U.S. Court Issues Worldwide Anti-Enforcement Injunction

This post was written by Hannah Buxbaum, the John E. Schiller Chair in Legal Ethics and Professor of Law at the Indiana University Maurer School of Law in the United States.

Last month, Judge Edward Davila, a federal judge sitting in the Northern District of California in the United States, granted a motion by Google for a rare type of equitable relief: a worldwide anti-enforcement injunction. In *Google v. Nao Tsargrad Media*, a Russian media company obtained a judgment against Google in Russia and then began proceedings to enforce it in nine different countries. Arguing that the judgment was obtained in violation of an exclusive forum selection clause, Google petitioned the court in California for an order to block Tsargrad from enforcing it.

As Ralf Michaels and I found in a recent analysis, the anti-enforcement injunction is an unusual but important device in transnational litigation. There aren't many U.S. cases involving these orders, and one of the leading decisions arose in the context of the wildly complicated and somewhat anomalous Chevron Ecuador litigation. As a result, there is little U.S. authority on a number of important questions, including the legal standard that applies to this form of relief and the mix of factors that courts should assess in considering its availability. Judge Davila's decision in the Google case addresses some of these questions.

Background

In 2020, Google terminated Tsargrad's Google account in order to comply with U.S. sanctions law. Tsargrad sued, alleging that Google violated its terms of service in terminating the account. Although those same terms included an exclusive forum selection clause choosing California courts, Tsargrad initiated the litigation in Russia. It cited a Russian procedural law that vested Russian arbitrazh courts with "exclusive jurisdiction" over disputes involving sanctioned parties, arguing that this rule prevented it from bringing suit in California.

Tsargrad prevailed on the merits in that case. The court ordered Google to

restore Tsargrad's account or suffer a compounding monetary penalty. Google did not restore access, and the penalty mounted to more than twenty decillion dollars (in Judge Davila's words, "a number equal to two followed by thirty-four zeroes"). Tsargrad then started filing actions to enforce its judgment in a number of foreign courts. This prompted Google to seek an anti-enforcement injunction in the Northern District of California.

What Legal Standard Applies to Anti-Enforcement Injunctions?

An anti-enforcement injunction orders a party not to initiate or continue legal proceedings to enforce a judgment. It looks like a species of anti-suit injunction and might therefore be subject to the test used to decide those. As Judge Davila correctly recognized, though, the two contexts are quite different.

An anti-suit injunction aims to prevent parallel litigation from developing in the first place, avoiding a race to judgment and the possibility of inconsistent judgments on a single matter. Those risks aren't relevant to anti-enforcement injunctions, where the foreign court has already entered a judgment. In such cases, the policy of res judicata also comes into play. Anti-enforcement injunctions are also potentially much more intrusive into other legal systems than anti-suit injunctions. The type of injunction that Google sought would have worldwide effect, blocking legal proceedings not only in courts with concurrent jurisdiction over the underlying dispute but in any court, anywhere, in which an enforcement proceeding might be brought. For these reasons, Judge Davila chose instead to apply the normal test for preliminary injunctions, requiring Google to demonstrate: (1) likely success on the merits, (2) irreparable harm, (3) a balance of equities favoring injunction, and (4) public interest favoring injunction.

Does Breach of a Forum Selection Clause Justify an Anti-Enforcement Order?

Once a foreign court has entered a judgment, it is (and should be) very difficult for the judgment debtor to obtain an order from a U.S. court completely blocking any enforcement efforts. In this case, there were two possible grounds for granting that relief. First, as in the *Chevron* case, it appeared that Tsargrad's

enforcement campaign was vexatious and oppressive. Apparently, Tsargrad had itself described its strategy as a "global legal war"—and may have viewed the twenty-decillion-dollar penalty as leverage to extort a settlement or force Google to defend itself in multiple forums. Second, it appeared that Tsargrad had procured the Russian judgment in breach of an exclusive forum selection clause. As Google argued, issuing an anti-enforcement injunction under those circumstances would both preserve the jurisdiction of the chosen courts and vindicate Google's contractual rights.

The case proceeded on the second theory. This raised two interesting questions regarding a post-judgment injunction. First, because the breach of the forum selection clause had already happened, was there any ongoing or future harm to justify injunctive relief? Judge Davila concluded that there was—not based on the forum selection clause itself, but based on an additional *implied* term "bar[ring] parties from enforcing judgments obtained in violation of [a] forum selection clause."

Second, wouldn't the balance of equities here suggest that Google was far too late in seeking injunctive relief? It could have filed an ordinary anti-suit injunction based on the exclusive forum selection clause when Tsargrad initiated the litigation in Russia, rather than waiting until that action proceeded to judgment. (In Ralf's and my study, this kind of delay surfaced as one of the most common reasons to deny anti-enforcement injunctions.) Judge Davila maneuvered around this issue. The basis for injunctive relief, he said, wasn't the breach of the forum selection clause but rather the breach of the implied promise not to enforce judgments procured in violation of the clause. And Google couldn't have sought relief for *that* breach until Tsargrad actually began its enforcement efforts.

What About Comity?

Every country has its own rules regarding the recognition and enforcement of foreign judgments. It's one thing for a U.S. court to deny enforcement of a foreign judgment in the United States, under U.S. rules. But by barring a judgment holder from taking steps to enforce its judgment *anywhere*, a worldwide anti-enforcement injunction indirectly prevents other countries from considering the enforceability of that judgment under their rules. Judge Davila appreciated the serious comity concerns this raises. He concluded, however, that those concerns

were outweighed in this case, citing the "grossly excessive" penalty imposed on Google and the vexatious nature of Tsargrad's enforcement campaign. With the exception of Russia, then ("it is simply a bridge too far to enjoin a Russian citizen from enforcing a Russian judgment in Russian court"), he gave the order worldwide scope.

Conclusion

Pending a final decision on the merits, the court here did everything it could to block Tsargrad from enforcing the Russian judgment. In addition to entering the anti-enforcement injunction, the court entered an "anti-anti-suit injunction" barring Tsargrad from going back to Russia to seek an anti-suit injunction against the proceedings in California. The open question, as always, is what courts in other countries will do if Tsargard disregards the injunction and continues its efforts to enforce the Russian judgment.

This post is cross-posted at Transnational Litigation Blog.

Tatlici v. Tatlici: Malta Rejects $740 Million U.S. Defamation Judgment as Turkish Case Looms

Written by Fikri Soral, Independant Lawyer, Turkey; and LL.M. student, Galatasaray University, Turkey

A Maltese court has refused to enforce a $740 million default judgment issued by the 15th Judicial Circuit Court of Florida (Palm Beach County) in a defamation suit brought by Applicant Mehmet Tatlici against his half-brother, Defendant Ugur Tatlici. [1] The Florida court's award—issued on 8 January 2020 in a defamation suit filed by Mehmet Tatlici against his half-brother—was deemed procedurally deficient and substantively incompatible with Malta's public policy,

particularly due to its lack of reasoning and its chilling effect on free expression.[2]

The Maltese court found that the Florida default judgment—submitted as a redacted, one-page certification—could not be meaningfully reviewed, as the complete, reasoned version was essential to assess whether any part of the judgment violated Maltese ordre public.[3] The court emphasized that it is not for the issuing court's clerk to determine what may be withheld, and that the absence of judicial reasoning in a claim involving hundreds of millions in damages was, in itself, contrary to Malta's fundamental procedural standards and ordre public.[4] Notably, the court flagged the stratospheric scale of the damages—€659,932,000—as irreconcilable with Malta's defamation laws, viewing enforcement as a potential threat to freedom of speech and contrary to Malta's ordre public.[5]

At the same time, parallel enforcement proceedings remain ongoing in Turkey, where Applicant Mehmet Tatlici is seeking recognition and enforcement of the same Florida judgment.[6] Simultaneously, a criminal investigation is underway in Turkey, concerning felonies of fraud, aggravated fraud, and document forgery in relation to how the Florida judgment was procured.[7]

Background and Procedural History

The proceedings stem from a protracted intra-family dispute between Mehmet Tatlici and his half-brother Ugur Tatlici, heirs to the late Turkish billionaire Salih Tatlici. On 8 January 2020, the 15th Judicial Circuit Court for Palm Beach County, Florida entered a default judgment in favour of Mehmet Tatlici in *Mehmet Tatlici v. Ugur Tatlici*, Case No. 50-2018-CA-002361-XXXX-MB, awarding him $740 million in damages for alleged defamation. The judgment was based on Mehmet Tatlici's allegations that online publications on websites and social media had harmed his reputation and caused the collapse of a real estate project in Istanbul, the legitimacy of which is now disputed and appears to be addressed before a Turkish heavy penal court in Turkey for alleged fraud.[8]

Mehmet Tatlici claimed that the online publications led to the termination of a real estate development project in Istanbul, allegedly abandoned by a Romanian investor due to reputational concerns.[9]

Defendant U?ur Tatlici, however, denies any involvement in the publications and

maintains that the defamatory material was fabricated by Applicant Mehmet Tatlici and his Florida lawyers to manufacture a basis for litigation.[10] According to his filings and expert submissions, the alleged project was never viable to begin with. The same materials state that the project was legally impossible under Istanbul's zoning laws, relied on fictitious contractual arrangements, and was tied to a Romanian company with only $50 in registered capital, two offshore shareholders, and a concealed ultimate beneficial owner (UBO), lacking any credible financial capacity to support a development of that scale.[11] Defendant Ugur Tatlici also states that he was not made aware of the Florida proceedings at the time and therefore had no opportunity to contest the allegations or raise these objections in the original action.[12] He argues that the judgment was obtained by default through fraud and misrepresentation.[13]

Following the Florida judgment, Mehmet Tatlici launched recognition and enforcement proceedings in Malta and Turkey. In Malta, he filed Application No. 719/2020TA before the Civil Court (First Hall), which dismissed the application on 13 February 2025, citing several grounds, including the absence of a reasoned judgment, the gross disproportionality of damages, and the judgment's incompatibility with Maltese public policy.

Meanwhile, enforcement efforts are ongoing in Turkey, where the case is before the Istanbul 13th Civil Court of First Instance presided over by Judge Hakan Kabalci. In parallel, Turkish prosecutors have opened a criminal investigation into the circumstances surrounding the Florida judgment, focusing on felonies of fraud, aggravated fraud, and document forgery. The matter is expected to be brought before a Turkish heavy penal court for further proceedings.

The Maltese Court's Decision

In its judgment dated 13 February 2025 (Application No. 719/2020TA), the Civil Court (First Hall) of Malta, presided by Judge Toni Abela LL.D., denied enforcement of the $740 million (€659 million) Florida defamation judgment obtained by Mehmet Tatlici. The court grounded its refusal on unreasoned and incomplete nature of the Florida judgment, violations of Maltese ordre public, lack of jurisdiction, and broader free expression principles under Maltese and EU law.[14]

First, a critical basis for refusal was the failure to submit a full, reasoned version

of the Florida judgment. The 740-million-dollar default judgment was a product of a single-page handwritten jury verdict form, devoid of any accompanying judicial opinion explaining the basis for the award.[15] The court highlighted that such a submission made it impossible to evaluate whether the judgment was consistent with Maltese public order and emphasized that reasoned judgments are not merely technical requirements but essential to meaningful judicial review.[16] Procedural formalities, the court stated, are part of ordre public in Malta and cannot be waived, even with party consent. [17]This alone rendered the application unenforceable.

Significantly, this procedural deficiency mirrors difficulties Applicant Mehmet Tatlici is encountering in ongoing Turkish enforcement proceedings, where the Applicant has also been requested to provide a complete, authenticated copy of the Florida judgment.

Second, beyond procedural failings, the court strongly objected to the scale of damages—€659,932,000—awarded for defamation. It observed that such "stratospheric" sums are entirely incompatible with the way defamation is treated under Maltese law.[18] The court emphasized that while monetary penalties for defamation are permissible, they must not have a chilling effect on individual expression or public discourse.[19]

The court explicitly referenced the applicant's own anticipation that the respondent might invoke a SLAPP (Strategic Lawsuit Against Public Participation) defence.[20] While Malta does not directly adjudicate the merits of U.S. legal standards, it emphasized that the chilling effect of such judgments—especially when arising from online speech—raises serious concerns under Maltese and European principles of democratic discourse. Crucially, the court did not make any finding as to whether Defendant Ugur Tatlici authored the allegedly defamatory material. It declined to engage with the underlying merits of the Florida judgment and limited itself to the enforceability of that decision under Maltese law.

Third, the court further held that it lacked jurisdiction under Article 742 of the Maltese Code of Organization and Civil Procedure[21]. The application failed to establish any sufficient nexus with Malta—either through residence, assets, or subject matter.[22]

Broader Analysis

The *Tatlici* decision highlights how courts in recognition proceedings are increasingly attentive to the substantive and procedural legitimacy of foreign default judgments—particularly in cases involving defamation, extraordinary damages, and minimal jurisdictional connection to the forum of origin. Rather than approaching enforcement as a purely formal exercise in judicial comity, the Maltese court subjected the Florida judgment to a rigorous public policy review, grounded in Maltese constitutional values and European legal standards.

This cautious approach is especially warranted in defamation matters, which remain a notoriously unsettled area of private international law. The Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, which aims to promote the mutual recognition and enforcement of civil and commercial judgments across borders, expressly excludes defamation claims from its scope under Article 2(1)(k). This exclusion is not incidental—it reflects the deep and enduring divergences between legal systems in balancing reputation and freedom of expression, and in regulating media liability, damage awards, and procedural safeguards.

As a result, defamation judgments—especially when obtained by default and accompanied by disproportionate damages—remain subject to domestic standards in the enforcing forum. The *Tatlici* ruling exemplifies how national courts can, and must, use that discretion to filter out foreign judgments that fail to meet local thresholds of proportionality and constitutional legitimacy.

In this respect, the case underlines a growing transatlantic divergence. Although the United States offers strong First Amendment protections in theory, its procedural system permits extraordinary libel damages, especially through default, without requiring the detailed judicial reasoning expected in civil-law jurisdictions. In Europe, by contrast, the enforcement of such awards is viewed not only as a matter of technical admissibility, but as a question of whether the judgment itself comports with core constitutional commitments—particularly the protection of democratic discourse and media freedom.

The *Tatlici* judgment sits comfortably alongside other recent European decisions—such as *Real Madrid v. Le Monde****[23]*** in France and *ZDF****[24]*** in Germany—which have refused to enforce even intra-EU defamation rulings where

the outcome would infringe national free expression standards. These cases reflect the principle that domestic free expression standards must not be undermined by "importing" judgments from systems with differing legal thresholds.

