

2025 New Chinese Arbitration Law: Improvements Made and To Be Further Made

(This post is written by Dr. Chen Zhi who is an Attorney at Zhiheng Law Firm Guangzhou Office, PRC).

I. Introduction

On September 12, 2025, the newly revised Arbitration Law (hereinafter New Arbitration Law) of the People's Republic of China (hereinafter "PRC") was adopted by the Standing Committee of the National People's Congress (hereinafter as "SCNPC") with the subsequent promulgation by the President of PRC, and will take effect on March 1, 2026. The New Arbitration Law features novelties such as the introduction of "arbitration seat", limited liberalization of *ad hoc* arbitration, enshrining online arbitration, a higher threshold for eligibility of arbitrator, and a shorter duration for applying for annulment of arbitral award from six months to three months. Nonetheless, some articles of the New Law leave room for further discussion. This article combs through the history of revision, delves into the highlights and remaining gaps of the New Arbitration Law, and provides insights into its significance for the development of commercial arbitration in Mainland China from the perspective of an arbitration practitioner in Mainland China.

II. A Snapshot of The Revision History

Since the enactment of the Arbitration Law in 1995, commercial arbitration in Mainland China has undergone overwhelming development from a blank slate to a non-ignorable hub in the arena of international arbitration. Nonetheless, for nearly three decades, the PRC Arbitration Law itself was left largely untouched, receiving only minor revisions to keep pace with other legislation in 2009 and 2017 (hereinafter collectively as the Old Arbitration Law).

On 30 July, 2021, a Draft Amendment to the Arbitration Law (hereinafter as 2021 Draft) released by the Ministry of Justice sparks the overhaul of arbitration legal framework, making it more in line with the common practice in international

commercial arbitration such as the UNCITRAL Model Law by embedding competence-competence principle, tribunal's power over interim relief, extension of arbitration agreements, etc., while a long-term silence emerged in the subsequent three years with no further official documents.

However, the first amendment draft issued on 4 November 2024 (hereinafter as 1st Draft) by SCNPC had given rise to controversies and generated criticism, as many of the novelties and reformative features aligning Chinese arbitration with the international standards as set out in the 2021 version were removed, including the abovementioned two articles concerning the non-signatory issues. The 1st Draft gave rise to strong criticisms from the circles of research and practice[i]. Nonetheless, some articles concerning foreign-related arbitration, *inter alia*, auxiliary proceedings for *ad hoc* arbitration by the court of the seat were retained.

On 1st May, 2025, the Second Draft Amendment (hereinafter as 2nd Draft) was issued, even though one of the most controversial proposed clauses was removed, *inter alia*, Art. 23 (3) in the 1st Draft, endowing the administrative bureau with the power to fine arbitration institutions, the conservative stance remained unchanged. After that, the New Arbitration Law was enacted in mid-September of 2025 with minor revisions compared to the 2nd Draft.

As there have been plenty of comments making comparisons between the New Arbitration Law and the former version of the Arbitration Law, with a myriad of appreciations[ii], this article brings into focus the substantial differences between the adopted version and the working drafts to offer a more neutral and objective comment.

III. Revisions Concerning Arbitration Agreement: Breakthroughs and Limits

1. Revisions on the Formality and Substance of the Arbitration Agreement

Generally, the New Law retains the written-form requirement and the parties shall fix an arbitral institution. In case of any ambiguity about the arbitration institution, the parties shall reach a supplementary agreement subsequently,

failing which the arbitration agreement will be rendered null and void as stipulated in Article 27 (1) and Article 29 of the New Arbitration Law. This promulgation is identical to that in the Old Arbitration Law[iii].

However, there are two novelties as to the arbitration agreement:

First, there is the implied consent to arbitrate by conduct *as per* Article 27 (2) of the New Arbitration Law, where the implied consent can be deemed to be reached if: (1) one party pleads the existence of an arbitration agreement when filing the Request of Arbitration; (2) the other party fails to object the existence of arbitration agreement before the first hearing on merits; (3) the silence is recorded in writing after express notice by the tribunal. The provision is in line with arbitral practice that tribunals routinely inquire parties' opinions on the jurisdiction and record via the minutes of hearing, while it is nuanced with the conduct-based estoppel as set out in Article 7 Section (5) (option I) of the 2006 UNCITRAL Model Law on International Commercial Arbitration[iv](hereinafter as UNCITRAL Model Law) where the implied consent is reached through exchange of statements of claim and defence, in other words, there will be no implied consent to arbitrate under Article 27 (2) in document-only hearing. The New Arbitration Law also sets up a higher threshold for implied consent by adding to the tribunal's obligation to notice and record, which is not found in the corresponding part of the 1st Draft.

Second, the recognition of *ad hoc* arbitration to a limited extent. Under the new law, *ad hoc* arbitration is permitted only for:(i) foreign-related maritime disputes; or(ii) foreign-related commercial disputes between enterprises registered in the Pilot Free Trade Zone permitted by the PRC State Council, Hainan Free Trade Port or other districts permitted by relevant regulations. This scope is therefore drastically narrower than the promulgation in the 2021 Draft and the 1st Draft, which allowed for *ad hoc* arbitration in "foreign-related cases"[v]. Moreover, arbitrators of *ad hoc* proceedings must satisfy the statutory qualification requirements applicable to institutional arbitrators, superseding the looser requirement for "arbitrators engaging in foreign-related arbitration" as set out in the 1st Draft[vi].

Crucially, the New Law deletes the seat court's power to assist arbitration through the appointment of an arbitrator when the parties to *ad hoc* arbitration

fail to agree upon the constitution of the tribunal (Art. 92 of the 1st Draft), and the deposit of the award by *ad hoc* tribunal (Art. 93 of the 1st Draft). Instead, the New Arbitration Law only stipulates that the tribunal must file a notice with the China Arbitration Association (which is yet to be established) within three working days upon its constitution. With the auxiliary role of the judiciary being vastly weakened, without the icebreaking function of the judiciary, the *ad hoc* proceedings will confront a grave challenge while deadlock arises, in particular where the parties are uncooperative as to the designation of arbitrators.

2. Introduction of the Arbitral Seat

For the first time, the New Arbitration Law defines the “seat” (???) to ascertain the “legal gravity” of the award, where the law governs the arbitration proceedings and the court possesses the power of supervision over the arbitration. A three-stage test is advanced in the ascertainment of the seat of arbitration: (i) party agreement; (ii) failing which, the arbitration rules; (iii) in the absence of such rules, the tribunal’s determination. This sequencing aligns with international common practice as well as the courts’ repeated judicial practice in Mainland China[vii].

Because courts’ powers to assist with *ad hoc* arbitration have been repealed, the seat court’s functions are largely confined to post-award judicial review. Also, the conflict-of-law rule that would have subjected the validity of the arbitration agreement to the law of the seat Art. 21) was also eliminated. Given that Art. 18 of the Law on the Application of Laws to Foreign-Related Civil Relations 2011 already provides an identical choice-of-law formula, the deletion avoids redundancy and potential inconsistency.

3. Determination of Jurisdiction and the Chinese Style Competence-competence

The New Arbitration Law reinstates the separability doctrine of arbitration agreement from the matrix contract, adding up that the non-conclusion, ineffectiveness or rescind of main contract are not detrimental to the effectiveness of arbitration clause incorporated therein.

Art. 31 of the New Arbitration Law empowers the tribunal or the arbitration institution to rule on its own jurisdiction “upon the request of a party”. This is

considered the incorporation of competence-competence in statute by some commentators[viii]. However, Art. 31 is materially different from the competence-competence as set out in Art. 16 (3) of the Model Law, which only allows for the parties to resort to the court after the decision rendered by the tribunal, also promulgation of the New Arbitration Law fails to ensure “negative effect” of competence-competence which requires a *prima facie* review over the arbitration agreement by state court in pre-award stage, which is well established in jurisdictions like Singapore[ix], France[x], the UK[xi], and Hong Kong SAR[xii]. Under the New Arbitration Law, the court’s priority regarding the decision on arbitral jurisdiction in most circumstances remains unchanged[xiii]. As per some commentators, this may give rise to problems such as the violation of the “minimal intervention principle”[xiv]. Therefore, Art. 31 of the New Arbitration Law is at best a Chinese-style competence-competence.

Overall, unlike the liberal approach in the 2021 Draft and the 1st Draft, the New Arbitration Law takes a more conservative stance, leaving room for further perfection. Nonetheless, there are some laudable novelties concerning arbitration agreements in integrating the well-settled arbitration practice (including the common practice by the judiciary) during the past 30 years.

IV. Revisions Concerning Arbitration Proceedings and Judicial Review

The New Arbitration Law makes minor revisions as to the conduct of arbitration proceedings and judicial review over the arbitral award, compared with the parts of the arbitration agreement. There are several aspects to be delved into below:

1. Novelties Concerning Arbitration Proceedings and Judicial Review

1.1. The Recognition of Online Arbitration

Art. 11 of the New Arbitration Law explicitly states that arbitration can be handled through electronic means, hence the virtual hearings , electronic delivery of files, and other relevant conduct online are put on the same footing as their physical equivalents, unless the parties have otherwise agreed. The opt-out model for online arbitration aligns the statute with the technical development in internet-era, ensuring the efficiency of commercial arbitration.

1.2. Separated Standard for Proper Notice in Arbitration

Article 41 of the New Arbitration Law clarifies that the proper notice issue in arbitration is subject to the parties' agreement or the applicable arbitration rules, rather than rules for service in civil litigation, this article has integrated Article 14 of the 2018 *Provisions of the Supreme People's Court on Several Issues Concerning the Handling of Cases Regarding Enforcement of Arbitral Awards by the People's Courts* and can be extended to proceedings of setting aside. This ensures the confidentiality, efficiency and flexibility of proper notice in arbitration.

1.3 Stringent Rules for Qualification and Disclosure of Arbitrator

Articles 14 and 43 of the New Arbitration Law refine the appointment of the presiding or sole arbitrator: the parties may agree that the two co-arbitrators nominate the presiding arbitrator, failing which the presiding arbitrator or sole arbitrator must be appointed by the director of the arbitration institution "*in accordance with the procedure laid down in the arbitration rules*" instead of the mere discretion of the director, this provides more transparency in appointment of arbitrators.

Moreover, the New Arbitration Law also introduces a continuing obligation of disclosure by arbitrators where there is any circumstance that is likely to give rise to justifiable doubts, which builds up arbitrators' ongoing statutory duty of disclosure in the ascertainment of the arbitrator's impartiality and neutrality to ensure the integrity of arbitration proceedings[xv]. While the legislature cannot exhaust all circumstances, detailed guidance from institutions and practitioners—such as the three color lists provided by the IBA Guidelines on Conflicts of Interest in International Arbitrations—is required for more legal certainty.

Art. 22 of the New Arbitration Law succeeded the high condition for a qualified arbitrator to be listed in the roster of an institution, which is traditionally summarized as "three eight-year working experiences, two senior titles" (????)[xvi]. The New Arbitration Law provides more draconian requirements, *i.e.*, the limits and prohibitions on civil servants being qualified as part-time arbitrators[xvii], and the mandatory removal of arbitrators from the roster while they are disqualified from certain certificates (*i.e.*, disqualified from being a lawyer due to a criminal offence)[xviii]. This high threshold is applicable to *ad hoc* arbitration with foreign-related factors. The high threshold is set up for fairness

and integrity of arbitration, while whether the state's deep involvement in a gatekeeping role is more appropriate than the choice by the market-reputation is open to debate.

1.4. Shortening Time Limit for Application Setting Aside

For post-award judicial review, the time limit to apply for annulment is cut from six months upon the receipt of the award to three, bringing the law in line with international common practice like Article 34 (3) of the UNCITRAL Model Law. This warrants the finality of awards.

2. Regulations That Remain Unchanged

Many comments stress that the New Law adds pre-arbitral preservation and conduct preservation[xix], but from the author's perspective, these merely fill the loophole by aligning the statute with the Civil Procedural Law revised in 2012, which is not so notable. Article 43 of the 2021 Draft, which empowered both the court and tribunal to order interim relief in arbitration (two-tier system), is removed, leaving Mainland China among the few jurisdictions where arbitrators cannot issue interim measures (one-tier system). While this is to some extent compatible with the arbitration practice in Mainland China, which shall not be criticized heavily for the following reasons:

First, Chinese courts are likely to employ relatively lower threshold for granting asset preservation, which is always confined to a preliminary review on the formalities (i.e., whether there is a letter by the arbitration institution, or guarantee letter issued by competent insurance companies), instead of a review on merits concerning the risk of irreparable harm, proportionality, and urgency rate like the tribunal in international commercial arbitration seated outside Mainland China[xx]. Hence, the lower standard for issuance of interim relief by courts in Mainland China ensures the efficiency and enforceability of interim relief and may overall meet the requirements of parties.

Second, the two-tier system for issuance of interim relief may give rise to problems concerning the conflict of powers, as per the decision of the *Gerald Metals* case[xxi] by the High Court of England and Wales, courts can only grant interim relief while the power of the tribunal is inadequate. Hence, the one-tier system may be more suitable for common practice in Mainland China, as courts are more preferable for their efficiency and enforcement in granting asset

preservation.

Last but not least, some commentators disagree with the author's opinion for the reason that the lower standard is only applicable to asset preservation, while not applicable to other types of judicial preservation where the thresholds are relatively higher, and the tribunal shall be empowered to issue interim relief for recognition of the interim order outside Mainland China[xxii]. Nonetheless, the author disagrees with this position, as per the author's experience, in most arbitration cases, asset preservation is the only concern of parties; preservation of evidence and preservation of conduct are rarely seen. Also, the enforcement of interim relief outside Mainland China is insufficient to justify the tribunal's power over interim relief, for whether such relief is enforceable depends heavily on the law where the enforcement is sought, instead of the law where the order is rendered, see Art. 17 H (1) of the UNCITRAL Model Law: "An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article".

Other unchanged parts concerning arbitration proceedings and judicial review are not preferred, i.e., the high threshold for document-only hearing that only by the parties explicit agreement, the tribunal is not liable to conduct a hearing on evidence (unlike the UNCITRAL Arbitration Rule, which provides that a hearing shall be conducted at the request of one party). The evidence adduced shall be presented in the hearing for the comment by other parties ????, while the comment on evidence by exchange of written submissions, which has been widely used in arbitration practice, has been omitted, producing uncertainty for the efficiency and flexibility of arbitration. Also, the statutory limbs for annulment of arbitral award remain untouched, that the concealment of evidence or forgoing evidence may lead to the annulment of the award, which opens the door for review on the merits of the arbitral award, incompatible with the minimal intervention.

