A Judgment is a Judgment? How (and Where) to Enforce Third-State Judgments in the EU After Brexit

In the wake of the CJEU's controversial judgment in *H Limited* (Case C-568/22), which appeared to open a wide backdoor into the European Area of Justice through an English enforcement judgments (surprisingly considered a 'judgment' in the sense of Art. 2(a), 39 Brussels Ia by the Court), international law firms had been quick to celebrate the creation of 'a new enforcement mechanism' for non-EU judgments.

As the UK had already completed its withdrawal from the European Union when the decision was rendered, the specific mechanism that the Court seemed to have sanctioned was, of course, short-lived. But crafty judgment creditors may quickly have started to look elsewhere.

In a paper that has just been published in a special issue of the Journal of Private International Law dedicated to the work of Trevor Hartley, I try to identify the jurisdictions to which they might look.

In essence, I make two arguments:

First, I believe that the CJEU's unfortunate decision can best be explained by the particular way in which foreign decision are enforced in England, i.e. through a new action on the judgment debt. Unlike continental exequatur proceedings, this action actually creates a new, enforceable domestic judgment, albeit through proceedings that closely resemble the former. It follows, I argue, that only judgments that result from a new action based on the judgment debt (rather than a mere request to confirm the enforceability of the foreign judgment) can be considered 'judgments' in the sense of Art. 2(a) and the Court's decision *H*

Limited (which also requires the decision to result from 'adversarial proceedings'). Among many reasons, I find such a limited reading easier to reconcile with the Court's earlier decision in *Owens Bank* (Case C-129/92) than a wider understanding of the decision.

Second, I believe that several European jurisdictions still offer enforcement mechanisms through which third-state judgments could realistically be transformed into European judgments (clearing both the requirement of creating a new judgment and resulting from adversarial proceedings). This applies to Ireland and Cyprus (but not Malta) as well as to the Netherlands (through its so-called *verkapte exequatur*) and Sweden.

The full paper is available here; a preprint can also be found on SSRN.

Conference report 'European Account Preservation Order: Practical Challenges and Prospects for Reform' (University of Luxembourg, 3 December 2024)

This report was written by Carlos Santaló Goris, postdoctoral researcher at the University of Luxembourg

Recent developments on the application of the EAPO Regulation

On 3 December 2024, the conference 'European Account Preservation Order: Practical Challenges and Prospects for Reform' took place at the University of Luxembourg, organized by Prof. Gilles Cuniberti (University of Luxembourg). The conference also served as an occasion to present the book 'European Account Preservation Order – A Multi-jurisdictional Guide with Commentary', published by

Bruylant/Larcier. The book was co-edited by Dr. Nicolas Kyriakides (University of Nicosia), Dr. Heikki A. Huhtamäki (Huhtamäki Brothers Attorneys Ltd), and Dr. Nicholas Mouttotos (University of Bremen), and offers a comprehensive overview on the application of the European Account Preservation Order ('EAPO') at the national level. It contains a report for each Member State where the EAPO Regulation applies, addressing specific aspects of the EAPO procedure that depend on domestic law.

The conference was structured into two panel discussions. The first panel focused on the specific issues regarding the application of the EAPO Regulation identified by practitioners with first-hand experience with this instrument. The second panel discussion explored the potential reform of the EAPO Regulation and which specific changes should be implemented to improve its application. This report aims to offer an overview of the main highlights and outputs of the presentations and discussions of the conference.

First panel discussion: the use of the EAPO application in the practice

The first panel was composed of Dr. Laurent Heisten (Moyse & Associates Law Firm, Luxembourg), Alexandra Thépaut (Étude Calvo & Associés, Luxembourg), and Lionel Decotte (SAS Huissiers Réunis, France) and moderated by Dr. Elena Alina Ontanu (University of Tilburg). This first panel aimed to explore specific issues in the application of the EAPO Regulation from the practice perspective. The discussion was opened by Dr. Laurent Heisten, who indicated that the EAPO is way more complex than the Luxembourgish national provisional attachment order, the *saisie-arrêt*. He highlighted that the Luxembourgish *saisie-arrêt* has more lenient prerequisites than the EAPO. In his view, that might explain why creditors often opt for the *saisie-arrêt* instead of the EAPO.

The complexity of the EAPO compared to the Luxembourgish *saisie-arrêt* was also remarked by Ms. Alexandra Thépaut. However, she also acknowledged that the EAPO presents some advantages against the Luxembourgish national equivalent procedure. In particular, she referred to the certificate that banks have to issue immediately after the implementation of an EAPO (Article 28). This is something that does not occur with the Luxembourgish *saisie-arrêt*. Another advantage of the EAPO she referred to is the possibility of obtaining information about the debtors' bank accounts (Article 14). The Luxembourgish *saisie-arrêt* also lacks an equivalent information mechanism.

During the discussion, Prof. Gilles Cuniberti intervened to indicate that using the EAPO could be less costly than relying on equivalent domestic provisional measures. He refers to a specific case in which the creditor preferred to apply for an EAPO in Luxembourg instead of a domestic provisional attachment order in Germany. The reason was that in Germany, the fee for applying for a national provisional measure would be in proportion to the amount of the claim, while in Luxembourg, there is no fee to obtain an EAPO.

A second recurrent issue identified by the panellists was the use of standard forms. In this regard, Mr. Lionel Decotte highlighted while standard forms can seem practical in a cross-border context, they are rather complicated to fill in. Ms. Alexandra Thépaut mentioned finding particularly complex the section on the interest rates of the EAPO application standard form.

Second panel discussion: the future reform of the EAPO Regulation

The second panel focused on the potential reform of the EAPO Regulation. The panellists were Prof. Gilles Cuniberti, Dr. Carlos Santaló Goris, and Dr. Nicolas Kyriakides, and it was moderated by Dr. Nicholas Mouttotos. Prof. Gilles Cuniberti explored the boundaries of the material scope of the EAPO Regulation. He first advocated suppressing the arbitration exception. He explained that it had been adopted by a political decision which was not submitted to the discussion of the expert group. This was most unfortunate, as the rationale for excluding arbitration from the Brussels I bis and other judgment regulations (the existence of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards) was inexistent concerning a remedy belonging to enforcement per se, which was always outside of the scope of the Brussels I bis Regulation.

Prof. Gilles Cuniberti also defended making available the EAPO Regulation in claims regarding matrimonial and succession matters, both expressly excluded from its scope. In his view, there is no reason for these two subject matters to be excluded as the Succession and Matrimonial Property Regimes Regulations, again, only apply to jurisdiction and enforcement of judgments (and choice of law), but do not offer any remedy to attach bank accounts. Lastly, he advocated expanding the use of the EAPO to provisional attachment of financial instruments. This is a potential reform of the EAPO Regulation expressly foreseen in Article 53.

Dr. Carlos Santaló Goris focused on the reform of the EAPO Regulation from the

creditors' perspective. He observed that national case law on the EAPO shows that creditors with an enforceable title encounter many difficulties satisfying the EAPO's *periculum in mora*. This is due to the strict interpretation that courts have of this prerequisite in light of Recital 14 of the Preamble. He also mentioned that there is a pending preliminary reference on the interpretation of the EAPO's *periculum in mora* before the European Court of Justice (C-198/24, *Mr Green*).