The question of jurisdiction further reinforces the court's reasoning. In both *Tatlici* and the New Zealand case *Kea Investments Ltd v. Wikeley Family Trustee Ltd****[25]***, the enforcing courts questioned the legitimacy of default judgments rendered in forums with no meaningful connection to the underlying dispute. In *Tatlici*, the Florida judgment was entered by default, despite both parties being Turkish nationals, with no substantial ties to Florida, and the disputed real estate project located in Istanbul. Similarly, in *Kea*, the Kentucky default judgment was obtained without adversarial process. Notably, while the New Zealand Court of Appeal ultimately lifted an anti-enforcement injunction on procedural grounds, it upheld the High Court's finding that the judgment had been fraudulently procured and was not entitled to recognition.[26]

The *Kea* case offers a compelling comparative example, where the courts found a U.S. default judgment to be fraudulently obtained and not entitled to recognition, despite ultimately reversing an anti-enforcement injunction on procedural grounds.[27] Though the injunction was lifted, the underlying concerns remained and reinforced the principle that fraudulently and strategically engineered default judgments cannot be presumed enforceable.[28]

In both cases, the core issue is not hostility to foreign law, but resistance to opportunistic use of foreign legal systems to generate leverage in unrelated or parallel disputes. The *Tatlici* decision affirms that enforcement forums are not neutral venues for rubber-stamping foreign awards. They are guardians of legal coherence and public policy, tasked with ensuring that enforcement respects the procedural and constitutional identity of the local legal order.

Taken together, these themes point toward a developing global norm that recognition and enforcement of defamation judgments will continue to operate outside the harmonized legal frameworks of instruments like the Hague Judgements Convention—and rightly so. The reasons are structural, not incidental. As long as national systems take various positions on how to balance speech, reputation, and remedies, enforcement will remain subject to localized scrutiny, particularly when judgments are opaque, exorbitant, or jurisdictionally

artificial.

Conclusion

While Malta has now delivered a clear repudiation of the Florida judgment on procedural and public policy grounds, the spotlight now shifts to Turkey, where enforcement proceedings remain ongoing, and a parallel criminal investigation is actively examining whether the judgment was procured through fraud. As the jurisdiction most closely connected to both parties and to the disputed commercial project at the heart of the defamation claim, Turkey is uniquely positioned to conduct a fuller legal inquiry—assuming the proceedings unfold independently and free from undue influence, unlike concerns raised in the Florida case.

The outcome of the Turkish proceedings may prove decisive—not only for the parties involved but also for evolving standards of cross-border enforceability. In this sense, *Tatlici* is a test of how national courts respond to foreign default judgments used strategically— and whether such judgments can withstand scrutiny in jurisdictions with stronger procedural safeguards and a more immediate interest in the truth.

[1] *Mifsud Av. Malcolm Noe v. Ugor Tatlici*, Civil Court (First Hall), Judgment of 13 February 2025, Application No. 719/2020TA. Available at: https://ecourts.gov.mt/onlineservices/Judgements/PrintPdf?JudgementId=0&CaseJudgementId=151468 ("**Judgement**")

[2] *ibid*, at pp. 2–8.

[3] *ibid*, at p. 3.

[4] *ibid*, at p. 5.

[5] ibid.

[6] Istanbul 13th Civil Court of First Instance (File No. 2024/416 E.)

[7] Beykoz Chief Public Prosecutor's Office, Case No. 2025/720 Sor.

[8] Istanbul Anadolu 8th Criminal Judgeship of Peace, File No. 2024/9316 Misc.

[9] Docket Entry no. 183, 184 and 185, Mehmet Tatlici v. Ugur Tatlici (Case No.

50-2018-CA-002361-XXXX-MB) ("**Original Action**") available at: https://appsgp.mypalmbeachclerk.com/eCaseView/search.aspx

[10] ibid. Docket Entry no. 105.

[11] ibid.

[12] ibid.

[13] ibid.

[14] *Judgement*, at pp. 2–8.

[15] Original Action, Docket Entry no. 38.

[16] *Judgement*, at p.4.

[17] *ibid*.

[18] *ibid*. at p.5.

[19] ibid.

[20] ibid.

[21] *ibid*. at p.8.

[22] ibid.

[23] Real Madrid Club de Fútbol v. Le Monde, Case C-633/22, ECLI:EU:C:2024:843 (CJEU, 4 October 2024)

[24] Bundesgerichtshof (BGH) [Federal Court of Justice], Case IX ZB 10/18, Judgment of 19 July 2018.

[25] Wikeley v Kea Investments Ltd [2024] NZCA 609.

[26] ibid.

[27] ibid.

[28] ibid.

The Personal Status Regimes in the UAE — What's New and What Are the Implications for Private International Law? A Brief Critical Appraisal

Prologue

On 15 April 2025, the new federal UAE law on personal status (Federal Decree Law No 41 of 14 October 2024) officially entered into force ("2024 PSL"). This law fully replaces the 2005 Federal Act on Personal Status (Federal Law No. 28 of 19 November 2005 as subsequently amended) ("2005 PSL"). The new law marks the latest step in the UAE remarkable wave of legal reforms, particularly regarding personal status matters. It follows a series of significant developments

at both the federal and local levels. *At the federal level*, this includes the adoption of the law on Civil Personal Status (Federal Decree-Law No. 41 of 3 October 2022 on Civil Personal Status) ("2022 CPSL") and its executive regulation. *At the local level*, specific legislations were adopted in the Emirate of Abu Dhabi, most notably the 2021 Law on Civil Marriages and its Effects (as subsequently amended) ("2021 ADCML"), and its Procedural Regulation. These legislative efforts collectively address what is commonly referred to as "civil family law" (for further details see previous posts on this blog here, here, here, and here). Together with the new 2024 PSL, these instruments will collectively be referred to as the "Family Law Regulations" (see Table below).

This overactive legislative activity has inevitably impacted on the articulation between the different legislative texts, both within the federal framework and between the federal and local levels. *At the federal level*, there is a need to consider the interaction between the 2024 PSL and the 2022 CPSL. *At the intergovernmental level*, this extends to the interplay between these two federal laws and the 2021 ADCML.

The icing on the cake – or perhaps the tipping point – is when private international law enters the equation. This is because the above family law regulations include provisions determining their scope of application, and in some cases allow for the application of foreign law under some conditions. This necessarily bring them into contact with the conflict of law rules contained in the 1985 Federal Act on Civil Transactions (Federal Law No. 5 of 21 March 1985, as subsequently amended) ("1985 FACT").

Moreover, with the exception of the federal regulation on civil personal status, the other legislative texts also contain detailed rules on international jurisdiction. This leads to further interaction with the 2022 federal law on Civil Procedure (Federal Decree-Law No. 42 of 10 October 2022 on the Civil Procedure). This aspect, however, will not be addressed in this post. For a comparative overview of international jurisdiction in divorce matters, see my previous post here.

Table of relevant legislative texts:

Legislation	Federal level	Local Level

<table>
<tr><td rowspan="2">Family Law Regulations</td><td>Federal Decree-Law No. 41 of 3 October 2022 on Civil Personal Status (*)
• Art. 1: Scope of application and applicability of foreign law
• Art. 11(3): Possibility of applying foreign law in successions and wills?</td><td>Abu Dhabi Law No. 14 of 7 November 2021 On Civil Marriage and its Effects in the Emirate of Abu Dhabi (as subsequently amended)
• Art. 3: Direct application of the law
• Art. 11(3): Possibility of application of foreign law in matters of successions and wills
• Art. 17bis: International jurisdiction
Procedural regulation (Resolution No. (8) of 1 February 2022 concerning the Marriage and Civil Divorce Procedures in the Emirate of Abu Dhabi)
• Art. 4: International jurisdiction (confusingly referred to as territorial jurisdiction in the Regulation)
• Art. 5: Scope of applicationadjd.gov.ae/…/regulation 8 2022 family law.pdf</td></tr>
<tr><td colspan="2">Federal Decree Law No 41 of 14 October 2024 on Personal Status
• Art. 1: Scope of application and applicability of foreign law
• Arts. 3 and 4: International jurisdiction</td></tr>
<tr><td>Private International law</td><td colspan="2">Federal Decree-Law No. 42 of 10 October 2022 on the Civil Procedure
• Arts. 19 – 23: International jurisdiction
Federal Law No. 5 of 21 March 1985 on Civil Transactions
• Arts. 10 – 28: Conflict of laws rules</td></tr>
</table>

(*) One of the unresolved questions is whether the 2022 CPSL also applies in Abu Dhabi—at least in a way that would override the provisions of the Abu

Dhabi Law that are inconsistent with the federal legislation. This aspect is briefly addressed below.

It must be acknowledged that the current framework is highly complex, marked with multiple layers of interaction, and at times, inconsistencies and unresolved questions. The aim of this short post is simply to highlight these difficulties, particularly those relating to the scope of application and the interplay with choice of law rules, leaving a more-in-depth analysis for another occasion.

I. Innovations and clarifications

1. Scope of application

One of the most significant innovations introduced by the new 2024 PSL is its clear delineation of its scope of application, particularly in relation to the other foundational law, that is the 2022 CPSL. Indeed, the latter has already defined its scope by limiting its application to family law matters between *non-Muslims*, whether nationals or foreigners. Accordingly, it can be inferred that 2024 PSL limits its scope to family law matters *involving Muslims*. This is explicitly stated in respect of family relations involving UAE citizens. As for *non-citizens*, since family relations of foreign non-Muslims are primarily governed by the 2022 CPSL, the reference to *"non-UAE citizen"* in 2024 PSL should be understood as referring to "*foreign Muslims*".

2024 PSL	2022 CPSL
Art. 1 [Scope of Application]: (1) The provisions of this Law shall apply to *UAE citizens* if *both parties of the relationship or one of them is Muslim*.	**Art. 1 [Scope of Application]**: (1) The provisions of this Decree-Law shall apply *to non-Muslims who are national citizens of the United Arab Emirates*, and to *non-Muslim foreigners residing in the state* […]

Art. 1 [Scope of Application]: (3) The provisions of this Law shall apply to *non-UAE citizens* […]

(*) All translations are based on the officially adopted versions, with modifications made where necessary. Own underlines and Italics.

2. Parties' agreement

Another point worth highlighting is that both federal personal status laws contain provisions suggesting that a certain degree of party autonomy is permitted. However, the extent of this autonomy remains unclear. This issue will be discussed below.

<table>
<tr><th>2024 PSL</th><th>2022 CPSL</th></tr>
<tr><td>Art. 1 [Scope of Application]:
(2) The provisions of this Law apply to non-Muslim UAE citizens unless […] they agree to apply another law permitted by the legislation in force in the State.</td><td rowspan="2">Art. 1 [Scope of Application]:
(2) The persons governed by the provisions of this Decree-Law … may agree to apply other legislation regulating the family or personal status matters currently in force in the State instead of applying the provisions of this Decree-Law.</td></tr>
<tr><td>Art. 1 [Scope of Application]:
(3) The provisions of this Law shall apply to non-UAE citizens unless […] any other law that has been agreed to be applied, as permitted by the legislation in force in the State.</td></tr>
</table>

3. Possibility of applying foreign law

Finally, like the 2022 CPSL and the now-repealed 2005 PSL, the 2024 PSL also allows for the application of foreign law. What is particularly noteworthy, however, is that the formulation originally found in the repealed 2005 PSL was

not reproduced in the newly adopted 2024 PSL, despite its inclusion – albeit with some modifications – in the 2022 CPSL (see the underlined portion below). The reasons for this divergence remain unclear.

2024 Personal Status Law	2022 Civil Personal Status Law
Art. 1 [Scope of Application]: (3) The provisions of this Law shall apply to non-UAE citizens *unless one of them invokes the application of his law* [….] (*)	**Art. 1 [Scope of Application]**: (1) The provisions of this Decree-Law shall apply to non-Muslims who are national citizens of the United Arab Emirates, and to non-Muslim foreigners residing in the state, *unless one of them invokes the application of his law, with regard to matters of marriage, divorce, successions, wills, and establishment of filiation*, <u>without prejudice to the provisions of Articles (12), (13), (15), (16), and (17) of the Federal Law No. (5) of 1985[on Civil Transactions]</u> (**).

(*) The Gender biased formulations found in the original texts are maintained.

(**) Art. 1(3) of the now-repealed 2005 PSL stated as follows: "The provisions of this Law shall apply to non-UAE citizens, unless one of them invokes the application of his law, without prejudice to the provisions of Articles (12), (13), (15), (16), (17), <u>(27) and (28)</u> of the Federal Law No. (5) of 1985 on Civil Transactions".

The numbered articles concern respectively, conflict of law rules in matters of marriages (12), divorce (13), maintenance (15), guardianship and other institutions of protection of persons with limited capacity and absentees (16), successions and wills (17), as well as public policy (27) and failure to prove foreign law (28).

II. Ambiguities and persistent problems

1. Ambiguities

a) Scope of application

i) The 2021 ADCML and its 2022 Procedural Regulation

One of the most crucial points concerns the relationship between federal and local laws. As previously mentioned, the Emirate of Abu Dhabi took the initiative in 2021 by enacting its "Law on Civil Marriage and Its Effects". This law – originally titled the "*Personal Status Law of Non-Muslim Foreigners*" – defined its scope of application in a more restrictive manner compared to the 2022 CPSL. While the latter applies to both *foreign and local non-Muslims*, the 2021 Abu Dhabi law was limited, as its title suggests, to *foreign non-Muslim only*.

2021 ADCML (before amendment)	2022 CPSL
Art. 1 [Definitions]: ***Foreigner*:** *Any male or female non-Muslim foreigner*, having a domicile, residence or place of work in the Emirate.	**Art. 1 [Scope of Application]**: (1) The provisions of this Decree-Law shall apply to *non-Muslims who are national citizens of the United Arab Emirates*, and to *non-Muslim foreigners residing in the state […]*
Civil Marriage: A union that is intended to be of indefinite duration according to the provisions of this Law, *between a foreign man and woman, both non-Muslim*.	

Only a few weeks after its adoption, the 2021 ADCML was amended. Notably, in addition to the change of the title as mentioned above, all references to "foreigners" and "foreign non-Muslims" were replaced with the more neutral phrase of "*persons covered by the provisions of this law*". Moreover, new jurisdictional rules were adopted (Art. 17bis). Despite this amendment, and somewhat surprisingly, the amended law does not only define "*persons covered by the provisions of this law*" in an ambiguous manner (see some critical comments here), but also it continues to define civil marriage as union "between a foreign man and woman, *both non-Muslim*". This has reinforced the impression that both the original law and its subsequent amendments were enacted without thorough consideration of their internal consistency or of the broader legal context in which they would operate.

