The Reception of Hilton v Guyot and Comity in the Recognition and Enforcement of Foreign Judgments in Anglophone Africa

Introduction

Hilton v Guyot, is the most influential case in the United States—and perhaps globally—on the use of comity as a basis for recognising and enforcing foreign judgments. In that case, Justice Gray of the United States Supreme Court defined comity as follows:

"No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent of which the law of one nation… shall be allowed to operate within the dominion of another nation, depends upon… the "comity of nations"…"

Comity in the legal sense is neither a matter of absolute obligation, on one hand, nor a mere courtesy and goodwill, on the other; it is the recognition which one allows within its territory to the legislative, executive or judicial act of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under protection of its laws…"

By contrast, under English common law, the dominant basis for recognising and enforcing foreign judgments is the theory of obligation. Blackburn, J in the English case of *Schibsy v Westenholz* stated that the true principle is that,

"…the judgment of a court of competent jurisdiction over the defendant, imposes a duty or obligation on him to pay the sum for which the judgment is given, which the courts in this country are bound to enforce…"

And further on in his judgment, Blackburn J. makes it plain that the doctrine of "comity" is incorrect. Thus, no question of reciprocity could arise in an action brought upon a foreign judgment."

The theory of obligation is applied in many Commonwealth and Anglophone African countries. Interestingly, an emerging but underexplored trend is the growing consideration—and in some instances, application—of the principle of comity by courts in these jurisdictions, with several African judges expressly citing *Hilton v Guyot*.

This blog highlights selected cases illustrating this development, focusing on Liberia, Kenya, Uganda, Tanzania, South Africa, and Nigeria. The discussion is limited to the common law framework and does not address statutory regimes or international conventions.

Liberia

Liberia is a country that has historical ties of dependence to the United States located in West Africa. In *Turner v Burnette*, the Liberian Supreme Court firmly established the principle of comity in the recognition and enforcement of foreign judgments, drawing particular support from *Hilton v Guyot*. The Court further explained—by reference to another U.S. authority—that:

"*The application of comity does not rise [sic] to the effect of establishing an imperative rule of law; it has the power to persuade but not command. Comity being voluntary, and not obligatory, rests in the discretion of the tribunal of the forum and is governed by certain more or widely recognized rules." Generally, greater force and dignity will be given to judgments of foreign courts when parties have had their day in a court of competent jurisdiction, after due service of process or after an entry of appearance, and have had a full and impartial hearing upon the merits of their case; unless it can be shown that the proceedings were tainted with fraud."*

Andrew Moran and Anthony Kennedy, conclude on the basis of the above Liberian Supreme Court decision that, "*It seems, therefore, that any foreign judgment may be enforceable in Liberia at common law as a matter of comity between nations. The procedure appears to be that a suit commenced on the foreign judgment, in the same way as an action is commenced at common law in other jurisdictions.*"

Kenya

Kenya is a former colony of the United Kingdom located in East Africa. Nevertheless, Kenyan courts apply both the theory of obligation and the principle of comity in recognising and enforcing foreign judgments at common law.

In *ABSA Bank Uganda Limited (Formerly Known as Barclays Bank of Uganda Limited) v Uchumi Supermarkets PLC,* the Kenyan High Court held at paragraph 5 that,

In the absence of a reciprocal enforcement arrangement, a foreign judgment was enforceable in Kenya as a claim in common law. Where a foreign court of competent jurisdiction had adjudicated a certain sum to be due to another, a legal obligation arose to pay that sum, on which an action of debt to enforce the judgment could be maintained. In deciding whether a foreign court was one of competent jurisdiction, the courts would apply not the law of the foreign court itself but English rules of private international law. The competence of the foreign court was the competence of the court in an international sense, that was, its territorial competence over the subject matter and the defendant. Its competence or jurisdiction in any other sense was not material."

However, in a more recent case, the Kenyan Supreme Court in *Ingang'a & 6 others v James Finlay (Kenya) Limited*, relying on *Hilton v Guyot*, applied the principle of comity in determining whether to recognise and enforce a locus inspection order from Scotland (see Anam Abdul Majid and Chukwuma Okoli). After quoting the key passage from *Hilton v Guyot* with approval, the Court stated at paragraph 60 that:

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

Uganda

Uganda is a former colony of the United Kingdom located in East Africa. Nevertheless, Ugandan judges apply both the theory of obligation and the principle of comity in recognising and enforcing foreign judgments at common law.

At common law, the principle of comity, with key reference to *Hilton v Guyot,* also formed the sole basis of recognising and enforcing a US judgment in the earlier Ugandan case of *Christopher Sales v Attorney General.*

More recently, Ugandan courts have justified the recognition and enforcement of foreign judgments by reference to the theories of obligation, comity, and reciprocity. In the very recent case of *Brianna v Mugisha*, Justice Nagawa, after a careful consideration of Ugandan case law authorities and *Hilton v Guyot*, stated that:

"5.4 However, I have observed that despite the absence of a statutory reciprocal arrangement, Ugandan courts have recognized and enforced foreign judgments under the common law principles of obligation, reciprocity, and comity.

5.5. These doctrines provide a legal foundation for cross-border judicial cooperation, particularly in the absence of a formal treaty or statutory framework, such as in the case of Uganda and the United States.

5.6. The doctrine of comity is based on mutual respect between sovereign states. It allows a court to recognize and enforce a foreign judgment not as a matter of strict legal obligation, but out of respect to the foreign court's authority and fairness in its proceedings. Courts apply comity where: the foreign court had competent jurisdiction over the matter and the parties, the proceedings were conducted fairly, with due process observed and enforcing the judgment would not be contrary to public policy in the recognizing jurisdiction.

5.7. The obligation theory treats a valid foreign judgment as creating a legal duty on the judgment debtor to comply, similar to a contractual obligation. This approach holds that once a court of competent jurisdiction has determined a party's liability, that decision should be

respected and enforced in other jurisdictions unless there is a compelling reason not to do so, such as: Fraud in obtaining the judgment, Violation of natural justice, or a fundamental defect in jurisdiction.

5.8. Under reciprocity, a foreign judgment will only be enforced if courts in the originating country would likewise enforce judgments from the enforcing country. This principle ensures mutual legal cooperation between jurisdictions."

It must be noted, however, that the recent acceptance of reciprocity in Uganda as a basis for recognising and enforcing foreign judgments at common law represents a significant departure from the position in other Anglophone and Commonwealth African countries, as well as Commonwealth jurisdictions more generally. It should also be emphasised that the court's remarks on the applicability of reciprocity at common law were, at best, obiter, as the court did not apply the doctrine to the facts of the case.

Tanzania

In Tanzania, a significant number of recent cases have used foreign judgments to preclude new actions on grounds of res judicata, obligation, and comity (*Exim Bank (COMORES) SA vs Costa Sari; Standard Chartered Bank (Hong Kong) Limited & Another vs Independent Power Tanzania Limited & Others*)

South Africa

South Africa, located in Southern Africa and formerly colonised by both Britain and the Netherlands, is a mixed legal system drawing from Roman Dutch law and the common law. The theory of obligation remains the dominant basis for the recognition and enforcement of foreign judgments. This position was affirmed by the Supreme Court of Appeal in *Jones v Krok*, where the Court endorsed the English authority of *Nouvion v Freeman* as support for applying the obligation theory in recognising and enforcing foreign judgments

However, in *Government of the Republic of Zimbabwe v Fick*,, the Constitutional Court referred to the principle of comity to justify the development of the common law framework for recognising and enforcing judgments from international courts, signalling a limited but notable openness to comity based reasoning.

Nigeria

Nigeria is a former colony of the United Kingdom and is located in West Africa. Under the common law regime, it applies the theory of obligation in the recognition and enforcement of foreign judgments (*Alfred C Toepfer Inc v Edokpolor).*

However, some Nigerian judges at the Supreme Court have proposed comity, jurisdictional reciprocity, and the facilitation of international trade and commerce as additional bases for enforcing foreign judgments (Grosvenor Casinos Ltd v Ghassan Halaoui (2009) 10 NWLR 309, 338–39 (Oguntade JSC)), but there has been no reported case where these proposals have been implemented in practice.

Conclusion

The purpose of this post is to highlight how selected Commonwealth and Anglophone African courts have received and applied the principle of comity in the recognition and enforcement of foreign judgments under the common law, particularly as articulated in *Hilton v Guyot*.

At present, Liberia is the only jurisdiction that fully applies the principle of comity as advanced in *Hilton v Guyot*, arguably influenced by its historical ties to the United States.

Kenya, Uganda and Tanzania apply the doctrine of obligation alongside the principle of comity.

South Africa primarily follows the doctrine of obligation, although a few cases have considered comity in the context of recognising and enforcing foreign judgments, albeit without concrete application.

In Nigeria, courts continue to rely principally on the doctrine of obligation at common law. Although some Supreme Court justices have proposed comity as a possible basis for enforcement, this has not been implemented in practice.

Overall, the doctrine of obligation remains the dominant common law basis for the recognition and enforcement of foreign judgments across Anglophone and Commonwealth Africa. Nonetheless, the principle of comity, as developed in

Hilton v Guyot, continues to play an important role in shaping the jurisprudence of a limited number of African jurisdictions.

No Exequatur Granted for a Panamanian Judgment in Greece Due to Public Policy Considerations [Piraeus Court of First Instance Case No. 2040/2026, Unreported]

INTRODUCTION

Following a significant hiatus, the public policy defense has re-emerged prominently in discussions surrounding the enforcement of foreign judgments, particularly in the context of a judgment issued by the Panama Maritime Court in 2024. The primary issue addressed by the Greek court was whether a foreign judgment could be recognized and enforced when the foreign court denied appellate proceedings due to the failure to post a security deposit that was both substantial and necessary for the appeal process.

FACTUAL BACKGROUND AND LEGAL FRAMEWORK

The case involved a claim for damages between a company based in Hong Kong and another company registered in the Marshall Islands. This dispute was adjudicated under Panama’s maritime law, established by Law 8 of 1982 and

updated by Law 55 of 2008, which governs maritime-related disputes through a specialized and efficient legal framework. The Panamanian maritime courts possess exclusive jurisdiction over in rem actions, enabling prompt vessel arrests and maritime liens within both Panamanian territorial waters and the Panama Canal for claims related to damages, cargo issues, and collisions.