Regarding the creditor's security, he stated that the vague criteria used to calculate the amount of the security is also a source of divergences on how the amount of the security is established from one Member State. He provided the example of Germany, where courts often require 100% of the amount of the claim. This percentage contrasts with other Member States, such as Spain, where the amount of the security represents a much lower percentage of the amount of the claim. Additionally, he also suggested reforming the EAPO to transform it into a true enforcement measure. In his view, creditors with an enforceable title should not only have the possibility of obtaining the provisional attachment of the funds in the debtors' bank accounts but also the garnishment of those funds.

Finally, Dr. Nicolas Kyriakides explored how to foster the use of the EAPO Regulation across the EU. In his view, it would be necessary to expand the use of the EAPO Regulation to purely domestic cases. He referred to the case of the European Small Claims Procedure and how this instrument served as an inspiration for some national legislators to introduce equivalent domestic procedures. In his view, when judges and practitioners use these equivalent domestic procedures, indirectly they become familiar with the EU civil proceedings on which the equivalent domestic procedure was modeled. This is a way of integrating the EU civil proceedings into the legal practice. Therefore, when judges and practitioners have to apply the EU civil procedures, they already know how to do it. This can result in a more efficient and effective application of these EU instruments. On a second level, Dr. Nicolas Kyriakides identified the legal basis that the EU legislator might have to adopt such kinds of measures. He considered that the EU could invoke Article 81 (Judicial cooperation in civil and commercial matters), and Article 114 (Harmonization for the Internal Market) of the Treaty on the Functioning of the European Union could serve to harmonize domestic procedural rules within the boundaries of the principles of subsidiarity, proportionality, and procedural autonomy.

The panelists' presentations were followed by an open discussion with the

audience. One of the issues that was addressed during this discussion was the use of the IBAN to determine the location of the bank accounts. Prof. Gilles Cuniberti expressed his concern about the use of the IBAN since nothing prevents a bank from opening an account with an IBAN that does not correspond to the Member State where the account is effectively held.

Waiting for the Commission's report on the EAPO Regulation

Following Article 53(1) of the EAPO Regulation, the Commission should have elaborated a report on the application of the EAPO by 18 January 2024. This conference offers a glimpse into what might eventually appear reflected in that report. The EAPO Regulation seems still far from being an instrument often relied on by creditors who try to recover a cross-border claim. The conference, which combined a practical and academic analysis of the EAPO regulation, served to identify some of the problems that might be preventing the EAPO from being perceived by creditors as an efficient tool to secure cross-border claims. Initiatives like this conference can help prepare the ground for designing a more effective EAPO procedure.

The Art. 2(b) CISG Conundrum: Are Tender Contracts Under the Ambit of an Auction?

By Harddit Bedi* and Akansha Tripathy**

Introduction

It is beyond dispute that *The Convention of International Sales of Goods, 1980* (CISG) has facilitated international trade disputes. However, Courts and tribunals continue to apply their minds in adjudicating the applicability of CISG before advancing into substantive issues. This exercise is not very prolific as it prolongs

proceedings. Chapter 1 of the convention lays down the scope and extent of the CISG. Amongst other things, the CISG application *does not apply* to contracts formed by, inter-alia, auctions under Art. 2(b) of CISG. The word *auction* itself is nowhere defined in the convention.

This led to ambiguity. Courts of different jurisdictions had to adjudicate the definition of the word *auction,* Take, for instance, the *Electronic electricity meter case*. The Swiss Federal Supreme Court had to determine if the bidding process in a tender contract was the same as an auction. The similarities between a bidding process and an auction cannot be understated. However, unlike an auction, in a tender contract, it is the sellers that bid, not the buyers. Hence, a tender contract *may* be construed as a reverse auction, not an auction. This leads to the issue: *Are tender Contracts—by them being reverse auctions— barred by the CISG under Article 2(b)?*

The Exclusion of Auctions in CISG—but Why?

Article 2(b) explicitly reads that the CISG exempts sales by auction. In an auction, sellers invite buyers to bid on goods, with the highest bidder securing the purchase. The process ensures competition among buyers, with the help of the seller or an intermediary, and ends with the auctioneer declaring the winning bid. The reason for this exclusion in the convention is not well-founded but speculated. *First*, it is excluded because auctions are often subject to special rules under the applicable national law, and it is best to not harmonize them. *Second*, there was no need to include an auction since auctions universally, at that time, did not take place across borders in any case. *Third*, in an auction, the seller may not know the details about the buyer, including but not limited to, domicile, nationality, and place of operations. That is why, the applicability of the CISG would be uncertain due to Article 2(b) of the CISG since the aforesaid information determines whether the contract is an international one. These reasons justify exclusion, however, defining the term *auction* would have abated vagueness and ambiguity. Since, in the present context, The exclusion of “sales by auction” can be narrowly interpreted to apply only to traditional auctions, where sellers solicit bids from buyers. However, alternatively, it can be broadly construed to include any competitive bidding process, including reverse auctions.

A Case for CISG Applicability vis-à-vis Tender Contracts

Tender contracts, despite being formed after an auction, do not come under the ambit of Art.2(b). ***First***, *just because tender contracts are formed through a bidding process does not make it an auction.* It is advanced that tender contracts differ from an auction but may be similar to reverse auctions. In a reverse auction, it is the buyer who invites multiple sellers to bid, to secure goods or services at the lowest possible price. This process is common in procurement, particularly in government tenders and large-scale corporate sourcing. Similarly, since *primarily*, a tender involves a buyer inviting potential sellers to submit bids for goods or services; the process can be closely equated with a reverse auction in its characteristics—not auctions. Also, the procurer can also consider several other factors and have the discretion to determine to award the contract. This is unlike how an auction functions. In an auction, the seller typically does not have the discretion to consider other factors besides the highest price quoted. Ulrich G. Schroeter, a member of the CISG advisory council, (2022 paper) advances that CISG is applicable in Tender contracts. He states, *"The CISG furthermore also applies to international sales contracts concluded with a seller which has been selected by way of a call for tender (invitation to tender, call for bids)."* The aforementioned arguments suggest that at the very least it would not be correct to construe tender contracts as auctions. The question that then follows is whether reverse auctions can also be presumed to be included in the ambit of *auction* mentioned in Art.2(b); which is answered in the subsequent point.

Second, *the absence of explicit exclusion extends to implied inclusion.* The UNCITRAL Commentary of Art 2 of the convention advances that all international sale of goods contracts can be governed by CISG besides the following. Art 2 does not refer to contracts formed by bidding process or reverse auctions but just auctions. In addition to this, the World Bank standard tender rules also do not explicitly exclude the application of CISG. From these, there is a reasonable inference that reserving an auction or just contracts formed via bidding are not explicitly included. On the contrary, if anything, the CISG application was included in the New Zealand government as guidance for foreign bidders, although it was later changed to *"Common Law of contracts."* Such an inclusion is also present in an international purchase of equipment, by a Brazilian nuclear power state-owned entity. With this argument in mind, a counter-argument may be taken to advance that a court/tribunal can extend the interpretation of an

auction to also include a reverse auction. However, that would be a way too broad interpretation and no coherent argument exists to make such a broad interpretation.

***Third**, precedents have historically not exempted CISG application in tender contracts*. In 2019, the Swiss Federal Supreme Court dealt with the issue of tender contracts in CISG. It established that contracts initiated through public tenders do not fall under the ambit of Art. 2(b). The test laid is whether or not one party is foreign or not to the tender contract. So long as that element is present in the transaction, tender contracts are just as valid as any other contract with respect to Art 2(b). In another Swiss precedent, while not directly addressing the issue at hand, the tribunal held that an invitation to a tender is a form of invitation to a contract. Hence, a contract formed through just a process of bidding, though not an auction, can be governed by CISG as it so was in the said precedent. Additionally, as stated above, government procurement is done through mostly reverse auctions/Tender contracts/bidding. Such government procurement when faced with an international element has invoked the application of CISG.