2021 ADCML (after amendment)

Art. 1 [Definitions]: **Civil Marriage:** A union that is intended to be of indefinite duration according to the provisions of this Law, *between a foreign man and woman, both non-Muslim*. **Persons covered by the provisions of this law:** Foreigners and Nationals, non-Muslims, whether male or female. (*)

(*) The original ambiguity in the formulation is maintained in purpose.

In 2022, a Procedural Regulation ("2022 Procedural Regulation") was adopted with the intention of clarifying, *inter alia*, the scope and application of the 2021 ADCML. However, this instrument has introduced more inconsistencies and ambiguities than it has resolved. This is particularly evident with regard to the definition of "civil marriage", as well as the *ratione personae* and *ratione materiae* of both the 2021 ADCML and its accompanying 2022 Procedural Regulation.

Abu Dhabi 2021 Law (after amendment)	The 2022 Procedural Regulation
Art. 1 [Definitions]: **Civil Marriage:** A union that is intended to be of indefinite duration according to the provisions of this Law, *between a foreign man and woman, both non-Muslim.*	**Art. 1 [Definitions]:** **Civil Marriage:** Marriage that is concluded and registered under statutory laws and regulations, *without taking into account of any particular religious law.*

Persons covered by the provisions of this law: *Foreigners and Nationals, non-Muslims,* whether male or female	**Persons covered by the provisions of this law:** *Foreigners and non-Muslims Nationals,* whether male or female
	Article 5 (Persons covered by the provisions of this law): The provisions of this law govern civil marriages and their effects, as well as all matters concerning the civil family according to the following cases: *1) Non-Muslim citizens* 2) A foreigner who holds the nationality of a *country that does not primarily apply rules of Islamis Sharia in matters of personal status* […] In the case of multiple nationalities, the nationality to be taken into account shall be the one used based on the person's status of residence in the State. 3) Where the marriage is concluded *in a country that does not primarily apply rules of Islamic Sharia in matters of personal status* [….] 4) Where the *marriage is concluded in accordance with the provisions of civil marriage*. 5) Any other case for which a decision is issued by the Head of the Department.

Problems of interpretation and application generated by the ambiguities and inconsistencies of the 2021 ADCML and its 2022 Procedural Regulations have already been addressed on this blog (see here, here, and here). These issues particularly concern the application of these instruments to foreign Muslims, a

possibility permitted under the 2021 ADCML and its 2022 Procedural Regulations as confirmed by recent case law, but not allowed under the 2022 CPSL.

ii) Constitutional implications

Given the differing scopes of application, a crucial issue has arisen: whether the 2022 CPSL overrides the local law in this respect. In other words, does the Federal Civil Personal Status Law also apply in Abu Dhabi?

From a constitutional perspective, the answer should be affirmative (see Article 151 of the Federal Constitution). However, the issue remains largely unresolved. In practice, lower courts in Abu Dhabi appear to give little weight to the federal law, applying the local law and its regulations instead. (The Abu Dhabi Supreme Court seems to follow a slightly different approach, as on some occasions it cited the 2022 Federal Law on Civil Personal Status. For examples, previous posts here, and here).

iii) Impact of the 2024 PSL

The situation, however, changes significantly with the adoption of the 2024 PSL. It is undisputed that this new federal law applies in Abu Dhabi as well. The absence of any local regulation on personal status (other than the 2021 ADCML and its 2022 Procedural Regulation) makes the application of the new federal law self-evident. Therefore, even if one were to argue (for the sake of discussion) that the 2022 CPSL does not apply in Abu Dhabi, it will still be necessary to observe how Abu Dhabi courts will reconcile the new law, which explicitly applies to *Muslims* (regardless of their nationality or whether their country of origin applies Islamic sharia in personal status matters), with the existing local regulations. A typical case would be a Muslim couple from Europe or elsewhere where Islamic Sharia does not primarily apply in matters of personal status, or Muslims from Muslim jurisdictions *who got married under the 2021 ADCML*, but then one of the parties claims the application of the 2024 PSL because they are Muslim, and therefore subject to the federal and not local law.

b) The Parties' agreement

As mentioned above, both federal laws allow the parties to "agree" to apply "another law permitted by the legislation" (2024 PSL) or "other legislation regulating family or personal status matters" currently in force in the UAE (2022 CPSL). The formulations used here are highly problematic, as their exact meaning remains unclear.

For instance, it is unclear, whether the phrase "legislation in force" includes also local laws, notably the 2021 ADCML. Assuming that the 2022 CPSL does not override the 2021 ADCML, could parties residing in Dubai agree to apply it? This remains unresolved.

Moreover, an open question also concerns the form that such an agreement must take. Is an explicit agreement required, e.g., one that is formally recorded in the marriage contract? Or can consent be implied, such that a party's reliance on the provisions of a given law is sufficient to infer tacit agreement?

Finally, and more importantly, it is not clear whether "non-UAE citizens" under the 2024 PSL, which applies primarily to *Muslims* (see above), would be allowed to choose the application non-Muslim law. While this can be somewhat "tolerated" in matters of marriage or divorce as the practice now in Abu Dhabi clearly shows (see previous post here, although the boundaries of such "tolerance" remains certainly unclear notably in other Emirates. From a broader perspective, see examples cited in Béligh Elbalti, "The Recognition and Enforcement of Foreign Filiation Judgments in Arab Countries", *in* Nadjma Yassari *et al.* (eds.), *Filiation and the Protection of Parentless Children* (T.M.C. Asser Press, 2019), 397), such a possibility seems to be inconceivable in matters of successions, giving the longstanding position of UAE courts to consider that the Federal Personal Status Law – which is largely based on Islamic Sharia – should apply whenever one of the parties (the deceased or the heir) is Muslim (for detailed analyses and overview of applicable case law, see Béligh Elbalti, "Applicable Law in Succession Matters in the MENA Arab Jurisdictions – Special Focus on Interfaith Successions and Difference of Religion as Impediment to Inheritance", 88(4) *RabelsZ* 2024 748, 751).

2. Persistent problems

Two are particularly relevant here, both concern (a) the applicability of foreign law, and (b) the interplay of the family law regulations with private international law.

a) Applicability of foreign law

A key difference between the 2021 ADCML and the 2022 CPSL (as well as the 2024 PSL) lies in the fact that the former excludes the very application of foreign law, rendering the 2021 ADCML directly and automatically applicable in all disputes that enter into its scope of application (it must be acknowledged, however, that a recent Abu Dhabi Supreme Court's ruling suggests otherwise. Upon examination, though, the Court's reference to choice of law rules does not have any tangible implication on the above stated conclusion). The only exception concerns matters of succession and wills, for which, a reference to choice of law rules is explicitly provided for within the law itself.

2021 ADCML (after amendment)	2022 CPSL
Article 3 [Scope of Application] (*) (**): (1) If the marriage is concluded in accordance with this law, it shall be the applicable law governing the effects of the marriage and its dissolution. (2) This law shall apply to wills and succession matters concerning persons subject to its provisions, provided that the estate or the bequeathed property is located within the State.	**Art. 1 [Scope of Application]**: (1) The provisions of this Decree-Law shall apply to non-Muslims who are national citizens of the United Arab Emirates, and to non-Muslim foreigners residing in the state, *unless one of them invokes the application of his law, with regard to matters of marriage, divorce, successions, wills, and establishment of filiation […]*

Article 11 [Distribution of Estate]: (3) Notwithstanding paragraph (2) of this Article [testate succession], any heir of the foreign deceased may request the application of the law governing the estate in accordance with the provisions of [1985 FACT], unless a registered will provides otherwise.	**Article 11 [Distribution of Estate]:** (3) Notwithstanding paragraph (2) of this Article [testate succession], any heir of the foreign deceased may request the application of the law governing the estate in accordance with the provisions of [1985 FACT], unless a registered will provides otherwise.

(*) It is worth noting that article 3 in its original form was similar to that of Article of the 2022 CPSL. It stated as follows: "Unless the foreigner requests the application of their national law, the court shall apply this law to foreigners in matters relating to marriage, divorce, inheritance, wills, and the establishment of parentage."

(**) See also Article 5 of the Procedural Regulation cited above.

This does not only give rise to problems of inconsistency with the federal personal status laws, but also with the 1985 FACT.

b) Interplay with choice of law rules

This is arguably the main issue that remains unresolved despite the various reforms and amendments. As mentioned above, the federal laws allow "one of the parties" to invoke the application of "his law". Theoretically, if properly invoked, the foreign law would apply instead of the federal provisions. However, this possibility raises three core issues:

1) who is exactly meant by "one of the parties" (*ahadihim*)?

2) what is meant by "his law" (*qanunihi*), and

3) what is the current relevance of choice of law rules governing family matters as set out in the 1985 FACT?

i) Meaning of "one of the parties"

Regarding 1), there is a range of diverging opinions. For instance, the Explanatory Report of the now-repealed 2005 PSL referred to the *"adversary party"* (*al-khasm*). Certain strands in literature, *contra legem*, suggest that this concerns any party, but only *when both of them share the same nationality*. Case law, however, reveals more diverse scenarios: courts addressed the issue of the application of foreign law regardless of whether the parties hold the same nationality or not, and when the foreign is invoked by any of them. Yet, to the best of our knowledge, UAE courts have not provided a definitive answer to this question, often focusing instead on whether the party's claim could be accepted or not.

ii) The Meaning of "his law"

Regarding 2), case law has largely clarified that "his law" refers to the *lex patriae*. Still, ambiguity remains in cases involving parties of different nationalities. Prior to 2020, the main connecting factor in matters of marriage and its dissolution was the *lex patriae* of *the husband*. It was thus unclear whether the wife could invoke the application of *"her law"* or whether she should claim the application of the *lex patriae* of her husband, when the latter based his claim on UAE law. In any case, where a party holds multiple nationalities, Article 24 (still in force) states that the *lex fori* (UAE law) shall apply.

However, in 2020, an amendment to the 1985 FACT introduced significant changes, shifting away from *lex patriae* as the main connecting factor in personal status. Particularly, articles 12 and 13 dealing respectively with marriage and its dissolution now refer to *lex loci celebrationis*. Moreover, Article 17 dealing with successions and wills grants considerable weight to *professio juris*, allowing a person in testate successions to designate the law that shall govern their estate. These changes have further deepened the discrepancy between the federal personal status regulations and the choice of law provisions contained in the 1985

FACT.

iii) Relevance of choice of law rules

Regarding 3), an as a result of what was stated above, resolving conflicts of law and coordinating the application of the various legislative instruments has become particularly difficult without significantly stretching the wording, and arguably, the intended meaning of the law. This difficulty is especially evident when the *lex loci celebrationis* differs from the parties' *lex patriae*.

Article 1(2) of the 2022 CPSL offers somehow better articulation by including a two-part clause: "*unless* one of the parties invoke the application of his law, *without prejudice* to the provisions of Articles (12), (13), (15), (16), and (17)" of the 1985 FACT. Nevertheless, this articulation becomes problematic when both parties share the same nationality but have concluded their marriage abroad.

In any case, both laws remains silent on the consequences of the parties invoking his *lex patriae* when it conflicts with the law designated under the conflict of laws rules included in the 1985 FACT.

Epilogue

In practice, these theoretical complexities are often resolved in a far more radical and pragmatic way: *foreign law is rarely applied*, even when validly invoked by one or both parties.

It is against this backdrop that one can understand the rationale behind the adoption of civil family law regimes and the recent adoption of the 2024 PSL: rather than refining the existing conflict-of-law mechanisms, these instruments aim to sidestep them altogether by offering a self-contained and directly applicable alternative.

Opinion of AG de la Tour in C-713/23, Trojan: A step forward in the cross-border recognition of same-sex marriages in the EU?

Dr. Carlos Santaló Goris, Postdoctoral researcher at the University of Luxembourg, offers an analysis of the Opinion of Advocate General de la Tour in CJEU, Case C-713/23, Trojan

From *Coman* to *Trojan*

On 5 June 2018, the Court of Justice of the European Union ('CJEU') rendered its judgment in the case C-673/16, *Coman*. In this landmark ruling, the CJEU decided that Member States are required to recognize same-sex marriage contracted in another Member Stated to grant a residence permit to the non-EU citizen spouse of an EU citizen under the EU Citizens' Rights Directive. The pending case C-713/23, *Trojan* goes a step further than C-673/16, *Coman*. On this occasion, the CJEU was asked whether EU law requires a civil registry of Poland, a Member State that does not provide any form of recognition to same-sex couples, to transcribe the certificate of same-sex marriage validly contracted in another Member State. A positive answer would imply that the same-sex marriage established under German law would be able to deploy the same effects as a validly contracted marriage under Polish law. While the CJEU has not yet rendered a judgment, on 3 April 2025, Advocate General de la Tour issued his Opinion on the case. While the CJEU might decide differently from AG de la Tour, the Opinion already gives an idea of the solution that might potentially be reached by the CJEU. This post aims to analyse the case and explore its implications should the CJEU side with AG de la Tour.

Background of the case

Mr. Cupriak-Trojan, a German-Polish citizen, and Mr. Trojan, a Polish national,

got married in Germany, where they used to live. Then, they moved to Poland, where they requested to transcribe the German marriage certificate in the Polish civil registry. Their request was rejected on the ground that marriage is not open to same-sex couples under Polish law. It was considered that the transcription of the certificate would go against Polish public policy. Upon the rejection, the couple decided to contest the decision before Polish administrative jurisdiction. They considered that refusal to transcribe the certificate contravenes the right to freedom of movement and residence enshrined in Article 21 of the Treaty on the Functioning of the European Union ('TFEU') and Article 21 of the EU Charter of Fundamental Rights ('EUCFR') in light of the principle of non-discrimination under Article of 7 of the EUCFR. In other words, when they decided to move to Poland, the non-recognition of their marriage under Polish law hindered their right to freedom of movement and residence. Eventually, the case reached the Polish Supreme Administrative Court, which decided to submit the following preliminary reference to the CJEU:

'Must the provisions of Article 20(2)(a) and Article 21(1) TFEU, read in conjunction with Article 7 and Article 21(1) of [the Charter] and Article 2(2) of Directive [2004/38], be interpreted as precluding the competent authorities of a Member State, where a citizen of the Union who is a national of that State has contracted a marriage with another citizen of the Union (a person of the same sex) in a Member State in accordance with the legislation of that State, from refusing to recognise that marriage certificate and transcribe it into the national civil registry, which prevents those persons from residing in the State in question with the marital status of a married couple and under the same surname, on the grounds that the law of the host Member State [(18)] does not provide for same-sex marriage?'