The Panamanian court ruled in favor of the claimant, mandating the defendant to either return the vessel or pay approximately 45 million USD, i.e., the valuation of the vessel along with associated legal costs, as ordered by the court.

Subsequently, the judgment creditor sought recognition and enforcement of the Panamanian judgment in Greece, as the vessel was docked within Greek territorial waters.

The opposing party contended that the ruling from the Panamanian Naval Court of First Instance contravened Greek public policy and the European Convention on Human Rights (ECHR), primarily because the appellate process was effectively obstructed. According to Article 490 of Panama's Maritime Courts and Disputes Law, the appellant was required to deposit a security of nearly 45 million USD (equivalent to the judgment amount and associated legal fees) within ten days to have its appeal considered.

The original text from Article 490 reads:

"Artículo 490. Para cursar la apelación se requerirá la consignación, ante la secretaría del Tribunal Marítimo de primera instancia, de una caución que garantice el pago del monto de la condena más las costas. Para determinar el monto de la caución se considerará la caución consignada para levantar el secuestro o el valor del bien secuestrado. Dicha caución será consignada dentro de los diez días siguientes a la notificación de la providencia que admita el recurso. Si el apelante no consigna la caución de que trata este artículo, el juez declarará desierto el recurso."

In light of the above, the excessive requirement for a security deposit resulted in the judgment debtor's appeal being dismissed, thereby forfeiting its right to be heard.

FINDINGS OF THE GREEK COURT.

The Greek court recognized that while imposing a financial guarantee as a prerequisite for appeal can have legitimate justifications, such as discouraging vexatious litigation and promoting judicial efficacy, the circumstances in this case revealed that the requirement was manifestly disproportionate and unduly burdensome. The court articulated the following concerns:

– The required guarantee matched the total amount of the initial judgment plus costs.

– There was no cap, no exceptions, and no discretion for reduction based on the specifics of the case.

– It effectively forced the appellant to comply with the first-instance judgment in full just to access the appeal process.

The court referenced Article 323(5) of the Greek Code of Civil Procedure, which encompasses the public policy clause, confirming that the security requirement violated the principle of proportionality. Furthermore, limiting access to the court and undermining judicial protection directly contravened Article 6(1) of the ECHR and Article 20, paragraph 1 of the Greek Constitution.

Consequently, the obligation to deposit an amount of USD 44,397,715.97, which constitutes the awarded sum of the initial judgment (USD 41,248,107.88) plus legal costs (USD 3,149,608.09), was viewed as an untenable financial burden that contradicts the right to judicial protection.

More specifically, the imposition of a security deposit that equaled the judgment amount plus legal fees, with no statutory limits, exceptions, or discretionary reduction possibilities, violated public policy. This requirement substantially infringed upon the appellant’s right to access judicial remedies against an enforceable ruling.

Finally, the court noted that while Greek law allows for provisional enforceability of first-instance judgments under certain conditions, including the possibility of appeal suspension without a guarantee if there is a likelihood of success, such provisions were absent in Panamanian law.

Non-Qualifying Ceremonies: The Futility of Foreign Registration of Islamic Marriages under English Law

This blog note is kindly provided by Dr. ***Muhammad Zubair Abbasi*** *(Lecturer, School of Law, Royal Holloway, University of London; zubair.abbasi@rhul.ac.uk).* *It follows the author's previous post on this topic, which was published earlier* ***on this blog****.*

Introduction

In *MA v WK* [2025] EWFC 499, three women had undergone Islamic marriage (*nikah*) ceremonies in England. Each argued that subsequent registration of her marriage in Pakistan had converted it into a valid foreign marriage entitled to recognition in England and Wales. The Family Court rejected this argument because the *lex loci celebrationis* is fixed at the place and moment of the ceremony; no later act of registration in another jurisdiction can alter it.

The more important question is why the argument was made at all. Each applicant had already accepted that her ceremony was a non-marriage or non-qualifying ceremony (NQC) under English matrimonial law. Each had therefore been excluded, by the rule established in *Attorney General v Akhter & Others* [2020] EWCA Civ 122 from the financial remedies that the Matrimonial Causes Act 1973 would otherwise have provided. The argument from Pakistani registration was, in substance, a desperate attempt to find through private international law a route that domestic law had closed. It was always going to fail but the fact that it was attempted is itself instructive. When the law systematically denies recognition to a form of marriage that a significant part of the population regards as valid, litigants will look for whatever route remains open. *MA v WK* is a

record of one such attempt, and it is unlikely to be the last as long as the existing legal framework remains unreformed.

The Facts

There were three female applicants, each of whom had celebrated a *nikah*-only in England and sought to rely on subsequent registration in Pakistan. The first, MA, had celebrated a *nikah* with WK in Oxfordshire on 1 April 2013. She produced a Pakistan Marriage Registration Certificate recording both the marriage date and entry date as 1 April 2013, with an issue date of 26 August 2024. The second, TM, had celebrated a *nikah* with MM at a mosque in England on 19 January 1992. She produced a Pakistan Marriage Registration Certificate, but the entry date was 2 October 2025 — thirty-three years after the ceremony and after MM had already remarried in Pakistan in 2017. The third, AM, had celebrated a *nikah* with RK in England in 2005. No evidence of registration was produced.

Non-Qualifying Ceremonies and Private International Law

The formal validity of a marriage is governed by the *lex loci celebrationis*, as restated by Moylan LJ in *Tousi v Gaydukova* [2024] EWCA Civ 203. All three ceremonies took place in England; all three applicants accepted that none had complied with the Marriage Act 1949. Each was therefore a non-qualifying ceremony (NQC). The question was whether subsequent registration in Pakistan could convert them into valid foreign marriages capable of recognition in England and Wales. The court held that it could not: the *lex loci* is determined by the place of celebration, not by any later administrative act. There is no authority for the proposition that registration can substitute for, or supplement, the ceremony for the purposes of legal recognition.

The applicants advanced two arguments. First, that registration is the operative event for *lex loci* purposes, deriving from *Sottomayor v De Barros (No 1)* (1877) 3 PD 1, a principle elevating it to the “pinnacle” of matrimonial law [para 16]. That reading does not survive examination: in *Sottomayor* ceremony and registration

happened simultaneously at an English register office, and their coincidence does not make registration the constitutive event. The three further authorities relied upon, *Boughajdim v Hayoukane* [2022] EWHC 2673; *Entry Clearance Officer v Firdous* [2018] HU/04562/2016 (Upper Tribunal); and *Farah v Farah* 16 Va. App. 329 (Va. Ct. App. 1993), each turned on where the ceremony, or its dominant elements, had taken place. None held that registration of an English ceremony abroad could shift the *lex loci*; they are authority for the opposite proposition.

The second argument assumed what it needed to prove. The principle in *Berthiaume v Dastous (*Quebec) [1929] UKPC 73*,* that a marriage valid where celebrated is valid everywhere, operates in favour of a marriage validly formed at its place of celebration. It avails nothing where the ceremony was not valid there in the first place. A further difficulty lay in Pakistani law itself. On the expert evidence, accepted in *Rana v Manan* 2011] EWHC 2132 and applied here, registration under section 5 of the Muslim Family Laws Ordinance 1961 is directory rather than mandatory: it is the *nikah* contract that creates the marriage. What Pakistani law had done in registering these marriages was not to create new Pakistani marriages, but to record marriages that Pakistani law treated as having taken place in England.

On the presumption of marriage, the answer was straightforward. The presumption, as Evans LJ explained in *Chief Adjudication Officer v Bath* 1999] EWCA Civ 3008 at [31]–[32], fills evidential gaps; it does not operate where there is positive evidence of non-compliance with the statutory formalities. The circularity this produces is uncomfortable. A party who wishes to argue for recognition of her marriage must disclose to the court the circumstances of the ceremony; and once she has done so honestly, she will typically have foreclosed the only doctrine that might have assisted her.

Commentary

The judgment in this case is the latest in a sequence that has progressively narrowed the legal options available to parties in religious-only or a nikah-only marriages. Until *Attorney General v Akhter & Others* [2020] EWCA Civ 122, the courts had available to them a range of tools: the “hallmarks of marriage” test from *Gereis v Yagoub* [1997] Fam Law 475; the presumption of marriage from

long cohabitation from *Chief Adjudication Officer v Bath*1999] EWCA Civ 3008; and a generally flexible approach to the non-marriage category, which had been applied in reported cases almost exclusively to polygamous unions (*A-M v A-M (Divorce: Jurisdiction: Validity of Marriage)* [2001] 2 FLR 6; *Gandhi v Patel* [2002] 1 FLR 603; *Shagroon v Sharbatly* [2012] EWCA Civ 1507; and *El Gamal v Al-Maktoum* [2011] EWHC B27.

The Court of Appeal's introduction of the NQC category in *Attorney General v Akhter & Others* [2020] EWCA Civ 122 changed the landscape. A court asked to classify a religious-only ceremony now asks a single, decisive question: did the ceremony comply, at least to some degree, with the statutory requirements? If the answer is no, the ceremony is outside the regulatory framework entirely, and neither the hallmarks test nor the presumption can operate to bring it back in. The present case is a private international law application of the same logic: the question is what happened at the ceremony, assessed as at the date of the ceremony, and later events, including registration abroad, are irrelevant.

The choice of jurisdiction made no difference to that conclusion. The applicants sought declarations of marital status under section 55(1) of the Family Law Act 1986, which enables a person to apply for a declaration that a marriage was at its inception valid, or that it subsisted on a particular date. That jurisdiction is declaratory, not constitutive: it identifies the status that the law recognises, it does not create one. The argument from foreign registration was in substance an invitation to the court to use the section 55 jurisdiction to confer a status that English law does not recognise. It was always going to fail, not because of any deficiency in the evidence or any technical point of procedure, but because the declaratory jurisdiction cannot be deployed as a means of circumventing the requirements that the Marriage Act 1949 imposes.