Conclusion

This question at hand is pertinent since CISG has proven to be a successful framework, hence, its scope and applicability should not be restricted. Especially with relation to tender contracts since they form a substantial method of procurement of big entities and governments. Not to mention, no valid reason exists for the exclusion. The economic reasons are present and not even touched upon since the article strictly restricted itself to legal arguments. To summarize, the applicability of CISG to tender contracts is ambiguous due to Article 2(b), which excludes “sales by auction” from its ambit. Auctions are usually seller-driven competitive bidding. Whereas, Tender contracts are where buyers ask for bids from sellers. By virtue of this, Tender contracts are different from auctions in certain aspects such as control, procedural formalities, and evaluation criteria which are considered factors beyond price. Since it is a form of reverse auction, it would be incorrect to include reverse auctions as an *auction* under Art.2(b). More importantly, previously, courts and tribunals have not given the word *auction* such a broad interpretation. It has allowed CISG to govern the contract. Hence, in

conclusion, tender contracts do not come under the ambit of "*auction*" of Art 2(b) CISG.

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Japanese Court Enforces a Singaporean Judgment Ordering the Payment of Child Living Expenses

I. Introduction

Foreign family law decisions can be recognized, and where necessary, enforced in Japan if they meet the prescribed requirements for this purpose. Prior to 2018, it was an establish practice to apply the same recognition and enforcement regime used for civil and commercial matters to foreign family law decisions. However, discussions existed in literature regarding whether constitutive family law judgments and decrees should be recognized following the choice of law approach, or whether the specific characteristics of foreign family law decisions might justify exceptions, such as the non-application of certain recognition requirements (see Mario Takeshita, "The Recognition of Foreign Judgments by Japanese Courts" 39 *Japanese Annual of International Law* (1996) 59-61).

Since 2018, the applicable regime has been significantly clarified, effectively putting an end to much of the prior academic debate on the subject. This

development stems from the introduction of new provisions on the recognition and enforcement of foreign family law decisions in the Act No. 20 of 2018, which amends the procedural acts applicable to family law cases as it will be outline below (English translation can be found in 62 *Japanese Yearbook of International Law* (2019) 486. See also Prof. Yasuhiro Okuda's translation in 50 *ZJapanR/J. Japan.L* (2020) 235).

This Act, which came into force on 1 April 2019, also introduces new detailed rules on international jurisdictional in family law disputes (for details, see Yuko Nishitani, "New International Civil Procedure Law of Japan in Status and Family Matters" 62 *Japanese Yearbook of International Law* (2019) 141; Yasuhiro Okuda, New Rules on International Jurisdiction of Japanese Courts in Family Matters, 50 *ZJapanR/J. Japan.L* (2020) 217).

Nonetheless, it has to be acknowledged that, in the context of the recognition and enforcement of foreign family law decisions, several issues remain open. In addition, since the entry into force of the new law, there have been relatively few reported cases that provide clear guidance on the application of the legal framework. In this respect, the Chiba District Court's judgment of 19 July 2024 presented here, concerning the enforcement of a Singaporean divorce judgment component ordering the payment of child living expenses, offers valuable insights.

II. Facts

The case concerns X's (ex-wife, Plaintiff) request for an enforcement judgment under Article 24 of the Civil Enforcement Act (CEA) to enforce a portion of a Singaporean judgment rendered in November 2010, requiring the Y (ex-husband, the Defendant) to pay, *inter alia*, living expenses for two of their three children until they reached the age of majority, along with accrued interest. X initiated the enforcement action in 2019. By the time of the action, one child had already attained the age of majority under Singaporean law (21 years), while the other reached the age of majority during the pendency of the case.

The parties in the case married in Japan in the early 1990s, where they lived and had two sons. In 1997, the Y relocated to Singapore, followed by the rest of the family in 1998. While living in Singapore, they had their third child, a daughter. In March 2007, X initiated divorce proceedings before Singaporean courts, with Y

participating by appointing legal counsel and responding to the proceedings.

In accordance with Singapore's two-step divorce process, the court issued a provisional judgment in October 2008 dissolving the marriage. The court then proceeded to address ancillary matters, including custody, guardianship, visitation, living expenses, and the division of joint assets. During these proceedings, Y permanently left Singapore and returned to Japan in June 2010. Following his departure, Y ceased to participate in the proceedings, and his legal counsel was subsequently granted permission to withdraw from representing him.

In November 2010, the Singaporean court issued a final judgment granting X sole custody and guardianship of the children, ordering the payment of living expenses, and dividing the couple's joint assets. Prior to the hearing, a notice was sent to Y's last known address, which he had provided during the proceedings. However, the judgment, as well as the summons for appeal, was not served on Y, leading to the expiration of the appeal period without the judgment being challenged.

In 2019, X sought enforcement of the Singaporean judgment as indicated above. Before the Court, the parties disputed most of the recognition requirements (article 118 of the Code of Civil Procedure [CCP]). Y also challenged enforcement by raising a defense based on the existence of a ground for an objection against civil execution, notably the fact that the limitation period for the claims related to the payment of living expenses under the foreign judgment had expired. Finally, Y argued that X's request to enforce the foreign judgment constituted an abuse of right or a violation of the principle of good faith.

III. Ruling

In its judgment rendered on 19 July 2024, the Chiba District Court largely dismissed Y's arguments and granted X's application, with two exceptions: the court rejected X's claim for living expenses claim for the children beyond the age of 21. It did not also allow the enforcement of the portion of accrued interest on the living expenses, which the Court found to be extinguished under Singaporean statute of limitations.

Before addressing each of the issues raised, the court first outlined the general

applicable principles, citing relevant Supreme Court cases where available. Although these parts are crucial, they will be omitted from the summary for brevity.

1. Whether the foreign judgment can be deemed final [Article 118, first sentence of the CCP]

According to the court, under Singaporean law, a judgment becomes effective on the date it is issued, and an appeal must be filed within 28 days from the judgment date, regardless of whether the judgment is served. The court observed that since no summons for an appeal was served within this period, the foreign judgment should be deemed final.

2. Whether the foreign court had jurisdiction [Article 118(1) of the CCP]

The court first noted that the foreign lawsuit involved X seeking divorce and addressing ancillary matters with Y. The court, then categorized the case as "personal status" case, and assessed the indirect jurisdiction of the foreign court by reference to the Japanese rules of direct jurisdiction in personal status cases as set out in the Personal Status Litigation Act (PSLA), article 3-2 *et seq*. For the court, article 3-2(i) of the PSLA allows that an action concerning personal status be filed with the Japanese courts when the defendant has domicile in Japan, and that jurisdiction is determined at the time the lawsuit is filed (article 3-12 of the CCP). Applying this test to the case, the court found that, at the time the foreign proceeding was initiated, both parties were domiciled in Singapore, and concluded that the Singaporean court had jurisdiction over the matter. Furthermore, the court considered that there were no circumstances suggesting that it would be unreasonable, on the basis of the principle of *jori* (*naturalis ratio*), to recognize the foreign judgment issued by the foreign court.