AG de la Tour's analysis

AG de la Tour starts his analysis by acknowledging that matters concerning the civil status of persons depend on the national law of the Member States. However, the right of freedom of movement and residence imposes on Member States the recognition of the civil status of persons validly established in other Member States. In this regard, he recalls that the CJEU adopted a two-fold approach to civil status matters. In matters concerning an EU citizen's identity (e.g. name or gender), Member States are required to include those identity details in the civil registries. However, in civil status matters concerning ties

legally established in other Member States (e.g. marriage or parenthood), there is no such obligation, and recognition of those ties is limited to the 'sole purpose of exercising the rights which the person concerned derived from EU law' (para. 29).

In the present case, AG de la Tour considers that the non-recognition of the same-sex marriage amounts to a 'restriction on the exercise of the right' to freedom of movement and residence under EU law (para. 32). Subsequently, he proceeds to examine whether such restriction is compatible with the right for respect for private and family life guaranteed by Article 7 of the EU Charter of Fundamental Rights ('EUCFR'). He examines this issue through the lens of the European Court of Human Rights ('ECtHR') case law on Article 8 of the European Convention of Human Rights ('ECHR'), the equivalent provision of Article 7 of the EUCFR. It should be reminded that the EUCFR expressly acknowledges in its Article 53 the ECHR and the ECtHR case law as the term of reference for establishing the minimum standards for its interpretation. In this regard, the ECtHR has repeatedly stated that Article 8 of the ECHR requires its contracting States to provide same-sex couples with a 'specific legal framework'. Nonetheless, contracting States are not required to legalize same-sex marriages and enjoy a margin of discretion to decide how the recognition of the same-sex couple provided.

Based on the referred ECtHR case law, it appears that the non-recognition would constitute a restriction on the right to freedom of movement and residence incompatible with the EUCFR. At this point, the question arises whether such recognition should be done by entering the same-sex marriage certificate into the civil registry. Here, AG de la Tour considers that EU law does not require the marriage licence transcription. As he mentioned at the beginning of his reasoning, 'Member States' obligations in terms of civil status relate only to the determination of a Union citizen's identity' (para. 38). In his view, the registration of foreign marriage certificate 'falls within the exclusive competence of the Member States' (para. 42). Member States can thus refuse the transcription of the marriage certificate if the recognition of the same-sex marriage can be achieved through other means. This discretion is given to Member States to decide whether they enter a foreign same-sex marriage in their civil registry or not would also be in line with the ECtHR case law, which acknowledges States a wide margin of appreciation on how to recognize foreign same-sex marriages.

In the case of Poland, since there is no kind of legal framework for same-sex

couples in this Member State, the only possible solution appears to be the registration of the marriage certificate. Therefore, as an exception, and given the specific Polish circumstances, AG de la Tour considers that Poland would be required to entry into its civil registry of the same-sex marriage.

Recognition yes, transcription no

The fil rouge of AG de la Tour's reasoning was to find a manner to provide recognition for same-sex marriages without overstepping on the Member States' competences in matters concerning the civil status. Finding that right to freedom of movement and residence entails an obligation to transcribe the marriage certificate would not be 'in strict compliance with the division of competences between the European Union and the Member States' (para. 55). That would imply that an understanding of the 'freedom of movement and residence of Union citizens which may be exercised without limit so far as concerns personal status' (para. 56). Such a solution that would depart from the well-established CJEU case law on this matter, moving 'from an approach based on the principle of free movement of a Union citizen that is limited to his or her identity, to an approach based solely on the right to respect for his or her family life' (para. 57). This why AG de la Tour adopted a solution that allows recognition without the need for transcription of the marriage licence in the civil registry.

Regarding the recognition of same-sex marriages, it should also be noted that AG de la Tour leaves the Member States with wide discretion on how same-sex marriage is recognized. This means that the marriage does not necessarily need to be recognized as a marriage. They could be recognized in the form of a civil partnership. That is, for instance, the solution that exists under Italian law. Article 32bis of the Italian Private International Law Act provides that 'a marriage contracted abroad by Italian citizens with a person of the same sex produces the effects of the civil union regulated by Italian law'. Based on AG de la Tour's reasoning, had Poland had a similar, he would have accepted the recognition of a same-sex marriage in the downgraded form of a civil partnership and the transcription of the marriage certificate would have been required.

Promoting the effectiveness of the ECtHR case law through EU law

On its reasoning, AG de la Tour strongly relies on the ECtHR case law. This does not come as a surprise. Other LGBT rights cases involving civil status matters and

the right to freedom of movement contain similar references to the ECtHR jurisprudence. The most recent example is the C-4/23, *Mirin* in which the CJEU found that Romania had to recognize the gender change that occurred in another Member State. The main basis of this ruling was the ECtHR judgment, in which Romania had been found in violation of Article 8 of the ECHR because Romanian law did not provide a clear procedure to obtain legal gender recognition (*X and Y v. Romania*).

Such reliance on the ECtHR case law also serves to expose that Member States do not duly implement the ECtHR rulings. Poland has been found twice in violation of Article 8 of the ECtHR for not providing same-sex couples with any kind of formal legal recognition (*Przybyszewska and Others v. Poland* and *Formela and Others v. Poland*). While the Polish government has proposed an act introducing a civil partnership regime open to same-sex couples, it has not been approved yet. Furthermore, such an initiative only appeared after a more progressive government emerged out of the 2023 Polish general election. The situation is similar in other Member States such as Romania or Bulgaria. These Member States have been also called out by the ECtHR (*Buhuceanu and Others v. Romania* and *Koilova and Babulkova v. Bulgaria*) for not providing any sort of legal recognition for same-sex couples. However, unlike in Poland, no legislative changes are expected on this matter in the near future. If the CJEU adopts AG de la Tour's solution, all these Member States would have to allow the recognition of same-sex marriages contracted in other Member States, even if in the downgraded form of civil partnership. Unlike the Council of Europe with regards to the ECtHR rulings, the EU counts with more effective means to ensure that CJEU rulings are followed by Member States. Formally, the Commission could even trigger an infringement procedure against them in case they do not comply with the judgment in C-713/23, *Trojan*. Therefore, EU law would become the indirect path to make Member States comply with the ECtHR rulings.

The potential for reverse discrimination

The solution proposed by AG de la Tour entails the risk of recreating a situation of reserve discrimination of same-sex couples that have not left Poland against those who have obtained certain legal status for the relationship in other Member States while exercising the right to freedom of movement. A same-sex couple moving who married or entered a civil partnership in a Member State would be able to attain the recognition of their marriage or civil partnership in a Member

State that does not provide any legal framework for same-sex relationships. This is as far as EU law can go in this matter, given domestic family law matters strictly fall within the scope of Member States competencies.

It should also be noted that going to another Member State to get a marriage licence because the Member State where the same-sex couple resides does not provide any legal recognition would not be sufficient to achieve the recognition of such marriage in the Member State of residence. As AG de la Tour pointed out in his Opinion in C-4/23, *Mirin*, a close link needs to exist between the person and the Member State where the legal gender recognition is obtained (para. 71 and 72). Otherwise, there would be an abuse of EU law. The same would apply in the case of a marriage. Going to another Member State with the only purpose of obtaining a marriage licence and circumventing domestic law that does not provide a legal status for same-sex couples. The same-sex couple would have to establish a close link with the Member State where they seek to contract their marriage.

A New Precedent in Contract Conflicts: Decoding the Tyson v. GIC Ruling on Hierarchy Clauses

By Ryan Joseph, final-year BBA LLB (Hons) student, Jindal Global Law School, India.

Introduction

The recent decision of the UK High Court ("**Court**") in *Tyson International Company Limited* ("**Tyson**") *v. General Insurance Corporation of India* ("**GIC**") sets a critical precedent for cases that lie at the intersection of arbitration, contractual hierarchy, and judicial intervention through anti-suit injunctions. The

principal issue in the case revolved around the harmonious application of two conflicting dispute resolution clauses contained in two separate agreements pertaining to the same transaction. While one provided for dispute settlement through arbitration seated in New York, the other was an exclusive jurisdiction clause that provided for dispute settlement by England and Wales courts. To resolve this apparent conflict between the two clauses, the Court relied on a confusion clause (also known as a hierarchy clause) in the parties' agreement to rule that the exclusive jurisdiction clause, in favour of England and Wales courts, prevails over the arbitration clause. Based on this conclusion, the Court issued an anti-suit injunction against GIC from arbitrating the dispute in New York.

Factual Background

Tyson entered into a reinsurance agreement with General Insurance Corporation of India ("**GIC**"), a state-owned-entity. The transaction involved two agreements; a Market Reforms Contract ("**MRC**") and second Facultative Certificates ("**Certificates**"). The MRC contained an explicit choice of law and an exclusive jurisdiction clause, submitting disputes to English courts to be governed by the laws of England and Wales (**"English DRC"**). However, the subsequently issued Certificates introduced an arbitration clause referring disputes to arbitration in New York to be governed by the laws of New York (**"Arbitration Clause"**). A pivotal provision, termed the "Confusion Clause," was embedded within the Certificates, stipulating that in the event of a confusion, the MRC would take precedence over the Certificates.

The dispute arose when GIC claimed that Tyson had undervalued certain commercial numbers on which the insurance premium was based. Therefore, GIC sought to initiate arbitration in New York pursuant to the arbitration clause in the Certificates. In response, Tyson approached the High Court for an anti-suit injunction against the arbitration, arguing that pursuant to the English DRC, English courts would have exclusive jurisdiction over any dispute emanating from the transaction.

The Court stressed on the importance of circumspect judicial intervention when interfering in arbitration. However, considering the existence of the "confusion clause", Tyson argued that the arbitration agreement did not come into existence. Therefore, the principal question before the Court was: what is the effect of the confusion clause when interpreting the two agreements? If the confusion clause

had the effect of a hierarchy clause (as argued by Tyson) and hence gave precedence to the MRC, the arbitration agreement wouldn't come into existence and the anti-suit injunction would be granted. On the other hand, if the confusion clause was merely to give meaning to confusing terms in the Certificates (as argued by GIC), the two agreements would be read harmoniously without giving preference to either. GIC argued this can be done in two ways. First, the conflicting clauses could be read as an agreement between parties to treat the arbitration as a condition precedent to raising any claims before the English Courts. Or in the alternative, the two agreements would be read together to mean that English Courts will have jurisdiction to supervise the New York arbitration. Either ways, the arbitration agreement would be valid and hence the anti-suit injunction should fail.

Submissions of Parties

The Court summarised the principles governing anti-suit injunctions in *Times Trading Corp v National Bank of Fujairah*[1] to hold that an anti-suit injunction can be granted in all cases where it is just and convenient to do so.[2] However, such power must be exercised with circumspection where the claimant can demonstrate a negative right to not be sued. Tyson can establish such a right if it can demonstrate that an arbitration agreement was not concluded between the parties. Crucial to this conclusion would be determining the effect of the confusion clause in the Certificates.

The judge cited various authorities; specifically *Surrey County Council v Suez Recycling and Recovery Surrey Limited*[3], to discuss principles of contractual construction and summarised the position in that the role of the court is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. GIC made the following submissions in this regard: First, the phrase "confusion" in the clause refers to obscurity or uncertainty in the meaning of provisions and does not refer to a conflict or a contradiction. They relied on the meaning of the word "confusion" in the Oxford dictionary to support this premise and submitted that the clause operates to address any uncertainty that may arise when reading the provisions of the Certificates. Such uncertainties must then be addressed by interpreting the provisions in light of the MRC. However, the clause does not operate to address a conflict between the MRC and the Certificates, for such an instance is a "conflict" and not a "confusion". Lastly, they submitted that there is no confusion because the arbitration clause in the

Certificates should be read as a *Scott v. Avery*[4] clause[5] or, a clause conferring English Courts with supervisory jurisdiction over the New York arbitration.

Tyson submitted that by using the phrase "takes precedence" in the confusion clause, the clear objective intent of the parties is to create a hierarchy between the MRC and Certificates whereby in case of a confusion, the terms contained in the MRC will prevail over those in the Certificates. They further submitted that GIC is taking a very narrow interpretation of the word "confusion" and is reading it in isolation of the remainder of the clause to arrive at its conclusion. The word "confusion", when read in the context of the provision, has a broader purport to cover circumstances of contradicting terms between the MRC and the Certificates that create confusion regarding which clause will prevail. Thus the clause operates as a hierarchy clause whereby it clears the confusion by giving precedence to clauses in the MRC.

The Judgement

The Judge agreed with the submissions of Tyson and found that GIC's interpretation of "confusion" was too narrow to reflect an objective meaning of the language used by parties. He ruled that confusion can also arise where there are two clauses within a contract which are inconsistent such that there is confusion as to the intent of the parties as to their respective rights and obligations under the contract because of such inconsistency. Second, when the MRC grants exclusive jurisdiction to English Courts and the Certificates provide for disputes to be resolved through arbitration in New York, there is an obvious confusion as to which dispute resolution clause should apply. The judge noted that English courts must give generally give effect to an arbitration clause but this is a case of routine construction of contracts wherein courts cannot rewrite the parties' agreement. Accordingly, when parties have explicitly agreed that the MRC must take precedence in case of a confusion, such intention must be given effect. The Court opined that any attempt to resolve the confusion through any other means such as viewing arbitration as a condition precedent to any right of action or allowing the arbitration to continue under the supervision of English Courts would amount to rewriting the contract. As a sequitur, the court ruled in favour of Tyson and granted an anti-suit injunction against GIC.

GIC's Attempt to Appeal

In response to the judgment, GIC sought permission to appeal on two grounds (i) the court misconstrued the Confusion Clause in the Certificates and (ii) the court misconstrued the MRC and the Certificates in concluding that the English Court did not have jurisdiction over New York arbitration. When considering whether to grant an appeal, the test is whether GIC has a real prospect of success in relation to any of its grounds.

In order to discharge this burden, GIC made the following arguments: (1) the 'confusion' language is novel and has not been interpreted by courts in the past which gives it considerable scope to argue about its meaning; (2) the Certificates were contractual documents intended to supersede the MRC and not merely administrative documents; and (3) the Court has failed to consider the strong policy adopted by English courts in favour of giving effect to arbitration agreements whereby the conflict should be interpreted in a manner that upholds the agreement to arbitrate. Tyson in response argued that (1) the Court's construction of the word "confusion" gives effect to the meaning of the word in light of the clause as a whole whereas GIC's construction focuses only on the word 'confusion' in isolation of the entire clause. (2) GIC's interpretation of the Confusion Clause runs against commercial common sense; for an overriding effect would essentially nullify many of the provisions contractually agreed to in the MRC. (3) judicial precedents[6] that have ruled in favour of arbitration by resolving potential conflicts between contractual provisions lacked a hierarchy clause necessitating the courts to engage in the endeavour of contractual interpretation. In this case, where a hierarchy clause exists, it is not a matter of resolving conflicts by applying judicial standards of interpreting contracts but one giving effect to the parties' method of resolving confusion between conflicting provisions.