None of this is a criticism of the applicants, who were doing what people in their position typically do: looking for whatever route the law might offer. It is a comment on the law itself. The Attorney General had foreshadowed a public policy objection under section 58(1) of the 1986 Act had the court found in the applicants' favour, an indication that the state's interest in maintaining the integrity of the marriage framework is regarded as sufficiently strong to resist even a successful argument from foreign registration [para 30]. That the argument failed means the public policy point did not arise, but its potential invocation confirms that the current framework is not one the courts are inclined

to look for ways around.

Conclusion

The decision in *MA v WK* is easy to justify on the law as it stands. The *lex loci celebrationis* is not a rule that administrative convenience in another jurisdiction can displace, and the section 55 jurisdiction does not exist to remedy the deficiencies of the Marriage Act 1949. But the case is a reminder that when domestic law closes every available door, litigants will look elsewhere.

The failure in this case is not one of private international law. The Marriage Act 1949, built on foundations laid by Lord Hardwicke's Clandestine Marriages Act 1753, which transformed the private marriage contract into a public act requiring the sanction of the church-state — was not designed with cultural and religious diversity in mind. The Government has committed to reform. But the proposed changes are prospective. They will not assist the three women in this case, nor the many others in the same position. Until Parliament addresses that gap, family courts will continue to turn away women whose marriages are real to everyone except the law.

A few takeaways from the Conclusions & Decisions of the HCCH governing body (CGAP – 2026 meeting): parentage/surrogacy, jurisdiction

project, cross-border recognition and enforcement of protection orders and a Note on the Trusts Convention

This week the Conclusions & Decisions (C&D) of the HCCH governing body, the Council on General Affairs and Policy (CGAP or Council), were published. Click the links below for the relevant language versions (English, French and Spanish).

Although a wide range of topics were discussed, I would like to focus on four items: parentage/surrogacy project, the cross-border recognition and enforcement of protection orders, the jurisdiction project and a Note on the Trusts Convention.

In my view, the C&D are significant for two reasons. First, the work related to a possible new instrument of a long-standing topic at the HCCH has been concluded (without a Convention) and secondly, a "new" topic has been inserted into the agenda of the HCCH. For more information, see below.

Parentage/surrogacy project

The parentage/surrogacy project has been a recurrent topic in the work of the HCCH. It has expanded more than a decade, starting in 2010 with some preliminary research, which resulted in the establishment of an Experts Group (EG) and subsequently, a Working Group (WG).

In preparation for this meeting, a document was drawn up by the Working Group (WG) on Parentage / Surrogacy entitled: *Final Report on the Feasibility of a possible Convention on the Recognition of Judgments on Legal Parentage* (Preliminary Document (Prel. Doc.) No. 1). This is a monumental work, which includes a text of a draft Convention (as of p. 13).

The specific proposal of the WG to the Council was the following:

"The WG acknowledged the importance of the HCCH Parentage / Surrogacy Project to develop an international instrument on legal parentage in cross-border situations. The WG agreed that such an instrument is desirable, as it could

enhance legal certainty, predictability and continuity while protecting the rights of children and families, and all persons involved."

It further acknowledged that policy differences remained and for some experts these were fundamental, and as a result, consensus could not be reached on a way forward (*i.e.* advancing to a Special Commission, which is the usual path when negotiating a HCCH Convention and which are meetings held prior to a Diplomatic Session).

With this Final Report, and as its name suggests, the work of the WG has concluded and this Preliminary Document is the last document drawn up by the WG on this topic.

Reflecting the disagreement existing at the WG level, the Council decided on this topic the following: "While recognising the progress made by the Working Group, CGAP decided not to advance to a Special Commission at this stage, with the understanding that this issue may be revisited at a later stage."

Accordingly, this year marks the end of this project (if not the end of an era), with the exception of monitoring legal and practical developments on the subject that are to be presented at the 2028 meeting of the Council (C&D No. 5). Perhaps this topic may be revived in the future when and if the time is ripe.

Cross-border recognition and enforcement of protection orders

While the ashes of the Surrogacy/Parentage project were still warm, a "new" proposal for a Convention emerged and was tabled by the UK as: *Prel. Doc. No 25 of January 2026 – Proposal from the United Kingdom to establish a Working Group on Recognition and Enforcement of Protection Orders* – not publicly available.

The Council mandated the establishment of a WG on a potential future convention on cross-border recognition and enforcement of protection orders (see C&D No. 22).This is remarkable and underlines the importance of keeping women and children safe. By tabling this proposal, the UK makes clear that this is an absolute priority.

This initiative will build on previous work conducted by the Permanent Bureau from 2011-2018, during which an Experts Group was established (see C&D No.

23 and 24). At its 2018 meeting, the Council noted that “14. The Council decided to remove from the Agenda of the HCCH the topic of recognition and enforcement of foreign civil protection orders, with the understanding that this issue may be revisited at a later stage.” A statement that now is history.

This will be an important initiative to follow in the future.

Jurisdiction project

The decision on the future of the jurisdiction project has been delayed until the next meeting of the Council in 2027. At that meeting a decision will be made whether that project advances to a Special Commission “or decide on any other outcome of the Project” (C&D 9).

A Report of the Chair of the Working Group on matters related to jurisdiction in transnational civil or commercial litigation was presented as Prel. Doc. No 2A of December 2025. This Report includes a draft text of a future convention on parallel proceedings and related actions (from p. 13, with many [square brackets], signalling lack of consensus or agreement on the text).

Last year a public consultation was launched on the Draft Text of a possible new convention on parallel proceedings and related actions, the results of which still need to be analysed. The Council mandated that a document be submitted analysing such responses by the end of September 2026 and gave specific instructions on how it should be drafted (C&D No. 8). The responses will be published subject to the permission of the respondents.

We will keep you informed of any new developments.

A Note on the Trusts Convention

Finally, a Note on the Application and Interpretation of Article 2 of the Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition and on the Institutions Analogous to Trusts was submitted as Prel. Doc. No 12B of January 2026 (for the actual Note see Annex V, p. 25). In particular, a fascinating explanation of the terms used in English (estate) and French (patrimoine) is included in pages 28-29. Equally interesting is Annex A to Note (for Section V) – Institutions Meeting the Criteria in Article 2 of the Trusts Convention. This Note was approved and will be published together with its

Annexes (C&D 69).

In sum, this Council's meeting decided on crucial matters related to treaty making on Private International Law at the HCCH. The next meeting of the Council in 2027 will also be of great importance as it will decide on the future of the jurisdiction project. With regard to specific projects, the cross-border recognition and enforcement of protection orders attests to the fact that a topic can indeed return to the agenda of the HCCH, and thus some experts may harbour the wish that the parentage/surrogacy project may rise one day like a phoenix from the ashes.

Muscles from Munich? How German Courts Might Stop US Companies from Violating Copyright through AI Training



Yesterday, the Regional Court of Munich (*Landgericht München I*) held a highly interesting oral hearing in a dispute brought by *GEMA*, a German collecting society representing composers, and *Suno*, a generative music AI company based in Cambridge, MA. The hearing was noteworthy, first, because it gave the public an opportunity to listen to numerous international hits, from Alphaville's Forever Young to Lou Bega's Mambo No. 5 (and their alleged copies created by *Suno*) in a courtroom; and secondly, because the dispute raises some interesting questions of private international law.

After *GEMA* had already scored a famous victory against *OpenAI* in November 2025, when the same chamber of the Munich Court had held that the company

had been violating the copyrights of several artists and composers by reproducing their song texts, the present proceedings differed not just in scope (focusing on the musical arrangement rather than texts) but also in its international dimension. For the first time, the claimant explicitly included the use of the protected works for training that had happened (according to both parties) exclusively in the US.

As far as those claims are concerned, the main obstacle to overcome for the claimant is the German court's jurisdiction. As Germany has no (codified) law on international jurisdiction over non-EU defendants, international jurisdiction is established by extending the rules on local jurisdiction (venue) to international jurisdiction (so-called 'double funtionality'; see Lutzi/Wilke, in Lutzi/Piovesani/Zgrabljic Rotar (eds), Jurisdiction over Non-EU Defendants (Hart 2024), 111 et seq). In the present case, this appears to provide an opportunity for the claimant to rely on a little-known norm of the German *Verwertungsgesellschaftsgesetz* (VGG; own translation and emphasis):

> ***§ 131 Exclusive Jurisdiction***
>
> *(1) For legal disputes concerning claims by a collecting society for infringement of a right of use or right of consent administered by it, the court of the district in which the* ***infringing act was committed*** *or in which the infringer has their* ***general place of jurisdiction*** *shall have* ***exclusive jurisdiction****. (…)*
>
> *(2) If, pursuant to paragraph 1, sentence 1,* ***different courts*** *have jurisdiction for multiple legal disputes against the same infringer,* ***the collecting society may bring all claims before any one of these courts.***

While the provision is clearly aimed at allocating local jurisdiction within Germany, nothing in its wording seems to exclude an international understanding, similar to other norms on local jurisdiction. While this would create a clearly exorbitant *forum actoris* for German collecting societies in cases falling under paragraph 2, this might be justified by the peculiar nature of collecting societies, which are heavily regulated in German law and are required, for instance, to enter into licensing agreements under 'appropriate' conditions (§ 34 VGG). Indeed, the Munich court appeared rather amenable to the proposition of applying § 131 VGG internationally.

In the present case, this would raise further interesting questions.

For once, does paragraph 1, according to which the courts of the place of infringing and the courts of the defendant's seat are competent, lead to 'different courts' being competent in the sense of paragraph 2? Traditionally, the provision was supposed to solve the problem of traveling showmen performing committing similar infringements in numerous places. As far as the training of AI is concerned, there might only be a single place of infringement, though. Then again, paragraph 2 only requires multiple competent courts for proceedings 'against the same infringer', which should allow other infringements, such as the streaming of allegedly copyright-violating output in Germany to be taken into account.