3. Whether the procedure leading to the foreign judgment violates public policy (the lack of service of the foreign judgment on Y) [Article 118(3) of the CCP]

The court admitted that the foreign judgment was not served on Y, and that he

was not aware of it within the appeal period. However, the court determined that, based on Y's conduct during the proceedings, he had voluntarily waived his right to be informed of the judgment's issuance. According to the court, Y knew a judgment on ancillary matters would be delivered and had the opportunity to receive it through proper procedures. The court also found that, while Y was not aware of the judgment within the appeal period, he had been given procedural safeguards and ample opportunity to become informed. Therefore, the court concluded that the lack of service of the foreign judgment did not violate the fundamental principles of Japanese procedural public policy.

4. Whether the content of the foreign judgment violates [substantive] public policy (the amount of living expenses for the children) [Article 118(3) of the CCP]

The court held that the foreign judgment's calculation of the children's living expenses was based on a reasonable evaluation of the parties' financial capacity, rejecting Y's argument that the calculation was unrelated to his financial situation or had punitive elements. The court further stated that the amount stipulated in the foreign judgment was not excessive or inconsistent with Japanese public policy, given the actual living expenses of the children. Moreover, the court emphasized that Y's challenge, based on his decreased or absent income was not accepted by the foreign court, would constitute a prohibited review of the merits under Article 24(4) of the CEA.

5. Whether reciprocity is established (Art. 1118(4) of the CCP)

For the court, the requirements for recognizing a foreign judgment in Singapore are based on English common law, which broadly aligns with the conditions outlined in Article 118 of the CCP. Thus, the court determined that reciprocity exists between Singapore and Japan.

6. The applicability of the statute of limitations on the claim for living expenses under the foreign judgment

The court confirmed that the party opposing enforcement of a foreign judgment

could raise in the exequatur proceedings defenses based on the extinction or modification of claims that occurred after the judgment was rendered. The court then determined that Singaporean law was applicable to the defense of extinctive prescription. Thereafter, the court compared the Singaporean limitation periods (12 years for claims based on the judgment and 6 years for interest) with Japan's shorter periods (5 years or 10 years for claims confirmed by a final judgment). The court found that applying Singapore's longer limitation periods did not manifestly violate Japan's public policy, upholding the validity of living expense claims filed within the 12-year period. However, it ruled that interest claims accrued before October 2013 had been extinguished due to the expiration of the 6-year limitation period.

7. Abuse of Rights or Violation of the Principle of Good Faith

The court addressed Y's argument that X's attempt to enforce the foreign judgment constitutes an abuse of rights or a violation of good faith. The court rejected this claim, stating that enforcing a judgment in accordance with the law does not breach the principle of good faith or constitute an abuse of rights. In addition, the court found no evidence to support Y's argument.

IV. Comments

1. Significance of the Case

The Chiba District Court judgment of 19 July 2024 is significant for its treatment of various issues concerning the recognition and enforcement of foreign family law decisions under the new legal framework. The court addressed key issues such as indirect jurisdiction, procedural and substantive public policy, reciprocity, and the ability to raise defenses during the exequatur process, including objections based on the expiration of limitation periods and the consistency of foreign law with Japanese public policy. Most of these issues are subject of ongoing academic discussion in Japan (for an overview, see Manabu Iwamoto, "Recognition and Enforcement of Foreign Decisions on Personal Status Litigation and Family Relations Cases" 62 *Japanese Yearbook of International Law* (2019) 226).

2. Personal Status Cases v. Domestic Relations Cases

Japan's legal framework for recognizing foreign judgments in general is governed primarily by domestic law. As far as foreign family law decisions are concerned, it is generally admitted that their recognition and enforcement depend on whether the family law relationship is classified as a "personal status case" or a "domestic relations cases."

"Personal status cases" generally encompass "contentious" family law disputes concerning marital or parental relationships, such as divorce, which is a quintessential example of a "personal status case". Family law matters in this category, as determined by article 2 of the Personal Status Litigation Act (PSLA), are governed by its provisions. Given the constitutive nature, foreign judgments on personal status cases typically do not require enforcement.

On the other hand, "domestic relations cases" groups family matters that are generally "non-contentious", although certain cases, such as claims for custody or maintenance, can be highly adversarial. These matters are governed Domestic Relations Case Procedure Act (DRCPA), which includes appended tables listing cases classified as domestic relations cases. Unlike personal status cases, some types of domestic relations cases may involve elements that require enforcement, such as the payment of maintenance or the return of a child.

From the perspective of Japanese law, maintenance cases typically fall under this category (see Manabu Iwamoto, "International Recovery of Maintenance in Japan" 65 *Japanese Yearbook of International Law* (2022) 254).

3. Applicable legal regime

In this regard, the 2018 reform brought some significant changes. Indeed, a new provision was introduced in the DRCPA (new article 79-2) and article 24 of the CEA on the enforcement of foreign judgments was modified to accommodate these changes. However, no similar provision was introduced in the PSLA, since it was considered that contentious judgments in family law matters are not different from contentious judgments in civil and commercial matters, therefore, they

should be subject to the same legal regime.

Accordingly, depending on the type of case involved, foreign family law decisions can be recognized either (i) by direct application of article 118 of the CCP, when the foreign judgment in question pertains to "personal status cases", or (ii) by *mutatis mutandis* application of article 118 of the CCP pursuant to article 79-2 of the DRCPA, when the foreign decision is rendered in a matter relating to "domestic relations cases". The main difference between these two approaches is that, unlike foreign personal status judgments, the requirements of article 118 of the CCP would fully apply *mutatis mutandis* to foreign domestic relations decisions, provided that doing so "is not contrary to the nature" of the decision in question (article 79-2 of the DRCPA). In other words, for foreign domestic relations decisions, the requirements of article 118 of the CCP may apply *partially,* depending on the nature of the case.

In this context, since maintenance judgments is typically classified under "domestic relations cases", their recognition is, as a matter of principle, governed by article 79-2 of the DRCPA, along with the *mutatis mutandis* application of the requirements of article 118 of the CCP. Whether recognition and enforcement of foreign maintenance judgments is subject to full or partial application of the recognition requirements under article 118 of the CCP is subject to discussion in literature. However, the general tendency among courts, as confirmed by the case presented here, is to apply all the recognition requirements.

4. Conjunction between personal status cases and domestic relations cases

A key challenge arises, however, when a foreign family law judgment combines elements of personal status (e.g., divorce) with issues categorized under domestic relations (e.g., child custody or maintenance). In this regard, while the Chiba District Court treated the foreign judgment as a single "personal status case" and applied article 118 of the CCP, without reference to Article 79-2 of the DRCPA, prevailing literature and case law suggest that each aspect should be treated separately.

Following this approach, the court should have proceeded as follows: first, it should have categorized the court order to pay child living expenses as pertaining to "domestic relations cases". Under this categorization, the court would then

have needed to assess, pursuant to article 79-2 of the DRCPA, whether all the recognition requirements of article 118 of the CCP should apply *mutatis mutandis*, or only partially, depending on the nature of the case. Finally, the court should have reviewed the indirect jurisdiction of the foreign court by reference to the jurisdictional rules set out in the DRCPA (specifically, article 3-10, which governs cases relating to maintenance obligation), rather than those set out in the PSLA.

That said, it has to be acknowledged, that the court's ultimate conclusion would likely not have changed since the jurisdiction of the foreign court would also have been justified by the jurisdictional rules included in the PSLA, which allow actions for ancillary measures, including child custody and support, to be decided by the court exercising divorce jurisdiction (article 3-4 of the PSLA).