Based on the submissions, the Judge concluded that GIC did not have a realistic prospect of success on either of its grounds. At the outset, although one could accept GIC's construction of the Confusion Clause, it still lacks the realistic prospect of persuading the Court of Appeal to eschew the construction adopted by the Court and instead acceding to GIC's construction. Finally, the Confusion Clause in this case is a relevant factor that distinguishes this case from previous

cases favouring arbitration because it operates as a hierarchy clause to mitigate any confusion when reading the Certificates and the MRC together. Since the parties have contractually agreed to the hierarchy clause when resolving any confusion, the court must give effect to the clause when resolving conflicts and cannot apply its own principles of interpreting conflicting terms of a contract; for any such attempt would amount to rewriting the parties' agreement. Therefore, even the second ground lacks a realistic prospective of succeeding before the court of appeals. Since both the grounds for appeal lacked a realistic prospective of succeeding, the application for leave to appeal was refused.

Key Takeaways and Implications

The said ruling in underscores the Court's role in upholding contractual intention of parties when resolving conflicts between competing dispute resolution clauses. By affirming the primacy of the Market Reform Contract through the Confusion Clause, the court reinforced the principle that hierarchy clauses serve as decisive mechanisms in contractual interpretation. Furthermore, the court's refusal to grant leave to appeal solidifies the precedent that courts will not rewrite contracts but will instead give effect to unambiguous terms agreed upon by parties. This case sets as an important judicial precedent for interpreting confusion clauses and strengthens the predictability of contractual enforcement in commercial agreements. As a takeaway, when drafting multiple contracts for the same transaction, it is worth considering the harmonious impact of differing clauses in the various agreements. Parties, must discuss their commercial objectives and have a clearer communication of their intended outcomes before agreeing to multiple dispute resolution clauses that cover the same transaction.

[1] Times Trading Corp v National Bank of Fujairah (Dubai Branch) [2020] EWHC 1078 (Comm)

[2] Girish Deepak, 'ANALYSIS: UK HIGH COURT ISSUES ANTI-SUIT INJUNCTION AGAINST NEW YORK-BASED COURT ANDARBITRATION PROCEEDINGS IN DISPUTE INVOLVING INDIAN STATE-OWNED INSURANCE COMPANY' (IA Reporter, 27 February 2025) <https://www.iareporter.com/articles/analysis-uk-high-court-issues-anti-suit-injun

ction-against-new-york-based-court-and-arbitration-proceedings-in-dispute-involving-indian-state-owned-insurance-company/> accessed 11 March 2025

[3] Surrey County Council v Suez Recycling and Recovery Surrey Limited [2021] EWHC 2015 (TCC)

[4] Scott v Avery (1856) 5 HL Cas 811

[5] Keren Tweeddale, Andrew Tweeddale, 'Scott v Avery Clauses: O'er Judges' Fingers, Who Straight Dream on Fees' [2011] 77(4) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, pp. 423 – 427

[6]Sulamerica CIA Nacional de Seguros SA & Ors v Enesa Engenharia SA & Ors [2012] EWHC 42 (Comm), Surrey County Council v Suez Recycling and Recovery Surrey Limited. [2021] EWHC 2015 (TCC)

Australian Federal Court Backs India on Sovereign Immunity: Another Twist in the Devas v. India Saga

by Shantanu Kanade, Assistant Professor, Dispute Resolution, Jindal Global Law School, India

The Federal Court of Australia ("**Federal Court**"), in its recent judgement in the *Republic of India v. CCDM Holdings, LLC*[1] ("**Judgement**"), held that the Republic of India ("**India**") was entitled to jurisdictional immunity from Australian Courts in proceedings seeking recognition and enforcement of foreign arbitral awards dealing with disputes arising from 'non-commercial' legal relationships. The Court's judgment was rendered with respect to an appeal filed by India against an **interlocutory judgement** of a primary judge of the same court, rejecting India's sovereign immunity claim.

Background of the Dispute

Three Mauritian entities of the Devas group ("**Original Applicants**") had commenced arbitration proceedings in 2012 under the 1998 India-Mauritius BIT, impugning India's actions with respect to an agreement for leasing of space spectrum capacity entered between Devas Multimedia Private Limited (an Indian company in which the Original Applicants held shares) and Antrix Corporation Limited (an Indian state-owned entity). In 2011, India's Cabinet Committee on Security decided to annul the said agreement, citing an increased demand for allocation of spectrum towards meeting various military and public utility needs ("**Annulment**"). The arbitration proceedings that followed culminated in a jurisdiction and merits award in 2016[2] and a quantum award in 2020 ("**Quantum Award**")[3]. The Original Applicants have since sought to enforce the Quantum Award against India in different jurisdictions, discussed **here**.[4]

Proceedings Before the Primary Judge

The Original Applicants commenced proceedings before a primary judge of the Federal Court ("**Primary Judge**") in April 2021 for recognition and enforcement of the Quantum Award. In May 2023, the Original Applicants were substituted with three US entities of the Devas Group which were respectively assignees of each of the Original Applicants (collectively the "**Applicants**").

India asserted that it was immune to the jurisdiction of the Federal Court under section 9 of the Foreign State Immunity Act, 1985 ("**Act**"), which states: "*Except as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding.*" An exception to this general rule of immunity is provided in section 10(1), which states: "*A foreign State is not immune in a proceeding in which it has submitted to the jurisdiction in accordance with this section.*" Section 10(2) further provides that a State may submit to jurisdiction "*by agreement or otherwise*". The Applicants argued that by ratifying the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("**Convention**"), India has submitted to the jurisdiction of Australian courts by agreement within the meaning of Section 10(1) and (2) of the Act in relation to proceedings for recognition and enforcement of foreign arbitral awards.

In deciding whether India has waived its immunity, the Primary judge invoked the judgement of the High Court of Australia ("**High Court**) in *Kingdom of Spain v Infrastructure Services* ("***Spain v. Infrastructure Services***")[5], which dealt with a similar claim of jurisdictional immunity by Spain with respect to enforcement of an ICSID Convention award. Observing that that the "*standard of conduct for submission by agreement under Section 10(2) requires either express words or an implication arising clearly and unmistakably by necessity from the express words used*", the Primary Judge held that ratification of the Convention by India amounts to a "*clear and unmistakable necessary implication*" that it has agreed to submit to the jurisdiction of Australian courts as per Section 10(2).[6] The Primary Judge opined that permitting India to take a sovereign immunity defence would be inconsistent with Article III of the Convention, which requires all Contracting States to "*recognize arbitral awards as binding and enforce them*".[7]

The Primary Judge noted that India had made a commercial reservation to the Convention, per which it would "*apply the Convention only to differences arising out of legal relationships [. . .] which are considered as commercial under the Law of India.*" ("**Commercial Reservation**"). However, he did not consider this to be relevant to the instant case as enforcement of the Quantum Award was sought in Australia, which had made no such reservation.[8]

The Primary Judge thus rejected India's claim to jurisdictional immunity, while granting leave to appeal to the Full Court of the Federal Court ("**Full Court**").

The Full Court Judgement

India appealed the judgement of the Primary Judge to the Full Court, contending that he erred in rejecting India's plea on jurisdictional immunity. The Full Court framed two issues for consideration: (1) by ratifying the Convention, did India waive foreign state immunity in respect of enforcement of an award that is generally within the scope of the Convention but excluded by its Commercial Reservation ("**Issue 1**"), and (2) is the Quantum Award outside the scope of India's Commercial Reservation? ("**Issue 2**").[9]

On Issue 1, India asserted that it had not submitted to the jurisdiction of Australian courts with respect to proceedings for recognition and enforcement of

awards that fell outside the scope of its Commercial Reservation. The Applicants submitted that the Commercial Reservation is a unilateral reservation that does not oblige other contracting States to the Convention ("**Contracting States**") to limit recognition and enforcement of such awards in the same manner.

In considering these submissions, the Full Court undertook a detailed analysis of the rules set out in the Vienna Convention on the Law of Treaties ("**VCLT**") that deal with the legal effects of reservations made by a State while expressing its consent to bound by a treaty. The Court observed that as the Commercial Reservation is a reservation "*expressly authorised*" by Article I (3) of the Convention, it falls within the terms of Article 20(1) of the VCLT and does not require any subsequent acceptance by other Contracting States. To determine the legal effects of the Commercial Reservation, the Court turned to Article 21 of the VCLT, read with the *Guide to Practice on Reservations to Treaties* published by the International Law Commission. Based on the foregoing analysis, the Court concluded that "*the effect of a reservation is that between the reserving and accepting state (which in the case of the New York Convention is all other states), the reservation modifies the provision of the treaty to the extent of the reservation for each party reciprocally (. . .).*"[10] Applying the said understanding, the Full Court opined that obligations under the Convention undertaken towards or by a Contracting State that has made a commercial reservation are limited by such reservation. Both India and Australia thus had no obligation towards each other to enforce awards that do no not pertain to "commercial" relationships under Indian law.[11]

The Full Court then considered whether India's ratification of the Convention, qualified by its Commercial Reservation, entails a "*clear and unmistakable necessary implication*" that it has waived its immunity from Australian courts (as per the standard articulated in *Spain v. Infrastructure Services*). The Court found that no such implication arises as India's ratification of the Convention subject to the Commercial Reservation is "*a sufficiently (un)equivocal expression of India's intention not to waive foreign State immunity in proceedings enforcing the Convention in respect of non-commercial disputes (. . .).*" [12]

Despite the parties not contesting Issue 2, the Full Court determined the issue for the sake of completeness of legal analysis. Interestingly, given the absence of evidence on what constitutes "commercial" relationships under Indian law, the Full Court approached the question of whether the Quantum Award fell within the

scope of the Commercial Reservation from the perspective of Australian law (following case law from the High Court[13]). In doing so, the Court considered Section 11 of the Act, which provides for a "commercial transaction" exception to foreign State immunity. While acknowledging that considerations under Section 11 and those concerning India's Commercial Reservation are different, the Full Court opined that there is a significant overlap between the two and proceeded to analyse the Quantum Award under Section 11. The Applicants had invoked the exception under Section 11 as a separate ground before the Primary Judge, which he rejected on the ground that the Annulment "*was made by the body vested with the highest form of executive policy-making in India, and was stated to be for reasons of public policy*" and was not thus not a "commercial transaction". Reiterating the Primary Judge's reasoning, the Full Court concluded that the Quantum Award is not an award dealing with differences arising from a "commercial" relationship.[14]

It is interesting to consider if the court's approach would have been any different if it were answering this question from an Indian law perspective. The position under Indian law on whether awards rendered in investor-State arbitrations ("**Investment Awards**") can be considered as pertaining to "commercial" relationships is ambiguous. Of particular relevance are two Delhi High Court judgements, in which the court opined that Investment Awards cannot be considered "commercial" for the purposes of enforcement under Part II of the Arbitration and Conciliation Act (which implements the Convention in India).[15] Critics of these judgements, on the other hand, have emphasised that there is enough basis in Indian law and policy to suggest that Investment Awards are commercial in nature. Perhaps the strongest argument in this regard is that India's 2016 Model BIT expressly states that Investment Awards "*shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention.*"[16]

Reflections on the Judgement

The Applicants have filed a special leave to appeal the Full Court judgement ("**Judgement**") to the High Court. The reflections shared below are thus subject to a potential reconsideration of the Judgement by the High Court.

Firstly, prevailing uncertainty regarding enforceability of Investment Awards in India (as discussed above) is what has prompted investors such as Devas to seek enforcement of such awards in other jurisdictions. In this regard, the Judgement could render Australia an unfavourable enforcement jurisdiction for Investment awards to which India is a party. This is because India could invoke jurisdictional immunity in all future enforcement proceedings until the ambiguity concerning the commercial nature of Investment Awards under Indian law is resolved (either through legislative action or a Supreme Court ruling).

Secondly, this Judgement may have significant implications for enforcement in Australia of all Investment Awards not rendered under the ICSID Convention and thus subject to enforcement under the Convention ("**Convention Awards**"). *Spain v. Infrastructure Services* has settled the position that jurisdictional immunity is not available to a foreign State under Australian law with respect to enforcement of ICSID Convention awards. This Judgement, however, casts a shadow of doubt on the enforceability of Convention Awards in Australia by leaving the door open for other Contracting States that have made a commercial reservation to the Convention to invoke jurisdictional immunity in enforcement proceedings for such awards.

Given its likely implications, it is no surprise that the Judgement has come in for criticism by some commentators[17] who have highlighted the following issues: (1) the Full Court's approach to commerciality of Investment Awards is inconsistent with that of courts in comparable jurisdictions such as the US and Canada, which have enforced Convention Awards despite these States having made a commercial reservation to the Convention, and (2) the characterisation of the Quantum Award as 'non-commercial' is contrary to the wide interpretation of term "commercial" envisaged in the UNCITRAL Model Law[18], which has the force of law in Australia.[19]

All stakeholders will now have to wait and watch how the High Court, if and when it takes up the appeal, deals with the Full Court's findings.

[1] *Republic of India v CCDM Holdings, LLC* [2025] FCAFC 2 ("**Judgement**").

[2] *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. the Republic of India*, PCA Case No. 2013-09,

UNCITRAL ("**CC/Devas Arbitration**"), Award on Jurisdiction and Merits (25 July 2016).

[3] CC/Devas Arbitration, Award on Quantum (13 October 2020).

[4] Jeanne Huang, *The Indian Satellite Saga and Retaliation: Recognizing the Supreme Court of India's Judgment Abroad?*, Coonflictoflaws.net, https://conflictoflaws.net/2024/the-indian-satellite-saga-and-retaliation-recognizing-the-supreme-court-of-indias-judgment-abroad/#_edn1.

[5] *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11.

[6] *CCDM Holdings, LLC v Republic of India (No 3)* [2023] FCA 1266, ¶ 51 ("**Primary Judgement**").

[7] Primary Judgement, ¶43.

[8] Primary Judgement, ¶58.

[9] Judgement, ¶54.

[10] Judgement, ¶67.

[11] Judgement, ¶68.

[12] Judgement, ¶72.

[13] *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54.