V. Other Changes in the New Arbitration Law

The New Arbitration Law makes notable adjustments to the terminology of arbitral institutions. It replaces the former term "arbitration commission" with "arbitral institution" across the board, clarifies that no hierarchy exists among

different institutions, and expressly defines their legal nature as “non-profit legal persons” as per Art. 13 (2) of the New Arbitration Law, which keeps the arbitration institution’s independence from governmental institutions and avoids administrative intervention. In Art. 86, it also encourages domestic institutions to expand overseas and allows foreign institutions to operate within China on a limited basis. This reflects the ruling party’s enthusiasm for improving the arbitration system and establishing world-class arbitration institutions, as revealed in the Resolution by the 20th Central Committee of the Communist Party of China in its third plenary session dated 18 July 2024.[xxiii]

As for the long-delayed and yet to be founded China Arbitration Association, the New Law once again underscores its role in supervision of arbitration institutions across the country, however, whether this will accelerate its establishment remains to be seen.

VI. Conclusion

In short, while the New Law runs substantially longer than the Old Arbitration Law, its substantive changes fall short of the 2021 Draft and even the 1st Draft, taking “two steps forward and one step back.” Yet many of its revisions merit praise: they consolidate three decades of innovation in Chinese arbitration practice and should help advance both the arbitration sector and the broader rule-of-law business environment. Through a skyrocket development in the past 30 years, Mainland China has been a non-negligible hub for commercial arbitration, with collectively 285 institutions, 60,000 listed arbitrators by 31 July 2025, and 4,373 foreign-related arbitrations being handled by Chinese institutions in 2024[xxiv], the revision of Arbitration Law worthy more in-depth discussion.

[i] Zhong, Li , *Dissecting the 2024 Draft Amendment to the PRC Arbitration Law: A Stride Forward or a Step Back?*, available at <https://arbitrationblog.kluwerarbitration.com/2024/12/03/dissecting-the-2024-draft-amendment-to-the-prc-arbitration-law-a-stride-forward-or-a-step-back/>, last visited on 19 September, 2025.

[ii] See i.e., Mingchao Fan, *An Unexclusive Comparative Analysis of the New Chinese Arbitration Law and the English Arbitration Act 2025*, available at

tribunal constituted in the ordinary way, are inadequate, or where the practical ability is lacking to exercise those powers, that the court may act under section 44.)

[xxii] See Xie, Xiaosong, *Reform of Arbitration System from The Len of New Arbitration Law: Highlights and Shortcomings* (????????????????????????????????), available at <https://mp.weixin.qq.com/s/1PWoolr9unRoBfs7nfys9Q>, last visited on 19 September, 2025.

[xxiii] Resolution of the Central Committee of the Communist Party of China on Further Deepening Reform Comprehensively to Advance Chinese Modernization, available at <https://www.chinadaily.com.cn/a/202407/22/WS669db327a31095c51c50f2f8.html>, last visited on 20 September, 2025.

[xxiv] The statistic is drawn from the conference concerning foreign-related arbitration hosted by Ministry of Justice on 31 July, 2025, available at https://www.moj.gov.cn/pub/sfbgw/fzgz/fzgzggflfw/fzgzggflfw/202409/t20240910_505751.html, last visited on 20 September, 2025.

Major amendment to Chinese Arbitration Act after three decades

This guest post is written by Jie Zheng, Assistant Professor & Research Fellow, Shanghai University of Finance and Economics

On 12th September 2025, the 17th session of the Standing Committee of the 14th National People’s Congress passed the Amendment to the Arbitration Law of the People’s Republic of China (hereinafter “Chinese Arbitration Act”) to be effective from 1st March 2026[1], which was first adopted in 1994. Since its adoption, China has undergone enormous economic reforms and a more urgent need to

align the legislation with international arbitration practices. There were only two minor revisions in 2009 and 2017 to fix technical inconsistencies with other procedural laws. In July 2021, the Ministry of Justice of China released a Draft Revision of the Arbitration Law for public consultation. [2] This was the first comprehensive reform since 1994. The draft was reviewed by the Standing Committee of the National People's Congress three times.

The first draft was reviewed by the Standing Committee of the NPC in November 2024, covering legal aspects of foreign-related arbitration reforms, improvement of the international reputation of Chinese arbitration, streamlining of procedure rules, and arbitration institutional reforms.[3] The second draft was reviewed in April 2025, focusing on the internal governance of arbitration institutions and the judicial support and review of arbitration.[4] The third draft review was completed on 12th September 2025 (the latest Amendment), adding rules on online arbitration and interim measures in the pre-arbitration stage, ensuring the investigation powers of the arbitral tribunal, and expanding the scope of *ad hoc* arbitration as outlined in the previous draft.[5]

I. The urgent necessity of the amendment to the Chinese Arbitration Act

The current Chinese Arbitration Act has been effective since 1995. Back then, there were a few arbitration institutions, among which, CIETAC, CMAC are the most famous ones. According to the statistics, by August 2025, there are currently 285 arbitration institutions in China, taking over cases of parties from more than 100 nations or regions, involving financial disputes, e-commerce disputes, construction disputes, maritime disputes, intellectual property disputes, etc. [6]

Facing the global economic recession and anti-globalization trend, China has furthered its opening-up policies, including the initiation of its Belt and Road projects for foreign investment, establishing free trade zones and free trade ports to test advanced trade policies to be in alignment with the global trade practices. The amendment of the Chinese Arbitration Act is one of the necessary legislative reforms to promote the use of arbitration in international commercial disputes and enhance the attractiveness of foreign investment in China. The latest Amendment intends to serve for a high-quality and advanced level of opening-up, and create a business attractive environment to settle economic disputes. It includes Chinese characteristic features, together with foreign-related arbitration rules compatible with international practices.

II. Major aspects of the latest Amendment to the Chinese Arbitration Act

- Arbitration institutional reforms

Legal nature of the arbitration institution in China

The term “arbitration institution” is applied to replace the old term “arbitration commission”. This shows the understanding of Chinese legislators towards the nature of arbitration institutions. The wording “arbitration commission” represented an administrative and bureaucratic feature, as they were established by the local government and business associations. Now, it is clearly stipulated in Article 13 of the amendment that arbitration institutions are charitable not-for-profit legal persons, stressing the independence of arbitration institutions.

The Amendment no longer distinguishes between domestic arbitration institutions and foreign-related arbitration institutions, as most arbitration institutions in China accept foreign-related arbitration disputes nowadays. Nevertheless, unlike in other jurisdictions where arbitration institutions are self-regulated under their

statutes and supervised by judicial powers[7], in China, the arbitration institutions are still registered and supervised by the administrative department of justice pursuant to Article 14 and Article 26 of the Amendment.

Internal governance of arbitration institutions

The arbitration institution shall comprise one chairman, two vice chairmen, and seven to eleven members. There is an additional requirement on the qualifications of the members in Article 18 of the Amendment. Firstly, at least two-thirds of the members shall have expertise in law, trade and economics, and scientific technology. Secondly, the composition of the members should be adjusted every five years, and at least one-third of the members should be replaced to avoid conflict of interest.

- Support for online arbitration

Online arbitration has become a common practice in recent years in China.[8] Article 11 of the Amendment has confirmed the legality of online arbitration and the effectiveness of online arbitration. The parties may opt out of online arbitration if they do not agree.

- Arbitrators

Article 22 of the Amendment has excluded the double-heading of arbitrators who are prosecutors, judges, or any civil servants, who are restricted by law to act as arbitrators. It also welcomes foreign experts in law, trade and economics, maritime, and scientific technology to act as arbitrators.

Article 45 further requires the arbitrators to disclose any potential situations to the arbitration institutions in which a reasonable doubt could be cast on the independence or impartiality of the arbitrator.

Regarding the appointment of the third arbitrator in case of a three-member arbitral tribunal, Article 43 allows the parties can agree on different options: 1) the chief of the arbitration institution to appoint; 2) the parties to appoint themselves; 3) the already appointed two arbitrators to appoint.

- Interim measures in pre-arbitration proceedings

Article 39 of the Amendment has confirmed the possibility of the parties to apply for interim measures or injunctions before the initiation of the arbitration proceedings. The people's court has the responsibility to proceed with the parties' application.

- Arbitral tribunal's extended powers

Article 55 empowers the arbitral tribunal's power to collect evidence and request that relevant authorities assist. In the past, the arbitral tribunal had limited resources to collect evidence, except for requesting the parties to provide relevant evidence. With this latest amendment, the relevant authority has the duty to assist the arbitral tribunal if the evidence is hard to obtain by the arbitral tribunal.

- Setting aside and non-enforcement of arbitral awards

According to Article 72 of the latest Amendment to Chinese Arbitration Act, the time limit for applying for setting aside an arbitral award has been changed from 6 months to 3 months only. This is to enhance the efficiency of arbitration and avoid the party abusing the right of objection to delay the enforcement of arbitral awards.

During the enforcement stage, the respondent can invoke the same legal grounds of setting-aside the arbitral awards in Article 71 first paragraph to resist the enforcement of the arbitral awards. The Amendment has unified the legal grounds for setting-aside and non-enforcement applications of arbitral awards.

- Foreign-related Arbitration

Foreign-related arbitration refers to the two-track regime of arbitration in China, where domestic arbitration falls within a stricter judicial review over arbitral awards.[9] China traditionally uses a three-tiered approach to determine whether a dispute involves foreign-related elements: it looks at (1) who the parties are to the disputes, it assesses the (2) subject matter of the disputes, and looks at the (3) legal natures of the disputes.

Seat of arbitration

Before, Chinese Arbitration Act used the word “location of the arbitration commission” to determine the nationality of the arbitral awards. This point of view has been shifted by the judiciary towards the “seat theory” together with the development of case law.[10] In Article 81 of the Amendment, it is emphasized that the seat of arbitration should be chosen by the parties. In the absence of such choice in the arbitration agreement, the arbitration institutional rules should be used to determine the seat of arbitration. If there are no stipulations in the arbitration institutional rules regarding the seat of arbitration, the arbitral tribunal has the power to determine the seat of arbitration in accordance with the convenience principle. In the absence of the parties’ agreement, the applicable law to the arbitration proceedings and to the judicial review of arbitral awards should be the law of the seat of arbitration. The legislative bodies have confirmed the judicial practices supporting the seat theory and explored ways to ascertain the seat of arbitration.

***Ad hoc* arbitration**

Article 82 of the Amendment allows parties in foreign-related maritime disputes, and parties from Free Trade Pilot Zones[11], Hainan Free Trade Port, and other regions approved by the Chinese government to choose *ad hoc* arbitration. The parties should nevertheless inform the Association of Chinese Arbitration about the parties’ names, seat of arbitration, the composition of the arbitral tribunal, and the arbitration rules, within three days after the establishment of the arbitral tribunal. The people’s courts should provide judicial support for the interim

measures applied by the parties.

Foreign arbitration institutions welcomed in China's FTZs

Article 86 of the Amendment supports foreign arbitrations to establish business entities in the free trade pilot zones, Hainan Free Trade Port, or other regions that are approved by the government in China. No further stipulations are made regarding the types of activities that such entities can engage in.

III. Future alignment with international commercial arbitration practices: the way ahead

Compared with the 1994 Chinese Arbitration Act, the latest Amendment is an applaudable endeavor showing the determination of the Chinese government to modernize its arbitration laws and align with international practices. Nevertheless, in contrast to the draft amendment by the Ministry of Justice in 2021, the latest Amendment was a step backward.

First of all, the validity requirement of the arbitration agreement has not been amended. Considering that *ad hoc* arbitration is currently only allowed in a limited scope of practices, the requirement of a named arbitration institution has been kept. However, as perceived from the *Longlide* case[12], the validity requirement of a named arbitration institution also includes foreign ones.

Secondly, the Amendment did not change the competence-competence rules in the Chinese Arbitration Act. The court still has the primary role in determining

the jurisdiction of the arbitral tribunal, but it is worth mentioning that Article 31 of the Amendment has added *the arbitral tribunal*, together with the arbitration institution and the court, to be able to determine the jurisdiction of the tribunal in case the parties have objections against the validity of the arbitration agreement.

Thirdly, the tribunal still has no power to rule on parties' applications for interim measures, which is left to the people's court. Such an application must be passed from the arbitral tribunals to the courts.

Lastly, it's a pity that *ad hoc* arbitration has a limited scope of application. It is restricted to maritime disputes and parties from FTZ-related areas, without further expansion to foreign-related arbitration.

As a conclusion, the Amendment demonstrates major advancement of the arbitration rules, but much can be done in the future with the economic development and international commercial practices proceeding in China.

[1] Amendment to the Arbitration Law of the People's Republic of China, President's Order No. 54, <https://www.moj.gov.cn/pub/sfbgw/gwxw/xwyw/202509/t20250913_525029.html> accessed 15 September 2025.

[2] Ministry of Commerce, Draft Amendment to the Arbitration Law of the PRC for public consultation, <https://www.moj.gov.cn/pub/sfbgw/lfyjzj/lflfyjzj/202107/t20210730_432967.html> accessed 15 September 2025.

[3] He Rong, Minister of Ministry of Justice, Explanations on the Draft Amendment to the Arbitration Law of the PRC, <http://www.npc.gov.cn/npc/c2/c30834/202509/t20250912_447719.html> accessed 15 September 2025.

[4] NPC, the Second Draft Amendment of the Arbitration Law of the PRC intends to further implement the foreign-related arbitration regime, <

http://www.npc.gov.cn/npc/c2/c30834/202504/t20250425_444888.html> accessed 15 September 2025.

[5] Xinhua Net, Amendment to Arbitration Law of the PRC, effective from 1st March 2026, <http://www.npc.gov.cn/npc/c2/c30834/202509/t20250912_447759.html>. The full text of the Amendment can be accessed via <https://www.moj.gov.cn/pub/sfbgw/gwxw/xwyw/202509/t20250913_525029.html> accessed 15 September 2025.

[6] People's Court Daily?Chief of the National People's Congress Legislative Committee Civil Law Branch Answering Questions regarding the amendment of Chinese Arbitration Act,<<https://www.zcia.cn/info/10990.html>> accessed 15 September 2025.