Assuming that the court would not consider this sufficient to trigger the *forum actoris* of paragraph 2, it would need to answer another question, namely if paragraph 1 as a rule of exclusive jurisdiction would also prevent the claimant from (subsidiarily) relying on § 23 of the Civil Procedure Code (ZPO), which creates jurisdiction at the location of the defendant's property. In other contexts, authors have argued that provisions of exclusive *local* jurisdiction should not be understood as provisions of exclusive *international* jurisdiction so as not to render the recognition and enforcement of decisions from other fora impossible.

If the Munich court accepted its international jurisdiction on either of those bases, the applicable law would, of course, still be US copyright law (including its relatively far-reaching exceptions for 'fair use', which the defendants argue should apply here) pursuant to Article 8 Rome II. Thus, if the decision – which has been scheduled for **12 June** – includes a positive decision on international jurisdiction regarding the US-based training, it might not yet include a decision on the substance in this regard, but could instead include an order for expert evidence on foreign law (§ 293 ZPO).

The claimants would understandably still consider this as a win, though, as it would provide a basis for future claims by German collecting societies against AI companies. In this sense, it would fit neatly into what *Linda Kuschel* and *Darius Rostam* have described, in reaction to the previous decision against OpenAI, as '*the current popular narrative of a tightly regulating EU that protects rightsholders and a US that favors AI-friendly market solutions.*' While the Munich judges said rather little about their own preferred interpretation of the

law at yesterday's hearing, especially with regard to international jurisdiction, they also made no effort to dispel this narrative.

German Federal Court of Justice on the Pegasus-Software Scandal: States do not have a general right of personality

This case note is kindly provided by *Dr. Samuel Vuattoux-Bock, LL.M. (Kiel)*, Freiburg University (Germany)

On February 24, 2026, the German Federal Court of Justice ruled on the Kingdom of Morocco's claim against the German news portal "Zeit Online" (Case no. VI ZR 415/23). In 2021, the journal alleged that Morocco had spied on several lawyers, journalists, and high-ranking politicians, including French President Emmanuel Macron, using the surveillance software "Pegasus". Morocco denied the allegations and sued the publication for damages, claiming an infringement of its general right of personality. The Federal Court of Justice of Germany, the highest court for civil and criminal matters, rejected Morocco's claim, arguing that states do not have such a right. This decision is interesting because it lies at the intersection of private international law, national tort law, and public international law. The following article aims to present the main points of this decision in terms of both its international and substantive aspects.

I. Aspects of Private International Law: A too Easy Gateway into German Law?

First, the court had to determine if it was competent and which law should apply to this claim (Nos. 7 et seq.). Despite the claimant's status as a Third State, the

application of the Brussels Ibis Regulation (EU 1215/2012) was unproblematic here. Morocco's claim was not made "in the exercise of State authority (acta iure imperii)" (Art. 1(1) Brussels Ibis), and the defendant is based in a European Union Member State (Hamburg, Germany).

However, the determination of the applicable law revealed some hesitation on the part of the Court (Nos. 11 et seq.). Surprisingly, the Court did not decide whether the Rome II Regulation or German autonomous private international law should apply to the case (no. 13). Although the court considered the possible application of the exception of Art. 1(2)(g) Rome II ("non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation."), the Court did not address whether an infringement of a legal person's reputation falls under this exception (nos. 15 and 16). However, infringements of rights relating to personality through the media clearly fall under the exception of Art. 1(2)(g) Rome II. The debate about applying this exception to legal persons is actually caused by the application of the Rome II Regulation to claims related to unfair competition (Art. 6(1) and (2) Rome II), not by their mere quality as legal persons (see CJEU, ECLI:EU:C:2017:766, Bolagsupplysningen and Ilsjan, mn. 38). However, the present case is not related to business matters or competition claims; therefore, the exception of Art. 1(2)(g) Rome II should clearly apply.

Therefore, German private international law should apply, which the Court also examined (nos. 18 et seq.). The Court found that the parties had made an implied choice-of-law agreement for German law (no. 19). The Court ruled that, throughout the entire procedure, the parties' exclusive reference to substantive German law satisfied the conditions of such an agreement under Art. 14(1)(a) Rome II (no. 17) and Art. 42 of the Introductory Act to the Civil Code (EGBGB). This decision, if it can be understood, left some kind of an aftertaste of insecurity of the Court, as it appeared to be the simplest way to reach German law. Art. 40 EGBGB, relating to the applicable law for torts, allows the claimant to choose between the place where the harm arose (*Erfolgsort*) and the place where the event which gave rise to the harm occurred (*Handlungsort*). The eventual question of the claimant's (Morocco) choice for determining where the harm occurred would have led to the well-known difficult question of the localization of such an infringement through the Internet and the possible application of Moroccan law. In such a case, the Court would also have had to consider the application of Art. 40(3)(2) EGBGB, which states that this law is inapplicable if the

claimant's purpose is not actually to seek compensation (e.g. to exert pressure on the defendant). The Court did not address these issues and concluded that German law applies.

II. Aspects of Substantive Law: A Panorama of Public International Law for the Benefit of Private Law

German tort law is based on a restrictive approach. The central norm, Sect. 823(1) of the Civil Code (BGB), lists the legally protected rights: Life, Body, Health, Freedom, Property and "other right". This last category allows for the protection of interests comparable to those listed, such as the right to one's personality, or the protection of victims from certain types of professional pure economic loss. Schematically, damages can only be granted for other interests if the tortfeasor infringed upon a protective law (Sect. 823(2) BGB) or if the harmful act is immoral (Sect. 826 BGB), which conditions are stricter.

Therefore, the claimant first tried to obtain damages based on the general case law regarding the infringement of personality rights under Sect. 823(1) BGB, and second, based on the infringement of criminal laws as protective laws under Sect. 823(2) BGB. However, the claims based on criminal legislation (Sect. 90a, 90b, 185 et seq., 102 to 104a of the Criminal Code, StGB) failed because foreign states are not subject to these norms (nos. 62 et seq.).

Therefore, the debate focused on Sect. 823(1) BGB and, logically, if such a right of personality also exists for states. After establishing that domestic law does not grant states such a right according to settled case-law (nos. 21 et seq.), the Court considered whether such a right exists as a general principle of public international law (nos. 23 et seq). In doing so, the Court examined an extensive body of case law (nos. 28 et seq.) from international courts and arbitral tribunals, the European Court of Humans Rights, diverse international and regional organizations (e.g. the Council of Europe, the European Union, the OSCE…) and national courts (USA, England, Scotland, France and Germany). The Court concluded that a protection of an alleged right of personality for states against private individuals does not exist. Most of the relevant decisions involve cases concerning diplomats or claims from state to state. In fact, the Court noted that

many organizations encourage states to refrain from suing journalists regarding questions of the state's reputation to guarantee freedom of speech and press freedom (cf. no. 54). Although the Court does not explicitly refer to it, the idea of extracontractual liability that does not "open the floodgates" of liability, as well as the weighing of interests, are typical to German tort law. The interest of a foreign state in protecting its honor against statements by private individuals is neither necessary nor worthy of protection under civil law.

III. Final remarks

By ruling that foreign states do not have a right of personality that can be enforced against private individuals, the German Federal Court aligned itself with the decision of the French Cour de Cassation. The highest French court for civil and commercial matters also decided on the very same case in 2024, i.e. a claim of the Kingdom of Morrocco against a French journal regarding the very same accusations. In this case too, the French Cour de cassation – without spending a word on the aspects of private international law – decided that "a foreign state is not entitled to bring a public defamation action against an individual" (no. 12). These decisions are certainly welcome, as they reinforce the independence of the press against foreign attempts to influence press freedom in Europe, especially in these troubled times.

Climate Litigation Before the German Federal Court of Justice – "Too Complex" for Private Law instruments?


CC BY SA 3.0 ComQuat Wikimedia Commons

Written by Marc-Philippe Weller, Carolina Radke, and Marianna Dänner (all Heidelberg University)

On 2 March 2026, the German Federal Court of Justice (*Bundesgerichtshof*; "BGH") held an oral hearing in two proceedings concerning the civil liability of companies regarding climate change. The authors of this blog post attended the hearing as members of the audience.

The German NGO *Deutsche Umwelthilfe (DUH)* is suing the car manufacturers *BMW* and *Mercedes Benz*, requesting a legal order obliging both companies to refrain from placing combustion engine cars on the market beyond 2030. These two proceedings join the club of (strategic) climate change lawsuits in Germany. Crucially, they are the first of their kind based on tort law to reach the German Federal Court of Justice. Accordingly, the hearing was eagerly awaited by many. The decision, which will be rendered on 23 March 2026, will undoubtedly have an impact on future climate lawsuits.

While no issues of international jurisdiction or applicable law arose in the proceedings in question – as all Parties are seated in Germany –, the judgment of the BGH could further motivate foreign parties to bring claims against German companies, thereby giving rise to questions of international jurisdiction and the applicable law (see for more details *Weller/Weiner*, Corporate Climate Liability in Private International Law, in: Japanese Yearbook of Private International Law, Vol. 26 (2024), 2). In this context, one may refer to the deliberations of the Higher Regional Court (OLG) Hamm in *Lliuya against RWE* (OLG Hamm, 28. Mai 2025, 5 U 15/17).

1. Legal Framework

The climate goal of the German Constitution (*Grundgesetz*; GG) derived from its Art. 20a was specified by the German Constitutional Court (*Bundesverfassungsgericht*) in line with the Paris Agreement, namely, to limit the rising global average temperature to well below 2°C and preferably to 1.5°C above pre-industrial levels. Combustion engine cars contribute to the global CO2

emissions and hence to the greenhouse gas effect and the global warming. Against this background, the question arises whether the constitutional climate goal can (additionally) be enforced through private lawsuits against companies, notwithstanding the fact – as emphasized in the present case – *BMW* and *Mercedes* are acting in accordance with the existing public regulatory framework in Germany.

In both proceedings, the claim of *DUH* relies on Section 1004(1) of the German Civil Code (*Bürgerliches Gesetzbuch*; BGB) in conjunction with Section 823(1) BGB.