[14] Judgement,¶82.

[15] *Union of India v. Vodafone Group,* 2018 SCC OnLine Del 8842, ¶¶ 90-91; *Union of India v. Khaitan Holdings (Mauritius) Limited & Ors*, SCC OnLine Del 6755, ¶¶ 29-30.

[16]Model Text for the Indian Bilateral Investment Treaty (2016), Article 27.5, https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf.

[17] Micheal Lee, *Check for NYC Reservations: Federal Court of Australia Affirms India's Sovereign Immunity Against Recognition and Enforcement of Non-ICSID Arbitral Award*, Steptoe Clients Alerts (26 March 2025),

https://www.steptoe.com/en/news-publications/check-for-nyc-reservations-federal-court-of-australia-affirms-indias-sovereign-immunity-against-recognition-and-enforcement-of-non-icsid-arbitral-award.html?tab=overview.

[18] UNCITRAL Model Law on International Commercial Arbitration (1985), Article I(1), footnote 2 states as follows: *"The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. [. . .]."*

[19] International Arbitration Act 1974, Section 16(1).

Finder on the Supreme People's Court's Notice on Foreign State Immunity Procedures

The news about the Supreme People's Court of the People's Republic of China issuing the Notice on Procedural Matters Related to Civil Cases Involving Foreign State Immunity has been previously reported on this blog.

Following this significant development, Professor Susan Finder, a distinguished Scholar in Residence at Peking University School of Transnational Law, has kindly shared her insights on the matter. Her post was originally published on the Supreme People's Court Monitor. Given its valuable contribution, we decided to repost it here.

Our sincerest thanks to Professor Susan Finder for her thoughtful analysis and generosity in sharing her thoughts.

At the end of March, the Supreme People's Court (SPC) issued procedures to implement China's Foreign State Immunity Law (the Law) in the form of a "Notice on Procedural Matters in Civil Cases Involving Foreign State Immunity" (关于涉外国国家豁免民事案件相关程序事项的通知 – *Guanyu she waiguo guojia huomian minshi anjian xiangguan chengxu shixiang de tongzhi*) (Notice). That law has been in force since the beginning of 2024. Consistent with its practice, the SPC published a press release along with the text of the notice. The press release, in the form of the head of the SPC's #4 Civil Division's answers to reporters' questions, provides useful background. *I surmise that the press release is an edited version of materials submitted to SPC leadership for approval (as described in my 2024 article)*. I had anticipated that the SPC would do so, after additional research and soliciting comments *from both inside and outside the court system* but had guessed that a notice would be issued in 2024. Although the notice does not so state, I surmise that foreign state immunity cases will be considered "important and difficult" and therefore subject to special internal procedures. See Professor William Dodge's article for comparisons to US law and comments on the Law. Professor Huo Zhengxin provides another perspective. This post summarizes the major points of the notice, *with my comments.*

1. The general rule is that foreign governments and their property have immunity, with exceptions as set out in the Foreign State Immunity Law. The press release usefully makes clear that Article 1 of the Notice requires that a plaintiff filing a civil lawsuits against a foreign state as a

defendant or third party, must list in the complaint the specific provisions of the Law the lawsuit is based on, and explain which exception it falls into for the court to review. The court also has the responsibility to clarify (释明 – *Shiming*) the complaint in the process of receiving the complaint. *"Clarify/clarification" here is a term in Chinese Civil Procedure Law, analogous to a judge's right in other civil legal systems–the "right to ask, suggest to or require the parties to clarify or supplement their ambiguous, insufficient or improper claims, submissions or evidence."* If the plaintiff still fails to set out the legal basis after the court's clarifications, the plaintiff should be deemed to not have met the court's requirements, and the court should reject the case.

2. For those first instance civil cases that fall into the exceptions to the Foreign State Immunity Law, certain intermediate courts in provincial capitals (or their equivalent in directly administered cities, etc) have jurisdiction, as well as financial and intellectual property courts. The notice limits the number of courts that can hear foreign state immunity cases *(as I had surmised)*, through centralizing jurisdiction (集中管辖 – *Jizhong guanxia*), but permits financial courts and intellectual courts to hear them and requires other courts to transfer cases that they have accepted to ones with jurisdiction.
3. Article 3 concerns service of process, which must be according to relevant treaties or conventions, or other means not prohibited by the law of the foreign country, or alternatively by diplomatic note (via the Ministry of Foreign Affairs) (Article 17 of the Law). Service by announcement is prohibited.
4. The court must serve the complaint and other documents with a translation accompanying the original Chinese. The foreign government has three months to file a defense. The court has the discretion to permit an extension of time.
5. If the foreign state objects to the jurisdiction of the Chinese court, the court shall engage in a comprehensive review ex officio and may hear the views of the parties. Participation in an objection procedure is not deemed acceptance of Chinese jurisdiction (also Article 6 of the Law). If the foreign state does not respond or participate in the Chinese proceedings, the Chinese court must proactively review whether the foreign state has immunity and can hear the views of the

parties. (Article 18 of the Law). *The press release provides guidance to lower courts on the review: first, the people's court should examine whether the reasons put forward by the foreign country for enjoying jurisdictional immunity are valid; second, if the reasons put forward by the foreign country are not valid, the people's court should also conduct a comprehensive review on its own initiative, that is, in addition to the reasons, examine whether the foreign country really enjoys jurisdictional immunity and does not fall into the exception to jurisdictional immunity.*

6. If a court requires a certificate on factual issues of state behavior from the Ministry of Foreign Affairs (further to Article 19 of the Law), it shall report to the Supreme People's Court level by level (逐级报 – *Zhuji bao*) to consult and request (商请 – *Shangqing*) the Ministry of Foreign Affairs to issue a certificate. *This one sentence conveys the bureaucratic operation of the Chinese court system and the nuances of inter-bureaucracy relations.*

An attachment to the notice lists the authorized courts. The SPC has approved some of these courts to establish international commercial tribunals (courts). It is likely that those tribunals will hear sovereign immunity cases:

1. Beijing Fourth Intermediate People's Court (with an international commercial tribunal)
2. Tianjin No.3 Intermediate People's Court
3. Shijiazhuang Intermediate People's Court of Hebei Province
4. Taiyuan Intermediate People's Court of Shanxi Province
5. Hohhot Intermediate People's Court of Inner Mongolia Autonomous Region
6. Shenyang Intermediate People's Court, Liaoning Province
7. Changchun Intermediate People's Court of Jilin Province
8. Harbin Intermediate People's Court of Heilongjiang Province
9. Shanghai No.1 Intermediate People's Court (with an international commercial tribunal)
10. Nanjing Intermediate People's Court of Jiangsu Province (with an international commercial tribunal)
11. Hangzhou Intermediate People's Court, Zhejiang Province (with an international commercial tribunal)
12. Hefei Intermediate People's Court, Anhui Province

13. Fuzhou Intermediate People’s Court of Fujian Province
14. Nanchang Intermediate People’s Court of Jiangxi Province
15. Jinan Intermediate People’s Court, Shandong Province
16. Zhengzhou Intermediate People’s Court of Henan Province
17. Wuhan Intermediate People’s Court, Hubei Province
18. Changsha Intermediate People’s Court of Hunan Province
19. Guangzhou Intermediate People’s Court, Guangdong Province
20. Guangxi Zhuang Autonomous Region Nanning Intermediate People’s Court
21. Hainan Provincial First Intermediate People’s Court
22. Chongqing First Intermediate People’s Court
23. Chengdu Intermediate People’s Court of Sichuan Province
24. Guiyang Intermediate People’s Court, Guizhou Province
25. Kunming Intermediate People’s Court, Yunnan Province
26. Lhasa Intermediate People’s Court of Tibet Autonomous Region
27. Xi’an Intermediate People’s Court of Shaanxi Province
28. Lanzhou Intermediate People’s Court of Gansu Province
29. Xining Intermediate People’s Court of Qinghai Province
30. Yinchuan Intermediate People’s Court of Ningxia Hui Autonomous Region
31. Urumqi Intermediate People’s Court, Xinjiang Uygur Autonomous Region

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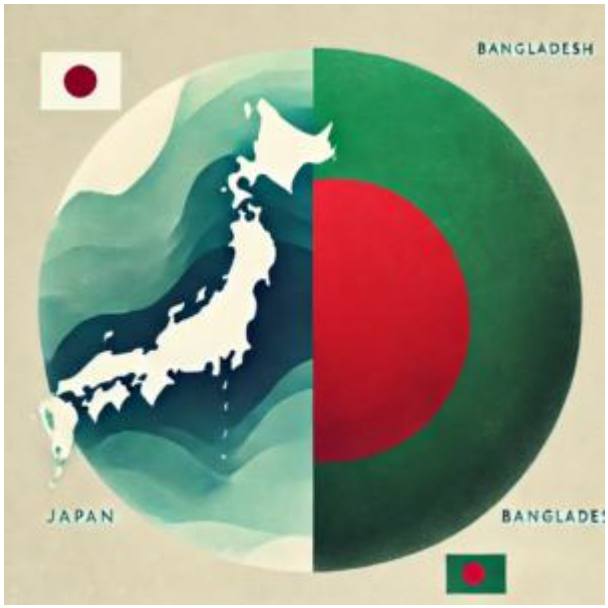
Caught Between Legal Boundaries: Child Custody Disputes Across Japan and Bangladesh

I would like to express my sincere gratitude to MD Sanwar HOSSAIN, *LLB (Hons) Wolverhampton University, MSS (Dhaka University), PgDiP (Northumbria University), Barrister at law (Hon’ble Society of Lincoln’s Inn),* Advocate (Appellate Division) Supreme Court of Bangladesh and Managing Partner, S

Hossain & Associates law office, for bringing the Bangladesh courts' decisions to my attention.



I. Introduction

The breakdown of an international marriage often leads to complex cross-border disputes, especially when children are involved. Tensions can intensify if one parent decides to take the children to their home country, often without the consent of the other parent.

In such cases, when the countries involved are signatories to the HCCH 1980 Child Abduction Convention, the Convention's mechanisms are designed to facilitate the prompt return of children to their country of habitual residence. This framework aims to prevent unilateral relocations that could have lasting impacts on the child's stability. However, when one or both countries are not parties to the Convention, resolving such cases becomes significantly more challenging. In such cases, national courts are compelled to address competing custody claims, assess allegations of wrongful removal, and determine whether they have jurisdiction to hear the case, all while balancing, often quite differently, the best interests of the children involved.

The case presented here is just one of many unreported cases where a romance relationship turns sour, leading to lengthy and contentious legal battles across jurisdictions. This note will focus on the Bangladeshi court's treatment of the

case, as it offers useful insights into the court's approach to handling such complex cross-border disputes.

II. The Case

1. Underlying Facts

X, a Bangladeshi citizen who also appears to have also a US citizenship, and Y, a Japanese citizen, met each other in Japan where they got married in 2008 according to the forms prescribed under Japanese law. Their marriage resulted in the birth of three daughters. From 2020, tensions between X and Y began to intensify, mainly due to financial disagreements. By late December 2020, a family dispute arose, after which (on 18 January 2021) Y informed X of her intention to divorce and ask him to leave their home.

On 21 January 2021, while the two elder daughters were on their way home from school, X intercepted them and took them to live with him at a separate residence. On 28 January 2021, Y initiated legal proceedings against X in the Tokyo Family Court, seeking custody of the children and an order to hand over the two daughters. On 18 February 2021, while Japanese courts were addressing the custody claim, X left Japan with the two children, after obtaining new passports for them. Since then, the daughters have been living and studying in Bangladesh.

2. Legal Battle

a) In Japan

As noted earlier, on January 28, 2021, Y initiated legal proceedings regarding custody of the children and sought an order for their handover. On 31 May 2021, the Tokyo Family Court issued a decree in favor of Y (*Hanrei Taimuzu*, No. 1496 (2022) p. 247, *Hanrei Jiho* No. 2519 (2022) p.60). The court reached its conclusion after assuming international jurisdiction on the grounds that the children's domicile was in Japan (Article 3-15, Article 3-8 of the Domestic Relations Case Procedure Act), and designating Japanese law as the applicable law to the case under the relevant choice of law rules (Article 32 of the Act on General Rules for Application of Laws). The court also refused to take into

account an interim custody order issued by Bangladeshi courts (see below), given its non-final and conclusive nature.

b) In Bangladesh

i) Custody dispute before the Family Court

On 28 February 2021, shortly after arrived in Bangladesh, X filed a lawsuit seeking sole custody before the competent family court in Bangladesh. On the same day, X obtained from that court an interim order on custody and restrained the taking of the children out of Bangladesh.

ii) *Habeas Corpus* Petition

In July 2021, Y travelled to Bangladesh, leaving her youngest daughter with the custody of her family members. Encountering difficulties in accessing her daughters, Y filed a *habeas corpus* petition, seeking a determination on whether the children were being unlawfully held in custody. Y argued, *inter alia*, that Japanese courts have proper jurisdiction over the custody claim and that their decision should be given effect.

The High Court Division of the Supreme Court of Bangladesh (hereafter, 'the High Court') considered that, the children welfare and well-being should be paramount and must be assessed independently by Bangladeshi courts, regardless of any foreign judgment. After reviewing the overall circumstances of the case, and hearing the children, the High Court ruled that daughters remain in X's custody, while granting Y visitation rights (Writ Petition No. 6592 of 2021 of 21 November 2021. A summary of the decision is provided by S Khair and M Ekramul Haque, "State Practice of Asian Countries in International Law – Bangladesh" (2021) 27 *Asian Yearbook of International Law* 146).

