to the other, from the self to nature or Gaia, the earth itself). The book constitutes an attempt to propose (more precisely, uncover) an alternative conception of legality, one that connects (with the other(s): human beings among themselves as well as with their environment) rather than alienates (an "*Ecological* Jurisprudence").

The phrase "The Ultimate Frontier" is also a (multiple) play on words. To the readers of this blog, versed as they are in conflict of laws, it will evoke the outer limit of a given legal system, the line that marks where it ends (where its laws cease to be applicable) but also where it comes into contact with other legal systems. In a sense, this is the traditional object of private international law (which, as the author point out performs a type of "boundary labour") but, again, the ambition of the book is much greater: the "Ultimate Frontier" at stake is that of modern legality, where it comes into contact with, and maybe gives way to, non-modern types of normativity. The book thus presents itself as a quest for the (re)discovery of such an alternative normativity. There seems to be, however, a darker meaning of the "Ultimate Frontier", which refers to the end of human time or a "horizon of extinction", alluding, among other jeopardies, to climate and

environmental distress and giving a sense of urgency to the book. The question at its core is not only that of "law's own survival" but also of finding a way for humans to (co-)exist on the planet in a less catastrophic way. The author's strongly held belief is that law has a role to play in this endeavor, provided that a fundamental reconfiguration is allowed to take place. The general idea is that while alterity in the legal world usually takes the form of a foreign norm or an alien cultural practice, the attitude of a legal tradition towards alterity is usually coherent irrespective of whether that alterity comes in legal form or in the form of nature or of other life forms. At the risk of oversimplification, it could be said that while, looking back, law is part of the problem, it could also become, looking forward, part of the solution.

The subtitle of the book, "A Global Horizon in Private International Law", emphasizes that its objective is to outline this reconfiguration in the particular field of private international law, or rather by building on some of the less obvious insights offered by private international law. This inquiry takes place at the "Global Turn", that is at a moment when Western legality has spread far and wide while at the same time losing the stato-centric quality that underpinned it. Why private international law? The reason is twofold. First of all, private international law, like comparative law or public international law, is well-suited to dealing with alterity, in the legal form. By contrast with these other areas of the law, however, the majoritarian (Savignian) approach to private international law is very much inscribed at the heart of modern legal thought. Methodologically, its engagement with alterity is asymmetrical: the forum (the self) and the foreign norm (the other) are not placed on an equal footing; the forum, while purporting to make room for foreign norms, actually very carefully selects and reshapes those of them that can be accepted. In terms of epistemology, the fundamental involvement of private international law (its complicity?) with byproducts of Modernity, notably capitalism (or neoliberalism) and coloniality, reveals this modern bias. Here, readers familiar with H. Muir Watt's previous works (see for instance "Private International Law Beyond the Schism") will recognize a familiar theme, that of private international law's (voluntary ?) obliviousness to the many challenges facing humanity, and consequently to its own role in enabling some of them (PIL disembedded). This obliviousness is so deeply rooted that it has had the incidental advantage of sheltering the discipline from the critical contemporary approaches (decoloniality for instance) that have flourished in public international law and comparative law, stigmatizing the biases at play. In this perspective,

private international law is very much (the best?) representative of the broader category of private law, self-perceived and described as too technical or formal to be political, even as it plays a crucial role in the fundamental separation within the *Oiko* (the separation of the economy from the ecology).

The quest for an Ecological Jurisprudence hence implies an awareness to both the challenges of the era, as well as un understanding of the role of private international law in paving the road to today's (dire) state of affairs. Such an awareness makes it possible to take a hard, critical look at the methods and shortcomings of contemporary private international law. This is not, however, the only or even the main reason why the book is grounded in private international law.

That second reason for this choice lies in the dual nature (or dual scenography) of private international law, which the book seeks to reveal. Behind or underneath the technical, "modern" and capitalism-enabling private international law, a "minor jurisprudence or shadow avatar" can be observed, that is committed to a truly pluralist approach, making room for alterity. Interestingly, according to the author, such a shadow account can be found in the (pre-modern) statutist and neo-statutist theories, supposedly made redundant by the Savignian, multilateralist approach. It is by highlighting the flickering, intermittent yet enduring influence of this secondary view of the field that Horatia Muir Watt sketches the outline of a private international law truly pluralist and open to alterity, a private international law that belongs to the world and from which, perhaps, our understanding of *ius* stands to profit.

The book's outline

The book is structured in three main parts. The first is dedicated to an exploration of private international law's methodological and epistemological duality. The two competing schemes (the classic, dominant, Savignian multilateralist approach and the minority statutist approach) each provide a set of tools (methods) by which law organizes its own interaction with "exogenous forms of legality". To quote a particularly telling sentence : "this duality [between the two modes of reasoning in respect to foreign law] can be correlated to two underlying models of legality: a modern, or monist, scheme, embodied during the nineteenth century, that seeks closure, order, decisiveness, objectivity and predictability from a purportedly

neutral (Archimedean) standpoint; and a further pluralist version, geared to diplomatic negotiation, reflexivity, the perpetual oscillation between poles and the refusal of separation between the observer and the observed, or between application and interpretation".

This part starts with a refreshing preliminary section presenting the core concepts of the discipline, ostensibly for the benefit of non-specialists but specialists will find the presentation to be quite creative. Horatia Muir Watt then offers, in a first chapter, a "story of origin" in which she revisits the traditional historical account of the advent of multilateralism, insisting on tensions and inconsistencies. Indeed, since the reception of foreign law generally comes at the price of a denial of difference, the suppressed otherness makes itself felt down the line, causing all kinds of trouble with which multilateralism deals in a piecemeal way.

The second chapter is dedicated to picking up those traces of alternative pluralist methodology, where alterity takes place *on the terms of the other*, thus forming a "shadow account". By the end of the first part, private international law has served its purpose as a revealer of two different ways of dealing with alterity, one of which, in the eyes of the author, may be "harnessed to the ecological needs of our planet". This part is particularly interesting to readers with past experience of private international law, as it provides an innovative and critical approach to the field, one that often challenges their assumptions and may renew the way they think about it and, maybe, teach it.

The second part may prove to be a more challenging read for (private international) lawyers because it presents a perspective on the law seen here mainly through the works and thoughts of non-lawyers. The idea here is to compare further (and more systematically) the two alternative conceptions of legality, with a focus on form and substance, or "aesthetics" and "ontology". The legality produced by Modernity, called "jurisdictional jurisprudence", systematically reduces alterity to a set of spare parts or raw material recognizable and useable. The form, the aesthetics, of Modern legality is a "rage for order", an all-encompassing love for division, classification, hierarchization and structuration, which singularly for (private) international law has taken the form of a particular insistence on the geographical division of space, and on the drawing of frontiers. To quote again a particularly telling sentence, "such a particular, obsessional form of legal ordering – in the name of science, nature or

reason – reinforced the severance of humanity from its surrounding". That is the ontology of Modern law: anthropocentric, "devastating life in its path and devouring the very resources it needs to survive". Fortunately, this majoritarian destructive force is haunted by its shadow opposite, the "minor jurisprudence", "made of (ontological) hybridity or interstitiality and (aesthetic) entwinement and oscillation". This form of legality is willing and able to take up the "labour of connection" that is necessary to an ecological jurisprudence. Here, the analysis relies heavily on Bruno Latour's work on the "passage of law" where law, by virtue of its operation, produces a connecting experience in a pluralist environment. Each time, conflict of laws acts as a revealer ("the heuristic") to support the argument, following the overall program of the book. Each type of legality accounts for some (often contradictory) features or element of our paradoxical discipline.

Conflicts specialists may finish this part of book with some ruffled feathers: the indictment of the multilateralist method they practice and indeed sometimes advocate for is quite relentless, and the relief provided by the idea that their shadow statutism may eventually redeem them might not always feel entirely sufficient. However, they (at least the undersigned) will also be grateful to have been initiated to some fascinating anthropological insights (including Philippe Descola's work), and generally for the benefits that such outside perspective inevitably provides.

In a somewhat more classical fashion, Part III explores the political-economic and ethical dimensions of the conflict of laws. With regards to economy, the contribution of private international law to what the author calls the neoliberal world order is not a surprise. Instrumental in this is the idea of individual autonomy, which provides a foundation for a market rationality seen as both unavoidable and inescapable. On the ethical plane, the book explores the possibility for conflict of laws methods to express radical hospitality in legal form. Taking seriously the teachings of phenomenology, it suggests transforming the separation between self and other into an understanding of the other as part of ourselves.