[7] Such as ICC, SIAC, ICSID.

[8] See Online Arbitration Rules of various arbitration institutions, including CIETAC, Guangzhou Arbitration Commission, Shenzhen Court of International Arbitration, etc.

[9] See Article 71 and Article 83 of the Amendment to Chinese Arbitration Act.

[10] Brentwood Industries v. Guangdong Fa Anlong Machinery Equipment Co., Ltd. (2015) Sui Zhong Fa Min Si Chu Zi No. 62. In this case, Guangzhou Intermediate People's Court rendered a judgment considering an arbitral award made by an ICC tribunal in Guangzhou as a foreign-related *Chinese* award that is subject to the enforcement regime under the Chinese Civil Procedure Law.

[11] China has approved 22 Free Trade Zones and 1 Free Trade Port (Hainan) across the country to experiment with new regulations and explore ways to improve business environment. See <<https://investinchina.chinaservicesinfo.com/investspecials/chinapilotfreetrade/>> accessed 17 September 2025.

[12] Longlide Packaging Co Ltd v BP Agnati SRL [2013] Min Si Ta Zu Di 13 Hao.

Personal Jurisdiction, Consent, and the Law of Agency

I have long argued – in articles, blog posts, and amicus briefs – that it violates due process to invoke a forum selection clause to obtain personal jurisdiction over a defendant who was not a party to the agreement in which the clause appears. This position has not yet achieved universal acceptance. The state courts in New York, in particular, have repeatedly held that forum selection clauses can be used to assert personal jurisdiction over non-party defendants who are “closely related” to the parties or the transaction. In this blog post, I use a recent case—*Bandari v. QED Connect Inc.*—decided by Magistrate Judge Gary Stein (SDNY) to highlight some of the problems with the “closely related” test.

The dispute in *Bandari* grew out of a stock purchase agreement. The plaintiff, Jalandher Bandari, was a resident of Texas. He agreed to purchase shares in QED Connect, Inc., a New York holding company, from David Rumbold, a resident of Illinois. The sale was orchestrated by Nanny Katharina Bahnsen, the chief executive officer of QED and a resident of Colombia. There were three parties to the stock purchase agreement: Bandari, Rumbold, and QED. (Bahnsen signed the contract on behalf of QED.) The agreement contained an exclusive forum selection clause choosing the state and federal courts sitting in New York City.

Although Bandari tendered the purchase price (approximately \$150,000), he never received the shares he was promised. When Bandari asked for his money back, Bahnsen made excuses and eventually stopped responding to his emails. Bandari subsequently brought a lawsuit in federal court in New York against QED, Rumbold, and Bahnsen. After none of the defendants appeared to defend the suit, Bandari moved for a default judgment.

The federal courts in New York will not grant a default judgment until they determine that personal jurisdiction exists. The court quickly concluded that it had personal jurisdiction over Rumbold and QED because they had signed the contract containing the New York forum selection clause. The court then went on

to conclude—wrongly, in my view—that Bahnsen was also subject to personal jurisdiction in New York because she had negotiated the sale and signed the contract on behalf of QED:

A party to a contract with a forum-selection clause may invoke that clause to establish personal jurisdiction over a defendant that is not party to the contract but that is “closely aligned” with a party, or “closely related” to the contract dispute itself, such as corporate executive officers. As the CEO of QED and the individual who negotiated the transaction with Bandari and signed the Agreement on behalf of QED, Bahnsen is “closely related” to both a party to the Agreement and to the dispute. Thus, she is also bound by the forum selection clause.

This conclusion is inconsistent with basic principles of agency law; an agent is not a party to a contract that the agent signs on behalf of a disclosed principal. It is inconsistent with basic principles of contract law; a person may not be bound by an agreement without their express consent. And it is inconsistent with basic principles of personal jurisdiction; a person who lacks minimum contacts with the forum is not subject to personal jurisdiction unless she consents. Nevertheless, the court concluded that Bahnsen was subject to personal jurisdiction in New York because she was “closely related” to the parties and the transaction.

This conclusion is made all the more jarring by that fact that the court also held that Bandari had failed to state a valid claim for breach of contract against Bahnsen *because she was not a party to the agreement*. In the court’s words:

[A]lthough Bandari’s breach of contract claim is asserted against all three Defendants, there is no basis for a finding of contract liability as to Bahnsen. Bahnsen is not a party to the Agreement and she signed the Agreement solely on behalf of QED. It is well established that a corporate officer who signs a contract on behalf of the corporation cannot be held personally liable for the corporation’s breach, absent a showing that the officer was the alter ego of the corporation. The Complaint does not adequately plead an alter ego theory of liability against Bahnsen and hence it does not state a viable breach of contract claim against her.

The court held, in other words, that Bahnsen (1) was subject to personal

jurisdiction in New York by operation of the forum selection clause, but (2) could not be held liable for breach of contract because she was not a party to the agreement containing the forum selection clause. The hand that authored the personal jurisdiction section of the opinion was seemingly unaware of what the hand that authored the breach of contract section of the opinion was doing.

One can, of course, reconcile these conflicting statements by taking the position that forum selection clauses are not subject to the usual rules of agency law, contract law, and personal jurisdiction. There are, however, constitutional problems with such an approach. Under this line of reasoning, a person residing in a foreign country (Colombia) is subject to personal jurisdiction in New York when she negotiates and signs a contract that contains a New York forum selection clause on behalf of the entity that employs her even though she is not the alter ego of the company and is not herself a party to the agreement. These actions are, in my view, insufficient to subject her to personal jurisdiction in New York.

Although the court declined to enter a default judgment against Bahnsen on the claim for breach of contract, it did enter a default judgment against her on the plaintiff's claims for securities fraud and common law fraud. A contract to which she was not a party, therefore, paved the way for the assertion of jurisdiction and the imposition of liability. New York has long sought to attract litigation business from around the world. It has been largely successful in those efforts. If that state continues to assert personal jurisdiction over foreign executives merely because they negotiate and sign contracts in their corporate capacity, however, one wonders whether these executives may start directing the company's attorneys to choose another jurisdiction.

[This post is cross-posted at Transnational Litigation Blog.]

Can a Seat Court Injunct a Foreign

Non-Party to an Arbitration? Singapore High Court clarifies in Alphard Maritime v Samson Maritime (2025) SGHC 154

This guest post is posted on behalf of Kamakshi Puri, Senior Associate at Cyril Amarchand Mangaldas, Delhi, India, and dual-qualified lawyer (India and England and Wales).

The Singapore High Court recently clarified the scope of the court's jurisdiction over foreign non-parties to the arbitration. In an application to set aside two interim injunctions, in *Alphard Maritime Ltd. v Samson Maritime Ltd. & Ors. (2025) SGHC 154*,^[1] the court held that the seat *per se* did not confer jurisdiction against non-parties to an arbitration, and that jurisdiction would first have to be established through regular service-out procedures before the seat court could grant an injunction against a non-party.

Factual Background

Briefly, the applicant, Alphard Maritime ("**Alphard**"), initiated SCMA arbitration^[2] against its debtor, Samson Maritime ("**Samson**"), and Samson's wholly owned subsidiary, Underwater Services ("**Underwater**"), for alleged breach of a settlement agreement for the sale of approx. nine vessels and Samson's shareholding in Underwater to Alphard ("**Subject Assets**"). Alphard initiated arbitration upon receiving information of the pledge/mortgage of the Subject Assets to J M Baxi Marine Services ("**Baxi**") in breach of the Settlement Agreement. In addition to *the ex-parte* freezing order against Samson and Underwater, Alphard had received from the seat court, acting in support of the arbitration, an *ex-parte* prohibitory injunction restraining Baxi and other creditors

of Samson from *assisting in or facilitating the dissipation of, or dealing with, any of Samson and Underwater's assets worldwide*. Baxi was not a party to the Settlement Agreement. While one of the defendants was based out of Singapore, Samson and Underwater were bound by the jurisdiction conferred to the seat court; however, Baxi was a foreign non-party to the arbitration.

While the interim freezing injunction against Samson and Underwater was vacated on the finding that there was no evidence of dissipation or risk of dissipation of assets, and the court observed that there was no basis for the injunction which in effect prohibited Baxi and/or the lenders from asserting their own contractual rights or enforcing proprietary rights against Samson which predated the Settlement Agreement, the injunction was vacated primarily on the finding that the Singapore court, as the seat court, had no jurisdiction over Baxi or the foreign lenders.

Seat Court's Jurisdiction over Foreign Defendants

A court must have *in personam* jurisdiction to grant an injunction against a party. Under Singapore law, which follows the English law on jurisdiction, jurisdiction is based on service of proceedings, and the court assumes jurisdiction over a foreign party (not having a presence in Singapore and not having submitted to the proceedings) through permission for service out of the claims. [3] The court allows permission for service out where "*the Singapore Court is the appropriate forum for hearing the proceedings*".[4] For the assessment of whether permission for service out should be granted, *i.e.*, that Singapore Court is the appropriate forum, the claimant is required to meet the following three-prong assessment: [5]

1. *A good arguable case that there is sufficient nexus with the Singapore court;*
2. *Singapore is the forum conveniens; and*
3. *There is a serious question to be tried on the merits of the claim.*

The “sufficient nexus” refers to the connection between the court and the defendant and follows the logic that a party may only be called to a foreign court where they have a sufficiently strong connection to the state. Practice Directions 63(3)(a) to (t) set out “Factors” that guide as to the possible connection that the foreign defendant may have with the Singapore court. **[6]**

Alphard relied on 2 factors - *first*, PD 63(3)(d), a claim to obtain relief in respect of the breach of a contract governed by the laws of Singapore. This was held to be inapplicable, as Baxi was neither a party to the contract, nor committed any breach. *Second*, PD 63(3)(n) claims made under any other written law of Singapore. In this regard, it was contended that the claim against Baxi was under Section 12A of the International Arbitration Act, *i.e.*, an exercise of the Singapore court’s power to grant an injunction against non-parties in support of Singapore-seated arbitration, which wide power ensured that non-parties did not collude with the defendants to frustrate the fruits of a claim. The court accepted PD 63(3)(n) as a relevant factor.

However, since sufficient nexus with the court is not enough for permission to service out, the court proceeded to the next equity, *i.e.*, whether Singapore was the ‘*forum conveniens*’. *Forum conveniens* is an exercise in determining the most appropriate court for deciding the *lis*. It is the assessment of the connection of the dispute with the Singapore court. The ‘dispute’ here was the prohibitory injunction against Baxi. The court held that to be the ‘appropriate court’ for interim relief against a *specific party*, it required more than the arbitration being seated in Singapore. The seat court would be the appropriate court if the dispute with the specific party could be traced to the arbitration, or assets/obligations were substantially that of party to the arbitration, *i.e.*,

1. Was the non-party bound by the arbitration agreement even if it was not a party to the arbitration?
2. did the non-party hold assets in Singapore, which arguably belonged

beneficially to a party to the arbitration (non-party was a trustee / pass-through for the assets)

3. was the non-party a corporate entity held/owned by the party to the arbitration, and therefore, did the dissipation of assets of the party amount to the dissipation of value of the party (merger of identity between the party and non-party)?

The Court held that in the absence of any of the above, the seat court would not be the *de facto* appropriate forum for injunctions against all non-parties even when the injunction is in aid of Singapore-seated arbitration. The court did not find any reason for Baxi, an entity pursuing its independent remedy against the Alphard, to be brought before the Singapore court.

Notably, Alphard had already pursued interim relief under Section 9 of the (Indian) Arbitration and Conciliation Act, 1996, against the Defendants, including Baxi, before the High Court of Bombay. [7] The Bombay High Court, acting further to its power for making interim orders for protection of the subject matter in arbitration, including in international commercial arbitration where the place of arbitration is outside India [8], granted a status quo injunction, including on Baxi, on further dealing in or creating any further third-party interests in the shares held by Samson in Underwater and a disclosure order in respect to the transaction for pledge created in favour of Baxi.

Concluding Thoughts

For the known benefits of enforcement and limited grounds of challenge of awards under Singapore law and before Singapore courts, foreign parties regularly opt for Singapore as the neutral seat of arbitration. In such cases, the only nexus of the dispute with the court is its designation as the seat court. Separately, arbitral tribunals do not have jurisdiction over non-parties to an arbitration; thus, courts assume adjudication for interim relief applications

against non-parties to the arbitration. With this decision, the Singapore court has confirmed the non-seat court's interference for interim reliefs where parties require protective orders vis-a-vis non-parties to the arbitration.

[1] Available [here](#).

[2] Arbitration under the Singapore Chamber of Maritime Arbitration ("**SCMA**") Rules.

[3] S. 16(1)(a)(ii) of the Supreme Court of Judicature Act 1969: "**16.**—(1) *The General Division has jurisdiction to hear and try any action in personam where — (a) the defendant is served with an originating claim or any other originating process — ... (ii) outside Singapore in the circumstances authorised by and in the manner prescribed by Rules of Court or Family Justice Rules.*"

[4] *Rules of Court 2021, Rule 1(1) of Order 8 of ROC 2021* "**1.**—(1) *An originating process or other court document may be served out of Singapore with the Court's approval if it can be shown that the Court has the jurisdiction or is the appropriate court to hear the action*" .

[5] Supreme Court Practice Directions 2021, Para 63(2).

[6] Prior to 2021, this condition was similar to English law, i.e., the "*Good and arguable case that a gateway applies*". While "gateways" have been done away with, the Practice Directives have set out a non-exhaustive list of factors (PD 63(3)(a)-(t)) which a claimant "should refer to" in order to meet the requirement under PD 63(2)(a). These factors mirror the gateways which were earlier found in the Rules of Court 2014. See Ardavan Arzandeh, *The New Rules of Court and the Service-Out Jurisdiction in Singapore*, (2022) *Singapore Journal of Legal Studies* 191-201.

[7] *Alphard Maritime Ltd. v Samson Maritime Limited & Ors. Commercial Arbitration Petition (L) No.7499 of 2025*, Order dated 02.04.2025, available [here](#).

[8] Section 9 read with Section 2(2) of the Arbitration Act, 1996.

AI in Arbitration: Will the EU AI Act Stand in the Way of Enforcement?