Section 1004(1) BGB allows an owner of an absolute individual right (like property or health) to demand that a disturbing party ("Störer") – i.e. the party interfering with the individual right – remove an interference or *refrain from future interferences*. Section 823(1) BGB provides claims for damages in the event of a violation of such a right.

DUH bases its claim – to prevent the manufacturers from placing combustion engine cars on the market from 2030 onwards – on an infringement of the so-called "General Right to Personality" (*Allgemeines Persönlichkeitsrecht*), which is provided for by the German constitution (Art. 2(1) in connection with Art. 1(1) GG) and which is recognized as protected right within the meaning of Section 823(1) BGB and Section 1004(1) BGB. Hence, infringements of that personality right can be stopped via an injunction based on Section 1004(1) BGB.

In the proceedings against *BMW* and *Mercedes-Benz*, the claimants want to activate an intertemporal dimension of that "General Right to Personality" called "Right to greenhouse gas-related freedom" (*Recht auf treibhausgasbezogene Freiheit*). This approach would be new in private law. It builds upon the famous "Klimaurteil" (climate judgment) of the *Bundesverfassungsgericht* from 24 March 2021. In this judgment, the Constitutional Court established a new legal figure called "eingriffsähnliche Vorwirkung". It extends the basic rights protection to a protection against infringements *by the state* in the future that are grounded in present state omissions or insufficient actions (in the sense of a right to intertemporal freedom). By analogy to this legal concept in public law, *DUH* argues that the legal figure "eingriffsähnliche Vorwirkung" should also apply in tort law to actions by private companies (such as BMW and Mercedes).

The claims of *DUH* were rejected in the previous instances (LG München I, 07 Feb 2023, 3 O 12581/21, OLG München, 12 Oct 2023, 32 U 936/23 for the claim against *BMW* and LG Stuttgart, 13 Sept 2022, 17 O 789/21, OLG Stuttgart, 08 Nov 2023, 12 U 170/22 for the claim against *Mercedes*).

2. Inside the courtroom: key legal arguments

In the oral hearing before the BGH, the arguments focused on two legal aspects:

(1) Does the legal figure of intertemporal protection of basic freedoms in the form of an *"eingriffsähnliche Vorwirkung"* apply also to private actors if – as is currently the case in Germany – the national CO2 budget has not yet been attributed among industrial sectors, the federal states, or even single actors? According to the Constitutional Court, the state has the obligation to concretize the remaining national budget ("Konkretisierungsauftrag") by assigning CO2 budgets to the different actors. What does this mean for the duties of private actors if the state fails to comply with this obligation by not assigning specific reduction targets? May civil courts assign specific reduction targets?

According to the claimant (*DUH*), the intertemporal protection of basic freedoms subsidiarily applies to such private actors that considerably contribute to global greenhouse gas emissions. The less reduction measures were taken now, the more strenuous reduction measures would be needed in the future, which would interfere in the basic rights freedoms more severely. CO2 budgets for private actors such as the car manufacturers could in that case be measured by scientific data (such as attribution science), so even without state-allocated CO2 budgets.

In the opinion of the defendants (*BMW* and *Mercedes*), it would exceed the competences of the courts if they were to allocate individual CO2 residual budgets to companies in such climate lawsuits. The counsels for the defendants relied on the argument of separation of powers and the complexity of climate change requiring multi-level solutions. Climate change would be a topic too complex to be solved by courts and by private law – instead, a mixture of legal instruments and a balancing of interests by the democratic legislator was needed. Any private law based litigation, being bilaterally restricted to the involved parties, would be arbitrary and could not solve the climate challenge which was a problem of societal scale. Courts would put themselves at the place of the legislator or at least thwart the legislator's concept or solution. The defendants'

counsels also argued with the margin of appreciation granted by the German Federal Constitutional Court in its 2021 decision.

The defendants also raised the argument that a CO2-budget for civil actors would be ineffective, as the climate reduction goals could only be achieved globally – as such, if in other states major emitters did not comply with their obligations, the national emitters had to make "extra" efforts to make up for the gaps. Besides, "national solo runs" would endanger international cooperation.

(2) Can private actors, such as *BMW* and *Mercedes*, be treated as "disturbing" within the meaning of Section 1004(1) BGB for contributing to the risk of future state climate protection measures? The BGH raised the question whether the manufacturers could be qualified as indirect disturber by action (*"mittelbare Handlungsstörer"*). This was argued to result from an evaluative tailoring of the manufacturers' responsibility (*"wertender Zuschnitt von Verantwortungsbereichen"*). A main point in the arguments in that respect revolved around the question if a private actor can be a disturber within the meaning of Section 1004(1) BGB if it complies with all legal requirements and duties. This was at least an indicator against a disturbance triggering liability under Section 1004(1) BGB.

The defendants argued that Section 1004(1) BGB as a *bilateral* claim was per se not suitable for resolving issues like climate change, which is a problem concerning our society *as a whole*, not only two parties in a civil proceeding. Civil law could not provide for protection if the threat caused concerned a mass of persons, not only another party.

Furthermore, according to the defendants, the disturber and the affected party would coincide since everyone contributed to climate change. It therefore would remain unclear where a distinction was to be drawn between who qualifies as a disturber and who does not. Besides, there was neither a general duty of care (*"Allgemeine Verkehrspflicht"*) nor specific CO2-budgets that the defendants are currently violating. Where the contested conduct was currently lawful, it could not be prohibited under civil law through the mechanism of Section 1004(1) BGB.

The claimant's counsel argued that formal concerns against emitters being disturbers in the legal sense had to remain unapplied, as otherwise private law in general could not provide legal protection in the field of climate change.

The defendants relied finally on the argument that private law based litigation such as the given proceedings were arbitrary for the reason that (1) it was "random" which emitter would be the target of such litigation and (2) that there could be no redress in a bilateral two party relationship as this would lead to the same emission being litigated in several proceedings (e.g. car manufacturers, car rental agencies and car drivers).

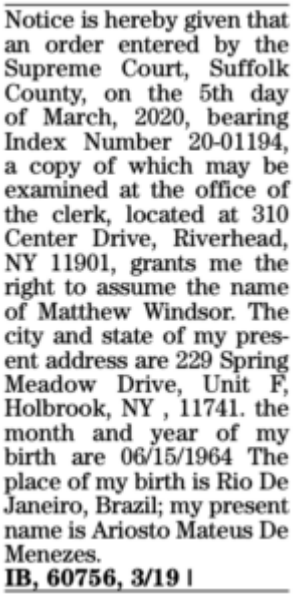
III. Assessment and outlook

The final decision of the German Federal Court of Justice will be rendered on 23 March 2026. The Court will implicitly decide whether combating climate change primarily falls within the responsibility of the legislator, or whether civil courts can also play a meaningful role in addressing this global challenge.

Brazilian Ruling Recognises US Name Change

Written by Prof Dr João Costa-Neto, Assistant Professor, Faculty of Law, University of Brasília
and Dr Pedro Pagano Payne, Academic Assistant, Faculty of Law, University of Brasília

In April 2025, the highest chamber (*Corte Especial*) of the Brazilian Superior



Notice is hereby given that an order entered by the Supreme Court, Suffolk County, on the 5th day of March, 2020, bearing Index Number 20-01194, a copy of which may be examined at the office of the clerk, located at 310 Center Drive, Riverhead, NY 11901, grants me the right to assume the name of Matthew Windsor. The city and state of my present address are 229 Spring Meadow Drive, Unit F, Holbrook, NY , 11741. the month and year of my birth are 06/15/1964 The place of my birth is Rio De Janeiro, Brazil; my present name is Ariosto Mateus De Menezes.
IB, 60756, 3/19 |

CourtofJustice(STJ),underJusticeMariaIsabelGallottiasrapporteur,ruledon 'Recognition of a Foreign Judgment' (HDE) no. 7.091/EX. The case concerned the recognition of a United States ruling changing the last name of a Brazilian national who had acquired US nationality. The Plaintiff sought recognition of (i) his US naturalisation and (ii) a ruling of the Supreme Judicial Court of Suffolk County, Massachusetts, which changed his name from 'Ariosto Mateus de Menezes' to 'Matthew Windsor'.

The Court decided it had no competence to ratify the naturalisation. Granting US citizenship is a prerogative of the US Government. And loss of Brazilian nationality is ruled by a specific domestic administrative procedure, under the Brazilian Ministry of Justice. The Court concluded that, because of lack of competence, the documents presented did not satisfy the statutory requirements for recognition under the Brazilian Code of Civil Procedure and the Court's internal rules. By contrast, the Court granted recognition of the name-change judgment. It found that the formal requirements for recognition had been met: the decision was rendered by a competent authority, had become stable, and was properly documented and translated. The decisive issue, therefore, was whether recognition would violate Brazilian *ordre public*.

Justice Gallotti grounded her analysis in Article 7 of the Introductory Statute to the Norms of Brazilian Law (LINDB), a statute inspired by the German *Einführungsgesetz zum Bürgerlichen Gesetzbuche* (EGBGB). LINDB provides that the law of the person's domicile governs name and capacity. The applicant was domiciled in the United States. The name change was carried out under US law. The case did not fall within any area of exclusive Brazilian jurisdiction (Article 23 of the Brazilian Code of Civil Procedure).

The Attorney General's Office (*Ministério Público Federal*) argued that Brazilian law does not permit total suppression of family names. The foreign judgment therefore offended public policy. The Court rejected this view. It held that the mere fact that Brazilian legislation does not provide total suppression or change of surnames does not invalidate a foreign act. The prohibition is not a "nuclear" or

foundational norm of the Brazilian legal order. There was no violation of *ordre public*, national sovereignty, or human dignity. Justice Gallotti stated: 'The "*ordre public* clause" is intended to prevent the recognition of rights that contradict the fundamental principles of our legal order. In general, private international law doctrine considers, for example, that Western countries tend not to recognise more than one spouse, even when the husband is domiciled in a country governed by Islamic law. Polygamy (the marriage of a man to multiple women) is understood to violate the basic and core rules of national family law and succession law.' Nothing of that nature was present in the case, said the Court. A foreign name change, even one involving the substitution of a surname, does not approach the level of structural incompatibility exemplified by polygamy.