The last chapter, titled "An Ethic of Responsiveness: The Demands of Interalterity" will be particularly interesting for conflicts lawyers. It is not unusual for us, particularly when we teach the subject, to insist, often with some sense of pride, that private international law is a place of openness to otherness. The first

two parts of the book have made quite plain that there are limits, at the very least, to the extent of that openness, but also maybe how hollow this claim may become if all we do is insert some element of a foreign legal system into our own. This last chapter explores what it actually means to take alterity seriously. Some pages, again, may be unsettling to read because making room for the Other is a radical experience for the Self, one in which the difference between the two disappears. In the course of the chapter, Horatia Muir Watt distinguishes value pluralism, an equivalent to political liberalism where a rights-based approach (privacy, freedom of expression) provides some space for diversity within a unitary form and source of legality, from a proper legal pluralism that accepts multiple legal norms which coexist on an equal footing. In conflicts terms, value pluralism coincides with multilateralism (the forum controls the reception of foreign law) while legal pluralism requires changing the location of legal authority (something the alternative method does willingly).

Highlights

The book's general orientation (its driving force perhaps) owes a lot to recent or contemporary developments in human sciences outside of the law, notably in sociology, anthropology and history of sciences. The influence of the late Bruno Latour, *inclassable* philosopher, anthropologist, sociologist and science epistemologist runs particularly strong in the book, as well as that of philosophers Emmanuel Levinas and Jacques Derrida, or anthropologist Levi-Strauss. More generally the references, within or without the law, are innumerable and very diverse. In this sense, the book stands out as a rare example of a truly transdisciplinary attempt at relocating (private international) law within the human sciences (and their contemporary debates and concerns), as well as an equally important effort to force the discipline to face up to the pressing challenges of our times (climate change, collapse in biodiversity, extreme inequalities, crises of late capitalism. As a result, the depth and expressiveness of the book (but also, it should be acknowledged, its density) are somewhat unusual for an academic work in the otherwise often technical field of private international law. It is also a testament to its author's commitment to openness to alterity (here in scientific fields and concepts). Also very striking is the avowed freedom of discourse that the author grants herself, not only in the interdisciplinary approach (which the author describes as *bricolage*, to make

apparent the choices and selection that she has had to make) but also, more generally, in the construction of the discourse itself which sometimes verges on free association, giving the book a palimpsestic quality, not unsuited for its stated purpose: the forecasting of an ecological jurisprudence.

The regular readers of Conflict of Laws.net may not have been Horatia Muir Watt's target audience, or at least her primary target audience, when writing this book. In itself, this willingness to engage with readers beyond the admittedly small circle of private international lawyers should be applauded, because few among them/us have managed, or even attempted, to offer (useable) insights to the legal community at large. This, however, should absolutely not be taken to mean that private international lawyers will gain nothing from *The Law's Ultimate Frontier*; quite the opposite, in fact. This book challenges one's understanding of private international law, and is an invitation to rethink the purpose of our involvement in its practice or scholarship. Many a time, the critique of a foundational myth – internationality, extraterritoriality, party autonomy, even tolerance… – or a novel way of (re)framing well-known doctrinal debates or cases, hallowed or recent – *Caraslanis*, *Chevron*, *Vedanta*… – produces a jolt, a "I did find it strange when first reading about it, but I could not quite put my finger on it" moment of illumination. This is no small feat.

Transforming legal borders: international judicial cooperation and technology in private international law – Part II

*Written by Yasmín Aguada*** [1]– *Laura Martina Jeifetz* ***[2]. Part I is available here

Abstract: Part II aims to delve deeper into the aspects addressed in the

previously published Part I. International Judicial Cooperation (IJC) and advanced technologies redefine Private International Law (PIL) in a globalized world. The convergences between legal collaboration among countries and technological innovations have revolutionized how cross-border legal issues are approached and resolved. These tools streamline international legal processes, overcoming old obstacles and generating new challenges. This paper explores how this intersection reshapes the global legal landscape, analyzing its advantages, challenges, and prospects.

Keywords: private international law, international judicial cooperation, new technologies, videoconferencing, direct judicial communications, Smart contracts, and Blockchain.

II.III. Videoconferences and virtual hearings

Videoconferencing and video-links are familiar today after the widespread use they acquired during the COVID-19 pandemic. These resources perform various functions in judicial processes, ranging from facilitating communications with the parties involved, experts and witnesses, to holding hearings and training activities. These are just examples that illustrate the wide range of uses they offer.[3]

Despite its long presence both nationally and internationally, videoconferencing has seen a notable increase in its application, particularly in the context of criminal cases, as can be seen in inmates' statements.[4] However, its growing expansion into areas such as international abduction cases and civil and commercial matters is also evident.[5]

Regarding the concept, Tirado Estrada states that videoconferencing constitutes *"an interactive communication system that simultaneously transmits and "in real time" the image, sound and data at a distance (in point-to-point connection), allowing relationships and interaction, visually, auditorily and verbally, to a group of people located in two or more different places as if the meeting and dialogue were held in the same place."* [6] It allows communication between people in different places and simultaneously through equipment reproducing images and sound.

Among the advantages that should be highlighted is its notable contribution to the agility in the processing of legal processes, which affects the quality and effectiveness of judicial procedures. These technologies enable a direct link without intermediaries between those involved in the judicial process, the administration of justice, and the relevant authorities.

Likewise, it is pertinent to point out the significant reduction in costs associated with transportation to the judicial headquarters while facilitating the recording and, therefore, the exhaustive record of the events in the hearings. Furthermore, it must be emphasized that videoconferencing ensures security conditions by applying robust encryption protocols.

Ultimately, videoconferences guarantee the observance of essential principles within the framework of due process, such as the publicity of the acts, the practical possibility of contradiction of the parties involved, and the immediacy in the perception of evidence.[7]

II.III.I. Regulatory instruments regarding the use of videoconferencing

In April 2020, The Hague Conference on Private International Law (HCCH) published a document within the March 18, 1970 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters[8]. The publication of this work, called *Guide to Good Practice on the Use of Video-Link under the Evidence Convention*, was drafted by the Permanent Bureau, with a Group of Experts contributing their insights and comments. Although the project started in 2015, its publication occurred during the pandemic. This soft law instrument provides a series of guidelines regarding platforms intended to enable the simultaneous interaction of two or more people through bidirectional audio and video transmission[9].

It is worth mentioning the Ibero-American Convention on the Use of Videoconferencing in International Cooperation between Justice Systems (Ibero-American Convention) and its Additional Protocol[10], signed in 2010. Both instances were approved by law 27. 162, dated August 3, 2015.

This Ibero-American Convention conceives videoconferencing as a resource that enhances and expedites cooperation between the competent authorities of the

signatory States. The treaty's scope covers the civil, commercial, and criminal matters. However, it is possible to extend its application to other fields in which the parties involved expressly agree (article 1).

The Convention recognizes the relevance of new technologies as fundamental tools for achieving swift, efficient, and effective justice. The primary objective is to promote the use of videoconferencing among the competent authorities of the States Parties, considering this medium as a concrete mechanism to strengthen and expedite cooperation in various areas of law, including civil, commercial, and criminal matters, as well as any other agreed upon by the parties. The Convention defines videoconferencing as an *"interactive communication system that allows the simultaneous and real-time transmission of image, sound, and data over a distance, with the aim of taking statements from one or more persons located in a place different from that of the competent authority, within the framework of a judicial process, and under the terms of the applicable law of the involved States."* (art. 2). This definition underscores the importance of immediacy and direct interaction, critical aspects ensuring the validity and effectiveness of the statements obtained through this medium.

Among the most relevant provisions of the Convention is the regulation of hearings via videoconference. The Convention establishes that if the competent authority of a State Party needs to examine a person within the framework of a judicial process, whether as a party, witness, or expert, or during preliminary investigative proceedings, and this person is in another State, their statement can be requested via videoconference, provided that this tool is deemed appropriate for the case. Additionally, the Convention details the requirements that must be met for the request to use videoconferencing and the rules governing its conduct, thus ensuring a standardized and efficient procedure.

The Additional Protocol to the Convention adds significant value by regulating practical aspects that enhance the efficiency of the judicial process. In particular, it addresses issues related to videoconferencing costs, establishing clear criteria on who should bear the expenses. It also regulates the linguistic regime, determining the language or languages used during the videoconferences, which is crucial to ensuring all parties' understanding and effective participation. Moreover, the Protocol sets precise rules for transmitting videoconference requests, simplifying and streamlining the procedure, which contributes to incredible speed and effectiveness in international judicial cooperation.