This guest post was written by Ezzatollah Pabakhsh, Master's Student at the University of Antwerp

The European Union has taken an unprecedented step by regulating artificial intelligence (AI) through the EU AI Act, which is the world's first comprehensive legal framework for AI governance. According to Recital 61, Article 6(2) and Annex III, 8(a), AI tools used in legal or administrative decision-making processes—including alternative dispute resolution (ADR), when used similarly to courts and producing legal effects—are considered high risk. These tools must comply with the strict requirements outlined in Articles 8 through 27.

These provisions are designed to ensure transparency, accountability, and respect for fundamental rights. This obligation will take effect on August 2, 2026, according to Article 113. Notably, the Act's extraterritorial scope, as outlined in Articles 2(1)(c) and (g), applies to any AI system that affects individuals within the European Union. This applies regardless of where the system is developed or used. It also applies to providers and deployers outside the EU whose output is used within the Union. This raises a critical question: can non-compliance with the EU AI Act serve as a basis for courts in EU Member States to refuse recognition or enforcement of an arbitral award on procedural or public-policy grounds?[1]

Consider the following scenario: Two EU-based technology companies, one Belgian and one German, agree to resolve their disputes through US-seated arbitration. Suppose the ADR center uses AI-powered tools that do not comply with the EU AI Act's high-risk system requirements. How would enforcement of the resulting award play out before national courts in the EU?

This scenario presents a direct legal conflict. If the winning party seeks to enforce the award in a national court of an EU Member State, two well-established legal grounds for refusing enforcement may arise.[2] First, the losing party may invoke Article V(1)(d) of the 1958 New York Convention, together with the applicable

national arbitration law. They could argue that reliance on AI systems that do not comply with the EU AI Act constitutes a procedural irregularity, as it departs from the parties' agreed arbitration procedure and undermines the integrity of the arbitral process.[3] Second, under Article V(2)(b) of the Convention, the enforcing court may refuse recognition on its own motion if it finds that using non-compliant AI violates the forum's public policy, especially when fundamental rights or procedural fairness are at stake.[4] The following section will examine these two scenarios in more detail.

Scenario 1: Procedural Irregularity under Article V(1)

Imagine that the ADR center uses an AI tool to assist the tribunal in drafting the award during the proceedings. This AI system uses complex algorithms that cannot produce transparent, human-readable explanations of how key conclusions were reached. The final award relies on these outputs, yet it offers no meaningful reasoning or justification for several significant findings. Furthermore, the tribunal does not disclose the extent to which it relies on the AI system, nor is there any clear evidence of human oversight in the deliberation process.

When the losing party in Belgium contests enforcement of the award, they invoke Article V(1)(d) of the New York Convention, arguing that the arbitral procedure did not align with the parties' expectations or the applicable law. This objection is also found in Article 1721 of the Belgian Judicial Code (BJC), inspired by Article 36 of the UNCITRAL Model Law and, to a large extent, mirroring the grounds of Article V of the New York Convention. Among these, two are especially relevant to the use of AI in the arbitral process and are central to the objection in this case.

First, under Article 1721(1)(d), a party may argue that the award lacks proper reasoning[5], which violates a core procedural guarantee under Belgian law.[6] This requirement ensures that parties can understand the legal and factual basis for the tribunal's decision and respond accordingly.[7] In this case, however, the award's reliance on opaque, AI-generated conclusions, particularly those produced by "black box" systems, renders the reasoning inaccessible and legally inadequate.[8] The EU AI Act further reinforces this objection. Articles 13, 16, and 17 require transparency, traceability, and documentation for high-risk AI systems. Meanwhile, Article 86 grants limited right to explanation for affected persons where a deployer's decision is based on Annex III systems and produces legal effects. If an award fails to meet these standards, it may not align with

Belgian procedural norms.

Second, under Article 1721(1)(e), a party may argue that the tribunal's composition or procedure deviated from the parties' agreement or the law of the seat. For example, if the arbitration agreement contemplated adjudication by human arbitrators and the tribunal instead relied on AI tools that materially influenced its reasoning without disclosure or consent, this could constitute a procedural irregularity. According to Article 14 of the EU AI Act, there must be effective human oversight of high-risk AI systems. Where such oversight is lacking or merely formal and AI outputs are adopted without critical human assessment, the legitimacy of the proceedings may be seriously undermined. Belgian courts have consistently held that procedural deviations capable of affecting the outcome may justify refusal of recognition and enforcement.[9]

Scenario 2: Public Policy under Article V(2)(b)

In this scenario, the court may refuse to enforce the award on its own initiative if it is found to be contrary to public policy[10] under Article V(2)(b) of the New York Convention, Article 34(2)(b)(ii) of the UNCITRAL Model Law, or Article 1721(3) of the Belgian Judicial Code (BJC). These provisions allow courts to deny recognition and enforcement if the underlying procedure or outcome conflicts with fundamental principles of justice in national and European legal systems.[11]

In comparative international practice, public policy has both substantive and procedural dimensions. When a breach of fundamental and widely recognized procedural principles renders an arbitral decision incompatible with the core values and legal order of a state governed by the rule of law, procedural public policy is engaged. Examples include violations of due process, lack of tribunal independence, breach of equality of arms, and other essential guarantees of fair adjudication.[12]

In this case, the use of non-transparent AI systems may fall within this category.[13] If a tribunal relies on these tools without disclosing their use or without providing understandable justifications, the process could violate Article 47 of the Charter of Fundamental Rights of the European Union. This article guarantees the right to a fair and public hearing before an independent and impartial tribunal. This issue, along with case law, could provide a reasonable basis for refusal based on public policy.[14] When applying EU-relevant norms,

Belgian courts are bound to interpret procedural guarantees in accordance with the Charter. [15]

Comparative case law provides additional support. In *Dutco*, for example, the French Cour de cassation annulled an arbitral award for violating the equality of arms in the tribunal's constitution, which is an archetypal breach of procedural public policy.[16] Similarly, in a 2016 decision under § 611(2)(5) ZPO, the Austrian Supreme Court annulled an award where the arbitral procedure was found to be incompatible[17] with Austria's fundamental legal values.[18] These rulings confirm that courts may deny enforcement when arbitral mechanisms, especially those that affect the outcome, compromise procedural integrity.

Belgian courts have consistently held that recognition and enforcement must be refused where the underlying proceedings are incompatible with *ordre public international belge*, particularly where fundamental principles such as transparency, reasoned decision-making, and party equality are undermined.[19] In this context, reliance on non-transparent AI—without adequate procedural safeguards—may constitute a violation of procedural public policy. As a result, enforcement may lawfully be denied *ex officio* under Article V(2)(b) of the New York Convention and Article 1721(3) of the Belgian Judicial Code, thereby preserving the integrity of both the Belgian and broader EU legal frameworks. Ultimately, courts retain wide discretion under public policy grounds to decide with real control whether or not to enforce AI-assisted awards.[20]

These potential refusals of enforcement within the EU highlight a broader trend, as domestic procedural safeguards are increasingly influenced by global regulatory developments, prompting questions about whether the EU's approach to AI in arbitration will remain a regional standard or evolve into an international benchmark.

The EU AI Act as a Global Regulatory Model?

The EU has a proven history of establishing global legal benchmarks—rules that, while originating in Europe, shape laws and practices far beyond its borders.[21] The GDPR is the clearest example of this. Its extraterritorial scope, strict compliance obligations, and enforcement mechanisms have prompted countries ranging from Brazil to Japan to adopt similar data protection frameworks.[22]

In arbitration, a comparable pattern could emerge. If EU courts apply the EU AI

Act's high-risk requirements when deciding on the recognition and enforcement of arbitral awards, other jurisdictions may adopt comparable standards, encouraging convergence in AI governance across dispute resolution systems. Conversely, inconsistent enforcement approaches could foster fragmentation rather than harmonisation. In any case, the Act's influence is already being felt beyond Europe, prompting arbitration stakeholders to address new questions regarding procedural legitimacy, technological oversight, and cross-border enforceability.

Conclusion

The interplay between the EU AI Act and the enforcement of arbitral awards highlights how technological regulation is shaping the concept of procedural fairness in cross-border dispute resolution. Whether the Act becomes a catalyst for global standards or a source of jurisdictional friction, parties and institutions cannot ignore its requirements. As AI tools move deeper into arbitral practice, compliance will become not just a regulatory obligation but a strategic necessity for ensuring the enforceability of awards in key jurisdictions.

[1] Tariq K Alhasan, 'Integrating AI Into Arbitration: Balancing Efficiency With Fairness and Legal Compliance' (2025) 42 Conflict Resolution Quarterly 523, 524.

[2] *ibid* 525.

[3] Jordan Bakst and others, 'Artificial Intelligence and Arbitration: A US Perspective' (2022) 16 Dispute Resolution International 7, 23; Sanjana Reddy Jeeri and Vinita Singh, 'Soft Law, Hard Justice: Regulating Artificial Intelligence in Arbitration' (2024) 17 Contemporary Asia Arbitration Journal 191, 222.

[4] Sean Shih and Eric Chin-Ru Chang, 'The Application of AI in Arbitration: How Far Away Are We from AI Arbitrators?' (2024) 17 Contemporary Asia Arbitration Journal 69, 81.

[5] Horst Eidenmuller and Faidon Varesis, 'What Is an Arbitration? Artificial Intelligence and the Vanishing Human Arbitrator' (2020) 17 New York University Journal of Law and Business 49, 72.

- [6] Dilyara Nigmatullina and Beatrix Vanlerberghe, 'Arbitration Related Lessons: Insights from the Supreme Courts around the World' (2020) 2020 *b-Arbitra | Belgian Review of Arbitration* 307, 354.
- [7] Gizem Kasap, 'Can Artificial Intelligence ("AI") Replace Human Arbitrators? Technological Concerns and Legal Implications' (2021) 2021 *Journal of Dispute Resolution* 209, 230, 249.
- [8] Shih and Chang (n 4) 79.
- [9] Koen De Winter and Michaël De Vroey, 'Belgium' in *Baker McKenzie International Arbitration Yearbook: 10th Anniversary Edition 2016-2017* (Baker McKenzie 2017), 81, 82, 85.
- [10] Eidenmuller and Varesis (n 5) 80-81; Bernard Hanotiau, 'Arbitrability; Due Process; and Public Policy Under Article V of the New York Convention Belgian and French Perspectives' (2008) 25 *Journal of International Arbitration* 721, 729-730.
- [11] Kasap (n 7) 252; Annabelle O Onyefulu, 'Artificial Intelligence in International Arbitration: A Step Too Far?' (2023) 89 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 56, 63.
- [12] Nigmatullina and Vanlerberghe (n 6) 351-352.
- [13] Shih and Chang (n 4) 86.
- [14] Nigmatullina and Vanlerberghe (n 6) 353.
- [15] A de Zitter, 'The Impact of EU Public Policy on Annulment, Recognition and Enforcement of Arbitral Awards in International Commercial Arbitration' (University of Oxford 2019) 5, 251-253.
- [16] Stefan Kröll, 'Siemens - Dutco Revisited? Balancing Party Autonomy and Equality of the Parties in the Appointment Process in Multiparty Cases | Kluwer Arbitration Blog' <<https://legalblogs.wolterskluwer.com/arbitration-blog/siemens-dutco-revisited-balancing-party-autonomy-and-equality-of-the-parties-in-the-appointment-process-in-multiparty-cases/>> accessed 18 August 2025; Nigmatullina and Vanlerberghe (n 6) 351.

[17] Alexander Zollner, 'Austrian Supreme Court Set aside an Arbitral Award Due to a Violation of the Procedural Ordre Public' (*Global Arbitration News*, 21 June 2017)

<<https://www.globalarbitrationnews.com/2017/06/21/austrian-supreme-court-set-aside-arbitral-award-for-violation-of-public-policy/>> accessed 18 August 2025. ; Franz Schwarz and Helmut Ortner, 'Austria' in Giacomo Rojas Elgueta, James Hosking and Yasmine Lahlou (eds), *Does a Right to a Physical Hearing Exist in International Arbitration?* (ICCA Reports, 2020) 26, <https://www.arbitration-icca.org/right-to-a-physical-hearing-international-arbitration> accessed 5 August 2025

[18] Nigmatullina and Vanlerberghe (n 6) 351.

[19] Alhasan (n 1) 5-6.

[20] Shih and Chang (n 4) 87; Hanotiau (n 10) 737.

[21] Arturo J Carrillo and Matías Jackson, 'Follow the Leader? A Comparative Law Study of the EU's General Data Protection Regulation's Impact in Latin America' (2022) 16 ICL Journal 177, 178; Michelle Goddard, 'The EU General Data Protection Regulation (GDPR): European Regulation That Has a Global Impact' (2017) 59 International Journal of Market Research 703, 703-704.

[22] Carrillo and Jackson (n 21) 242-245.

Clearly Inappropriate Down Under: Isaacman v King [No 2] and the Outer Limits of Long-Arm Jurisdiction

By Dr Sarah McKibbin, University of Southern Queensland

The Supreme Court of New South Wales' decision in *Isaacman v King [No 2]*^[1] is the kind of case that tempts one to say 'nothing to see here', and yet it richly rewards a closer look. On a conventional application of *Voth v Manildra Flour Mills*^[2] — the leading Australian authority on *forum non conveniens* — Garling J stayed proceedings that attempted to litigate a New York relationship dispute in Sydney, being 'well satisfied' that the NSW Supreme Court was a clearly inappropriate forum.[3] The reasons, though brief by design,[4] illuminate the transaction costs of jurisdictional overreach,[5] show how the *Voth* framework handles an *extreme* set of facts, and offer a careful case study for empirical debates about Australian 'parochialism' in jurisdictional decision-making.