The Court also placed the case in the context of recent domestic legal reform. Brazilian Law no. 14.382/2022 significantly facilitated changes of forenames in Brazil. A person may now change their first name extrajudicially (before a notary), without demonstrating a relevant reason. But such a change can only happen once in a lifetime and solely encompasses first names. Surname changes have also been made more flexible, but exclusively by allowing the recovery and inclusion of ancestral surnames. Brazilian law therefore no longer reflects a rigid immutability model, even if surnames remain harder to change than forenames. In HDE 7.091/EX, the Court considered it understandable and reasonable that the applicant adopted anglophone first and last names in the United States in order to avoid possible discrimination in the country of his new nationality. The change did not harm any relevant public or third-party interest.

From a comparative perspective, the decision sits at an interesting point. In Common Law jurisdictions, name change is generally available with considerable freedom, often through unilateral instruments such as a deed poll, subject to modest administrative formalities. In Germany and Austria, by contrast, name changes are treated as exceptional and typically require an 'important or relevant reason' under public-law procedures. Christian von Bar's comparative study *Gemeineuropäisches Privatrecht der natürlichen Person* (pp. 567–604) illustrates precisely the different models regarding name change. Some systems conceptualise the name primarily as an element of personal identity. Others see it as a structured institution embedded in family and public-order concerns. Brazil's domestic law still reflects elements of the latter approach. Yet in recognition proceedings, Brazil's highest Court with private law jurisdiction clearly opted for

continuity of status formed at the domicile.

The decision is also consistent with a long Brazilian tradition of construing public policy narrowly in cross-border cases. As noted in a recent article, Brazilian law was frequently referenced in Ernst Rabel's writings. For instance, Rabel noted how Brazilian Courts would recognise foreign divorces at a time when divorce was not yet permissible in Brazil. HDE 7.091/EX fits that pattern: foreign status effects may be recognised even when domestic law would not have produced the same result internally.

Ultimately, HDE 7.091/EX is a restrained and technically precise decision. It does not liberalise Brazilian internal surname law. It does not dissolve the state's control over civil status. What it does is confirm that *ordre public* remains a high threshold in recognition proceedings of foreign rulings. In an era of increasing personal mobility and multi-layered identities, this approach reinforces a central intuition of private international law: the stability of personal status across borders is itself a value worthy of legal protection.

Anti-Arbitration Injunction in Foreign-Seated Arbitrations: The Delhi High Court's Controversial Intervention in Engineering Projects (India) Limited v. MSA Global LLC (Oman)

This post is posted on behalf of Arnav Sharma, Jindal Global Law School, Sonipat, India

Introduction

On 25th July 2025, a single judge bench of the Delhi High Court delivered a judgment in *Engineering Projects (India) Limited v. MSA Global LLC (Oman)* in *CS (OS) 243 of 2025****[1]*** that has stirred considerable discourse in international arbitration circles. The fundamental question at issue in the instant case was whether an Indian Court can grant an anti-arbitration injunction to stay proceedings in a foreign-seated arbitration on grounds of the proceedings turning oppressive and vexatious due to procedural impropriety, notwithstanding internationally well-settled principles of minimal judicial intervention, party autonomy, and *lex arbitri* that govern international commercial arbitration? The Delhi High Court answered in the affirmative, holding that Indian civil courts possess inherent power under Section 9 read with Section 151 of the Code of Civil Procedure, 1908 ("**CPC**") to intervene under exceptional circumstances where the arbitral process itself becomes a vehicle of abuse.

This ruling carries profound implications for India's aspirations to position itself as a global arbitration hub. By granting relief that undermines the exclusive jurisdiction of the Courts at the Seat (Singapore in the instant case), the ruling has invited scrutiny vis a vis its alignment with the territorial principle as elaborated upon in ***Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*** ("**BALCO**")[2], and with internationally accepted 'best practices' which are well-settled considering that they promote predictability and finality in cross-border dispute resolution.

Facts

Engineering Projects (India) Limited ("**EPIL**"), a public sector enterprise, entered into a sub-contract agreement with MSA Global LLC (Oman) ("**MSA**") for the design, supply, installation, integration, and commissioning of a border security system at the Yemen-Oman border. The agreement contained an arbitration clause stipulating that any disputes would be resolved by way of arbitration under the rules of the International Chamber of Commerce ("**ICC**") with Oman's law being the governing law, while conferring exclusive jurisdiction upon the courts

at New Delhi, India. For the sake of clarity, Article 19 of the agreement between the parties containing the aforementioned arbitration clause, is extracted in its entirety as under:

"ARTICLE 19

LAW AND ARBITRATION

19.1 *Disputes if any, arising out of or related to or any way connected with this agreement shall be resolved amicably in the First instance or otherwise through arbitration in accordance with Rules of Arbitration of the International Chamber of Commerce. The jurisdiction of the Contract Agreement shall lie with the Courts at New Delhi, India.*

19.2 *This Agreement shall be governed by, construed and take effect in all respects according to the Laws and Regulations of the Sultanate of Oman.*

19.3 *Any dispute or difference of opinion between the parties hereto arising out of this Agreement or as to its interpretation or construction shall be referred to arbitration. The Arbitration Panel shall consist of three Arbitrators, one Arbitrator to be appointed by each party and the third Arbitrator being appointed by the two Arbitrators already appointed, or in event that the two Arbitrators cannot agree upon the third Arbitrator, third Arbitrator shall be appointed by the International Chamber of Commerce. The place of the Arbitration shall be mutually discussed and agreed.*

19.4 *The decision of the Arbitration Panel shall be final and binding upon the parties."*

In the course of performance of the contract, disputes arose between the parties concerning alleged delays in contractual performance. Consequently, MSA

invoked the arbitration agreement in 2023 nominating Mr. Andre Yeap SC ("**Mr. Yeap**") as a co-arbitrator. Thereafter, on 20.04.2024, Mr. Yeap submitted his statement of acceptance, availability, impartiality and independence to the ICC, expressly declaring that he had "nothing to disclose" with respect to any facts or circumstances that could give rise to justifiable doubts as to his impartiality or independence. EPIL nominated Hon'ble Justice Mr. Arjan Kumar Sikri (Retd.) as its co-arbitrator. The Tribunal was duly constituted on 05.09.2023 with Mr. Jonathan Acton Davis KC being appointed as the presiding arbitrator by the co-arbitrators.

In June 2024, the tribunal rendered a first partial award on MSA's application for interim measures. EPIL challenged this award before the Singapore High Court. In December 2024, in preparation of the evidentiary hearings, EPIL, through a Gujarat High Court Judgment dated 05.07.2024 titled ***Neeraj Kumarpal Shah v. Manbhupinder Singh Atwal***, discovered the Mr. Yeap had been previously appointed as an arbitrator in separate proceedings involving Mr. Manbhupinder Singh Atwal who happens to be MSA's Managing Director, Chairman, and Promoter. This prior involvement had not been disclosed when Mr. Yeap accepted his appointment. As such, on 19.01.2025, EPIL filed a challenge application before the ICC Court under Article 14(1) of the ICC Rules alleging non-disclosure and raising doubts about Mr. Yeap's independence and impartiality. The ICC Court in its decision acknowledged the non-disclosure as "regrettable" but rejected EPIL's challenge on merits, finding that the circumstances did not establish justifiable doubts regarding Mr. Yeap's impartiality or independence. Subsequently, EPIL filed an application before the Singapore High Court under Article 13(3) of the UNCITRAL Model Law seeking determination on the validity of Mr. Yeap's continued participation, and also simultaneously approached the Delhi High Court by filing the instant suit seeking a declaration and permanent injunction restraining MSA from continuing the ICC arbitration with the present tribunal composition. Further complicating the matter, MSA filed an enforcement petition before the Delhi High Court for the recognition and enforcement of the First Partial Award while also obtaining an anti-suit injunction from the Singapore High Court restraining EPIL from continuing its proceedings before the Delhi High Court.

The Dispute

The crux of the legal controversy in this case was around three inter-related questions.

1. Whether an Indian Civil Court has the jurisdiction to entertain a suit seeking an anti-arbitration injunction against a foreign-seated arbitration, particularly in light of the fact that the parties had agreed to arbitrate under ICC Rules with Singapore being designated as the seat. In this respect, MSA relied upon the judgment in ***Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd.*** ("**Indus Mobile**")[3] to contend that once parties agree to a specific seat of arbitration, it is solely the Courts at that seat that retain supervisory jurisdiction over the arbitral process to the exclusion of all other Courts. MSA further argued that the suit was barred by Section 5 and Section 45 of the Arbitration and Conciliation Act of 1996 which are the statutory embodiment of the principle of minimal judicial intervention and the territoriality doctrine affirmed in BALCO.

11. Whether the non-disclosure by Mr. Yeap rendered the arbitration proceedings vexatious, oppressive, and violative of Indian Public Policy. In this regard, EPIL argued that Mr. Yeap's failure to disclose this material information constituted a manifest violation of Article 11 of the ICC Rules, which mandates arbitrators to disclose any facts or circumstances likely to give rise to justifiable doubts as to their impartiality or independence. EPIL contended that such non-disclosure strikes at the root of party consent and procedural fairness thereby rendering the entirety of the arbitral process illegitimate. On the other hand, MSA relied upon Article 11.2 of the ICC Rules read with Clause 3.1.3 of the IBA Guidelines which mandate disclosure only if an arbitrator has been appointed on two or more occasions in the past three years by a party or one of its affiliates; MSA contends this requirement had not been satisfied in the instant case.

III. Whether EPIL was entitled to interim injunctive relief restraining the continuation of arbitral proceedings pending final disposal of the suit.

As such, this dispute was centred around reconciling party autonomy and minimal judicial intervention on one hand, with the Court's duty to prevent abuse of process and ensure procedural fairness on the other [4].