The ASADIP Principles on Transnational Access to Justice (TRANSJUS), approved on November 12, 2016, are again relevant. In article 4.6, using video conferences or any other suitable means to hold joint hearings is included[11]. Next, as already mentioned, it proposes that legal operators favour the use of new technologies, such as telephone and video conferencing, among other available means, as long as the security of communications is guaranteed.[12]

Within the scope of cooperation in civil matters, it is relevant to point out the Convention in force in Argentina since 7-VII-1987, which addresses the Obtaining of Evidence Abroad in Civil or Commercial Matters[13]. Regarding the integration of video conferences in this context, we underscore that in July 2024, a Special Commission was held to review the implementation of various Conventions, including the taking of evidence. During these deliberations, it was stressed that video links are in line with the provisions of the 1970 Convention.

The role of videoconferencing as an increasingly relevant means for taking evidence under Chapter I of the Convention was discussed. However, a marked division of opinion was identified among the Contracting States regarding the possibility of using videoconferencing to directly take evidence, highlighting a significant challenge for the Convention. Another issue addressed was the update of the Guide to Good Practices on the Use of Videoconferencing, published in 2020, which has been largely incorporated into the Evidence Handbook. This reflects the growing importance of videoconferencing in international proceedings and the recognition that new technologies must be integrated into conventional practices.

Furthermore, regarding compatibility with the modern technological environment, the Commission noted that, although the 1970 Convention continues to function well in a paper-based environment, it faces challenges adapting to technological developments, such as videoconferencing. This issue raises doubts about the Convention's ability to remain relevant in the future without greater acceptance of the "functional equivalence" approach by the Contracting States. Finally, a proposal was discussed to develop an international system to facilitate the electronic transmission of requests or create a decentralized system of platforms for such transmission. This proposal aims to improve the efficiency and modernize obtaining international evidence[14]. These

discussions underscore the importance of updating and adapting the 1970 Convention to new technological realities to ensure its effectiveness and relevance.

Moreover, it was established that Article 17[15] of the said Convention does not constitute an obstacle for a judicial officer of the court requesting a party located in a State Party to conduct virtual interrogations of a person in another Contracting State. In this sense, the use of technologies such as videoconferencing is adequately adapted to the principles and provisions of the Convention mentioned above, facilitating international cooperation in judicial matters.

Article 17 of the 1970 Hague Convention regulates the possibility of a duly appointed commissioner obtaining evidence in the territory of a contracting State about a judicial proceeding initiated in another contracting State. This article establishes a mechanism for obtaining evidence that does not involve coercion and is subject to two essential requirements: authorization by a competent authority and compliance with established conditions. Additionally, the article allows for a contracting State to declare that obtaining evidence under this article can be carried out without prior authorization.

This article is particularly relevant for international judicial cooperation in the region, as it facilitates evidence collection abroad without resorting to coercive mechanisms. However, countries like Argentina have objected to the application of Article 17. The reasons are related to the protection of national sovereignty, as the appointment of foreign commissioners to act in a State's territory to obtain evidence may be seen as an intrusion into that State's sovereignty. Some countries in the region consider that allowing commissioners appointed by foreign courts to operate could compromise their jurisdictional autonomy.

On the other hand, concerning legal security and process control, the States that have objected to Article 17 value maintaining rigorous control over the procedures for obtaining evidence within their territory. Authorizing the actions of foreign commissioners without strict supervision could raise concerns about legal security and fairness in the process. Finally, differences between the legal systems of the countries in the region and those from which the appointed commissioners come could create difficulties in the uniform application of the article.

In summary, while Article 17 of the 1970 Hague Convention offers a valuable mechanism for obtaining evidence abroad, its implementation has generated tensions in the region due to concerns about sovereignty, process control, and differences in legal systems. These objections reflect the need to balance international cooperation and respect for each state's jurisdictional autonomy.

The regulation in Argentina

In Argentina, the Order of the Supreme Court of Justice of the Nation (CSJN) 20/2013 is relevant. It establishes a set of Practical Guidelines for implementing video conferences in cases in process before the courts, oral tribunals, and appeals chambers, both national and federal, belonging to the Judicial Branch of the Nation.

This Order contemplates the possibility of resorting to videoconferencing when the accused, witnesses, or experts are outside the jurisdiction of the competent court. Consequently, it is essential to have adequate technical resources and a secure connection, which will be submitted to the evaluation of the General Directorate of Technology of the General Administration of the Judiciary. In this context, the regulations explicitly state that the application of these Guidelines must ensure full observance of the adversarial principles and effective defense.[16]

On the other hand, it should be noted that in February 2014, the Federal Board of Cortes and Superior Courts of Justice of the Argentine Provinces and the Autonomous City of Buenos Aires (JUFEJUS) gave its approval to the Protocol for the Use of the Videoconferencing System. This initiative aims to promote the adoption of hearings through video media as a resource aimed at reinforcing reciprocal collaboration, optimizing the effectiveness of jurisdictional processes, and simplifying the conduct of training and coordination meetings, among other relevant purposes.[17]

II.IV. Direct judicial communications.

Another of the IJC's essential tools is direct judicial communications (DJC), intended to facilitate communication between two judges involved in a specific case[18]. In the autonomous source, DJC finds legal reception in Art. 2612 of the Civil and Commercial Code of the Nation.[19]

Direct judicial communications *"are communications between two judicial authorities from different countries that are developed without the intervention of an administrative authority (intermediary authorities), as is the usual case of international warrants that are processed through Chanceries and/or Central Authorities designated by the country itself (generally administrative)."* [20]

DJC can be implemented in all areas of the IJC. The HCCH has indicated that direct judicial communications can be used to obtain information about specific cases or to request information. Initially, DJC has shown notable success in two main fields: international return proceedings for children and adolescents and cross-border insolvency processes. Over time, it has been acknowledged that various international instruments, both regional and multilateral—such as the 1996 Child Protection Convention—benefit from the use of direct judicial communications. As of March 2023, the International Hague Network of Judges (IHNJ)'s scope has expanded to include the 2000 Protection of Adults Convention[21].

Regarding international child abduction, since 2001, the Special Commission of the 1980 Hague Convention has explored the possibility and feasibility, as well as the limits, safeguards, and guarantees of direct judicial communications, initially linked to the development of the IHNJ to obtain the quick and safe return of the child. Shortly after the IHNJ of Specialists in Family Matters was created in 2002, a Preliminary Report was presented, and the DJC was identified as an ideal mechanism to facilitate the IJC. In 2013, the Permanent Bureau, in collaboration with a Special Commission, published the Emerging Guidance Regarding the Development of the International Hague Network of Judges[22].

In this context, direct judicial communications have evolved to incorporate updated safeguards and protocols. According to the "Emerging Guidance regarding the development of the International Hague Network of Judges," all communications must respect the legal frameworks of the countries involved, and judges should maintain their independence when reaching decisions. The guidance also outlines procedural safeguards, such as notifying the parties before the communication, keeping a record of the communications, and ensuring that conclusions are documented in writing. These practices help ensure transparency and preserve the rights of the parties involved.

In this framework, the HCCH has identified at least two types of communications: those of a general nature not related to a specific case and consisting, for example, of sharing general information from the IHNJ or coming from the Permanent Bureau of the Hague Conference, with his colleagues, or in keeping the Hague Conference informed of national developments affecting the work of the Conference; and those that consist of direct judicial communications related to specific cases, the objective of these communications being very varied, but on many occasions aimed at mitigating the lack of information that the competent judge may have about the situation and legal implications in the State of habitual residence of the child. These types of direct judicial communications are complemented by the safeguards incorporated in the 2013 Guidance, ensuring that the parties' rights are respected and transparency is maintained throughout the process.

Additionally, technological advancements are recognized as essential for improving direct judicial communications. The document highlights the importance of using the most appropriate technological facilities, such as telephone or videoconference, to ensure communications are carried out efficiently and securely. These technological tools are crucial in safeguarding the confidentiality of sensitive information, particularly in cases where confidential data is involved.

Direct judicial communications, which represent an essential advance in the field of the IJC, are widely influenced by the implementation of new information and communication technologies. Members of the International Hague Network of Judges emphasized the importance of the Hague Conference implementing, as soon as possible, secure internet-based communication, such as secure email and video conferencing systems, to facilitate networking and reduce costs derived from telephone communications.[23] In 2018, on the 20th Anniversary of the IHNJ, the participants reiterated the need to develop a Secure Platform for the IHNJ[24]. Currently, the secure platform for the IHJN is available.