The Factual Background

The facts almost read like a hypothetical designed to test the outer limits of exorbitant, or long-arm, jurisdiction. A US biotech executive residing in New York sued his former partner, an Australian marketing consultant, in the NSW Supreme Court for alleged negligent transmission of herpes simplex virus during their relationship in New York. The relationship began and ended in New York; the alleged transmission occurred there; the plaintiff's diagnosis and treatment took place there; and the defendant, though Australian, lived overseas and was only ordinarily resident in Victoria when in Australia. The plaintiff had a four-month period in 2022 split between Sydney, New South Wales, and Melbourne, Victoria, with visits to Queensland, while exploring business opportunities for skincare ventures. He pointed to social friendships in Sydney and his one-off membership of the North Bondi Returned Services League Club.[6]

None of this impressed Garling J as a meaningful link to New South Wales. As Garling J readily observed in the case's earlier procedural judgment, there was 'no connection whatsoever between either of the parties, and the pleaded cause of action and the State of New South Wales.'^[7] The RSL membership did not establish 'any connection at all with the forum'.^[8] The pleading itself underscored the foreignness of the dispute: by notice under New South Wales' court rules,^[9] the plaintiff relied on New York law, in particular New York Public Health Law § 2307, alongside common law claims available under New York law.^[10]

The decision

The stay analysis proceeded squarely under *Voth*. Garling J recited the familiar principles: the onus lies on the defendant; the question is whether the local court is a clearly inappropriate forum, not whether an alternative is more convenient; it is relevant that another forum can provide justice; and the need to determine foreign law is not conclusive but is a significant factor.[11] The only explicit nod to the English test in *Spiliada Maritime Corporation v Cansulex Ltd*[12] came through the High Court's own endorsement in *Voth* of Lord Templeman's aspiration for brevity in such applications. [13] Yet Garling J noted that an issue arising in oral submissions required further written submissions, precluding an *ex tempore* disposition, but nonetheless kept the reasons concise.[14]

On the facts, the connecting factors all pointed away from New South Wales. The conduct giving rise to the claim, the governing law, and the evidentiary base were in New York. Neither party had assets in NSW, so any judgment, whether for damages or for costs, would have to be enforced elsewhere, compounding expense.[15] Garling J accepted, and the parties did not dispute, that New York courts could exercise *in personam* jurisdiction over the defendant; that acceptance underpinned the conclusion that there was another forum where the plaintiff could 'obtain justice'.[16] The upshot was decisive but orthodox: the Supreme Court of New South Wales was a clearly inappropriate forum, and the proceedings would be stayed.[17]

The conditional order deserves to be recorded with some precision. The stay was to take effect seven days after publication of the judgment. Within that same seven-day period, the defendant was to file and serve a written undertaking that, if the plaintiff brought civil proceedings in the State of New York concerning the subject matter of the NSW suit, she would not plead any New York limitations defence, provided the plaintiff commenced in New York within three months of the stay taking effect and provided the claims were not statute-barred when the NSW proceeding was commenced.[18] Framed this way, the undertaking did not expand the analysis beyond *Voth*. It neutralised limitation prejudice, as long as the plaintiff did not delay commencing proceedings, and ensured practical access to the natural forum. Garling J also ordered the plaintiff to pay the costs of the *forum non conveniens* application.[19]

Two ancillary applications were left untouched. A motion seeking transfer to the Supreme Court of Victoria and a late-filed non-publication motion were not determined.[20] Given the stay, it was not appropriate to go on to decide further issues between the parties. Garling J added that ordering a transfer could impinge on the plaintiff's own choices about where to proceed next; and with the matter stayed, non-publication orders served no useful purpose.[21]

Comments

Situating *Isaacman v King [No 2]* in the post-*Voth* jurisprudence helps explain both the ease and the limits of the result. *Voth*'s 'clearly inappropriate forum' test was announced as only a slight departure from the English *Spiliada* test,[22] but, as Richard Garnett's early survey of the doctrine shows,[23] its operation had been variegated.[24] In the years immediately after *Voth*, Australian courts often refused stays where there were meaningful Australian connections — even if the governing law or much of the evidence was foreign — and sometimes gave generous weight to local juridical advantages.[25] Mary Keyes' analysis in the Australian family law context underscores why this felt unpredictable: a forum-centric test with broad judicial discretion risks certainty, predictability and cost.[26] Understandably then, Keyes argues for an explicitly comparative, *Spiliada*-style inquiry that focuses on effective, complete and efficient resolution, the parties' ability to participate, costs and enforceability.[27]

At the same time, the High Court tempered *Voth* in specific contexts. In *Henry v Henry*,[28] the majority effectively created a presumption in favour of a stay where truly parallel foreign proceedings between the same parties on the same controversy were already on foot, explicitly invoking comity and the risks of inconsistent outcomes.[29] In *CSR Ltd v Cigna Insurance Australia Ltd*,[30] the High Court went further. Even without identity of issues, the 'controversy as a whole' analysis could render local proceedings oppressive where their dominant purpose was to frustrate access to relief available only abroad.[31] These qualifications that, outside the special case of parallel litigation, *Voth* directs attention to the suitability of the local forum in its own terms; but where duplication looms in the form of parallel proceedings, the analysis necessarily broadens. That broader, comparative posture is also what Ardavan Arzandeh shows Australian courts actually do in practice, despite *Voth*'s formal

language.[32]

Isaacman v King [No 2] belongs to a different, more straightforward strand in that story: the ‘little or no connection with Australia’ cases in which stays have been ordered because the action and the parties’ controversy are overwhelmingly foreign.[33] Unlike the contested margins Garnett identifies, there was no pleaded Australian statutory right of a kind sometimes relied on as a juridical advantage; no contest about the availability of a competent foreign forum; and no tactical race between parallel proceedings. Garling J canvassed the classic connecting factors, noted the New York law pleaded, recorded the practical burdens of proof and enforcement, and concluded that New South Wales was clearly an inappropriate forum. That emphasis on concrete, case-specific connections and on consequences for the conduct and enforcement of the litigation fits both Keyes’ call for structured, predictable decision-making and Arzandeh’s demonstration that Australian courts, in substance, weigh the same considerations as *Spiliada*. [34]

Two implications follow. First, the decision is a neat instance of *Voth* doing exactly what it was designed to do when the forum is only nominally engaged. It offers little purchase for testing the harder comparative question whether, at the margins, *Voth*’s rhetoric yields different outcomes from *Spiliada*’s ‘more appropriate forum’ inquiry. That is consistent with Arzandeh’s view that the supposed gap is, in practice, vanishingly small.[35] Secondly, it gives texture to the practical burdens that inappropriate forum choices impose. Expert evidence on New York law would have been required; witnesses and records are in the United States; neither party’s assets are in New South Wales; and the court itself, even in this ‘easy’ case, could not resolve the application wholly on the basis of oral submissions because an issue warranted further written argument. Those are precisely the private and public costs Keyes highlights as reasons to favour a clearer, more comparative framework *ex ante*, rather than leaving calibration to *ex post* discretion.[36]

There is, then, a narrow lesson and a broader one. Narrowly, *Isaacman v King [No 2]* confirms that Australian courts will not entertain a claim whose only local anchors are social relationships and what amounts to a meal-discount club card. Broadly, it supplies one more controlled observation for comparative and empirical work: an extreme outlier that aligns with ‘no connection’ line of authority.[37] It also leaves open — indeed, usefully highlights — the need for

data drawn from genuinely contested cases, where juridical advantage and practical adequacy are engaged on the evidence, if we are to assess how far *Voth* diverges, in practice, from its common law counterparts.[38]

Conclusion

Isaacman v King [No 2] therefore earns its place not because it breaks doctrinal ground, but because it shows the doctrine working as intended. The plaintiff's Sydney friendships and RSL membership could not anchor a transatlantic dispute in a NSW court; New York law, evidence and enforcement pointed inexorably elsewhere; and a conditional stay ensured that the plaintiff would not be procedurally disadvantaged by being sent to the forum where the dispute belongs. If some *forum non conveniens* applications can be resolved quickly,[39] this was not one of them. But it was, in the end, a straightforward exercise of judicial discipline about where litigation should be done.

[1] [2025] NSWSC 381.

[2] (1990) 171 CLR 538 ('*Voth*').

[3] *Isaacman v King [No 2]* (n 1) [50].

[4] *Voth* (n 2) 565.

[5] See Andrew Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press, 2003; J J Spigelman, 'Transaction Costs and International Litigation' (2006) 80(7) *Australian Law Journal* 438, 441-3.

[6] *Ibid* [22].

[7] *Isaacman v King* [2024] NSWSC 1291, [85]. The earlier judgment dealt with preliminary procedural matters including the plaintiff's failed attempt to proceed pseudonymously.

[8] *Isaacman v King [No 2]* (n 1) [41]-[42].

[9] *Uniform Civil Procedure Rules 2005* (NSW).

[10] *Isaacman v King [No 2]* (n 1) [14], [45]-[46].

[11] *Ibid* [35]-[36].

[12] [1987] AC 460.

[13] *Isaacman v King [No 2]* (n 1) [37], quoting *Voth* (n 2) 565. One wonders how often Lord Templeman's aspiration is realised.

[14] *Isaacman v King [No 2]* (n 1) [37]-[38].

[15] *Ibid* [43], [46]-[49].

[16] *Ibid* [47].

[17] *Ibid* [39]-[51].

[18] *Ibid* [4], [56].

[19] *Ibid* [56].

[20] *Ibid* [7], [52]-[53].

[21] *Ibid* [8], [52]-[55].

[22] *Voth* (n 2) 558.

[23] Richard Garnett, 'Stay of Proceedings in Australia: A "Clearly Inappropriate" Test?' (1999) 23(1) *Melbourne University Law Review* 30.

[24] Cf Ardavan Arzandeh, 'Reconsidering the Australian *Forum (Non) Conveniens* Doctrine' (2016) 65 *International and Comparative Law Quarterly* 475.

[25] Garnett (n 22) 39-48.

[26] Mary Keyes, 'Jurisdiction in International Family Litigation: A Critical Analysis' (2004) 27 *UNSW Law Journal* 42, 63-4.

[27] *Ibid*.

[28] (1995) 185 CLR 571.

[29] *Ibid* 590-1; Garnett (n 22) 52-4.

[30] (1997) 189 CLR 345.

[31] *Ibid* 400-1; Garnett (n 22) 57-9.

[32] Arzandeh (n 23) 485, 486.

[33] Garnett (n 22) 45-6.

[34] Keyes (n 26) 63-4; Arzandeh (n 23).

[35] Arzandeh (n 23) 491.

[36] Keyes (n 26) 59-60.

[37] Garnett (n 22) 45-6.

[38] On the need for empirical research in this area, see Christopher A Whytock, 'Sticky Beliefs about Transnational Litigation' (2022) 28(2) *Southwestern Journal of International Law* 284.

[39] *Spiliada* (n 12) 465.

Indonesian Constitutional Court on International Child Abduction

**THE INDONESIAN CONSTITUTIONAL COURT DECISION REAFFIRMED
PARENTAL CHILD ABDUCTION IS A CRIMINAL OFFENCE**

By: Priskila Pratita Penasthika^[1]

INTRODUCTION

The Indonesian Constitutional Court Decision Number 140/PUU-XXI/2023, issued on 3 September 2024, confirms that parental child abduction is a criminal offence

under Article 330(1) of the Indonesian Criminal Code. Prior to this Decision, Article 330(1) of the Criminal Code was understood as a provision that could not criminalise someone for child abduction if the abduction was committed by one of the biological parents.

After 3 September 2024, through this Constitutional Court Decision, the abduction of a child by one of the biological parents, when the parent does not have custody based on a final court decision, is reaffirmed as a criminal offence.

CONSTITUTIONAL COURT DECISION

Facts

On 15 November 2023, five single mothers (Petitioners) whose children have been abducted by their ex-husbands submitted a petition to the Constitutional Court on 11 October 2023, challenging Article 330 (1) of the Indonesian Criminal Code, which states, *“Anyone who, with deliberate intent, removes a minor from the authority which in accordance with the laws is assigned to him, or from the supervision of a person authorised to do so, shall be punished by a maximum imprisonment of seven years.”*

The Petitioners shared a common experience: after divorcing their husbands, they were granted custody of their children through a court ruling. However, they have been deprived of this right because their ex-husband abducted their child.

The Petitioners also asserted that they had reported the ex-husband’s actions to the police under Article 330 (1) of the Criminal Code. However, in practice, the report was either dismissed or considered invalid because the police were of the view that the person who abducted the child was the biological father himself and, therefore, could not be prosecuted.

Given this background, the Petitioners believe that the phrase “anyone” (*“barang siapa”* in Indonesian) in Article 330(1) of the Criminal Code could be interpreted to mean that the biological father or mother of a child cannot be held accountable for the accusation of abducting their own child. Therefore, they submitted a petition to the Constitutional Court requesting a judicial review of Article 330(1) of the Criminal Code.

The Petitioners argue that the phrase “anyone” in Article 330(1) of the Criminal

Code should encompass all individuals, including the child's biological father or mother, as a legal subject. There should be no exceptions that grant absolute authority to the father or mother and exclude him or her from any legal action if he or she violates the child's rights. Protecting children's rights is a fundamental aspect of human rights, and the state has a responsibility to provide protection, oversight, and law enforcement to promote children's welfare. Consequently, the state has the authority to act against parents who violate children's rights.

Furthermore, the Petitioners request the Constitutional Court to declare that the phrase "anyone" in Article 330(1) of the Criminal Code, which was derived from the *Wetboek van Strafrecht voor Nederlandsch-Indië* (Staatsblad 1915 Number 732), and later enacted under Law Number 1 of 1946 on the Criminal Code in conjunction with Law Number 73 of 1958 on the Entry into Force of Law No. 1 of 1946 on the Criminal Code for the Entire Territory of the Republic of Indonesia, is unconstitutional, insofar as it is not interpreted to mean "*anyone, without exception the biological father or mother of the child.*"

The Decision

The Decision of the Constitutional Court Number 140/PUU-XXI/2023, which consists of nine Constitutional Judges, rejected the Petitioners' request in its entirety.

The Constitutional Court Judges believe that Article 330(1) of the Criminal Code is an explicit and well-defined provision (*expressive verbis*), so there is no need to interpret it or add any supplementary meaning to it. The Judges asserted that the phrase "anyone" encompasses every individual without exception, including the biological father or mother of the child. The Court also noted that adding a new meaning to Article 330(1) of the Criminal Code, as requested by the Petitioners, could potentially restrict the scope of the legal subjects covered by that provision and other provisions in the Criminal Code that use the phrase "anyone". This could result in legal uncertainty, according to the Judges.

In its legal deliberation, the Constitutional Court Judges referred to the United Nations Convention on the Rights of the Child (UNCRC), to which Indonesia is a state party, and its provisions are incorporated into Law Number 23 of 2002 on Child Protection, as amended by Law Number 35 of 2014 (Law on Child Protection). Furthermore, the Law on Child Protection recognises that the best

interests of the child, as stipulated in the UNCRC, are a fundamental principle for child protection. According to the Official Elucidation of Law on Child Protection, the best interests of the child mean that, in all actions concerning children undertaken by the government, society, legislative bodies, and judiciary, the child's best interest must be the primary consideration.