The Development of forum non conveniens in the Chinese Law and Practice

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The doctrine of *forum non conveniens* is an important principle in civil procedure laws and frequently applied by courts in many legal systems, especially those of common law countries. According to this principle, when courts exercise their discretionary power to determine whether to exercise jurisdiction over the factual circumstances of a case, they primarily consider issues of efficiency and fairness to find the most appropriate forum to settle the dispute. If the acceptance of a case would lead to inefficient outcomes and consequences that are contrary to justice, the court may refuse to exercise jurisdiction on the grounds that it is not the appropriate forum.

Unrealized by many international scholars and practitioners,[1] China has been

adopting (formally or informally) the doctrine of *forum non conveniens* for more than 30 years, first through a few court judgments, then provided in judicial interpretations issued by the Supreme People's Court of PRC ("SPC"), which is binding for all Chinese courts, and finalized in the 2024 *Civil Procedure Law of PRC*. This article introduces the history of Chinese law adopting the doctrine of *forum non conveniens* in the past years, and the development of China's law revision in 2023.

I. Judicial Practice Before Legislation or Judicial Interpretation

Chinese courts first applied the doctrine of *forum non conveniens* in a series of cases in the 1990s. For instance, in *Jiahua International Limited, Ruixiang Limited v. Yongqiao Enterprise Limited, Zhongqiao National Goods Investment* in 1995,[2] the SPC deemed it inappropriate for the original trial court to accept the case, though the connection factors are sufficient to establish jurisdiction, solely based on the appellants having representative offices and attachable property in the court's location, thus dismissing the two plaintiffs' lawsuits against the two defendants. Furthermore, in the case of *Sumitomo Bank v. Xinhua Real Estate Limited* in 1999,[3] the Supreme People's Court explicitly applied the doctrine of *forum non conveniens* as a stand rule for the first time, though lacking any provision in Chinese laws back then: since both parties to the case were legal persons registered in Hong Kong, the place of signing and performance of the involved agreement was in Hong Kong, and the parties chose Hong Kong law as the governing law for the agreement, the Supreme People's Court, considering the convenience of litigation, ruled that it was more appropriate for the Hong Kong court to have jurisdiction, and the Guangdong Provincial Higher People's Court should not accept the case.

From these two early judicial practices, it can be seen that the courts correctly focused on whether the court was "appropriate" or suitable to accept the case, just as many foreign courts did, and seeing the "convenience" requirement in the doctrine of *forum non conveniens* as only one side of the coin. However, later legislation and academics misunderstood *forum non conveniens*, many Chinese scholars and practitioners did not realize the point is to determine whether the court is "appropriate" for the case mainly because of its name contains "conveniens", but saw it as a tool to find whether other courts will be more "convenient" or economically efficient for the courts, ignored the fairness and justice requirements in this doctrine.[4]

II. Judicial Interpretations issued by the Supreme People's Court of PRC

In Article 11 of the 2005 *Minutes of the Second National Foreign-related Commercial and Maritime Trial Work Conference*,[5] SPC provided seven conditions for applying *forum non conveniens*, focusing on whether the Chinese court would face "significant difficulties in determining facts and applying laws" and whether a foreign court would be more "convenient" for the trial. In 2014, the SPC issued the *Interpretations of the Supreme People's Court on the Application of the Civil Procedure Law of the PRC*,[6] which outlined six conditions for applying *forum non conveniens* in Article 532,[7] essentially consistent with Article 11 of the *2005 Minutes*, still focusing on the convenience of the court in hearing the case rather than its appropriateness.

Such a provision on *forum non conveniens* caused four problems in practice.

First, based on the provisions of Article 532(4) of the *2014 Interpretations*, once a case involves the interests of the Chinese state, citizens, legal persons, or other organizations, the court will rule to exercise jurisdiction over the case. The court over-applies this clause to justify its jurisdiction, without comparing the appropriateness (sometimes even nor the convenience) of Chinese courts with foreign courts, and even if the parties to the case are Chinese nationals or the facts are connected to China, the court tends to rule that it has jurisdiction over the case.

Secondly, due to the lack of clear explanation of the term "convenience" in the *2014 Interpretations*, the court's standards were vague when interpreting and applying *forum non conveniens*. There are cases where the court arbitrarily determines that it is "inconvenient" to hear the case because the applicable law is foreign law and the facts of the case occurred abroad, thus rejecting jurisdiction.[8] This approach not only fails to argue the appropriateness of foreign court jurisdiction but also unduly restricts one's own jurisdiction. Different courts may apply this provision with a scope of discretion either too broad or way too narrow , hence failing to achieve the legislative purpose of "having the most appropriate court exercise jurisdiction".

Thirdly, no matter whether in common law jurisdictions or civil law jurisdictions, when applying the doctrines of *forum non conveniens* or *lis pendens*, the foreign courts upholding the jurisdiction is an important consideration for domestic

courts to reject the exercise of one's own jurisdiction. However, Chinese courts have repeatedly exercised jurisdiction over cases even when foreign courts have already taken the cases or even delivered judgments, causing parallel litigation and multiple judgments.[9]

Finally, when the legal requirements in Article 532 of the *2014 Interpretations* is met, the absolute rejection of the lawsuit is too rigid and inflexible , leaving no room for the court's discretion in different cases. If the foreign court refuses to exercise jurisdiction, the parties who were rejected by Chinese courts must re-file the lawsuits, which may lead to an increase in costs and a significantly delay of justice.

III. The Development in the 2024 Civil Procedure Law of PRC

In response to the problems in practice, the *Civil Procedure Law of the PRC* which came into effect on 1 January 2024, introduced *forum non conveniens* in Articles 281 and 282.[10] Article 281 is about to find the more convenient court to hear the case, and Article 282 proposes five conditions for the application of *forum non conveniens*, which to some extent resolves the previous practical dilemmas and responds to the criticisms from the academia.

First, Article 282(1) of the 2024 *Civil Procedure Law of PRC* restricts the determination of "convenience" to cases where "*it is evidently inconvenient for a people's court to try the case and for a party to participate in legal proceedings since basic facts of disputes in the case do not occur within the territory of the People's Republic of China*", avoiding the situation where courts determine that the doctrine of *forum non conveniens* should be applied merely because the parties agree to apply foreign law or there is evidence situated or disputes occurred abroad, thereby excessively narrowing jurisdiction.

Secondly, the new law deleted the over-broad exclusion standard in Article 532 (4) of the *2014 Interpretations* by stating that "*the national interest, or the interest of any citizen, legal person or any other organization of the People's Republic of China*", instead, Article 282 (4) provides that "*not involving the sovereignty, security, or public interest of the People's Republic of China*", avoiding the situation where Chinese courts exercise jurisdiction merely because the parties are of Chinese nationality or the case facts are connected with China, and narrowing the exclusion from vague "national interest" to clearer "national

sovereignty, security, or public interest", thus better balancing the "fairness" requirements within the doctrine of *forum non conveniens*.

Lastly, Article 282 paragraph 2 adds that after the Chinese court applied the *forum non conveniens* exception to dismiss the action, if the foreign court refuses to exercise jurisdiction or does not take necessary measures to hear the case or does not conclude the case within a reasonable period, the Chinese court shall accept the case, safeguarding the procedural rights of the parties. This new provision resolves the problem reflected in Article 532 of the *2014 Interpretations* and relevant practice where the party can only start over the action before the people's court.

IV. Conclusion

Generally speaking, the 2024 *Civil Procedure Law of PRC* represents a successful improvement, it shows the balance of fairness and convenience in the new rules and serves the requirements of *forum non conveniens*. However, it still has room for further refinement to align more closely with the original intent of *forum non conveniens*.