Since its initial implementation, a secure communications system has been established to facilitate efficient and protected exchanges between judges from different jurisdictions within the IHNJ. This system strengthens judicial cooperation in cross-border child protection, allowing judges to share relevant information directly under security standards that ensure confidentiality and

procedural efficiency. During the 25th anniversary celebration of the IHNJ on October 14, 2023, representatives from over 30 jurisdictions gathered in The Hague, highlighting the value of this network and discussing its expansion, which -as was mentioned- now includes the 2000 Protection of Adults Convention in addition to the 1980 Child Abduction and 1996 Child Protection Conventions?[25].

III. FUTURE PERSPECTIVES. SMART CONTRACTS AND BLOCKCHAIN?

In analyzing possible future evolution in the interaction between international judicial cooperation and new technologies, it is essential to consider how blockchain technology and its derivatives, such as smart contracts, could significantly impact this area.

Blockchain technology, known for its ability to create immutable and transparent records, has the potential to revolutionize international judicial cooperation by providing a secure and trusted platform for the exchange and management of legal information between jurisdictions. Records on the blockchain could be used to ensure the authenticity and integrity of court documents, which in turn would strengthen trust between the parties involved.[26]

Smart contracts are autonomous and self-executing protocols that could simplify and speed up the execution of agreements between international judicial systems. These contracts may be designed to execute automatically when certain predefined conditions are met, which could be helpful in legal cooperation involving the transfer of information or evidence between jurisdictions.

However, successfully implementing blockchain technologies in international judicial cooperation would require overcoming significant challenges. Critical considerations include the standardization of protocols and data formats, interoperability between judicial systems, and the question of the legal sovereignty of records on the blockchain.

Blockchain technology and smart contracts could offer innovative solutions for international judicial cooperation by improving reliability, transparency, and process automation. Although the challenges are significant, their proper adoption could transform how jurisdictions interact and collaborate globally on legal matters.

Concerning automated contracting, it is noteworthy that during its fifty-seventh session in 2024, the United Nations Commission on International Trade Law (UNCITRAL) finalized and adopted the Model Law on Automated Contracting (MLAC)[27] and gave in principle approval to a draft guide for its enactment. In November, Working Group IV (Electronic Commerce) is expected to review this guide to enacting the UNCITRAL Model Law on Automated Contracting to finalize and publish it.

IV. BENEFITS AND CHALLENGES.

The convergence between international judicial cooperation and new technologies presents several substantial benefits that can profoundly transform how jurisdictions worldwide collaborate on legal matters. Certain advantages can be identified by explicitly analyzing electronic requests, direct judicial communications, videoconferences, and future projections related to blockchain technology and smart contracts. Between them:

Efficiency: New technologies allow for streamlining judicial cooperation processes, eliminating unnecessary delays. Electronic requests and direct judicial communications reduce document processing and sending times, significantly reducing shipping times by traditional mail.

Cost savings: Technologies reduce the need for physical resources, such as paper, transportation, and additional personnel for administrative procedures. Video conferencing also reduces travel costs for witnesses, experts, and attorneys as they can participate from their respective locations.

Transparency and authenticity: Document digitization and electronic system implementation ensure a transparent and reliable record of communications. Additionally, electronic signature and authentication technologies guarantee the integrity and legitimacy of shared documents.

Greater access to justice: Technologies can democratize access to justice, allowing involved parties, especially those in remote locations or with limited resources, to participate in judicial proceedings and collaborate more effectively. These promises to avoid the long delays that traditional processing channels suffer, ultimately undermining the basic principles of access to justice and making adequate judicial protection difficult.

New technologies are transforming international judicial cooperation by eliminating time, distance, and resource barriers while improving the efficiency and effectiveness of transnational judicial processes. These technologies could raise the quality and speed of justice globally.

V. FINAL CONSIDERATIONS

Throughout this journey, we have explored how the intersection between international judicial cooperation and new technologies is transforming the legal landscape internationally. We have observed the growing impact of these new technologies in the IJC field and in the collaborative efforts between States to seek legal and administrative solutions to improve access to justice in cross-border proceedings. In this context, we have analyzed several technological tools, such as electronic requests and videoconference. At the same time, we have observed how facilitating instruments such as Apostilles and direct judicial communications have also incorporated, or are incorporating, technological components to improve their results.

Contemplating the possible future directions of this complex network of connections between the IJC and new technologies immerses us in searching for answers and alternatives and deep reflection on the numerous challenges that arise. Indeed, the rapid integration of new technologies is fundamentally changing various aspects of the legal field, which requires careful contemplation.

In conclusion, it is appropriate to emphasize the benefits that the implementation of new technologies can bring to the field of the IJC: reduction of costs and delays that lead to greater efficiency and agility while guaranteeing the fundamental rights of due process, defense, and security, always guided by the basic principle of ensuring access to justice.

In essence, this contribution highlights the crucial role that the symbiotic relationship between international judicial cooperation and evolving technologies will play in shaping the future of global legal practices.

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[3] HARRINGTON, CAROLINA. "Justicia, aislamiento y videoconferencia la experiencia del derecho internacional privado en desandar barreras: guía de buenas prácticas de la conferencia de la haya 2019", in Guillermo Barrera Buteler (Dir.), *El derecho argentino frente a la pandemia y post-pandemia covid-19*. Córdoba, Universidad Nacional de Córdoba, 2020.

[4]In the field of criminal cooperation, various legal instruments recognize the viability of the technological use of videoconferencing. These include the Statute of the International Criminal Court, ratified at the Rome Conference on July 17, 1998; the European Convention on Legal Assistance in Criminal Matters, approved on May 29, 2000 by the Council of Ministers of Justice and Foreign Affairs of the European Union; the Second Additional Protocol of 2001 (Strasbourg, November 8, 2001) to the European Convention on Mutual Assistance in Criminal Matters, signed in Strasbourg on April 20, 1959 by the member states of the Council of Europe. Additionally, noteworthy are the influential 2000 Palermo Convention on Transnational Organized Crime and the 2003 Mérida United Nations Convention against Corruption, among other notable instruments. These treaties highlight the usefulness and effectiveness of videoconferencing as a technological resource in criminal cooperation at the international level.

[5] GOICOECHEA, IGNACIO. "Nuevos desarrollos en la cooperación jurídica internacional en materia civil y comercial", in *Revista de la Secretaría del Tribunal Permanente de Revisión (STPR)*, 7, year 4, 2016.

[6] TIRADO ESTRADA, JESÚS JOSÉ. "Videoconferencia, cooperación judicial internacional y debido proceso.", in *Revista de la Secretaria del Tribunal Permanente de Revisión*, year 5, no. 10, 2017, p. 154. Available in:

https://dialnet.unirioja.es/servlet/articulo?codigo=6182260. Consultation date: 10/11/2024.

[7] GONZALEZ DE LA VEGA, CRISTINA, SEONE DE CHIODI, MARÍA Y TAGLE DE FERREYRA, GRACIELA. "Bases para el acceso a la justicia en la restitución internacional de NNA". Paper presented at the Argentine Congress of International Law, Córdoba, September 2019.

[8] Such Convention has been in force in Argentina since 07/07/1987. For more details: https://www.hcch.net/en/instruments/conventions/status-table/?cid=82. Consultation date: 10/11/2024.

[9] Video-link refers to the technology which allows two or more locations to interact simultaneously by two-way video and audio transmission, facilitating communication. – HCCH Guide to Good Practice on the Use of Video-Link under the Evidence Convention.

[10] For the Convention, videoconference is understood as an interactive communication system that reproduces, simultaneously and in real time, images, sound and data of people who are located in geographical locations other than that of the competent authority. This system allows the taking of statements in accordance with the applicable law of the intervening States. Available in: https://www.comjib.org/wp-content/uploads/imgDrupal/Convenio-Videoconferencia-ES-publicaciones_1.pdf

Consultation date: 06/13/2024.

In the following link you can check the status of signatures and ratifications of the treaties and agreements of the conference of ministers of justice of the Ibero-American countries. Available in: https://drive.google.com/drive/folders/1EzscrkCSThRo7gtjZJlt9LZphoMBtA0q. Consultation date: 04/09/2024.

[11] *"They are characterized by being framed in two (or more) processes for closely linked cases, heard before courts in different countries. The hearing is developed to "serve" more than one main process. Frequently, in family cases involving children, one can observe the existence of lawsuits initiated in different countries*

with various objects (restitution, parental responsibility, custody, communication regime, maintenance), which can benefit from the simultaneity implied in the joint celebration of the audience". HARRINGTON, CAROLINA. "Audiencias Multijurisdiccionales. Configuraciones y perspectivas para facilitar el acceso a justicia en litigios internacionales". Paper presented at the Argentine Congress of International Law, Córdoba, September 2019.