In cases of parental child abduction, aside from the child being the victim, the Constitutional Court recognises that the parent, who is forcibly separated from their child by the other parent, can also become a victim, particularly on a psychological level. This indicates that the psychological bond between parents and their biological children should not be severed, emphasising that the child's best interests must take precedence. In this context, the Constitutional Court Judges emphasise that criminalising one of the child's biological parents who breaches the provisions of Article 330(1) of the Criminal Code should only be considered as a last resort (*ultimum remedium*).

In another part of its Decision, the Constitutional Court addressed the issue of the Petitioners whose reports were rejected by the police. The Constitutional Court Judges stated that they had no authority to assess this matter. However, they affirmed in the Decision that law enforcement officers, especially police investigators, should have no hesitation in accepting any report concerning the application of Article 330(1) of the Criminal Code, even if it involves the child's biological parents. This is because the term "anyone" includes every individual without exception, including, in this case, the child's biological father and mother.

The Constitutional Court concluded that Article 330(1) of the Criminal Code provides legal protection for children and ensures fair legal certainty as outlined in the 1945 Constitution of the Republic of Indonesia. Therefore, the Court states that the Petitioners' request is rejected in its entirety.

Dissenting Opinion

The nine Constitutional Judges did not reach a unanimous decision. Judge Guntur Hamzah expressed his dissenting opinion, arguing that the Constitutional Court should have partially granted the Petitioners' request.

Judge Hamzah views the Petitioners' case as also involving the enforcement of a norm that breaches the principles of justice, the constitution, and human rights. Due to numerous cases of parental child abduction, often committed by biological

fathers, Judge Hamzah believes it is appropriate for the Constitutional Court to act as the defender of citizens' constitutional rights in this matter. This aims to safeguard the constitutional rights of biological mothers who hold custody, whether naturally or legally granted by the court, from acts of child abduction or forced removal by biological fathers. It not only ensures legal certainty but also offers reassurance to both the child and the parent who holds the legal custody rights.

Judge Hamzah is of the opinion that the Constitutional Court should have partially granted the Petitioners' request by inserting the phrase "including the biological father/mother" into Article 330(1) of the Criminal Code. This would have made Article 330(1) of the Criminal Code to read, "*Anyone who, with deliberate intent, removes a minor from the authority which in accordance with the laws is assigned to him, **including his biological father/mother**, or from the supervision of a person authorised to do so, shall be punished by a maximum imprisonment of seven years.*"

REMARKS

It is worth noting that Law Number 1 of 2023 on the Criminal Code (New Criminal Code) was approved by the Indonesian House of Representatives on 2 January 2023. The New Criminal Code will come into effect on 2 January 2026. There are no significant changes regarding the concept of child abduction in the New Criminal Code. Article 452(1) of the New Criminal Code is equivalent to Article 330(1) of the current Criminal Code. Article 452(1) of the New Criminal Code states: "*Every person who removes a Child from the authority which in accordance with the statutory regulations is assigned to him or from the supervision of a person authorised to do so, shall be punished by a maximum imprisonment of 6 (six) years or a maximum fine of category IV.*"

It is quite unfortunate that there has been no shift in the perspective towards parental child abduction cases in Indonesia. In early 2023, Indonesian lawmakers, as indicated in Article 452(1) of the New Criminal Code, still regard parental child abduction cases primarily from a criminal perspective. This stance is later reaffirmed in 2024 by the Court, as stated in the Constitutional Court Decision Number 140/PUU-XXI/2023.

Although the Constitutional Court Judges, in their Decision, recognise the

psychological bond between parents and the child as part of the child's best interests and acknowledge that criminalising a parent over child abduction is a last resort, parental child abduction is still viewed from a criminal perspective. Consequently, this Constitutional Court Decision does not provide an effective solution. The five petitioners remain unable to access their abducted children because they do not know their children's whereabouts or how to contact them.

The Constitutional Court Judges also hold conflicting views in their deliberations. On one hand, they acknowledge that the psychological bond between parents and a child must be prioritised as part of the child's best interests. On the other hand, they affirm the provision of Article 330(1) of the Criminal Code, which permits the criminalisation and imprisonment of the parent who commits child abduction, albeit as a last resort. It seems that the judges overlooked the possibility that criminalising and imprisoning the parent involved in child abduction could also harm the child's best interests, as it would deprive the child of access to that parent.

It is also regrettable that none of the Judges or the expert witnesses involved in the proceedings mentioned the HCCH 1980 Convention on the Civil Aspects of International Child Abduction (HCCH 1980 Child Abduction Convention), which provides a perspective on parental child abduction from its civil aspects. Consequently, the procedures for returning the wrongfully removed child to their habitual residence—while safeguarding access rights and prioritising the child's best interests as stipulated by the Convention—remain unfamiliar and unexplored in Indonesia.

The Constitutional Court Decision Number 140/PUU-XXI/2023, which considers parental child abduction from its criminal aspect, reveals a legal gap in Indonesian law that can only be filled in by the HCCH 1980 Child Abduction Convention. The Convention could serve as an instrument providing civil measures in cases of parental child abduction in Indonesia and promote a more effective resolution by ensuring the child's prompt return without depriving access to either parent. In other words, Indonesia's accession to the Convention has become more urgent to ensure that the child's best interests, as recognised by Indonesian Law on Child Protection, are adequately protected.

Recognising that many adjustments within Indonesian laws and regulations will still be necessary, the Author of this article has long hoped that Indonesia will

eventually accede to the HCCH 1980 Child Abduction Convention, hopefully sooner rather than later.

[1] Assistant professor in private international law at the Faculty of Law, Universitas Indonesia.

The 2025 International Arbitration Survey: The Path Forward

“The 2025 International Arbitration Survey: The Path Forward”

Luke Nottage (University of Sydney)

The 14th Queen Mary University of London Survey, again in collaboration with international law firm White & Case, was dissected at an Australian launch seminar (expertly moderated by partner Lee Carroll) at their Melbourne office on 22 July 2025. Some “early insights” had been provided during Paris Arbitration Weeks, when the Survey report was not yet public. This analysis delves deeper into the report and key findings, drawing also on the discussion with our co-panellists, including some suggestions for future research.

Survey Methodology

This latest Survey shows how the responses have become more expansive and therefore reliable over time. Although not a random survey, 2402 responses were received for the written questionnaire (the response rate is unspecified). This is significantly greater than “more than 900” respondents for the 2022 Survey focused on energy disputes, 1218 for the general 2021 Survey, and just 103 for the inaugural Survey in 2006. This study was again mixed-method, adding qualitative research through 117 follow-up interviews.

This increase in Survey participation arguably indicates the growing awareness of the research and interest in its results, as well as the proliferation and diversification of international arbitration (IA) over the last two decades. Overall respondents in 2025 (Chart 26) primarily practiced or operated in the Asia-Pacific (47%), illustrating arbitration's shift (along with economic activity) into Asia; separately in North America (a further 10% of respondents), Central and Latin America (7%); plus Europe (10%) and Africa (6%).

Respondents' primary roles (Chart 23) were counsel (35%), arbitrators (17%), both (14%), arbitral institution staff (9%), academics (8%) and tribunal secretaries (2%). Surprisingly, there were few in-house counsel (3%), who historically and anecdotally tend to be more concerned eg about costs and delays. Few respondents were primarily experts (1%), which may reflect the declining professional diversity within IA.

Arbitration with or without ADR

The 2025 Survey asked again about respondents' preferred method of resolving cross-border disputes (Chart 1). IA together with ADR was most popular (48%), compared to standalone IA (39%). The Survey contrasts this with 59% versus 31% in 2021 (p5). That shift could indicate that IA has been working effectively to address eg persistent complaints about its costs and delays.

However, more work needs to be done by IA stakeholders, as in the 2015 Survey only 34% of respondents had preferred IA with ADR, versus 56% preferring just IA. This indicates that the trend over the last decade remains towards combining IA with ADR. Additionally, future research could usefully ask what is meant by IA "together with ADR". As co-panellist Leah Ratcliff remarked from her experience (now as in-house counsel in Australia), parties are more comfortable with clauses providing for (structured) negotiations rather than (potentially still quite expensive) mediation before IA. It would also be interesting to check respondents' preferences regarding Arb-Med (arbitrators actively promoting settlement, or engaging an Arb-Med-Arb process as in Singapore - arguably showing up in the 2022 SIDRA Survey, Exhibit 8.1).

The 2025 Survey commentary also suggests that ADR preference may be partly "influenced by cultural factors" (p6), noting European respondents favoured more standalone IA (51%) compared Asia-Pacific respondents (37%). However, recall

that overall 39% favoured IA anyway.

There also remains great diversity within Asia regarding legal culture - let alone general culture. For example, first there are common law jurisdictions (eg Singapore, Hong Kong, Australia) with strong traditions now of domestic mediation for commercial disputes, due to high costs and delays in litigation initially (and sometimes still). This carries over into more willingness to agree to multi-tiered clauses mandating even mediation before arbitration. Secondly, however, there are some common law jurisdictions in Asia (notably India, despite extensive court delays) with no such tradition of privately-supplied mediation services. Relatedly, their legal advisors and parties are more reluctant to propose Med-Arb clauses in international contracts (although they may agree to them if proposed, if obtaining other benefits through negotiations). Thirdly, civil law jurisdictions (like Japan, with more efficient courts plus some Court-annexed mediation, but also mainland China) also seem less amenable to Med-Arb clauses, although long comfortable with clauses providing for good faith negotiations prior to IA. In addition, there is even greater diversity across Asia regarding Arb-Med (basically only practiced intensively in China, partly in Japan).

Preferred Seats and Rules

Earlier surveys had started to identify Singapore, Hong Kong and mainland Chinese cities within top preferred seats, along with traditional venues like London and Paris. Yet it was unclear whether this reflected the growing proportion of Asia-Pacific (essentially Asian) respondents. The 2025 Survey helpfully helps to address this question. Globally, ie among all respondents (Chart 3), the most preferred seat is London (chosen, among up to five seats, by 34%), then Singapore and Hong Kong (31% each), then Beijing and Paris (19% each). However, London and Singapore were ranked in the top four for all regional respondents, and Paris too except for Asia-Pacific respondents (Chart 2). Otherwise, the European and Asia-Pacific respondents “show strong preferences for seats in their respective regions” (2025 Survey, p7).

Quite similarly, LCIA Rules (nominated globally by 25% of all respondents, again with up to five preferences) were preferred in all regions except the Asia-Pacific, while SIAC Rules (chosen by 25%) and UNCITRAL Rules (15%) were preferred for all regions except Central and Latin America (Charts 4 and 5). By contrast, HKIAC Rules (25%) were most preferred by Asia-Pacific respondents (36%), but not

selected among top 5 preferences from respondents from other regions. As co-panelist (and experienced arbitrator) Michael Pryles noted at the launch seminar, Hong Kong and HKIAC Rules still benefit as a compromise for transactions and disputes involving mainland China. He also rightly suggested, as did an audience member, that asking about “preferences” may not give the full picture. This could be usefully compared with evolving actual practice, including arbitration case filings. Over 2024, for example, HKIAC handled 352 new arbitration cases (77% international) whereas SIAC handled 625 (91% international).

Co-panellist Diana Bowman, new Secretary-General of the ACICA, remarked that the ACICA Rules did not quite make Chart 5, despite the Australian Centre’s increased case filings in recent years. As a former Rules committee member (2004-2024), I added that arbitral institutions should not just be judged by case filing statistics. Those depend for example on geography, although there may be scope for Australia to focus on niches, such as the South America – Southeast Asia or South Asia trades, or (as Pryles also observed) specialist fields such as disputes over resources. In addition, improving Rules (and seats more generally) can allow local parties more credibly to propose them but then compromise in negotiations to obtain other contractual benefits.

Pryles also shared experiences and views about the growing impact on IA from sanctions on parties or participants. Notably, 30% of respondents noted that sanctions led to a different seat being chosen (Chart 6).

The 2025 Survey also found that 39% thought awards set aside at the seat should be enforceable in other jurisdictions (Chart 8), whereas 61% thought not. The 39% proportion is surprisingly high, as only French courts uniformly adopt this approach. Courts elsewhere will usually not enforce, unless there is some particularly egregious flaw regarding the seat court (such as proven corruption) or seat jurisdiction (such as legislation retrospectively impacting arbitration agreements or awards). Perhaps the 39% of respondents agreed with enforcement but only in such exceptional circumstances, which might then be separated out as a third possibility in future research. Meanwhile, this trend (and growing deference towards decision of seat courts instead upholding challenged awards) should reinforce the importance of carefully choosing the seat.

IA Enforcement and Efficiency

Past Surveys (and other research) typically identified enforceability of IA awards (and agreements), neutrality and expertise of arbitrators, flexibility in procedures, then privacy and confidentiality, as major advantages over cross-border litigation. The 2025 Survey innovated by focusing on the growing awareness and engagement in various public interest elements (eg environmental) even in commercial IA, including its perceived advantages instead of litigation. Arbitrator expertise (47%), avoiding local courts and laws (42%) and (broader?) neutrality (28%) were often chosen from among three options (Chart 15). Confidentiality was selected by 34% of respondents, which seems understandable given these are still commercial disputes (not ISDS arbitrations involving greater public interests and so already associated with more transparency). Enforceability of awards was only chosen by 32%, but this may reflect greater actual or anticipated problems with public policy or arbitrability exceptions to enforcement.

Then 2025 Survey also usefully drilled down into another commonly posed question: voluntary compliance with IA awards (Chart 7). Interestingly respondents said this happened similarly, almost always or often, for non-ICSID awards against states (33%) as for ICSID awards (34%), despite most of the latter involving the more delocalised ICSID Convention enforcement regime. Also surprisingly, good compliance for non-ICSID private awards was only reported by 40% of respondents. This may also indicate persistent question around “formalisation” and over-lawyering in IA, discussed more broadly under “efficiency and effectiveness” in the 2025 Survey (pp15-19).

Notably, respondents were asked to choose up to three options for processes that would most improve efficiency in IA (Chart 10). The most popular were expedited arbitration (50%, generating further questions) and early determination of unmeritorious claims or defences (49%). But there was also interest in non-binding pre-arbitral assessments by an expert (13%), mandatory settlement discussions (12%) or mediation (11%) in procedural timetables, and even “baseball arbitration” (11%). Interestingly, as this remains a hot topic for multi-tiered clauses, 7% chose “limiting grounds to challenge pre-arbitration ADR outcomes in arbitration proceedings” (rather than in court). Less surprisingly, as these impact on fees earned by counsel (the largest respondent group) and are rarely mentioned in arbitral Rules, only 1% picked “sealed offers” as a mechanism to improve efficiency.