On the one hand, in most common law jurisdictions, the fairness requirement of finding the most appropriate forum also includes the potential for oppressive or vexatious litigation, abuse of judicial process, or "real injustice" to the parties if the case is heard by the domestic court, rather than public interest provided in Article 282(4). A better approach seeks to identify the most appropriate forum for achieving justice in every single case.

On the other hand, due to the misunderstanding of finding the most "convenient" forum, even though Articles 281 and 282 consider both convenience and fairness requirements, they fail to synthesize these aspects into a single requirement of "appropriateness". This leads to a fragmented consideration of "convenience" and "fairness" by the courts when applying the provisions, rather than understanding them as two sides of the same coin in the service of finding the most appropriate forum.

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[1] The latest article regarding the *forum non conveniens* in Chinese law is published in 2024, gave a description of the development from judicial practice to legal provisions, but lacked theoretical analysis and comment on the reasons and consequences of the transformation of such development. Before that, only 2 articles were devoted to the practice of *forum non conveniens* in China until 2014. See Liang Zhao, *Forum Non Conveniens in China: From Judicial Practice to Law*, 11 The Chinese Journal of Comparative Law 1 (2024); Chenglin Liu, *Escaping Liability via Forum Non Conveniens: ConocoPhillips's Oil Spill in China*, 17 U. PA. J.L. & Soc. CHANGE 137 (2014); Courtney L. Gould, *China as a Suitable Alternative Forum in a Forum Non Conveniens Motion*, 3 TSINGHUA CHINA L. REV. 59 (Fall 2010).

[2] Supreme People's Court (1995) Jing Zhong Zi No. 138 Civil Ruling.

[3] Supreme People's Court (1999) Jing Zhong Zi No. 194 Civil Ruling.

[4] Chinese theories and laws translated *forum non conveniens* as "Bu Fang Bian Fa Yuan", which means "a court that is not convenient to settle the dispute". Prof. Dr. Dr. CHEN Weizuo insists that it should be named as "Fei Shi Dang Fa Yuan", which means "a court that is not appropriate to settle the dispute".

[5] Fa Fa [2025] No. 26.

[6] Fa Shi [2015] No. 5.

[7] The number of which later changed to Article 530 after the judicial interpretation was revised in 2022, but the content remained unchanged. Article

532 stipulated that: "*Where a foreign-related civil case falls under all the following circumstances, the people's court may render a ruling to dismiss the plaintiff's action, and inform the plaintiff to institute an action in a more convenient foreign court. (1) The defendant raises a claim that the case shall be subject to the jurisdiction of a more convenient foreign court, or raises an objection to jurisdiction. (2) The parties do not have an agreement specifying the jurisdiction of a court of the People's Republic of China. (3) The case does not fall under the exclusive jurisdiction of a court of the People's Republic of China. (4) The case does not involve the national interest, or the interest of any citizen, legal person or any other organization of the People's Republic of China. (5) The people's court has great difficulties in the determination of facts and the application of laws since major facts of disputes in a case do not occur within the territory of the People's Republic of China, and the laws of the People's Republic of China do not apply to the case. (6) The foreign court has jurisdiction over the case and it is more convenient for it to try the case.*"

[8] *Schott Solar Holdings Ltd. v. Schott Solar Investment Ltd.*, Shanghai No. 1 Intermediate People's Court Civil (Commercial) First Instance No. S17, 2014.

[9] See e.g. *Chen Huanbin et al. v. Chen Weibin et al.*, Beijing Second Intermediate People's Court (2015) Civil (Commercial) Final No. 6718; *Value Financial Services Ltd. v. Century Venture Ltd.& Beijing De Shi Law Firm*, Supreme People' Court (2014) Civil Final No. 29.

[10] Article 281 provides that: *"After a people's court accepts a case in accordance with the provisions of the preceding article, if a party applies to the people's court in writing for suspending the proceedings on the ground that the foreign court has accepted the case prior to the people's court, the people's court may render a ruling to suspend the proceedings, except under any of the following circumstances: (1) The parties, by an agreement, choose a people's court to exercise jurisdiction, or the dispute is subject to the exclusive jurisdiction of a people's court. (2) It is evidently more convenient for a people's court to try the case.*

If a foreign court fails to take necessary measures to try the case or fails to conclude the case within a reasonable time limit, the people's court shall resume proceedings upon the written application of the party.

If an effective judgment or ruling rendered by a foreign court has been recognized, in whole or in part, by a people's court, and the party institutes an action against the recognized part in the people's court, the people's court shall rule not to accept the action, or render a ruling to dismiss the action if the action has been accepted."

Article 282 provides that: "*Where the defendant raises any objection to jurisdiction concerning a foreign-related civil case accepted by a people's court under all the following circumstances, the people's court may rule to dismiss the action and inform the plaintiff to institute an action in a more convenient foreign court: (1) It is evidently inconvenient for a people's court to try the case and for a party to participate in legal proceedings since basic facts of disputes in the case do not occur within the territory of the People's Republic of China. (2) The parties do not have an agreement choosing a people's court to exercise jurisdiction. (3) The case does not fall under the exclusive jurisdiction of a people's court. (4) The case does not involve the sovereignty, security, or public interest of the People's Republic of China. (5) It is more convenient for a foreign court to try the case.*

If a party institutes a new action in a people's court since the foreign court refuses to exercise jurisdiction over the dispute, fails to take necessary measures to try the case, or fails to conclude the case within a reasonable period after a people's court renders a ruling to dismiss the action, the people's court shall accept the action."

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

Child Abduction Convention

I. Introduction

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

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

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

II. The facts

The case concerned a petition for a return order to Switzerland for a child (a girl, *in casu*) who had been wrongfully retained in Morocco by her father. Although the text of the decision lacks sufficient detail to fully clarify the circumstances of the

case, it can be inferred from the Court's summary of facts that the child was approximately 8 years old at the time Moroccan courts were seized and that the father is likely a Moroccan national. However, the ruling does not provide details regarding the nationality (or religion) of the left-behind mother nor does it specify the time frame within which the application was made.

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

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

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

Before the Supreme Court, the father reiterated his earlier arguments, particularly challenging the public prosecutor's standing to initiate such proceedings. He further invoked Article 12 of the HCCH 1980 Child Abduction Convention, arguing that the child was now settled in her new familial and educational environment. In addition, he asserted that the child suffered from emotional distress and anxiety due to alleged domestic violence she experienced while living with her mother. The father referred to reports and certificates issued by Moroccan medical and psychological institutions which were submitted as evidence of the child's state of mind and her strong resistance to being returned to Switzerland. The father also argued that the mother had not effectively exercised custody rights at the time the child came to live with him, and contended that the mother had consented to the child's relocation.

III. The Ruling

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

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

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

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

IV. Comments

The Supreme Court's ruling is remarkable in many respects. It directly challenges the notion of "Islamic exceptionalism" in matters of custody and parental

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

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

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

In the present case, however, the Supreme Court not only accepted that sole custody was granted to the mother under Swiss law, but also it did so although the application of Moroccan law would have led to a different outcome. Indeed, the Supreme Court has consistently ruled that the mother's refusal to return with the children to Morocco deprived the father of his right to supervise and control

the children under his legal guardianship (*wilaya*), thus justifying the father's claim to have the mother's custody rights revoked (Supreme Court, *Ruling of 21 June 2011*; *Ruling of 23 August 2011*). The Supreme Court took the same stance in a case involving child abduction, where the request for the return order, based on the French-Moroccan bilateral Convention of 1981 (article 25), was rejected on the ground that the issuing of such an order would contradict with Moroccan law on custody (Supreme Court, *Ruling of 15 October 2003*).