[12]ASADIP PRINCIPLES ON TRANSNATIONAL ACCESS TO JUSTICE (TRANSJUS). Available at: http://www.asadip.org/v2/wp-content/uploads/2018/08/ASADIP-TRANSJUS-EN-FINAL18.pdf. Consultation date: 10/11/2024.

[13] This Agreement, approved by Law No. 23,480, links us with 64 countries. HCCH. Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. Available in: https://www.hcch.net/en/instruments/conventions/status-table/?cid=82 . Consultation date: 10/11/2024.

[14] Consult Celis, Mayela, July 3, 2024 "This week at The Hague: A few thoughts on the Special Commission on the HCCH Service, Evidence and Access to Justice Conventions" Available in: https://conflictoflaws.net/2024/this-week-at-the-hague-a-few-thoughts-on-the-special-commission-on-the-hcch-service-evidence-and-access-to-justice-conventions/. Consultation date: /10/11/2024.

[15] *Article 17. In civil or commercial matters any person duly designated as a commissioner may, in the territory of a Contracting State, proceed, without compulsion, to obtain evidence relating to a proceeding instituted before a Court of another Contracting State. : a) if a competent authority designated by the State where the evidence is to be obtained has given its authorization, in general, or for each particular case; and b) if said person meets the conditions that the competent authority has established in the authorization. Any Contracting State may declare that the collection of evidence in the manner provided for in this article may be carried out without prior authorization.* Available in: https://www.hcch.net/es/instruments/conventions/full-text/?cid=82 . Consultation date: 05/20/2024.

[16]SUPREME COURT OF JUSTICE OF THE NATION. Agreed on 20/2013. Available at: https://www.csjn.gov.ar/documentos/descargar/?ID=77906 . Consultation date: 10/11/2024.

[17] JU.FE.JU. "Protocol for the use of the Videoconferencing System", 2014. Art. 3 defines: *"Videoconferencing shall be understood as an interactive communication system that simultaneously and in real time transmits image, sound and data at a distance between one or more sites."* Available in: https://www.jufejus.org.ar/protocolo-de-videoconferencias/. Consultation date: 10/11/2024.

[18] For more information see: HARRINGTON, CAROLINA. "Comunicaciones judiciales directas. Un arma versátil para enfrentar desafíos procesales en el derecho internacional privado de familia" in *LLC2018* (October), 3, 2017. Online Citation: AR/DOC/3303/2017.

[19]Art. 2612.- International procedural assistance. Without prejudice to the obligations assumed by international conventions, communications addressed to foreign authorities must be made by means of a letter. When the situation requires it, Argentine judges are empowered to establish direct communications with foreign judges who accept the practice, as long as the guarantees of due process are respected (...) ."

[20] GOICOECHEA, IGNACIO. Nuevos desarrollos en la cooperación jurídica internacional en materia civil y comercial. *Revista de la Secretaria del Tribunal Permanente de Revisión (STPR)*, year 4, No 7 (pp. 127-151), 2016, p. 136.

[21] HCCH. Details. 25th Anniversary of the International Hague Network of Judges. Available in: https://www.hcch.net/en/news-archive/details/?varevent=944. Consultation date: 22/10/2024.

[22] Direct Judicial Communications. Emerging Guidance regarding the development of the International Hague Network of Judges and General Principles for Judicial Communications, including commonly accepted safeguards for Direct Judicial Communications in specific cases, within the context of the International Hague Network of Judges. Available in:

https://assets.hcch.net/docs/62d073ca-eda0-494e-af66-2ddd368b7379.pdf. Consultation date: 22/10/2024.

[23] Conclusions 7 and 41, Inter-American Meeting of Judges and Central Authorities of the Hague International Network on International Child Abduction, Mexico, February 23-25, 2011. Available in: https://www.hcch.net/es/%20news-archive/details/?varevent=217. Consultation date: 10/11/2024.

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[25] https://www.hcch.net/en/news-archive/details/?varevent=944 Consultation date: 27/10/2024.

[26]AGUADA, YASMÍN and JEIFETZ, LAURA MARTINA. Nuevas oportunidades de la cooperación judicial internacional: exhorto electrónico y blockchain. Anuario *XIX* CIJS, 2019.

[27] The UNCITRAL Model Law on Automated Contracting introduces essential principles to legitimize contracts formed and executed by automated systems, even in the absence of human intervention. First, its focus on technological neutrality and legal recognition ensures that contracts are valid regardless of whether a person has directly reviewed them. This aspect is particularly valuable for smart contracts and blockchain applications, as it aligns with the requirements of coded and dynamic agreements, which may use information that updates periodically. Additionally, action attribution is clarified to hold users accountable for automated system actions, even in cases of unforeseen outcomes. These provisions are poised to enhance cross-border legal coherence and foster trust in automation within global legal frameworks. The document is available here: https://uncitral.un.org/sites/uncitral.un.org/files/mlac_en.pdf. Consultation date: 25/10/2024.

NUON-Claim v. Vattenfall: Pivotal or dud for collective actions in the Netherlands?

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On 9 October, the District Court of Amsterdam issued its final judgment in a collective action against energy supplier Vattenfall. This judgment was eagerly awaited as it is the very first judgment in a mass damage claim under the Dutch WAMCA procedure. The new framework for collective redress, which became applicable on 1 January 2020 (see also our earlier blogpost), has received a lot of attention in international scholarship and by European legislators and policy makers due to its many innovations and making it easier for consumers and small businesses to litigate against large companies. The most notable change in the Dutch act compared to the old collective action regime is the possibility to request an award for damages, making such proceedings attractive for commercial litigation funders. A recent report commissioned by the Dutch Ministry of Justice and Security (published in an English book here) found that most collective actions seeking damages brought under the WAMCA have an international dimension, and that all of these claims for damages are brought with the help of third party litigation funding (TPLF).

Since this judgment is the first of its kind under the Dutch WAMCA, with a claim value of 400 million euros, it has gained a lot of (media) attention. This blogpost provides an update on this most recent judgment and discusses its impact on the current mass claims landscape and TPLF in the Netherlands.

The Case

The claim of *Stichting NUON Claim*, the claim foundation ('the foundation') established to represent a group of SMEs who are or have been clients of energy company Vattenfall, relates to alleged excessive energy costs imposed on specific customers. The foundation alleged that energy supplier NUON, which has since been acquired by Vattenfall, illegitimately charged a compensation for electrical capacity to its business customers and that no actual service or product was provided in exchange for this so-called kW charge. Furthermore, many other similar customers did not have to pay the kW charge. The foundation alleged that this illegitimate charge resulted in bills that were on average 80% higher than those of competing energy suppliers, in some cases resulting in tens of thousands of euros in excessive annual fees.

In short, the main question in this case is whether Vattenfall (formerly NUON) was allowed to charge business customers a fee based on contracted capacity as an electricity supplier. Vattenfall had charged these costs to business customers with a 'small bulk consumer connection' (more than 3 × 80 Ampère) on the electricity grid since the liberalisation of the Dutch electricity market in 2002. These included medium-sized enterprises, small enterprises and non-profit institutions. According to the foundation, Vattenfall was not allowed to charge these costs because there was no service or product in return for the kilowatt (kW) fee charged. The foundation therefore initiated collective proceedings against Vattenfall. The foundation based its claim on Article 6:194 Dutch Civil Code (DCC), which contains a prohibition against acquisition fraud within Dutch private law.

The WAMCA and litigation finance

A first judgment in a mass damage case has been eagerly awaited as it could provide for a pivotal moment in which claimants would be awarded a multimillion euro claim and the commercial funder would reap the benefits of its investment. The WAMCA has sparked continuous debate due to the regime's perceived claimant-friendly design, its attractiveness for international commercial litigation funders and its alleged risk of fostering an 'American-style' claim culture. The opt-out system, few restrictions on third-party funding, and the supposed risk of litigation abuse were the target of criticism by, most notably, the US Chamber of Commerce (see report here). This criticism was met with calls for a more nuanced approach (see earlier blogpost here) and the fears of fostering a claim culture have been dampened by the modest numbers of cases that have been brought

under the WAMCA so far.