Dissatisfied with the order, Y appealed to the Appellate Division of the Supreme Court of Bangladesh (hereafter 'The Appellate Division'). After examining relevant international and domestic laws and precedents, The Appellate Division reiterated that the children's best interest should be given primary consideration. It concluded that the appropriate forum to resolve the custody dispute is the Family

Court, where proceedings were already pending. The Appellate Division ultimately decided to overturn the High Court's decision, placing the children in Y's custody, while granting X visitation rights until the Family Court issued its final verdict (Civil Petition for Leave to Appeal No. 233 of 2022 of 13 February 2022. A summary of the case is provided by S Khair and M Ekramul Haque, "State Practice of Asian Countries in International Law – Bangladesh" (2022) 28 *Asian Yearbook of International Law* 195).

iii) Continuation of the Proceedings before the Family Court

The proceedings resumed before the Family Court. On 29 January 2023, the first-instance court dismissed X's claim on the ground that the Bangladeshi courts lacked jurisdiction since the custody issue had already been decided in Japan, country of the family's last residence. The court also emphasized that children's welfare would be better ensured with the mother (Dhaka in Family Suit No. 247 of 2021 dated 29 January 2023). The decision was confirmed in appeal on similar terms (Family Appeal No. 22 of 2023 dated 12 July 2023). Dissatisfied, X appealed to the High Court.

iv) Ruling of the High Court

Before the High Court, X challenged the lower courts' conclusions. X's key arguments included the following:

(i) The parties had been litigating in Bangladesh for a long time, thus justifying the jurisdiction of the Bangladeshi courts over the dispute

(ii) The lower courts actively engaged in discussing the merits of the case, including the welfare of the children, and parental suitability, therefore, dismissing the claim on jurisdictional ground was illogical,

(iii) The decision rendered in Japan was not binding on the Bangladeshi courts

(iv) The Japanese decree cannot be given effect as it did not grant X any visitation right

In her response, Y argued that the lower courts correctly dismissed the case. Y's arguments include – among others – the following point:

(i) The cause of action *in casu* arose in Japan, where the children were born and raised. In addition, they had never visited Bangladesh before

(ii) All the parties resided in Japan before the dispute arose

(iii) Since Japanese court had already decided the custody issue, Bangladeshi courts lacked jurisdiction.

(iv) The lower courts thoroughly examined the case, placing emphasis on the children's welfare and well-being. In addition, all questions of welfare and custody should be addressed at the child's habitual residence

In its decision (Civil Revision No. 3298 of 2023 dated 13 February 2024), the High Court ruled that Bangladeshi courts have jurisdiction over the matter on the ground that:

(i) Although the children were born and primarily raised in Japan, the custody dispute partially arose in Bangladesh where X and the children were residing, at the time when the suit was filed, and continue to reside since then.

(ii) the jurisdiction of the Bangladeshi courts could not be ousted by the decision of Japanese court, given that – as an independent country – the courts are empowered to exercise jurisdiction under domestic law. Such an issue should have been seriously considered with due regard to Bangladesh's sovereignty, rule of law and the legal aspects of the country.

Regarding the custody determination, the High Court emphasized the importance of carefully considering and balancing various aspects of the case, with a particular focus on the welfare and well-being of the children as the paramount principle. The Court considered that, as a matter of law in Bangladesh, custody should always be granted to the mother, as this is in line with the welfare of the children. The Court also stressed the importance of placing particular emphasis on the opinion of the children and giving precedence to their mental state and

intention. Based on such considerations, the Court decided to divide the custody between the parents: custody of the child who wished to stay with the father was granted to X, while custody of the child who wished to return to Japan was granted to Y. The Court also urged the parties to ensure full visitation rights through amicable arrangement based on the principle of reciprocity.

III. Comments

The case, along with the manner in which it was handled by Japanese and Bangladeshi courts raise several important legal and practical questions. Among these, the following can be highlighted.

1. Relevance of the 1980 HCCH Convention

First, the case highlights the significance of the 1980 HCCH Convention in addressing cross-border unlawful relocation of children. Had Bangladesh been a contracting state, the resolution of the case would have been more straightforward, potentially avoiding the prolonged and conflicting litigation that ensued in both jurisdictions. In this respect, one particularly noteworthy aspect deserves to be mentioned. When submitting the writ petition before the High Court, Y argued that, despite the fact Bangladesh not being not a contracting state, the 1980 HCCH Convention could still be applicable. In support of her argument, Y relied on an earlier High Court decision, in which the 1980 HCCH Convention was recognized as being "part of international customary law" (*RMMRU v Bangladesh and others* (2020) 72 DLR 420). The High Court, however, did not address this issue.

2. Treatment of the Case in Japan and Bangladesh

Second, the contrasting approaches taken by the Japanese courts and the Bangladeshi courts in addressing the custody dispute are striking. In Japan, the courts followed a more classical, structured approach, beginning first by determining whether Japanese courts had international jurisdiction, then determining the applicable law before proceeding to assess the merits of the case.

This methodical manner to approach the case was facilitated by the fact that Japan has comprehensively codified its private international law. The existence of a clear applicable legal framework with renders the resolution of such cases a matter of straightforward interpretation and application of the relevant legal provisions (for a brief overview, see my previous post here).

The situation in Bangladesh presents notable differences, as rules of private international law in the country remains fragmented and only partially codified (for an overview, see Mohammed Abdur Razzak, 'Conflict of Laws – State Practice of Bangladesh' *in* S. R. Garimella and S. Jolly (eds.), *Private International Law – South Asian States's Practice* (Springer, 2017) 265). An appropriate approach would have been for the High Court to consider whether the Japanese decree could be recognized and enforced in Bangladesh in accordance with the relevant legal provisions (for an overview, see Sanwar Hossain, 'Cross-Border Divorce Regime in Bangladesh' *in* Garimella and Jolly *op cit.* 102, Abdur Razzak, *op. cit.*, 281). The Court's approach in the first and second decision appears to conflate the principle of "comity of nations" with the children's welfare as a paramount consideration that need to be independently assessed by Bangladeshi courts, and the issue of recognition with that of jurisdiction

3. Absence of Islamic law influence

Finally, one of the remarkable aspects of the Bangladeshi court's decisions is the absence of any discernable influence of Islamic law on the assessment of custody, despite the repeated references in the decisions to the religion of the parties. X, for instance, is described as a 'religious' person and 'a pious Muslim'. The decisions also mention that X and Y's marriage was celebrated according to Islamic tradition at a local mosque in Japan, following an earlier ceremony at a Shinto Shrine, and only after Y converted to Islam took a Muslim name.

In the High Court 2024 decision, Y is portrayed as an atheist who left Islam and who allegedly threatened X to raise the children in a '*Japanese culture where drinking alcohol, live together* (sic)*, eating pork are common*'. Before Bangladeshi Court, X did raise several Islamic principles related to child custody (notably the fact that, under Islamic law, custody should transfer to the father once the children reach a certain age), and emphasizing on his disagreement with Y who,

according to him, '*refused to follow and respect the Islami life style* (sic)'.

Given the significant role of the Islamic principles play in the Bangladeshi legal system, especially in family law matters (for a general overview, see Ahmad Nasir Mohad Yusoff and AHM Shafiqul Islam, 'The Legal System of Bangladesh: The Duality of Secular and Islamic Laws' (2024) *International Journal of Academic Research in Business & Social Sciences* 14(11) 1965), one might expect that the considerations mentioned above would influence the courts' decisions. For example, as a matter of general principle, the custody of children should not granted to someone who left Islam, particularly, when that person lives in a non-Muslim country (see e.g. the decision of the UAE Federal Supreme court of 10 April 2004 cited in Béligh Elbalti, 'The Recognition and Enforcement of Foreign Filiation Judgments in Arab Countries' *in* N. Yassari et al. (eds.), *Filiation and the Protection of Parentless Children* (T.M.C. Asser Press, 2019) 397).

Nonetheless, it is remarkable that none of these considerations were raised or taken into account by the judges, who addressed the case in an entirely objective manner. Even more striking, the High Court not only affirmed Y's suitability as a custodian, but also reiterated its longstanding principle that child custody should generally be granted to mothers. This principle was applied in the present case without any apparent consideration of Y's change of religion, giving no weight to her religious background or to the fact that she identifies as a non-Muslim who has left Islam.

Anti-Suit Injunctions and Dispute Resolution Clauses

By Adeline Chong, Singapore Management University

1. Introduction

In two decisions decided within a fortnight of each other, the Singapore Court of Appeal considered anti-suit injunctions pursued to restrain proceedings allegedly

brought in breach of arbitration agreements. The first case, *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* (‘*Asiana Airlines*’)[1] dealt with whether A could rely on an arbitration agreement between A and B to restrain B’s proceedings against C, a third party. The second case, *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* (‘*COSCO Shipping*’)[2] considered whether an arbitration agreement covered a tortious claim. To put it in another way, *Asiana Airlines* mainly concerned the ‘party scope’ of an arbitration agreement while *COSCO Shipping* concerned the ‘subject matter’ scope of an arbitration agreement.[3] Where the anti-suit application is to restrain foreign proceedings brought in breach of an arbitration or choice of court agreement, ordinarily it would be granted unless ‘strong cause’ is shown by the respondent.[4] This provides an easier path for the anti-suit claimant compared to the alternative requirement of establishing that the foreign proceedings are vexatious or oppressive in nature.

In both judgments, the Court emphasised that forum fragmentation was sometimes inevitable and that the crux was to ascertain parties’ intentions as to the ambit of the arbitration agreement. While both decisions canvassed other private international law issues, the primary focus of this comment is the Court’s approach to construing the scope of dispute resolution clauses. Although both decisions involved arbitration agreements, the same reasoning applies to choice of court agreements.[5] Further, the principles apply equally whether the application concerns a stay of proceedings or an anti-suit injunction.[6]

2. *Asiana Airlines*

Asiana Airlines (a Korean company) entered into a joint venture agreement with Gate Gourmet Switzerland GmbH (GGS). This joint venture resulted in the establishment of Gate Gourmet Korea (GGK). Asiana entered into a catering agreement with GGK. Both the joint venture and catering agreements contained arbitration agreements. It transpired that the chairman of Asiana had arranged for the two agreements to benefit his own personal interests, in breach of his obligations to Asiana. The chairman was later convicted in Korean proceedings.

Asiana commenced proceedings in Korea against GGK for a declaration that the catering agreement was null and void under Korean law due to its chairman’s breach of trust, and consequently, the arbitration agreement was similarly null and void. It also advanced an argument that the dispute was non-arbitrable due to

Korean public policy; all relevant stakeholders were members of the Korean public and the outcome of the proceedings would have an impact in Korea. Subsequently, Asiana also pursued actions against GGS and the directors of the Gate Gourmet Group. It alleged that the directors were actively involved in the chairman's unlawful conduct and therefore liable in tort under Korean law, and GGS was vicariously liable for their actions. The same points on nullity and public policy were raised.

Gate Gourmet applied for anti-suit injunctions in Singapore to restrain the Korean proceedings. Central to the anti-suit applications was the arbitration agreements in the joint venture and catering agreements. The Court of Appeal, hearing the appeal from a decision of the Singapore International Commercial Court (SICC), held that it was an abuse of process for Asiana to argue that the arbitration agreements were null and void given that it had not pursued previous opportunities to raise this point. Not surprisingly, Asiana's public policy argument received short shrift; it was too broadly framed as it was inevitable that proceedings involving big companies would have an impact on their home countries. Thus, the Court held that the Korean proceedings against GGK was in breach of the arbitration agreement in the catering agreement and the anti-suit injunction restraining the Korean proceedings against GGK was upheld.

More interesting was the anti-suit injunction restraining the Korean proceedings against the directors. Asiana argued that the directors were non-parties to the joint venture agreement and the arbitration agreement contained therein and as GGS were sued on the basis of vicarious liability, the proceedings were not related to the agreement. The Court applied Korean law, the proper law of the agreement, to construe the arbitration agreement. It observed that under Korean law, arbitration agreements could cover non-contractual claims and that the tortious claims pursued were closely connected with the joint venture agreement. The anti-suit injunction restraining the Korean proceedings against GGS was affirmed. The question which then arose was whether the anti-suit injunction restraining the proceedings against the directors could be maintained on the same basis of breach of the arbitration agreement or could only be maintained if the Korean proceedings against the directors were shown to be vexatious or oppressive in nature. As the Court observed, an anti-suit injunction based on the first ground meant that 'GGS as the anti-suit claimant would have to show that if Asiana pursued the claim against the [directors], it would breach *GGS's* rights

under the JVA Arbitration Agreement.'[7]

This question involved the situation where A and B are parties to the dispute resolution clause and B commences proceedings against C in a different forum from that named in the clause. Can A pursue an anti-suit injunction restraining B's action against C on the ground that that action is in breach of the clause?[8] Another variant of this situation is where C applies for an anti-suit injunction restraining B's action against C as being in breach of the jurisdiction clause. In a prior decision *VKC v VJZ*,[9] the Court of Appeal held that section 2(1)(b) of the Contracts (Rights of Third Parties) Act 2001 did not cover exclusive jurisdiction clauses.[10] In contrast, the New South Wales Court of Appeal in *Global Partners Fund v Babcock & Brown*[11] took the view that C could rely on the benefit of the jurisdiction clause under the common law provided C was a 'non-party' who was intimately involved in the transaction between A and B.[12]

The UK House of Lords in *Donohue v Armco Inc*[13] held that where an exclusive English choice of court agreement bound some, but not all, of the parties in the foreign proceedings, the avoidance of forum fragmentation amounted to strong reasons not to uphold the choice of court agreement. The requested anti-suit injunction in *Donohue*, however, involved those who were parties to it: A sought an anti-suit injunction restraining B's action against A. Nevertheless, Lord Scott of Foscote had commented in *obiter* that A could in certain circumstances obtain an anti-suit injunction restraining not only proceedings against itself but also proceedings against C if there was a possibility that A and C would be jointly and severally liable. This is provided the wording of the clause was sufficiently wide to cover the proceedings against C and A had a sufficient interest in obtaining the anti-suit injunction, namely, to avoid incurring liability as a joint tortfeasor. The Singapore Court of Appeal rejected Lord Scott's comments, as it thought that it would be overinclusive and prohibit legitimate claims against third parties.[14] Instead it cited with approval the decision in *Team Y&R Holdings Hong Kong v Ghoussoub; Cavendish Square Holding BV v Ghossoub*[15] to the effect that the *Fiona Trust*[16] principle that the intentions of rational businessmen would be to have a 'one-stop shop' for litigation cannot apply with the same force when considering claims involving third parties. Clear language is required before an exclusive jurisdiction clause covers claims brought by or against third parties.[17] The risk of forum fragmentation, which underscored Lord Scott's suggestion in *Donohue*, should not be 'overstated'.[18]

This more narrow construction of the party scope of dispute resolution clauses raises the risk of B manipulating the situation and evading the dispute resolution clause by pursuing claims against C. However, as the Court pointed out, it would be open for A to apply for an anti-suit injunction on the basis that B's proceedings against C rendered the proceedings between A and B vexatious or oppressive. Additionally, C could also independently seek an anti-suit injunction restraining the proceedings against it on the vexation or oppression ground.[19]

On the facts, the Court held that while the directors had signed the joint venture agreement, they had done so in their capacity as representatives of GGS. There was nothing in the wording of the arbitration agreement to indicate that Asiana and GGS intended the clause to apply to claims against the directors. The anti-suit injunction restraining the action against the directors could not succeed on the basis of breach of the arbitration agreement; it could only succeed on the vexation or oppression ground. However, Gate Gourmet failed to show any bad faith on Asiana's part in suing the directors. Therefore, the anti-suit injunction was upheld in relation to the action against GGS as being in breach of the arbitration agreement while the anti-suit injunction restraining the action against the directors was discharged.