The survey found “perhaps most surprisingly, given the respondents’ generally

favourable view of combining arbitration with ADR, the option of multi-tiered dispute resolution clauses with mandatory ADR processes was included by fewer than 1% of respondents as one of their three picks. To some interviewees, ADR adds an unnecessary procedural layer. Others question the utility ...” (p16). However, this low response rate arguably is due to the question’s phrasing, which asked about measures to improve efficiency *in arbitration* (not the overall dispute resolution process).

A final hot topic canvassed in the 2025 Survey concerns AI in IA (pp27-33). Pryles was skeptical about arbitrators delegating too much to Artificial Intelligence for their reasoning. Surprisingly, however, although 71% of respondents had never used AI for “evaluating legal arguments” in the past 5 years, for the next 5 years this was expected to drop to 31% (Chart 18). Admittedly, some of this may be done by lawyers and so less problematic than for arbitrators.

Less controversial is the existing use of AI for “document review” (never used so far by only 41%, expected to drop to 10%). However, that raises the question of whether an even more efficient approach would be for arbitrators to more proactively help identify the issues to be determined, and hence relevant evidence. The 2012 Survey (Chart 9) had found that to be the best means experienced to expedite arbitral proceedings, even when phrased as arbitrators doing this “as soon as possible after constitution” of the tribunal (which is more controversial than as the arbitration progresses, eg under the JCAA Interactive Arbitration Rules).

Conclusion

The 2025 Survey, especially combined with the earlier ones, provides a rich resource to understand current practices and concerns in IA. It also helps identify future opportunities and challenges, as well as promising ongoing research into this always-evolving field.

Foreign illegality and English courts: Do the Ralli brothers now have a sister?



by Patrick Ostendorf (HTW Berlin)

In the recent and interesting case of *LLC Eurochem v Société Generale S.A. et al* [2025] EWHC 1938 (Comm), the English High Court (Commercial Court) considered the extent to which economic sanctions enacted by a foreign jurisdiction (EU law in this instance) can impact the enforcement of contractual payment claims (governed by English law) in English courts. More broadly, the decision also highlights the somewhat diminishing role of the Rome I Regulation (and its interpretation by the European Court of Justice) in the English legal system, and probably that of conflict of laws rules in general.

The underlying facts

A Russian company, respectively its Swiss parent (the assignee of the claimed proceeds of the drawdown), both of which are ultimately controlled by a Russian oligarch, claimed €212 million from two banks (one French and one Dutch, the latter operating through its Italian branch) out of six on-demand bonds governed by English law, based on corresponding exclusive jurisdiction agreements in favour of English courts. The performance bonds had been issued by the defendant banks to secure the proper performance of a contract for the construction of a fertiliser plant in Russia, which was terminated as a consequence of Russia's illegal invasion of Ukraine. When the Russian company called on the bonds to recover advance payments made under the construction contract, the banks refused to pay, arguing that doing so would violate applicable

EU sanctions.

The Commercial Court agreed with the banks that payment under the bonds would indeed breach both Art. 2 of Council Regulation (EU) No 269/2014 and Art. 11 of Regulation (EU) No 833/2014. However, even though the ultimate owner of the claimant was also subject to UK sanctions, UK sanctions did not apply in this case, as payment under the bonds would not have involved any acts in the UK or by UK companies or persons.

The key question

The key question was therefore this: Could the banks rely on the EU sanctions as a defence against the payment claim in an English court, given that their contractual performance would be illegal under foreign law? According to the *Ralli Brothers* principle (as established by the English Court of Appeal in *Ralli Brothers v Companie Naviera Sota y Aznar* [1920] 2 KB 287 and also serving as a blueprint for Art. 9(3) of the Rome I Regulation), the answer would be yes if the contractual performance required an act to be carried out in a place where it would be unlawful to do so. However, was the place of performance in the EU in this case, despite the fact that, under English common law, the place of payment is generally where the creditor (here, the claimant, as the beneficiary) is located, unless otherwise agreed by the parties?

The court's resolution

The resolution was straightforward in relation to the defendant Italian branch, as the corresponding bond incorporated the ICC Uniform Rules for Demand Guarantees (URDG) and Art. 20(c) of the URDG explicitly states that payment is to be made at the branch or office of the guarantor (para. 447). However, the Commercial Court also answered this question in the affirmative with regard to the payment claims against the French bank (the relevant five bonds had not incorporated the URDG). This was based on the general proposition that, in relation to on-demand instruments, the place of performance should generally be where the demand must be made — hence in this case in France rather than Russia or Switzerland (paras 449 ff.).

Public policy was the alternative reasoning offered by the Commercial Court

More interesting still is the alternative argument offered by the Commercial Court. The court explicitly agreed with the defendants that the bonds should not have been enforced, even if the place of performance were in Russia (in which case the Ralli Bros. principle could accordingly not apply). The court postulated that, even outside the Ralli Bros. rule, *'a sufficiently serious breach of foreign law reflecting important policies of foreign states may be such that it would be contrary to public policy to enforce a contract'* (paras 466 et seq). According to the defendants (and as confirmed by the court), the principle of comity was engaged particularly strongly here, given that the defendants would have faced prosecution, significant fines and the risk of imprisonment for individuals acting on behalf of the banks in France and Italy if they had paid.

Comments

The alternative reasoning given by the Commercial Court for the unenforceability of the bonds based on public policy seems to have two flaws.

Firstly, the view that enforcing a contract may be contrary to public policy due to a sufficiently serious breach of foreign law even outside the Ralli Bros. rule cannot be based on a clear line of precedent. The Commercial Court only refers to two High Court decisions, the more recent of which is *Haddad v Rostamani* (2021) EWHC 1892, para. 88. These decisions are difficult to reconcile with the Court of Appeal's finding in *Celestial Aviation Services Limited v Unicredit Bank GmbH* [2024] EWCA Civ 628, paras. 105 et seq and prior High Court precedents relied on in this judgment, in particular *Banco San Juan Internacional Inc v Petróleos De Venezuela S.A.* [2020] EWHC 2937 (Comm), para. 79, which states that, *'the doctrine therefore offers a narrow gateway: the performance of the contract must necessarily involve the performance of an act illegal at the place of performance. Subject to the Foster v. Driscoll principle, [...] it is no use if the illegal act has to be performed elsewhere'*. In *Banco San Juan*, the High Court referred to the *Foster v Driscoll* principle as the only legitimate expansion of the Ralli Bros. rule. But this principle is not applicable in the present case: It is limited to contracts entered into by the parties with the intention of committing a criminal offence in a foreign state (*Foster v Driscoll* [1929] 1 KB 470, 519).

Secondly, it is somewhat ironic that, in order to give effect to EU sanctions law, the Commercial Court relies on English common law precedents that hardly align with Art. 9(3) of the Rome I Regulation. This is because the ECJ has expressly

taken the view that Art. 9 contains an exhaustive list of situations in which a court may apply foreign overriding mandatory provisions not merely as a matter of fact (see ECJ, 18 Oct 2016, Case C-135/15, *Nikiforidis*: ‘Article 9 of the Rome I Regulation must therefore be interpreted as precluding the court of the forum from applying, **as legal rules**, overriding mandatory provisions other than those of the State of the forum or of the State where the obligations arising out of the contract have to be or have been performed’).

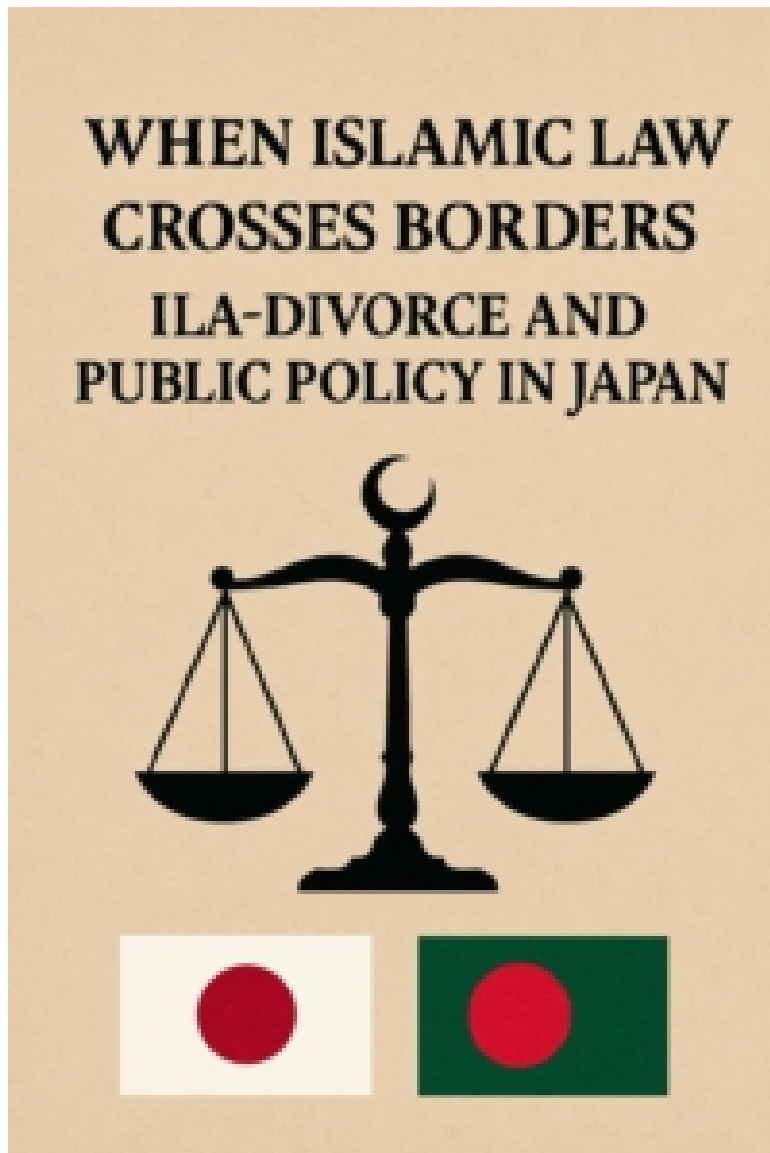
Although the Commercial Court does not mention the Rome I Regulation in this regard, it still forms part of English statutory law as ‘assimilated law’ (formerly ‘retained EU law’). The justification for ignoring the Regulation is probably the prevailing, though (against the background of the general function of private international law and the fact that Art. 9 of the Rome I Regulation explicitly and exhaustively deals with this very problem) unconvincing, view in England that the Ralli Bros principle, and consequently its potential expansion in the present case, is not a conflict of laws rule in the first place: Instead, it is considered a principle of domestic English contract law, therefore unaffected by the exhaustive nature of Art. 9(3) of the Rome I Regulation (in favour of this view, for example, *Chitty on Contracts*, Vol. I General Principles, 35th edition (2023), para. 34-290, *Dicey, Morris & Collins*, *The Conflict of Laws*, Vol. 2, 16th edition (2022), para. 32-257 with further references. Contrary, *A. Briggs*, *Private International Law in English Courts* (2014) para. 7.251, who rightly notes that such a characterisation ‘was only possible by being deaf to the language and tone in which the judgments were expressed, and it is a happy thing that the Rome I Regulation puts this seemingly principle on a statutory footing’ and characterises the Ralli Bros principle accordingly as a ‘rule of common law conflict of laws’ (*A. Briggs*, *The Conflict of Laws*, 4th edition, 2019, p. 239). For a full discussion of the history and characterisation of the Ralli Bros rule, see *W. Day* (2020) 79 CLJ 64 ff.)

The need to rely both on a questionable characterisation and expansion of the Ralli Bros principle in this case may be due to English contract law (at least in its substantive core) being ill-equipped to address factual impediments caused by foreign illegality for the parties. Unlike civil law jurisdictions, which can rely on the doctrine of (temporary) impossibility to address such cases — the recent decision of the Court of Arbitration in CAS 2023/A/9669, *West Ham United Football Club v PFC CSKA & FIFA* (applying Swiss law), is a case in point — the doctrine of frustration is apparently too limited in scope to recognise factual

impediments triggered by foreign illegality. Furthermore, the doctrine of frustration does not offer the necessary flexibility as it results in the termination of the contract rather than merely suspending it temporarily.

When Islamic Law Crosses Borders: Ila-Divorce and Public Policy in Japan

I. Introduction



The question of the application of Islamic law in non-Muslim countries has triggered extensive discussions and debates regarding the consistency of Islamic law rules - whether codified in modern legislation or not - with the forum's public policy. This issue has attracted particular attention in the field of family law, where various legal Islamic institutions (such as dower, polygamy, and early marriage) have sparked considerable controversy and posed significant challenges in both court practice and academic debate. This is particularly salient in the field of dissolution of marriage, as Islamic practices such as *talaq* and *khul* have often been the subject of intense discussions concerning their recognition and validity in non-Muslim jurisdictions.

The case presented here is another example of the complexity inherent in the reception of peculiar Islamic law institutions in private international law. Recently decided by the **Nagoya High Court (second-instance court) in its ruling of 12 June 2025**, it concerns a type of marital dissolution based on *ila* (an oath of sexual abstention). To the best of my knowledge, no comparable case involving *ila* has been decided before in any jurisdiction, which makes this ruling particularly important both in theory and in practice. This is especially so given that resorting to *ila* in this case appears to have been part of a litigation strategy, anticipating an unfavourable outcome if the case had been brought before the court as a *talaq* case (see *infra* V). As such, the case provides an opportunity to consider the nature of this unusual Islamic legal institution, its specific features, and the challenges it may raise when examined by foreign courts.

II. The Case:

The parties in this case are a Bangladeshi Muslim couple who married in accordance with Islamic law in Bangladesh and subsequently moved to Japan, where they had their children. All parties, including the children, are permanent residents of Japan.