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

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

Brazil's New Law on Forum Selection Clauses: Throwing the Baby out with the Bathwater?

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

Hamburg, Germany.

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

The Recognition of International Forum Selection Clauses Under Brazilian Law

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

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

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

What seemed settled since 2015 is now back in the center of debate. On June 4, 2024, the Brazilian National Congress passed a law amending Art. 63 CCP and creating additional requirements for forum selection clauses. According to the

new wording of Art. 63 §1 CCP, a forum selection clause is valid only if the chosen court is "connected with the domicile or residence of one of the parties or with the place of the obligation."

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

International Forum Selection Clauses: The Wrong Target?

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

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

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

And Now? First Clues in Recent Case Law

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

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

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

Another interesting decision was rendered on September 4, 2024, in the county of Guarulhos, also in the state of São Paulo, concerning a forum selection clause in a publishing contract between an author and a publisher, both domiciled in Brazil. The clause selected Lisbon, Portugal, as the forum for hearing the dispute. In enforcing the clause, the court stayed proceedings brought by the author in Brazil. Although the new amendment was not explicitly mentioned in the decision,

the court's reasoning included the justification that the clause was enforceable since the contract provided that the title, which was the subject of the publishing contract, was also to be marketed in Portugal. This could be an indication that the place of performance of the contract establishes a sufficient connection with the "place of the obligation" pursuant to Art. 63 §1 CCP. Referring to Article 9 of the Law of Introduction to the Brazilian Civil Code, scholars argue that the place of conclusion of the contract may also satisfy this requirement.

Conclusion

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

This post is cross-posted at Transnational Litigation Blog.

Improving the settlement of (international) commercial disputes in Germany

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

As reported earlier on this blog, Germany has been discussing for years how the framework conditions for the settlement of (international) commercial disputes can be improved. Triggered by increasing competition from international commercial arbitration as well as the creation of international commercial courts

in other countries (as well as Brexit) these discussions have recently yielded a first success: Shortly before the German government coalition collapsed on November 6, the federal legislature adopted the Law on the Strengthening of Germany as a Place to Settle (Commercial) Disputes (Justizstandort-Stärkungsgesetz of 7 October 2024)[1]. The Law will enter into force on 1 April 2025 and amend both the Courts Constitution Act (Gerichtsverfassungsgesetz – GVG) and the Code of Civil Procedure (Zivilprozessodnung – ZPO)[2] with the aim of improving the position of Germany's courts vis-à-vis recognized litigation and arbitration venues – notably London, Amsterdam, Paris and Singapore. Specifically, the new Law brings three innovations.

English as the language of proceedings

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

The new Law, however, does not stop here. In addition to allowing the establishment of (full) English language commercial chambers at the regional court level it requires that federal states ensure that appeals against English-language decisions coming from commercial chambers will also be heard (completely) in English in second instance at the Higher Regional Courts *(Oberlandesgerichte)* (cf. § 184a(1) No. 1 GVG). The new Law also allows the Federal Supreme Court *(Bundesgerichtshof)* to conduct proceedings entirely in English (cf. § 184b(1) GVG). Unfortunately, however, the Federal Supreme Court is not mandated to hear cases in English (even if they started in English). Rather, it will be in the discretion of the Federal Supreme Court to decide on a case-by-case basis (and at the request of the parties) whether it will hold the proceedings in English – or switch to German (cf. § 184b GVG). The latter is, of course,

unfortunate, as parties cannot be sure that a case that is filed in English (and heard in English at first and second instance) will also be heard in English by the Federal Supreme Court thus reducing incentives to commence proceedings in English in the first place. But be this as it may: it is to be welcomed that the German federal legislature, after long and heated debates, finally decided to open up the German civil justice system to English as the language of the proceedings.

Specialized "commercial courts" for high-volume commercial disputes

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

It is unfortunate, however, that the German legislature was afraid that the commercial courts would be flooded with (less complex) cases – and, therefore, decided to limit their jurisdiction to disputes with a value of more than € 500.000,00 (cf. § 119b(1) GVG). As a consequence, only parties with a high-volume case will have access to the commercial courts. This is problematic for several reasons: First, it is unclear whether a reference to the value of the dispute is actually able to distinguish complex from less complex cases. Second, any fixed threshold will create unfairness at the margin, as disputes with a value of slightly less than € 500.00,00 will not be allowed to go to the commercial courts. Third, requiring a minimum value can lead to uncertainty because the value of a dispute may not always be clear *ex ante* when the contract is concluded. Fourth, a fixed

threshold may create the impression of a two-tier justice system, in which there are “luxury” courts for the rich and “ordinary” courts for the poor. And, finally, there is a risk that the commercial courts will not receive enough cases to build up expertise and thus reputation. Against this background, it would have been better to follow the example of France, Singapore, and London and to open commercial courts for all commercial cases regardless of the amount in dispute. At the very least, the legislature should have set the limit much lower. The Netherlands Commercial Court, for example, can be used for any disputes with a value higher than € 25,000.00.

Better protection of trade secrets

The third innovation, finally, concerns the protection of trade secrets. However, unlike the other innovations the relevant provisions are not limited to certain chambers or senates (to be established by the federal states on the basis of the new Law), but apply to all civil courts and all civil proceedings (cf. § 273a ZPO). They allow the parties to apply for protection of information that qualifies as a trade secret within the meaning of the German Act on the Protection of Trade Secrets (Gesetz zum Schutz von Geschäftsgeheimnissen – GeschGehG). If the court grants the application, all information classified as a trade secret must be kept confidential during and after the proceedings (cf. §§ 16 Abs. 2, 18 GeschGehG). In addition, the court may restrict access to confidential information at the request of a party and exclude the public from the oral hearing (§ 19 GeschGehG). The third innovation, thus, account for the parties’ legitimate interests in protecting their business secrets without unduly restricting the public nature of civil proceedings, which is one of the fundamental pillars of German civil justice. At the same time, it borrows an important feature from arbitration. However, since the new rules are concerned with the protection of trade secrets only, they do not guarantee the confidentiality of the proceedings as such. As a result, the parties cannot request that the fact that there is a court case at all be kept secret.

Success depends on the federal states

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

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

The second caveat concerns the likely success of the new Law with regards to *international* disputes. In fact, even if the federal states implement the new Law in a perfect manner, i.e. even if they establish a sufficient number of commercial chambers and commercial courts and even if they make the investments described above, it seems unlikely that German courts will become sought-after venues for the settlement of international commercial disputes. This is because the German civil justice system has numerous disadvantages when compared with international commercial arbitration. In addition, the attractiveness of German courts suffers from the moderate reputation and poor accessibility of German substantive law. Both problems will not disappear with the implementation of the new Law.

Against this background, the new Law holds the greatest potential for *national* high-volume commercial disputes. However, it should not be forgotten that these kinds of disputes represent only a small fraction of the disputes that end up before German courts each year. In order to really strengthen Germany as a place to settle dispute, it would, therefore, be necessary to address the problems that these cases are facing. However, while the (now former) Federal Minister of Justice made promising proposals to this effect in recent months, the collapse of

the German government coalition in early November makes is unlikely, that these proposals will be adopted any time soon. In the interest of the German civil justice system as a whole, it is, therefore, to be hoped that the proposals will be reintroduced after the general election in early 2025.