The Decision

On Maintainability

At the very outset, the Delhi High Court affirmed the strong presumption in favour of the civil court's jurisdiction as under Section 9 of the CPC, which confers authority to adjudicate all suits that are of a civil nature unless the same is expressly or through implication barred by statutory law. The Court relied on the case of ***Dhulabhai v. State of Madhya Pradesh[5]*** and held that the exclusion of civil court jurisdiction cannot be readily inferred and must be clearly provided by law. Further, the Court distinguished the rulings in Indus Mobile and BALCO, noting that while these judgments do affirm the seat principle and the territoriality doctrine, they did not create an absolute bar on civil courts' power to grant an anti-arbitration injunction in exceptional circumstances. The Court found guidance in the ***Union of India v. Dabhol Power Company[6]*** and ***ONGC v. Western Company of North America [7],*** wherein it was held that Indian Courts do have the power to grant injunctions against foreign proceedings whenever the circumstances make the proceedings oppressive, or where such an injunction is necessary or expedient, or when the ends of justice so require; with the former specifically referring to Sections 5 and 45 of the Arbitration and Conciliation Act of 1996 and stating that neither of them oust, entirely, the jurisdiction of the Indian Courts. Additionally, the Court emphasised the distinction between anti-suit injunctions and anti-arbitration injunctions, noting that the latter require a higher threshold of oppression or vexatiousness to be met, citing examples along the lines of doubts as to the consent of the parties, allegations of forgery, or fundamental procedural impropriety which can meet the

aforementioned threshold. Crucially, the Court held that the principle of minimal judicial intervention does not and must not translate into negligible interference[8], and said this crucial difference has been preserved to ensure that private dispute resolution mechanisms such as arbitration do not turn oppressive or operate in an unruly manner, which can be deemed contrary to the foundational principles of judicial propriety.

On Vexatiousness and Oppressiveness of the Proceedings

The Court began the discussion in this regard by defining "vexatious" as proceedings instituted in the absence of sufficient legal basis and primarily intended to annoy, harass, and/or burden the opposing party, and "oppressive" as conduct that unjustly imposes harsh burdens or unfair disadvantages upon a party to the proceedings. Thereafter, in reference to the ICC Rules, the Court noted that Article 11 therein casts a categorical obligation upon arbitrators to make full and frank disclosure of any circumstance that might give rise to justifiable doubts regarding their impartiality or independence. It was emphasised that this obligation must be assessed from the perspective of the parties as is clear from the language of the provision insofar as it says "in the eyes of the parties", rather than from an arbitrator's subjective perception of bias. Further, it was noted that the arbitrator cannot withhold disclosure on the ground that the fact appears benign or remote in lieu of the fact that the obligation arises when there exists even a possibility that the information, if known to the parties, might give rise to an apprehension of bias in the parties' minds.

The Court found that Mr Yeap's non-disclosure was deliberate and calculated. Even though Mr. Yeap admitted in his response to the initial challenge application that he had made enquiries and was aware of the potential need for disclosure, he chose not to do the same based on his subjective assessment that four years had passed since the prior appointment in the matter concerning MSA's Chairman. Moreover, Mr. Yeap had acknowledged in the initial proceedings that "had I made the disclosure, the possibility of the Respondent seeking to challenge my impartiality could not be discounted". The Court viewed this statement as evidence of the fact that the non-disclosure was intentional and aimed at avoiding

objection. Further, the Court held that the ICC Court's decision on the challenge, while acknowledging the non-disclosure as "regrettable", erroneously misplaced the burden on EPIL to demonstrate actual bias rather than focusing on the breach of the mandatory disclosure requirement, thereby noting that the decision was a classic case of *operation successful, but patient dead*. The logic behind this was that, while the ICC Court's decision may seem sound on the surface and in compliance with the formal procedure, it did not address the substantive loss of confidence in the arbitral process's neutrality.

On Interim Injunction

As such, applying the triple test of (i) prima facie case, (ii) balance of convenience, and (iii) irreparable harm for interim injunction as under Order XXXIX Rules 1 and 2 of the CPC, the Court found that all three conditions were satisfied and accordingly stayed the ICC arbitral proceedings until final disposition of the suit and restrained both parties from participating in the arbitration with the tribunal's present composition.

Concluding Remarks

While the judgment articulates laudable concerns about procedural fairness and impartiality, the approach that has been adopted raises serious questions about jurisdictional overreach, inconsistency with India's pro-arbitration legislative intent, potential damage to India's credibility as an arbitration-friendly jurisdiction.

Firstly, the most fundamental flaw in the judgment lies in its erosion of the seat principle which is unarguably a cornerstone of international arbitration law[9]. The UNCITRAL Model Law, which forms the very basis of India's Arbitration and Conciliation Act, is predicated on the seat principle, which has also been unequivocally affirmed by the Indian Supreme Court in cases such as BALCO. By granting an anti-arbitration injunction in this matter, the Delhi High Court effectively usurped the supervisory jurisdiction of the Singapore courts. The

Singapore Court had already considered and rejected EPIL's challenge to Mr. Yeap's appointment, yet the Delhi High Court substituted its own judgment on the same issue. This created an untenable situation of conflicting judicial orders: the Singapore High Court granted an anti-suit injunction restraining the Delhi proceedings on 23 May 2025, while the Delhi High Court proceeded to grant an anti-arbitration injunction on 25 July 2025. Judicial conflicts of such nature undermine the predictability and finality that parties seek when choosing arbitration, not to mention the violation of principles of comity between courts. Additionally, it's not as if EPIL was rendered remedy-less before the seat courts at Singapore. There were multiple appeals available to Singapore High Court's decision on the challenge to Mr. Yeap's impartiality. The Delhi High Court's position could still have been appreciated had EPIL had no remedy left at the seat courts except to continue with vexatious and oppressive arbitral proceedings, but this was not the case. Further, the judgment's reliance on ***Dabhol Power Company*** and ***ONGC v. Western Company*** were misplaced considering that those cases involved enforcement of foreign awards or bank guarantees, and not the question of intervening in ongoing foreign-seated arbitrations with active supervisory courts. Not to mention that the judgment's characterisation of MSA's conduct as vexatious appears rather selective and outrightly ignores EPIL's own forum shopping tendencies, i.e., filing parallel challenges before ICC, Singapore Courts, and Delhi Courts simultaneously.

Secondly, while the Court correctly emphasised the importance of arbitrator disclosure, the underlying principles were applied in a problematic manner. The Court failed to consider that four years had passed since Mr. Yeap's prior appointment, and neither the ICC Rules nor the IBA Guidelines mandate disclosure of appointments separated by such a temporal gap unless it can be demonstrated that the same constitutes a pattern of repeated appointments; this standard is akin to Entry 20 of the Vth Schedule to India's 1996 Act. The ICC Court's decision carefully considered these standards and concluded that while disclosure would have been prudent, a failure to do the same did not give rise to justifiable doubts about Mr. Yeap's impartiality or independence. The Delhi High Court's characterization of this reasoned decision as *operation successful, but patient dead* is rather dismissive, fails to engage with the substantive reasoning, and fails to also take into account the fact that international arbitration

institutions like the ICC possess expertise in assessing arbitrator conflicts; it is a clear case of ‘due process paranoia’ [10]. Domestic courts ought to be cautious about second-guessing such determinations, especially when institutional rules provide clear mechanisms and standards for such challenges. Further, the judgment entirely conflates two distinct issues: whether disclosure was required, and whether non-disclosure renders the arbitrator actually biased.

Lastly, the present judgment runs counter to India’s objective to become an arbitration-friendly jurisdiction, as expressed in the Law Commission’s 264th Report. By allowing a non-seat court to stay a foreign-seated arbitration based on alleged procedural impropriety, the decision sends a troubling signal to international parties i.e., choosing India as a contracting party, even with a foreign seat, exposes you to unnecessary intervention by Indian Courts; this is precisely what the BALCO regime sought to eliminate[11]. The judgment also creates a dangerous precedent for other jurisdictions. If Indian courts can intervene in Singapore-seated arbitrations, what is to stop Chinese courts from intervening in London-seated arbitrations, or vice versa? The result would be a race to obtain competing injunctions, undermining the entirety of the international arbitration framework.? Beyond doctrinal concerns, this is also a clear case of practical ineffectiveness. The ICC tribunal and Singapore courts are not bound by the Delhi High Court’s judgment and have continued to recognise the arbitration’s validity. Singapore subsequently issued a permanent anti-suit injunction against EPIL on 18.09.2025, and initiated contempt proceedings when EPIL obtained yet another ex parte injunction from the Delhi courts restraining MSA from participating in the Singapore contempt proceedings. This cycle of competing injunctions serves neither party’s interests and brings both judicial systems into disrepute, which is a massive concern, especially when this ordeal was wholly avoidable considering that under the New York Convention, any award rendered in this arbitration would have ultimately been enforceable in India only through the procedures in Part II of the 1996 Act, at which point EPIL could have raised objections under Section 48, including alleged violation of public policy. The availability of this post-award remedy also undermines the necessity for pre-emptive intervention.

A better approach would have been for the Court to (i) recognise that the seat court in Singapore has exclusive supervisory jurisdiction, (ii) acknowledge that EPIL has adequate remedies through the ICC challenge process and challenges before Singapore courts under Article 13 of the UNCITRAL Model Law, along with post-award resistance to enforcement, and (iii) decline jurisdiction on *forum non conveniens* grounds while allowing EPIL to pursue its remedies before the aforementioned appropriate fora.

[1] 2025 SCC OnLine Del 5072.

[2] (2012) 9 SCC 552.

[3] (2017) 7 SCC 678.

[4] See https://www.scconline.com/blog/post/2022/10/20/party-autonomy-or-the-choice-of-seat-the-essence-of-arbitration/ for a discussion.

[5] 1968 SCC OnLine SC 40.

[6] 2004 SCC OnLine Del 1298.

[7] (1987) 1 SCC 496.

[8] See https://disputeresolution.cyrilamarchandblogs.com/2025/08/delhi-high-court-clarifies-scope-of-anti-arbitration-injunctions-in-foreign-seated-proceedings/ for a discussion.