3. *COSCO Shipping*

PT OKI (an Indonesian company) had sub-chartered a vessel which belonged to COSCO Shipping (a Chinese company). The head charter and sub-charter contracts each contained a law and arbitration clause for English law and arbitration in Singapore. Further to that, contracts of carriage were entered into between the two companies. These contracts, which were evidenced by or contained in bills of lading, incorporated the law and arbitration clause in the charter contracts. While loading PT OKI's cargo at the port of Palembang, Indonesia, COSCO Shipping's vessel allided with the trestle bridge of the jetty, causing damage which allegedly amounted to US$269m. The bridge and port were owned and operated by PT OKI. Various proceedings were pursued by both parties, the most relevant of which were: PT OKI commenced proceedings against COSCO in Indonesia in tort for the damage to the trestle bridge; COSCO applied for an anti-suit injunction in Singapore to restrain PT OKI from continuing with the Indonesian action; and COSCO commenced arbitration against PT OKI before the Singapore International Arbitration Centre (SIAC) in Singapore seeking declarations of non-liability and various reliefs arising out of the allision. COSCO

alleged that PT OKI had breached the safe port warranty under the head charter agreement as incorporated into the bills of lading and raised contractual defences also found in the head charter agreement and incorporated into the bills of lading.

The anti-suit application was based on PT OKI's alleged breach of the arbitration agreement. The Court of Appeal considered the meaning of the phrase 'arising out of or in connection with this contract', used in the arbitration agreement and which is standard language in dispute resolution clauses. At first instance, the judge had referred to various tests-such as the 'parallel claims test',[20] 'causative connection test' and the 'closely knitted test'[21] to ascertain if the tort claim fell within the scope of the arbitration agreement. The Court of Appeal emphasised that the various tests were 'simply labels and tools developed to assist the courts'[22] and pushed back against any presumption that parties must always have intended for all their claims to be decided in the same forum. The crux was the parties' intentions as encapsulated by the wording of the agreement; thus '[i]f upon examining the text of the agreement and the nature of the competing claims, a claim is not within its ambit, then forum fragmentation is inevitable and the courts should not steer away from that outcome …'[23]

The Court adopted a two-stage test when ascertaining the scope of an agreement: first, the court should identify the matter or dispute which parties have raised or foreseeably will raise in the foreign proceedings; and secondly, the court must then ascertain whether such matter or dispute falls within the scope and ambit of the agreement. At the first stage, the court is trying to identify the substance of the dispute between the parties. It should not consider only the claimant's pleaded cause of action but should also take into account defences or reasonably foreseeable defences and cross-claims that may arise. The Court held that it was not necessary for the claims or defences to be connected to the contractual relationship. This is significant because the tort action in Indonesia was not based on the contract between the parties.[24] It concluded that the tort action fell within the scope of the arbitration agreement. The parties must have contemplated that a pure tort claim for damage to the trestle bridge caused during the performance of the contracts of carriage between the parties and where it was foreseeable that defences based on the contract would be raised would fall within the scope of the arbitration agreement. Thus, the anti-suit injunction could properly be founded on breach of the arbitration agreement. There was no consideration if 'strong cause' was shown by PT OKI to justify the

breach of the arbitration agreement; it did not appear that arguments had been made on this point.

4. Conclusion

The decisions in *Asiana Airlines* and *COSCO Shipping* should not be read as the Singapore courts resiling from the *Fiona Trust* principle, which has been cited and applied in a number of other decisions.[25] The core idea that one should adopt a common-sense approach when construing dispute resolution clauses, bearing in mind that the parties are rational businessmen, still underlines the two judgments. The clarification added by the Court of Appeal was the starting point must always be the wording of the dispute resolution clause and the context in which it was entered into.[26] This is in contrast with the prior approach where sometimes the court tended to start with the presumption that parties intended for 'one-stop shopping' and to apply the presumption in the absence of any contrary evidence.[27] There is now an important shift in focus. The court should not go to great lengths to achieve a construction which supports 'one-stop shopping' where this is not borne out by the wording of the clause and the circumstances of the case. If this means that there would be parallel litigation across a few jurisdictions, the courts should not shy away from that conclusion.[28] In particular, where third parties are concerned, clear language must be used to bring third parties within the scope of a dispute resolution clause. Ultimately, *Asiana Airlines* and *COSCO Shipping* underscore the importance of clear and precise drafting of dispute resolution clauses.

[1] [2024] SGCA(I) 8; [2024] 2 SLR 279.

[2] [2024] SGCA 50; [2024] 2 SLR 516.

[3] The phrases 'party scope' and 'subject-matter scope' was coined by the New South Wales Court of Appeal in *Global Partners Fund Limited v Babcock & Brown Limited (in liq)* [2010] NSWCA 196.

[4] *Sun Travels v Hilton* [2019] 1 SLR 732 (Singapore CA) [68], [78], [81]-[87].

[5] *Asiana* [80]-[83].

[6] *COSCO* [73].

[7] *Asiana* [58].

[8] See Thomas Raphael, *The Anti-Suit Injunction* (2nd edn, OUP 2019) para 7.31.

[9] [2021] 2 SLR 753.

[10] This provision allows C to enforce a term of the contract if the term purports to confer a benefit on C.

[11] [2010] NSWCA 196 (noted A Chong, 'The "Party Scope" of Exclusive Jurisdiction Clauses' [2011] LMCLQ 470).

[12] Cf *Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd* [2019] NSWCA 61 [90] (President Bell) (in the context of a stay application).

[13] [2002] 1 All ER 749 (HL).

[14] *Asiana* [85]-[88].

[15] [2017] All ER(D) 81 (Nov) [82].

[16] *Fiona Trust & Holding Corporation v Privalov* [2008] 1 Lloyd's Rep 254 (UKHL).

[17] *Asiana* [72]-[73].

[18] *Asiana* [88].

[19] *Asiana* [84].

[20] *Eastern Pacific Chartering Inc v Pola Maritime Ltd* [2021] 1 WLR 5475 ("*The Pola Devora*") [37].

[21] *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87 (English CA) 89. The Court disagreed with the judge that the 'closely knitted test' applies only where the non-contractual claim may be recast as a contractual claim: *COSCO* [78]-[79].

[22] *COSCO* [3]

[23] *COSCO* [5].

[24] The court below had been troubled by the fact that the tort claim could not be recast as a contractual claim. It did not grant the anti-suit injunction: [2024] SGHC 92.

[25] Eg, *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 (Singapore CA), *Allianz Capital Partners GmbH, Singapore Branch v Goh Andress* [2023] 1 SLR 1618 (Singapore HC(A)).

[26] See also *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] 5 SLR 455 [34].

[27] Eg, *Vinmar Overseas* [79].

[28] See to similar effect, *Australian Health* [90].

[29] Eg, *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 (Singapore CA), *Allianz Capital Partners GmbH, Singapore Branch v Goh Andress* [2023] 1 SLR 1618 (Singapore HC(A)).

[30] Eg, *Vinmar Overseas* [79].

[31] See to similar effect, *Australian Health* [90].

Trending Topics in German PIL 2024 (Part 2 – Online Marriages, Gender Afiliation and Name Law)

As already mentioned in my previous post, at the end of each year I publish an article (in German) about the Conflict of Laws developments in Germany of the last twelve months, covering more or less the year 2024 and the last months of 2023. This post is the second with an overview over those topics that seem to be

most trending.

The two parts focus on the following topics (part 1 contained 1. and 2.):

1. Restitution of Money lost in Illegal Gambling
2. Applicable Law in the Dieselgate litigation
3. **The (Non-)Valitidy of Online Marriages**
4. **New German conflict-of-law rules regarding gender afiliation / identity**
5. **Reforms in international name law**

I will now give attention to the last three topics that focus on the three areas that are not harmonized by EU law (yet) and are mainly questions of family law.

This is not a resumen of the original article as it contains a very detailed analysis of sometimes very specific questions of German PIL. I do not want to bore the readers of this blog with those specificities. Those interested in knowing those details can find the article here (no free access).

I would be really curious to hear whether these or similar cases are also moving courts in other jurisdictions and how courts deal with them. So, please write me via mail or in the comments to the post if you have similar or very different experiences on those cases.

Part 2 – Online Marriages, Gender Afiliation and Name Law

1. **The (Non-)Validity of Online Marriages**
   One highly discussed topic of the last few years was the treatment of Online Marriages. Online Marriage refers to a marriage ceremony where the declarations of intent to marry are declared virtually by digital means. In the relevant cases, at least one of the (future) spouses was located in Germany when this intent was declared via Zoom, Whatsapp or similar means, while the rest of the ceremony, esp. the registration or the other acts of a registrar, was located in another State, esp. in Utah or Afghanistan. The case which the BGH (Supreme Court) decided in September 2024 was about two Nigerians that were in Germany while their declaration was registered in Utah, USA.

In German law, the validity of such a marriage is determined in two steps: The substantial law of marriage follows the law of the nationality of each spouse (Article 13 EGBGB). The formal validity, in general, follows the classical alternative connecting factors of either the law of the main question (*lex causae*) or the law of the place of the relevant (*lex locus*), Article 11 EGBGB. Nevertheless, regarding marriages, a special rule applies regarding the formal validity: Article 13 para. 4 EGBGB provides that a marriage concluded in Germany necessarily follows German law regarding the form.

As the requirements of each nationality's laws where fulfilled, main question of the case was: **Where does the celebration of a marriage actually take place if it is celebrated online**?

Before this question came up, the prevailing opinion and case law referred to the law of the place where the state authority or the religious authority were located (*Coester-Waltjen/Coester* Liber Amicorum Verschraegen (2023), 1 (6); vgl. auch *Gössl* NJW 2022, 3751; BGH 19. 12. 1958 – IV ZR 87/58), which in my opinion makes sense as these authorities make the crucial difference between a mere contract and a marriage conclusion from the point of view of German law. Nevertheless, the Supreme Court (BGH 25.9.2024 – XII ZB 244/22) and other courts (VG Karlsruhe 28.9.2023 – 1 K 3074/23*;* VG Düsseldorf 5.7.2024 – 7 K 2728/22) decided that the place of the marriage is located at the place where the spouses declare their intents to marry – with the consequence that Art. 13 para. 4 EGBGB applied in all cases where at least one spouse was located in Germany at the moment of the declaration.

I am personally not convinced of the case. The Supreme Court distinguishes the decision from so-called proxy marriages where the declaration is made by the proxy and, therefore, not where the spouses are located but where the proxy is communicating. Nevertheless, this comparison is not convincing: German courts characterize the declaration of a proxy as a (merely) formal requirement in cases where the "proxy" has no power to decide but merely communicates the will of the spouse. Thus, in my opinion, the "proxy" is more a messenger than a real proxy and then the location of the declaration again is where the spouses (not the proxies) are in the moment they send the messenger. Furthermore, I

am skeptical because the cases decided yet happened in migration contexts and might have been regarded differently with different parties.

What are your thought? Do you have similar questions in your jurisdictions**?**

2. **New German conflict-of-law rules regarding gender afiliation and "Mirin"**
   Since November 2024 the German EGBGB has an explicit conflict of laws rule on gender affiliation / gender identity. It was introduced by the Gender Self-Determination Act. According to Art. 7a para. 1 EGBGB (here you find the provision in German), a person's nationality's law must be applied. That was more or less the unwritten rule, courts followed in Germany. The second paragraph introduces a very **limited form of party autonomy**: According to Art. 7a para. 2 EGBGB , a (foreign) person with **habitual residence in Germany can choose German la**w for the change of gender or a related change of name.

   While this rule opens non-nationals to change their legal gender in Germany, **it does not comply with the case law of the CJEU**. In the decision **Mirin** (ECLI:EU:C:2024:845 – Mirin) the CJEU extended her case law regarding the recognition of names to gender changes that took place in another Member State. It establishes the obligation to recognise the change of gender validly made in another Member State.

   If a person changes the gender in another Member State without being a national of that State but (e.g.) living there, in Germany that gender reallocation cannot be accepted by Art. 7a EGBGB. An extension of Art. 7a para. EGBGB, i.e. a choice of law in favour of every habitual residence (not limited to a German one), might help, even though it probably will not include all situations possible where the obligation to recognize a gender afiliation can exist. This development again shows that the classical "recognition via conflict of laws" method is not able to implement the case law of the CJEU.

   What are your thoughts to those developments (Mirin and the new rule)?

3. **Reforms in International Name Law**
   Finally, there was a general reform of German name law and – in a last

minute move my the legislator – in **International Name Law as well**. The new rules will enter info force in May 2025.

At the moment, the law of the person follows her **nationality** (Article 10 para. 1 EGBGB – version until the end of April 2025). Furthermore, there is a very **limited** possibility of a **choice of law** for **spouses** regarding a common name (each spouses nationalities and German law if one has the habitual residence in Germany) and for **children** and their **family names** (nationality of each parent or other person with parental responsibility or German law, if one parent has the habitual residence in Germany).

The new Article 10 para. 1 EGBGB changes the connecting factor: instead of nationality, **habitual residence of the person determines her name, renvoi excluded**. According to Art. 10 para. 4 EGBGB, instead, **the person can choose the law of the nationality**. The futher choice of law for spouses and children family names remains, but allows spouses to choose the law of the habitual residence of one of them, no matter whether it is the German one or not. A child's name now can be chosen by the parents' and the child's nationality (new). In all those cases, persons with double nationality can choose both nationalities.

Finally, Article 48 EGBGB contains a provision that implements the **CJEU case law regarding the recognition of names**. Until now, it provides that a person can choose to change the name into the name acquired during a habitual residence in another Member State of the European Union and entered in a civil status register there, unless this is manifestly incompatible with fundamental principles of German law.

The new provision is almost identical, but some subtle but important changes were made: **First,** a person **does not have to have their habitual residence in the Member State** in which they acquired the name. **Nationality is sufficient.** This implements "Freitag". **Second,** it no longer depends on whether the name was **'lawfully' acquired in another Member State**, but only on the (possibly incorrect) entry of the name in a foreign register. This last requirement (in my opinion, see Gössl, IPRax 2018, 376) goes further that the CJEU requires, as the name has to be "validly acquired" in another Member State to create the obligation to "recognize" or accept that name. Nevertheless, the CJEU

most probably will not object to a Member State that is more recognition/acceptance-friendly than necessary.

I hope you found this overview interesting. Next year, I am planing to provide similar articles, so any feedback is very welcome.