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

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

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

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

Introduction

The New Zealand Court of Appeal has allowed an appeal against a permanent anti-suit and anti-enforcement injunction in relation to a default judgment from Kentucky, which the plaintiff alleged had been obtained by fraud: *Wikeley v Kea*

Investments Ltd [2024] NZCA 609. The Court upheld the findings of fraud. It also did not rule out the possibility of an injunction being an appropriate remedy in the future. However, the Court concluded that an injunction could only be granted as a step of last resort, which required the plaintiff to pursue its right of appeal against the Kentucky judgment.

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

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

The judgment

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

Comity

An entire section of the judgment is dedicated to the concept of comity, which the Court relied on as a guiding principle. The Court said that it was necessary "to confront, head on, the appropriateness, in comity terms, of an order which … in

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

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

Extreme caution was necessary, therefore, before exercising the power to grant an anti-suit/enforcement injunction (at [176]). Comity required "the court to recognise that, in deciding questions of weight to be attached to different factors, different judges operating under different legal systems with different legal policies may legitimately arrive at different answers" (at [177]). Anti-enforcement injunctions were especially rare and were "characterised by particularly careful assessments of whether the relief sought is truly necessary and consistent with comity" (at [180]).

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

Fraud as a distinct category?

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

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

On the facts of the present case, the Court thought that the category of natural justice was most relevant. The Court considered it "almost inevitable" that, had the New Zealand court been in the Kentucky court's position, it would have set aside the default judgment, on the basis that the proceeding had not been drawn to Kea's attention and sufficiently substantial grounds of defence had been made out (at [182]). The Court said that, in these circumstances, "[a]t least if the judgment were final, with all appeal rights exhausted and against a New Zealand entity … a New Zealand court might well consider that, despite its respect for the United States courts, a sufficiently fundamental policy issue was engaged – *one ultimately based in principles of natural justice and fair hearing rights* – that an anti-suit or anti-enforcement order should issue" (at [183], emphasis added).

What is more, the Court distinguished the case from *Ellerman Lines Ltd v Read* [1928] 2 KB 144 (CA) on the basis "there was no contractual jurisdiction clause that the New Zealand Court was seeking to enforce" (at [187]). It expressed "caution" about the proposition that the pursuit of the Kentucky proceedings should be injuncted because the proceeding was fraudulent and therefore "inherently unconscionable", referring to criticism by Dickinson that the language of unconscionability is "a vestige of an earlier monotheistic society [which] no

longer performs any useful role and obscures the real reasons for granting injunctions" (at [190]). A conclusion by the New Zealand court that the Kentucky proceeding was vexatious or oppressive had "the capacity to look patronising from the perspective of the United States – something which in comity terms should be avoided" (at [191]). The issue of fraud could be addressed by the United States court, "with all of the advanced legislative and common law apparatus available to it to do justice between the parties" (at [191]).

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

Comments

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

First, the Court seemed to eschew fraud as a distinct basis for the award of an anti-enforcement injunction, while accepting the appropriateness of determining whether the foreign proceeding was fraudulent (and granting declaratory relief to that effect). If the Court is willing to entertain a claim that the pursuit of a foreign proceeding forms part of a tortious conspiracy, why should this not provide a potential basis for an injunction (as opposed to, say, natural justice)?

This potential contradiction had flow-on effects for the scope of the Court's orders, because the Court refused to discharge the appointment of interim liquidators of WFTL. Interim liquidators had been appointed after attempts by the defendant to assign the benefit of the Kentucky default judgment from WFTL to a United States entity, to "insulate" WFTL from "any New Zealand judgment" (at [43]). The Court considered that the appointment of interim liquidators was "for valid domestic reasons by ensuring assets available to satisfy any New Zealand judgment remained under the control of New Zealand parties" and that it was "unaffected by discharge of the anti-suit and anti-enforcement injunctions" (at [196], [211](e)). The Court acknowledged that the interim liquidators could face pressure to enforce the Kentucky default judgment "in order to meet the New Zealand judgment debt and costs awards against WFTL – this despite the

judgments of the High Court and this Court finding claims under the Coal Agreement to be fraudulent and made pursuant to conspiracy" (at [201]). The Court did not "at this stage express any view about how the principles of international comity might respond to that particular scenario" (at [201]). Why is it a "valid domestic reason" to protect the satisfaction of a New Zealand judgment for damages that were incurred in defending the foreign fraudulent proceeding, but it is not a "valid domestic reason" to prevent enforcement of a judgment that is the result of such a fraudulent proceeding?

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

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

Zealand entity). Where a New Zealand entity is used as a vehicle for fraud, the New Zealand court may have a legitimate interest – or even a responsibility – to stop the fraud, albeit that an injunction is a measure of last resort.

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

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

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The recent introduction of a civil family law regime in the United Arab Emirates – the first of its kind in the region – has attracted considerable attention, both on

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

The Legal Framework

The civil family law regime in the UAE comprises three main legislative components. With the exception of Abu Dhabi, which pioneered a separate non-religious legal framework in late 2021, the *Federal Civil Personal Status Code* (Law No. 41/2022 of 3 October 2022) governs matters of marriage, divorce, child custody, and inheritance exclusively for non-Muslim citizens and non-Muslim foreigners. The law's scope is explicitly outlined in Article 1, which clearly differentiates based on religious affiliation rather than nationality.

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

1. Non-Muslim UAE citizens, and
2. Foreign nationals from countries 'that do not primarily apply Islamic Sharia in personal status matters,' as determined by the Instruction Guide

issued by the Chairman of the Abu Dhabi Judicial Department. For dual citizens, the nationality associated with their UAE residency prevails.

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

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

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

Moreover, in its amended form, Article 3 of Law No. 14/2021 stipulates that if a marriage has been concluded in accordance with this law, it shall apply with respect to the effects of the marriage and its dissolution. A narrow interpretation of this clause would deny jurisdiction whenever the parties did not marry before the Abu Dhabi Civil Family Court, even if they are non-Muslim foreigners married in a civil ceremony elsewhere. However, it seems clear that the drafters did not intend to exclude this core target group from the law's jurisdiction. Similarly, it is difficult to imagine that jurisdiction would be automatically assumed in cases involving Arab Muslims – even GCC citizens – who married in a civil ceremony in Abu Dhabi, where the Civil Family Court currently allows civil marriages for all but Muslim citizens of the UAE.

The ambiguity of these clauses grants considerable discretion to the courts, and current case law on personal jurisdiction for Muslim foreigners does not yet indicate a consistent approach or prevailing interpretation. For this reason, the

recent judgment by the Abu Dhabi Court of Cassation may indeed mark a turning point in the application of civil family law in Abu Dhabi.

Previous Case Law

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

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

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

The Abu Dhabi Court of Cassation Judgment of 30 October 2024

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

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

By confirming personal jurisdiction over the parties based on both Article 5(2) and Article 5(3) of Law No. 14/2021, the judgment marks a turning point in two key respects. First, it establishes the requirement to determine the effective nationality of dual citizens, affirming that no nationality, including that of an Arab-Muslim country, takes precedence unless it is linked to UAE residency. Second, by considering the type and location of the marriage, the court asserts that, from the moment a marriage is concluded, couples effectively select a legal framework – religious or civil/secular – that will govern the marriage's effects and potential dissolution, and that this choice must be honored in any subsequent legal proceedings. Although this perspective may be open to challenge, it provides greater clarity and legal certainty for foreigners of all faiths residing in the UAE.

Outlook

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

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

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

[2] It should be noted here that with the introduction of Law No. 14/2021, a

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