Among other discussions, the WAMCA has especially gotten attention due to the role played by commercial third party funders. (See our discussion on third party litigation funding and the WAMCA in this earlier blogpost.) In the case against Vattenfall too, there was some debate on the nature of the financing agreement between the claim foundation and international funder Bench Walk Guernsey PCC LTD. In an interim decision rendered in October 2023, the court reviewed such an agreement, which outlined the conditions under which the funder would receive a portion of any proceeds from the case. This included paying for legal costs and taking a share of any damages awarded to the claim foundation. It also detailed situations where additional funding might have been required and the rights of the claim foundation to manage the litigation and settlement discussions?.

The agreement also outlined the treatment of the litigation funder's fees for different groups of claimants. The claim foundation stated that it would withhold 25% of the compensation from the class members, but in cases where the litigation funder's agreed percentage (8-12%) was lower, it would not retain the difference. This meant, for example, that in case only 12% was due to the litigation funder, the additional 13% would not have been kept by the claim foundation. This 25% withholding would have only been relevant if the claim foundation could not claim compensation for all class members, limiting its representation to a smaller group. The court concluded that the explanation provided by the claim foundation on the reasonableness of the fees was sufficient. It emphasized that the uncertainty about the final amount of fees was acceptable because it depended on factors like the duration of the proceedings.

The Judgment

In its judgment the District Court of Amsterdam dismisses all claims of Stichting NUON-claim against Vattenfall. It rejects the foundation's claim that Vattenfall concealed essential information about the kW compensation, since the compensation was easy to calculate based on Vattenfall's offer. Furthermore, the explanation, which was included in the offer and the energy bills, made the price structure clear. According to the court, the customers were therefore not misled. Vattenfall also made it clear that the grid operator charges an amount for the transport of electricity and that this is not included in the price that Vattenfall charges these customers.

The foundation also stated that Vattenfall abused the inaction of some of its customers after a new annual offer. The court ruled that the kW customers in the liberalised market had the choice of which energy supplier they purchased energy from. They were therefore free to negotiate the contract terms and to switch to another supplier. In this situation, a kW customer cannot complain that they themselves did not do the comparative research, which other customers did do. Vattenfall has not exceeded any other standard of care and there is also no question of undue payment of the kW compensation.

The Amsterdam Court held that businesses ought to have exercised greater caution. It is reasonable to expect that 'average, observant businesses' will familiarize themselves with the energy prices on offer and will take the initiative to understand the information provided by suppliers. Additionally, the fact that a free market has been in place since 2002 implies that Vattenfall had no obligation whatsoever to inform its business customers about the existence of other customers with better contract terms and that contracts without the kW charge would probably be cheaper. The customers themselves were responsible for their choice of electricity supplier. The court also finds that it is incorrect to state that no product or service is provided in return for the kW fee. Electricity is provided, and including general cost components, such as personnel costs, in a tariff structure is permissible.

The Impact

For those expecting this judgment to be the very first case in which a multimillion-euro damage claim would be awarded, and thus opening the door to many more mass damage claims, the result may be somewhat of an anticlimax. Since the claimants have not been successful and no damages have been awarded, the case does not provide much to go on for funders, mass claim lawyers and others following these developments with interest. At the same time, the claim foundation lost the case on substantive grounds, and nothing in the decision suggests an impairment in the WAMCA's ability to provide access to justice for victims of mass harms.

From our perspective, there are two points that could be worthy of praise from a procedural point of view. The first is that, even after deeming 92% of the claims unfounded under Article 6:194 DCC, the court still refused Vattenfall's claim that the remaining 8% would be too small of group to justify a ruling in a collective

action, prioritizing the uniformity of the defendant's conduct instead. This favours procedural expediency and guarantees that a minority of class members wouldn't suffer from an eventual dismissing of the claim against the rest.

The second point is that the court took the perspective of the average user to rule on the sufficiency of the information provided by Vattenfall. This favours the groupability of class members in an abstract fashion, in contrast to the tendency other courts have shown to excessively scrutinize the similarity of the class members' situations to consider them a group with acceptably similar claims. In a ruling on EU consumer law earlier this year, the CJEU favoured this approach for collective actions in such area (see Case C-450/22 *Caixabank*).

That said, this judgment shows that the supposed claimant-friendly design of the WAMCA does not guarantee success and may come as a disappointment to claimants and funders alike. Notably as well is the fact that this case took about 2,5 years from summons to judgement, which is a relatively short time for complex class action cases, as illustrated by the timelines of other cases that were filed well before this case and that have still some ways to go before a judgment can be expected.

The question remains how funders will look at this result and if it has any impact on their willingness to keep funding Dutch class actions. Given the outcome of this case, with a negative result for the claimants and a dismissal of all claims on substantive grounds, it seems both funders and 'WAMCA-watchers' will have to wait a bit longer for that first pivotal judgment.

Children's rights, private law and criminal law perspectives of parental child abduction

Written by Fanni Murányi, who will defend her PhD on Children's rights, private law and criminological perspectives of parental child abduction at the Eötvös

Loránd University (expected in 2024).

In this short summary of her research, Fanni highlights her conclusions on the role of the child's views in abduction cases and the link between international child abduction and criminal law. She considered the legislative frameworks of the Hague Child Abduction Convention of 1980, the Brussels IIb Regulation (2019/1111) and the UN Convention on the Rights of the Child (UNCRC). She also investigated as well as the role of (domestic) criminal law.

The child's views

When a child is abducted by one of their parents, the child finds himself or herself in a very stressful situation. Even though the relevance of the child's views in these cases may be limited, listening to abducted children becomes increasingly important. As the Brussels IIb Regulation attaches even greater importance to the hearing of the child than the previous Regulation (2201/2003, Brussels IIa) did, more attention is needed. Children have the right to be given an opportunity to be heard (Art. 12 UNCRC, echoed by Arts 21 and 26 Brussels IIb). In the hope of presenting a nuanced picture of the European practice on child's involvement, Hungary and the Netherlands were compared. My empirical research is based on interviews with four Dutch and four Hungarian judges. Hungarian case law shows that – similarly to the European practice – the hearing of children by judges is typical in parental child abduction cases. This was also confirmed by the interviews. As there is no age barrier for hearing children in abduction cases, the Hungarian judges have multifaceted tasks. There is a demand for special training and for an assisting person, but the current form of *guardian ad litem* is not being used. In the Netherlands the court appoints a *bijzondere curator* for children three years of age or older. The *bijzondere curator* hears and accompanies the child and explains the court's decision if required. If supported by the *bijzondere curator*, children six years of age or older are heard by one of the judges of the full court as well. The interviews conducted with Dutch judges confirmed that the *bijzondere curator* greatly helps assessing the child's maturity and understanding the child. All judges expressed the difference between the hearing by a *bijzondere curator* and by a judge in the same way: time and expertise.

Although the involvement of children in mediation is improving, the way in which a child's voice can be included is also controversial. Neither the Hague Abduction Convention, nor the Brussels IIb refers to the hearing of the child in mediation,

but the latter clarifies the child's right to be provided with an opportunity to express his or her views in proceedings to which he or she is subject. In the Dutch model, the so-called *pressure cooker model*, integrates mediation into the schedule of the court proceeding. The mediation programme consists of three 3-hour sessions in the course of two days. The sessions are co-mediated by two mediators and on the first day of the mediation, the child is interviewed by a third mediator, a child psychologist. The child must be three years of age or older and both parents must consent to the hearing.

International child abduction and criminal law

If the court orders the return of the child to a country where parental child abduction is severely punished, the abducting parent has two potential routes permitted by law. The first is returning to that country with the child and being imprisoned for abducting. The second route is not returning with the child, avoiding these serious criminal consequences, but leaving the child alone with the left-behind parent. This shows that in countries where parental child abduction is severely punished, the return order might cause a separation between the parent (often the primary caretaker) and the child. Such separation might be a violation of Article 9 of the UNCRC (i.e. the right of the child not to be separated from the parents against their will).

Currently, there is no uniform criminal law definition of child abduction in the European Union. The types of punishment envisaged and the age of children involved in the offences vary widely. Thus, the act of the abducting parent may not be considered a crime in one country, while thousands of kilometers away it can lead to imprisonment for several years. The criminalization of abduction can be considered effective in searching for missing children, but the civil and criminal sanctions are unlikely to deter many potential abductors.

Allegations of domestic violence have often been raised as a defence in child abduction cases: the Hague Child Abduction Convention provides for a court to refuse to order the return a child if the return would pose a grave risk of exposing the child to physical or psychological harm or otherwise place the child in an intolerable situation (Art. 13(1)(b)). If the court rejects this exception and orders the return of the child to a country where parental child abduction is punished, the abducting parent as a *victim* of domestic violence may become a *perpetrator* of a crime. There is a real concern that primary caretakers are required to choose

between returning with the child to an environment where they would face a real risk of violence, and refusing to return so that the child would have to cope with a new situation. In either case there is a real risk of harm to the child.