The case concerns a divorce action filed by the husband (X) against his wife (Y), seeking dissolution of marriage primarily under Bangladeshi law, and alternatively under Japanese law. X argued that, in his complaint, he declared his intention "in the name of Allah" to abstain from sexual relations with his wife; and since four months had passed without any sexual relations with Y, a "*talaq*-

divorce” had been effected and thereby completed in accordance with Bangladeshi law. The divorce action was filed as a result of continuous disagreement and disputes between the parties on various issues including property rights, management of the household finance, and alleged misbehaviour and even violence on the wife’s side. At the time the action was filed, X and Y had already been living separately for some time.

One of the main issues revolved around whether the application of Bangladeshi law, which provides for this form of marital dissolution (referred to in the judgment as “*talaq*-divorce”), should be excluded due to inconsistency with Japanese public policy under Article 42 of the Act on the General Rules of Application of Laws (AGRAL).

The court of first instance (Nagoya Family Court, judgment of 26 November 2024) held that the “*talaq*-divorce” (as referred to in the judgment) was valid under Bangladeshi law and that its recognition did not contravene Japanese public policy. Notably, the court emphasized that “any assessment of whether the legal rules applicable between spouses who share the same religious and cultural background violate Japanese public policy should be approached with a certain degree of restraint”, given the strong cultural and religious elements involved in the personal status of the parties, who are both originally Bangladeshi nationals and Muslims who were married in accordance with Islamic law, even if they had been living and residing in Japan for some time.

Dissatisfied with the judgment, Y appealed before the High Court.

Y challenged the first instance judgment on various grounds. She basically argued – *inter alia* – that, given the strong ties the parties and their children have with Japan and their established life there, the mere fact that the parties are Bangladeshi nationals and Muslims should not justify a restrained implication of public policy, especially considering that the effects and consequences of the divorce would take place in Japan.

III. The Ruling

The Nagoya High Court upheld the judgment of the court of first instance, stating as follows (only a summary is provided here, with modifications and adjustments):

Under Bangladeshi law, which governs the present divorce, a husband may dissolve the marriage either through talaq (a unilateral declaration of divorce by the husband) or through other modes. There are several forms of talaq-divorce available to the husband, including ila. The latter entails the husband taking an oath in the name of Allah to abstain from sexual relations with his wife. If no intercourse occurs within four months following the oath, the divorce is considered to have taken effect.

In the present case, considering that Bangladeshi law is the applicable law, the talaq-divorce would be deemed valid, and would be recognized, since a period of four months had passed without any sexual contact between the parties after X made his declaration in the complaint.

Generally, when determining the applicability of Article 42 of the AGRAL, it is not the foreign law's provisions themselves that should be assessed in abstracto. Rather, the application of the foreign law as the governing law may be excluded [only] where (1) its concrete application would result in a consequence that is contrary to public policy, and (2) the case has a close connection with Japan.

Regarding (1), the marital relationship between the parties had deteriorated over time, and various elements, when taken together, indicate that the parties had already reached a serious state of discord that could reasonably be seen as leading to separation or divorce. Consequently, considering all these circumstances, and taking into account the background of the case, the nature of the parties' interactions, and the duration of their separation, it cannot be said that applying Bangladeshi law and recognizing the talaq-divorce in this case would be contrary to public policy.

With respect to (2), Y argued that, due to the strong connection between the case and Japan, the exclusion of the application of Bangladeshi in application of article 42 of the AGRAL should be admitted. However, as previously noted, the application of Bangladeshi law in this case does not result in a violation of public policy. Therefore, even considering the strong connection of the case to Japan, the application of Article 42 of the AGRAL cannot be justified.

IV. Comments

(*) Unless otherwise indicated, all references to Islamic law here are about classical Islamic law as developed by the orthodox Sunni schools, and not Islamic law as codified and/or practiced in modern Muslim countries.

1. Islamic law before Japanese Court

There are several cases in which Japanese courts have addressed the application of foreign laws influenced by or based on Islamic law. These cases have involved matters such as the establishment of filiation, annulment of marriage, parental authority, adoption, and divorce (whether based on the unilateral will of the husband or not). While in few instances the courts have applied the relevant foreign law without particular difficulties (for example, allowing a Japanese woman married to a Pakistani Muslim man to seek and obtain a divorce under Pakistani law), in most cases, the courts have refused to apply such laws on the grounds that they were contrary to Japanese public policy. The rules found incompatible with public policy include, among others, the non-recognition of out-of-wedlock filiation, the prohibition of interfaith marriage, the prohibition of adoption, the automatic attribution of parental authority to the father, and *talaq*-based divorce (triple *talaq*). The foreign laws at issue in these cases originate either from Muslim-majority countries such as Iran, Pakistan, Indonesia, and Egypt, or from non-Muslim countries with Muslim minorities who are governed by their own personal status laws, such as Myanmar and the Philippines.

The case commented on here provides a new example of a Japanese court grappling with the application of foreign law grounded in Islamic legal principles.

2. *Ila* and dissolution of marriage

Like many other traditional - and in some views, "exotic" - Islamic legal institutions (such as *zihar*, *li'an*, *khul*, *tamluk*, *tafwidh*, *mubara'a* definitions are intentionally omitted), *ila* is often difficult to apprehend correctly, both in substance and in function.

a) What is *ila*?

Generally speaking, *ila* can be defined as “the swearing of an oath by a man that he will not have intercourse with his wife” for a period fixed in the Quran (chapter 2, verse 226) at four months (See Ibn Rushd (I. A. Khan Nyazee, trans.), *The Distinguished Jurist’s Primer - Vol. II: Bidayat Al-Mujtahid wa Nihayat Al-Muqtasid* (Garnet Publishing, 2000) 121).

It worth mentioning first that *ila* is not an Islamic invention but was practiced in pre-Islamic society. In that context, *ila* allowed the husband to place considerable pressure on his wife by placing her in a state of marital limbo, which can be for an indefinite period. This left the woman in a vulnerable and uncertain position, as she was neither fully married in practice, nor legally divorced.

Islamic Sharia addressed this practice and, while it did not abolish it – unlike some other pre-Islamic institutions and practices –, it attempted to alleviate its harmful effects, by introducing a period of four months, during which the husband is invited to reconsider his decision and either resume marital life (Quran chapter 2, verse 226) or dissolve the marriage (Quran chapter 2, verse 227).

b) *Ila* - Different Practices

However, regarding the actual operation of *ila*, the schools of Islamic religio-legal jurisprudence (*fiqh*) diverge significantly on several points (Ibn Rushd, *op. cit.*). Two issues are particularly relevant here:

i. The first concerns whether :

(i-a) the four-month period stated in the Quran represents a maximum period, at the end of which the marriage is dissolved; or

(i-b) the four-month period merely marks the threshold between an oath of abstention that does *not* lead to marital dissolution and one that *does*. According to this latter view, only an oath exceeding four months, or one made for an indefinite duration, qualifies as *ila* that may result in the dissolution of marriage.

ii. The second issue concerns whether

(ii-a) the marriage is *automatically* dissolved once the four-month period has elapsed, if the husband does take the necessary actions to resume the marital life, that is after performing an act of expiation (*kaffara*) in accordance with the Quranic prescriptions (notably Chapter 5, verse 89); or

(ii-b), upon expiry of the term, the wife may petition a *qadhi* (Muslim judge), requesting that her husband either end the marriage by pronouncing *talaq*, or resume marital relations after performing an act of expiation (Chapter 5, verse 89). In such a case, the *qadhi* would then grant the husband a specified period to decide. If the husband fails to take either course of action, the *qadhi* may pronounce the dissolution of the marriage on account of his inaction. Depending on the legal opinion, this dissolution may be categorized either as a *talaq* issued on behalf of the husband, or as a judicial annulment (*faskh*).

Traditionally, the Hanafi school, prevalent in Bangladesh, follows positions (1-a) and (2-a), while the other major schools adopt views (1-b) and (2-b).

3. *Ila* and *talaq* - what's the difference?

It is not uncommon for *ila* to be described as “a form of *talaq*.” This appears to be the position of the High Court, seemingly based on the arguments presented by X’s representative during the trial. It is true that both *ila* and *talaq* are prerogatives reserved exclusively for men; women do not have equivalent right (except, in the case of *talaq*, where the husband may contractually delegate this right to his wife at the time of the marriage). It is also true that both *ila* and *talaq* may lead to the dissolution of marriage based on the unilateral intention of the husband. However, describing *ila* as a “form of *talaq*” is not – technically speaking – entirely accurate.

i. Under the majority of schools of *fiqh* – except for the Hanafi –, the distinction is quite clear. This is because unlike *talaq*, *ila*, by itself, does not lead to dissolution of marriage. A judicial intervention is required upon the wife’s request for the marriage to be dissolved (which is not required for *talaq*).

ii. Under the Hanafi school, however, the distinction between *ila* and *talaq* may be blurred due to their substantial and functional similarities. In both cases, a qualified verbal formula places the marriage in a suspended state^(*) for a specified period (the waiting period (*iddah*) in the case of *talaq*, and the four-month period in the case of *ila*). If the husband fails to retract his declaration within this period, the marriage is dissolved.

^(*) However, this does not apply in the case of a *talaq* that immediately dissolves the marriage: that is, a *talaq* occurring for the third time after two previous ones (whether or not those resulted in the dissolution of the marriage), or in the case of the so-called triple *talaq*, where the husband pronounces three *talaqs* in a single formula with the intention of producing the effect of three successive *talaqs*.

Nevertheless, a number of important distinctions remain between the two, even within the Hanafi doctrine.

a. The first concerns the frequency with which *talaq* and *ila* may be resorted to. Similar to *ila*, *talaq* does not necessarily lead to the dissolution of the marriage if the husband retracts during the wife's waiting period (*iddah*). However, its use – even if followed by retraction – is limited to two occurrences (Chapter 2, verse 229). A third pronouncement of *talaq* results in immediate and irrevocable dissolution of the marriage, and creates a temporary impediment to remarriage. This impediment can only be lifted if the woman marries another man and that subsequent marriage is irrevocably dissolved (Quran, Chapter 2, verse 230). By contrast, *ila*, does not have such limitation and can be repeated without restriction (in terms of frequency), provided that the husband retracts by performing the act of expiation each time.

b. The second concerns the form of retraction. In the case of *talaq*, the husband can resume conjugal life at will. No particular formality is required; and retraction can be explicit or implied. In the case of *ila*, however, retraction must take the form of an act of expiation (*kaffara*) in accordance with the Quranic prescriptions (Chapter 5, verse 89) before marital relations may resume.

4. *Ila* and public policy

a) *Ila* - some inherent aspects

As previously noted, *ila* has traditionally been used as a means for a husband to exert pressure or express discontent within the marriage by vowing abstinence from sexual relations. Under Islamic Sharia, this practice is preserved: husbands – even without making any formal oath of abstinence (*ila*) – are allowed to “discipline their wives” in cases of marital discord by abstaining from sharing the marital bed (*hajr*) as a corrective measure (Quran, Chapter 4, verse 34). Indeed, it is not uncommon that Muslim scholars justify the “rationale” behind this practice by stating that “a man may resort to *ila*...when he sees no other option but to abstain from sharing the marital bed *as a means of disciplining and correcting his wife* (*italic added*).... In this case, his abstention during this period serves as a warning to deter her from repeating such behavior” (O. A. Abd Al-Hamid Lillu, ‘Mirath al-mutallaqa bi-al-‘ila - Dirasa fiqhiyya muqarana ma’a ba’dh al-tashri’at al-‘arabiyya [The Inheritance Rights of a Woman Divorced by *Ila*: A Comparative Jurisprudential Study with Selected Arab Legislations]’ (2020) 4(3) *Journal of the Faculty of Islamic and Arabic Studies for Women* 630). It is therefore not surprising that some would view *ila* as “troubling” due to its perceived “sexism” and the fact that wives may find themselves at their husbands’ “mercy” with little thing to do (Raj Bhala, *Understanding Islamic Law (Shar’ia)* (Carolina Academic Press, 2023) 803).

These aspects, in addition with inherent gender asymmetry in the rights involved, calls into question the compatibility of *ila* with the public policy of the forum.

b) The position of the Nagoya High Court

As the Nagoya High Court rightly indicated, the exclusion of foreign law under the public policy exception does not depend on the content of the foreign law itself, assessed *in abstracto*. On the contrary, as it is generally accepted in Japanese private international law, public policy may be invoked based on two elements: (1) the result of applying the foreign law in a concrete case is found unacceptable in the eyes of Japanese law, and (2) there is a strong connection

between the case and the forum (see K. Nishioka & Y. Nishitani, *Japanese Private International Law* (Hart, 2019) 22).

The Nagoya High Court's explicit adherence to this framework, notably by engaging in an *in concreto* examination of the foreign law and avoiding invoking public policy solely on the ground of its content as some earlier court decisions suggest (see e.g. Tokyo Family Court judgment of 17 January 2019; see my English translation in 63 (2020) *Japanese Yearbook of International Law* 373), is noteworthy and should be welcomed.

That said, the Court's overall approach raises some questions. The impression conveyed by the Court's reasoning is that it focused primarily on the irretrievable breakdown of the marital relationship and the period of separation to conclude that there was no violation of public policy. In other words, since the marital relationship had reached a dead end, dissolving the marriage on the basis of objective grounds or on the basis of *ila* does not alter the outcome.

Although this approach is understandable, it would have been more convincing if the Court had carefully considered the nature of *ila* and its specific implications in this case, and eventually explicitly state that such elements were not established. These aspects appear to have been largely overlooked by the High Court, seemingly due to its unfamiliarity with Islamic legal institutions. It would have been advisable for the Court to address these aspects, at least to demonstrate its concerns regarding the potential abusive use of *ila*.

V. Concluding Remarks: *Ila* as a litigation strategy?

One may wonder why the husband in this case chose to resort to *ila* to end his marriage. One possible explanation is that Japanese courts have previously ruled that a *talaq* divorce in the form of triple *talaq* is inconsistent with public policy (Tokyo Family Court judgment of 17 January 2019, *op. cit.*). It appears that, anticipating a similar outcome, the husband in this case was advised to take a "safer approach" by relying on *ila* rather than resorting to triple *talaq* (see the comment by the law firm representing the husband in this case, available here – in Japanese only). To be sure, associating *talaq* solely with its most contested form (i.e., triple *talaq*) is not entirely accurate. That said, considering how the case under discussion was decided, it is now open to question whether it would

have been simpler for the husband to perform a single *talaq* and then abstain from retracting during his wife's waiting period (*iddah*). At least in this way, the aspect of "disciplining the wife" inherent in *ila* would not be an issue that the courts would need to address