[9] See https://indiacorplaw.in/2025/09/08/jurisdictional-overreach-and-the-illusion-of-equity-a-critique-of-the-delhi-high-courts-intervention-in-epi-v-msa-global/ for a discussion.

[10] See https://forum.nls.ac.in/nlsir-online-blog/arbitrator-non-disclosure-before-the-delhi-high-court/ for a discussion.

[11] See

https://legalblogs.wolterskluwer.com/arbitration-blog/a-shield-of-justice-or-a-sword-through-the-seat-the-delhi-high-courts-contentious-anti-arbitration-injunction/ for a discussion.

Cross-Border Personal Data Transfers: The Remaining Issues Following the Indonesian Constitutional Court Decision

Written by Dr Priskila Pratita Penasthika, Assistant Professor, Faculty of Law, Universitas Indonesia

INTRODUCTION

The Indonesian Personal Data Protection Law, Law Number 27 of 2022 (Indonesian PDP Law), came into effect on 17 October 2022. Before its enactment, data protection rules in Indonesia were fragmented across different sector-specific laws and regulations. The Indonesian PDP Law aims to unify these laws and regulations, providing greater clarity and ensuring consistent personal data protection across all sectors in the country. The Indonesian PDP Law sets out normative provisions on personal data protection; however, detailed, practical rules have yet to be specified in the implementing regulations. As of now, the drafting of these implementing regulations is still underway.

Many of the fundamental elements of the Indonesian PDP Law, including definitions of covered data and entities, lawful grounds, processing obligations, accountability measures, and relationships between data controllers and processors, are modelled after the European Union's General Data Protection Regulation (GDPR). Nonetheless, several key provisions are tailored specifically to the Indonesian context. For instance, the Indonesian PDP Law has broad extraterritorial reach, which shall apply to entities insofar as their personal data

processing activities have legal implications within Indonesia or pertain to an Indonesian national data subject outside Indonesian jurisdiction.

To date, there have been five decisions by the Constitutional Court of the Republic of Indonesia (*Mahkamah Konstitusi Republik Indonesia*) concerning the Indonesian Personal Data Protection Law. Briefly, the Indonesian Constitutional Court functions as one of Indonesia's apex judicial authorities, alongside the Supreme Court. Its primary jurisdiction involves the constitutional review of enacted laws (*undang-undang*) in Indonesia to assess their conformity with the 1945 Indonesian Constitution (as lastly amended in 2002), thereby safeguarding the constitutional rights therein. Its decisions are final, legally binding, and possess immediate legal effect upon issuance, with no provisions for appeal or annulment by any other institutional body.

This piece will focus on the most recent ruling by the Constitutional Court issued on 19 January 2026 regarding the Indonesian PDP Law, namely Case Number 137/PUU-XXIII/2025, as it pertains to matters within private international law.

FACTS

The Petitioner mainly requests a constitutional review of Article 56 of the Indonesian PDP Law, which specifies the requirements for cross-border personal data transfers. Article 56 delineates a tiered set of prerequisites for such transfers. A personal data controller responsible for transmitting personal data abroad (data exporter) must verify that the recipient country offers an adequate or higher level of personal data protection than that provided by the Indonesian PDP Law. If this requirement is not met, the data exporter must ensure that sufficient and binding data protections are in place in the recipient country. If neither condition is satisfied, the data exporter is obliged to obtain consent from the data subject prior to transferring personal data abroad. Furthermore, the forthcoming implementing regulations are expected to provide further details on the specific requirements for cross-border data transfers.

The petition was initiated with the briefing announcement issued by the White House on 22 July 2025 concerning the Framework for Negotiating a Reciprocal Trade Agreement between Indonesia and the United States of America (Indonesia-USA Reciprocal Trade Agreement Negotiation Framework). As part of this framework, Indonesia has committed to establishing legal certainty regarding

the ability to transfer personal data outside its borders to the United States.

The Petitioner argued that the Indonesia-USA Reciprocal Trade Agreement Negotiation Framework has led to a key interpretation of Article 56 of the Indonesian PDP Law concerning the transfer of citizens' personal data beyond Indonesian borders. The Petitioner maintained that, under a strict interpretive approach, the PDP Law allows data controllers to assess the adequacy requirement independently, without parliamentary oversight. This could potentially weaken democratic accountability and expose personal data vulnerable to misuse. Additionally, the Petitioner emphasised that such commitments should require approval from the House of Representatives, as they directly impact national sovereignty and the protection of citizens.

The foundation of the Petitioner's petition is based on Article 28G, paragraph (1) of the 1945 Indonesian Constitution, which protects citizens' rights to their dignity, family, honour, and property, as well as the right to be free from threats to their fundamental rights. Additionally, the Petitioner referred to Article 11 of the 1945 Indonesian Constitution, which confers authority on the House of Representatives and the President to conclude international agreements.

Therefore, the Petitioner requests that the Constitutional Court interpret the provisions of Article 56 of the Indonesian PDP Law to mean that transferring personal data to jurisdictions such as the United States should occur only if there is an international agreement approved by the Indonesian House of Representatives. Moreover, transfers to countries considered to lack adequate personal data protection standards should take place only with the consent of the data subjects, after informing them of the risks involved in the cross-border transfers of their personal data.

CONSTITUTIONAL COURT DECISION

The Constitutional Court rejected all of the Petitioner's petition and arguments. According to the Court, the cross-border transfer of personal data constitutes part of the administrative and technical measures carried out by the executive branch, rather than an agreement between nations that creates rights and obligations in the domains of politics, defence, or sovereignty. Based on this reasoning, the Court affirmed that there is no constitutional obligation to involve the Indonesian House of Representatives in any cross-border data transfer process, including in

determining the adequacy decision regarding such a personal data transfer.

Regarding the adequacy decision, the Court held that the personal data controller (data exporter) shall undertake technical verification procedures to ascertain whether the recipient country of the personal data transfer maintains data protection standards that are adequate or even higher than those provided in the Indonesian PDP Law. Furthermore, the Court pointed out that cross-border personal data transfers do not rely solely on the personal data controller to ensure adequacy or higher protection standards in the recipient country. Instead, it also necessitates the existence and active involvement of the Personal Data Protection Authority (PDPA), as prescribed in Articles 58-61 of the Indonesian PDP Law. The PDPA is tasked with overseeing, evaluating, and implementing technical policy measures to ensure compliance with requirements for cross-border personal data transfers. Nevertheless, it is important to note that such authority has yet to be established.

REMARKS

Despite the Constitutional Court's rejection of the petition, Case Number 137/PUU-XXIII/2025 brings to light persistent concerns regarding the Indonesian PDP Law, particularly its provisions on cross-border personal data transfers. These issues call for further discussion and highlight the pressing need to pass the implementing regulations and establish the PDPA.

*First***,** clarification is required regarding the party responsible for conducting cross-border transfers of personal data. Article 56 of the Indonesian PDP Law exclusively employs the term 'personal data controller' (*pengendali data pribadi*) in the context of cross-border data transfers, which seems to imply that only personal data controllers are authorised to carry out such transfers.

Second, it is necessary to delineate which countries are recognised as having adequate or higher levels of personal data protection. In this context, Article 60(f) of the Indonesian PDP Law provides that the PDPA is empowered to assess whether the requirements for cross-border personal data transfers are satisfied. The significant role of the PDPA in cross-border personal data transfer is also emphasised by the Constitutional Court Judges in Case Number 137/PUU-XXIII/2025. Since the PDPA has not yet been established or designated to date, this situation underscores the urgent need to set up or appoint such an authority.

Third, the forthcoming implementing regulations of the Indonesian PDP Law are expected to clarify issues surrounding cross-border personal data transfers, including the incorporation of whitelists and blacklists of specific jurisdictions, standardised contractual language, and specific data processing activities such as pseudonymisation and encryption. It is also presumed that the personal data controller and the forthcoming PDPA will be required to report to the Indonesian Ministry of Communication and Digital regarding cross-border transfers of personal data.

Fourth, as set out at the outset of this piece, the Indonesian PDP Law has an extensive extraterritorial scope. In the event of a personal data breach involving cross-border transfer of personal data, any individuals, corporations, public entities, and international organisations—irrespective of their origin or residence—whether functioning as personal data controllers or processors, may be considered potential defendants for violations that affect the rights of an Indonesian data subject. Referring to Article 2 of the Indonesian PDP Law, this applicability is contingent upon the occurrence of their misconduct (1) within the jurisdiction of Indonesia or (2) outside of Indonesia, provided that such misconduct results in legal consequences (a) within the Indonesian jurisdiction or (b) impacting an Indonesian personal data subject outside of Indonesian territory.

The subsequent issue concerns the court's jurisdiction. As no cross-border data protection litigation has occurred in Indonesia to date, the court's position in this matter remains indeterminate. Nevertheless, Indonesian courts are notorious for their indifference and insularity when addressing foreign-related issues. Furthermore, Indonesian civil procedural law does not specify provisions regarding parallel litigation. Consequently, in case of parallel proceedings concerning a cross-border data transfer dispute, it is likely that the Indonesian court would exercise jurisdiction and proceed with the legal proceeding in Indonesia, notwithstanding the existence of an ongoing legal proceeding involving the same dispute and parties in a foreign court.

If proceedings are conducted in a foreign court, the complexities of the issues may increase. Indonesia maintains a stringent stance that a foreign judgment is not enforceable unless it pertains to damages arising from marine salvage. Any foreign, other than those on damages resulting from marine salvage, must undergo re-examination by an Indonesian court. In light of this stance, it is apparent that Indonesian courts would not recognise or enforce foreign

judgments concerning cross-border personal data transfer disputes and would require such disputes to be relitigated before an Indonesian court.

Practical challenges also include the complexities of seizing assets or digital evidence located in foreign jurisdictions, given that Indonesia has not yet acceded to the HCCH 1970 Evidence Convention.

Further details concerning the Indonesian PDP Law and its private international law aspects are available in Priskila Pratita Penasthika, “Chapter 12 – Indonesia” in Adrian Mak, Ching Him Ho, and Anselmo Reyes (eds.), Privacy and Personal Data Protection Law in Asia (Hart Publishing, 12 December 2024).