The Bahraini Supreme Court on Choice of Court Agreements, Bases of Jurisdiction and… Forum non Conveniens!

I. Introduction:

In a previous post on this blog, I reported a decision rendered by the Bahrain High Court in which the court refused to enforce a choice of court agreement in favour of English courts. The refusal was based on the grounds that the case was brought against a Bahraini defendant and that rules of international jurisdiction are mandatory. The Bahraini Supreme Court's decision reported here is a subsequent development on the same case. The ruling is significant for many reasons. In a methodical manner, the Supreme Court identified the foundational justifications for the jurisdictional rules applied in Bahrain. Moreover, it clarified the role and effect of choice of court agreements, particularly their derogative effect. Finally, and somehow surprisingly, the Court supported its position by invoking to "the doctrine of *forum non conveniens*", explicitly mentioned in its decision.

The decision is particularly noteworthy, as it positively highlights the openness of Bahraini judges to adopting new legal doctrines previously unfamiliar within the country's legal framework. This openness likely signals an increasing acceptance of such jurisdictional adjustment mechanisms in legal systems outside the traditional common law or mixed jurisdictions. However, the decision also negatively highlights the challenges of importing foreign doctrines, particularly

when such doctrines are applied in contexts where they are not fully integrated or properly understood. These challenges are further exacerbated when the reliance on the foreign legal doctrine appears to be driven by judicial convenience rather than a genuine commitment to the principles underlying the imported legal doctrine.

II. Facts

The facts of the case have been previously reported (see here) and need not to be repeated. It suffices to recall that the dispute involved a breach of a pharmaceutical distribution sales agreements between an English company (the plaintiff) and a Bahraini company (the defendant). Relying on the choice of court agreement included in the contract, the defendant challenged the jurisdiction of Bahraini court.

The court of first instance rejected the challenge on the ground that the jurisdiction of Bahraini courts was justified by the "Bahraini nationality" of the defendant, and the mandatory nature of the Bahraini rules of international jurisdiction (see the summary of the case here).

On appeal, the Court of Appeal overturned the initial ruling on the grounds that Bahraini courts lacked jurisdiction.

Dissatisfied, the English company appealed to the Supreme Court, arguing that, as the defendant was a Bahraini company registered in Bahrain, jurisdiction could not be derogated by agreement due to the public policy nature of the Bahraini jurisdictional rules.

III. The Ruling

In its decision rendered in the *Appeal No. 5/00071/2024/27 of 19 August 2024*, the Bahraini Supreme Court admitted the appeal and overturned the appealed decision holding as follows:

"International jurisdiction of Bahraini courts, as regulated in the Civil and Commercial Procedure Act [CCCA] (The Legislative Decree No. 12/1971, Articles

14 to 20) and its amendments, is based on two fundamental principles: the principle of convenience (*al-mula'amah*) and the principle of party autonomy (*'iradat al-khusum*).

Concerning the principle of convenience, Article 14 of the CCCA states that Bahraini courts have jurisdiction over cases filed against non-Bahraini [defendants] who have domicile or residence in Bahrain, except for *in rem* actions concerning immovable properties located abroad. This is because it is more appropriate (*li-mula'amati*) for the courts where the immovable is located to hear the case. Similarly, Article 15(2) of the CCCA stipulates that Bahraini courts have jurisdiction over actions involving property located in Bahrain, obligations originated, performed or should have been performed in Bahrain, or bankruptcies opened in Bahrain. This means *a contrario* that, under the principle of convenience (*mabda' al-mula'amah*), the [said] provision excludes [from the jurisdiction of the Bahraini courts] cases where the property is located outside Bahrain, or where the obligations originated in and performed abroad, or was originated and should have been performed abroad, or concerns a bankruptcy opened abroad unless the case involves a cross-border bankruptcy as governed by Law No. 22 of 2018 on Restructuring and Bankruptcy.

Regarding the principle of party autonomy (*mabda' 'iradat al-khusum*), Article 17 of CCCA allows Bahraini courts to adjudicate cases, even when they do not fall within their jurisdiction, if the parties explicitly or implicitly accept their authority. While the law recognizes the parties' freedom (*iradat*) to submit (*qubul*) the jurisdiction of Bahraini courts to hear cases that otherwise do not fall under their jurisdiction, the legislator did not clarify the derogative effect of choice-of-court agreements when the parties agree to exclude the jurisdiction of Bahraini in favor of a foreign court, despite the Bahraini courts having jurisdiction over the case. In addition, the legislator remains silent on the rules for international jurisdiction in cases brought against Bahraini nationals. However, this cannot be interpreted as a refusal by the legislator [of the said rules] nor as an insistence on the jurisdiction of Bahraini court. In fact, the legislature has previously embraced the principle according to which Bahraini courts would decline jurisdiction over cases that otherwise fall under their jurisdiction when parties agree to arbitration, whether in Bahrain or abroad.

Based on the foregoing, nothing in principle prevents the parties from agreeing on the jurisdiction of a [foreign court]. However, if, one of the parties still brings

the case before Bahraini courts despite such an agreement, the issue extends beyond merely honoring the agreement to a broader issue dependent solely on how Bahraini courts assess their own jurisdiction. In this case, the parties' agreement [relied upon] before the Bahraini courts becomes just one factor that the court shall consider when deciding whether or not to decline jurisdiction. The court, in this context, must examine whether there are grounds to decline jurisdiction in favor of a more appropriate foreign [court] in the interest of justice, and the court shall decide accordingly when the said grounds are verified. This principle is known as "*The Doctrine of Forum Non Conveniens*" (*al-mahkamat al-mula'amat*).[1] Therefore, if all the conditions necessary for considering the taking of jurisdiction by a foreign court and the rendering justice is more appropriate (*al-'akthar mula'amah*) are met, Bahraini courts should decline jurisdiction. Otherwise, the general principles shall apply, i.e. that the taking of jurisdiction shall be upheld, and the courts will proceed with hearing the case.

Accordingly, the Bahraini courts' acceptance to decline jurisdiction in favor of a foreign court, based on the parties' agreement and in line with the principle of party autonomy, presupposes that [doing so] would lead to the realization of the principle of convenience (*mabda' al-mula'amah*). [This would be the case when] (1) the dispute shall have an international character; (2) there is a more appropriate forum to deal with the dispute [in the sense that] (a) the validity of the choice of court agreement conferring jurisdiction is recognized under the foreign law of the chosen forum; (b) evidence can be collected easily; (c) a genuine connection exists with the state of the chosen forum; and (d) the judgments rendered by the courts of the chosen forum can be enforced therein with ease.[2]

Furthermore, since the jurisdiction of Bahraini courts is based on the consideration that the adjudicatory jurisdiction (*al-qadha'*) is one of the manifestations of the State's sovereignty over its territory and that the exercise of this jurisdiction extends to the farthest reach of this sovereignty, it is incumbent [upon the courts] to ensure that declining jurisdiction by Bahraini courts does not infringe upon national sovereignty or public policy in Bahrain. The Assessment of whether all the abovementioned conditions are satisfied falls within the discretion of the courts of merits (*mahkamat al-mawdhu'*), subject to the control of the Supreme Court.

Given the above, and based on the facts of the case [.....], the appellant—an

English company—entered into an agreement of distribution and sale in Bahrain for pharmaceutical products [……], supplying the appellee—a Bahraini company—with said products. Seven invoices were issued for the total amount claimed; yet the appellee refused to make payment. [Considering that] Bahrain is the most appropriate forum for the administration of justice in this case – given the facts that appellee's domicile and its place of business, as well as the place of performance of the obligation are located in Bahrain – the parties' agreement to submit disputes arising from the contract in question to the jurisdiction of the English courts and to apply English law does not alter this conclusion. It is [therefore] not permissible to argue here in favor of prioritizing party autonomy to justify declining jurisdiction, as party autonomy alone is not sufficient to establish jurisdiction without the fulfillment of the other conditions required by the principle of *forum non conveniens* (*mabda' mahkamat al-mula'amah*).

Considering that the court of the appealed decision [unjustifiably] declined to hear the case on the grounds that it lacked jurisdiction, it violated the law and erred in its application. Therefore, its decision shall be overturned.

IV. Comments

Although the outcome of the case (i.e. the non-enforcement of a derogative choice-of-court agreement) might be somehow predictable given the practice of Bahraini courts as noted in the previous comment on the same case, the reasoning and justifications provided by the Supreme Court are – in many respects – surprising, or even … puzzling.

A comprehensive review of the court's ruling and its broader theoretical and practical context requires detailed (and lengthy) analyses, which may not be suitable for a blog note format. For this reason, only a brief comment will be provided here without delving too much into details.

1. International Jurisdiction and its Foundation in Bahrain

According to the Supreme Court, the international jurisdiction of Bahraini courts is grounded in two fundamental principles: convenience (*al-mula'amah*) and party

autonomy (*'iradat al-khusum*).

Convenience (*al-mula'amah*), as indicated in the decision, is understood in terms of "proximity", i.e. the connection between the dispute and Bahrain. This connection is essential for proper administration of justice, and efficiency of enforcing judgments. Considerations of "convenience" are reflected in the Bahraini rules of international jurisdiction as set out in the CCCA. Therefore, when the jurisdiction of Bahraini courts is justified based on these rules, the dispute can be heard in Bahrain; otherwise, the courts should dismiss the case for lack of jurisdiction.

However, Bahraini courts, although originally incompetent, can still assume jurisdiction based on party autonomy (*'iradat al-khusum*). Here, the parties' agreement – whether explicit or tacit – to submit to the authority of Bahraini courts establishes their jurisdiction.

At this level of the decision, it is surprising that the Court did not include the Bahraini nationality of the parties as an additional ground for the jurisdiction of Bahraini Court. While the Supreme Court rightly pointed out that the Bahraini regulation of international jurisdiction does not regulate dispute brought *against* Bahraini national, and that, unlike many codifications in the MENA region, nationality of the defendant is not *explicitly* used as a general ground for international jurisdiction, this does not imply that nationality has no role to play in Bahrain. In fact, as explained in the previous post on the same case, Bahraini courts have regularly assumed jurisdiction on the basis of the Bahraini nationality of the parties and have consistently affirmed that "*persons holding Bahraini nationality are subject to the jurisdiction of Bahraini courts as a manifestation of the state's sovereignty over its citizens*". Moreover, Article 16(6) of the CCCA allows for jurisdiction to be taken based on the *nationality* of the plaintiff in personal status matters, particularly when Bahraini law is applicable to the dispute.

Furthermore, one might question the inclusion of various aspects, such as the connection with Bahrain, administration of justice and efficiency, under the broad and somewhat vague label of "convenience". In a (more abstract) sense, *any* rule of international jurisdiction can be justified by considerations of "convenience". In any event, it worth mentioning here that modern literature offers a multitude of justifications for different rules of international jurisdiction, taking into account

various interests at stake, theories of jurisdictions, paradigms, and approaches (for a detailed account, see Ralf Michaels, "Jurisdiction, Foundations" *in* J. Basedow *et al.* (eds.) *Elgar Encyclopaedia of Private international Law – Vol. 1* (Edward Elgar, 2017) 1042).

2. The Unexpected Reference to *Forum Non Conveniens*

Once the Court identified the foundational bases of the Bahraini courts' jurisdiction, it engaged in a somewhat confusing discussion regarding the circumstances under which it might decline jurisdiction.

It is important to recall that the legal question before the court pertains to the effect of a choice-of-court agreement in favor of a foreign court. In other words, the issue at hand is whether such agreement can exert its derogative effect, allowing Bahraini courts to refrain from *exercising* jurisdiction.

Traditionally, Bahraini courts have addressed similar issues by asserting that the rules of international jurisdiction in Bahrain are mandatory and cannot be derogated from by agreement (as noted in the previous comment on the same case here). However, in this instance, the Court veered off in its analysis. Indeed, the Court (unexpectedly) shifted from the straightforward issue of admissibility of the derogative effect of choice-of-court agreements to the broader question of whether to decline jurisdiction, ultimately leading to a discussion of……*forum non conveniens*!

The Court's approach leaves an unsettling impression. This is because the ground of appeal was not framed in terms of *forum non conveniens*. Indeed, the appellant did not argue that the choice-of-court agreement should not be enforced because the chosen court was inappropriate or because Bahraini courts were *forum conveniens*. Instead, the appellant merely referred to the mandatory nature of the jurisdictional rules in Bahrain, which cannot be derogated from by agreement, irrespective of *any* consideration regarding which court *is clearly more appropriate to hear the case*.

This impression is further strengthened by the manner with which the Court addressed the issue it raised itself. Indeed, after setting out the test for declining jurisdiction on the basis of *forum non conveniens* (but, in fact, primarily concern

more the conditions for the validity of a choice-of-court agreement), the Court failed to examine and apply the very same tests it established. Instead, the Court concluded that Bahraini courts were *forum conveniens* simply because they *had* jurisdiction on the grounds that the defendant was a Bahraini company registered in Bahrain, had its domicile (principal place of business) there, and that Bahrain was the place of performance of the sale and distribution obligations.

However, upon a closer examination at the fact of the case, one can hardly agree with the Court's approach. On the contrary, all the reported facts indicate that the requirements set forth by the Court were met: (1) the international nature of the dispute is beyond any doubt; (2) English courts are clearly appropriate to hear the case as (a) the choice-of-court agreement in favor to English court is undoubtedly valid under English law; (b) it is unlikely that the case would raise any concerns regarding the collection of evidence (since one of the parties is an English company, one can expect that parts of the evidence regarding the transaction, payment, invoices etc. would be in English, and to be found in England); (c) there is no doubt about the genuine connection with England, as one of the parties is an English company established in England, and parts of the transactions are connected with England. Also, it is unclear how a choice-of-court agreement in this case would violate the sovereignty of Bahrain, as there is nothing in the case to suggest any public policy concerns.

The only potential issue might pertain to the enforceability of the future judgment in England (point (d) above) as there is a possibility that the appellee may have no assets to satisfy the future judgment in England. This might explain why the appellant decided to bring in Bahrain in violation of the choice-of-court. However, such concern can be mitigated by considering the likelihood of enforcing the English judgment in Bahrain, as it would meet the Bahraini enforcement requirements (articles 16-18 of Law on Execution in Civil and Commercial Matters [Legislative Decree No22/2021]).

V. Concluding Remarks

This is not the only case in which challenges to choice-of-court agreements in favor of a foreign court are framed in terms of *forum non conveniens* in Bahrain (see e.g., the *Bahrain Chamber of Dispute Resolution, Case No. 09/2022 of 17*

October 2022). However, to my knowledge, this is the first Supreme Court decision where explicit reference is made to "the doctrine of *forum non conveniens*" (with the terms cited in English).

In the case under discussion, there is a concern that the Court seems to have conflated two related yet distinct matters: the power of the court to decline jurisdiction on the ground of *forum non conveniens*, and the court's authority to decline jurisdiction on the basis of the parties' agreement to confer jurisdiction to a particular court (*cf.*, R. Fentiman, "*Forum non conveniens*" in Basedaw *et al.*, *op. cit.* 799). In this regard, it is true that in common law jurisdictions the doctrine of *forum non conveniens* is generally recognized as a valid defense against the enforcement of choice-of-court agreements (see J.J. Fawcett, "General Report" *in* J.J. Fawcett (ed.), *Declining Jurisdiction in Private International Law* (Oxford University Press, 1995) 54). However, it also generally admitted that the respect of the parties' choice should not be easily disregarded, and courts should only intervene in exceptional circumstances where there is a clear and compelling reasons to do so (see, Fentiman, *op. cit.*, 799). Such compelling reasons, however, are clearly absent in the present case.

Moreover, the way with which the Supreme Court framed the issue of *foreign non conveniens* inevitably raises several intricate questions: would the doctrine apply with respect to the agreement's prorogative effect conferring jurisdiction to Bahraini courts? Would it operate in the absence of *any* choice-of-court agreement? Can it be raised in the context of parallel proceeding *(lis pendens)?* Would it operate in family law disputes, etc.?

In my opinion, the answers to such questions are very likely to be in the negative. This is primarily because Bahraini courts, including the Supreme Court, have traditionally and consistently regarded their jurisdiction as a matter of public policy, given the emphasis they usually place on *judicial jurisdiction as a manifestation of the sovereignty of the State* which, when established, cannot be set aside or diminished. Such conception of international jurisdiction leaves little room to discretionary assessment by the court to evaluate elements of *forum non conveniens*, ultimately leading them to decline jurisdiction even when their jurisdiction is justified.

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[1] English terms in the original text. The Arabic equivalent can be better translated as "*forum conveniens*" rather than "*forum non conveniens*".

[2] Numbers and letters added.