First Thai Monetary Judgment Enforced in China, Highlighting Presumptive Reciprocity in China-ASEAN Region

This post is kindly provided by Dr. Meng Yu, lecturer at China University of Political Science and Law, and co-founder of China Justice Observer.

Key Takeaways:

- In June 2024, the China-ASEAN Free Trade Area Nanning International Commercial Tribunal under the Nanning Railway Transportation Intermediate Court in Guangxi ruled to recognize and enforce a Thai monetary judgment (*Guangxi Nanning China Travel Service, Ltd. v. Orient Thai Airlines Co., Ltd.* (2023) Gui 71 Xie Wai Ren No. 1).
- Apart from being the first case of enforcing Thai monetary judgments in China, it is also the first publicly reported case confirming a reciprocal relationship based on "presumptive reciprocity".
- The Chinese court's confirmation that "presumptive reciprocity", as outlined in the Nanning Statement, is a form of mutual consensus between China and ASEAN countries helps to promote the circulation of judgments within the China-ASEAN region.

On 18 June 2024, the China-ASEAN Free Trade Area Nanning International Commercial Tribunal under the Nanning Railway Transportation Intermediate Court, Guangxi (hereafter the "Nanning Court"), ruled to recognize and enforce a Thai monetary judgment.

This case marks the first time that a Chinese court has recognized and enforced a Thai monetary judgment. It is also the first publicly reported case to confirm a reciprocal relationship based on "presumptive reciprocity". The "presumptive reciprocity" test, outlined in the Nanning Statement of the 2nd China-ASEAN Justice Forum in 2017, has now been confirmed by the Nanning Court as a form of reciprocal consensus [1] between China and ASEAN countries. This explains

the use of the term “presumptive reciprocity consensus” in the Chinese news report (cf. Guangxi High People’s Court’s news).

Although the full text of the judgment has not yet been made publicly available, the Chinese news report and related court announcements provide valuable details about the case. This case marks the latest application of the new reciprocity requirement by Chinese courts and actively promotes the circulation of judgments within the China-ASEAN region.

I. Case background

In July 2015, Guangxi Nanning China Travel Service Co., Ltd. (“Nanning China Travel”), a Chinese company, and Orient Thai Airlines Co., Ltd. (“Orient Thai Airlines”), a Thai company, entered into an airline ticket sales contract based on their long-term cooperation in charter flights. The contract was signed in Nanning and stipulated that disputes would be settled by the court where the Orient Thai Airlines was located. Subsequently, disputes arose between the parties, and Nanning China Travel filed a lawsuit against Orient Thai Airlines in the Central Intellectual Property and International Trade Court of Thailand (“Thai Court”).

On 16 September 2019, the Thai Court issued a civil judgment No. GorKor 166/2562 (the “Thai Judgment”), ordering Orient Thai Airlines to pay CNY 18,002,676 (approx. USD 2,476,330) plus interest to Nanning China Travel.

In February 2023, in order to enforce the rights confirmed by the Thai Judgment, and considering that Orient Thai Airlines has multiple branches in China that may have executable assets, Nanning China Travel applied to the Nanning Court for recognition and enforcement of the Thai Judgment.

On 18 June 2024, the Nanning Court rendered the civil ruling (2023) Gui 71 Xie Wai Ren No. 1 to recognize and enforce the Thai Judgment.

II. Court’s views

Although China and Thailand have signed the “Treaty on Judicial Assistance in Civil and Commercial Matters and on Cooperation in Arbitration”, the treaty does

not contain provisions on judgment recognition and enforcement. In the absence of a treaty, as this is the case with Thailand, recognition and enforcement can be pursued on the basis of the principle of reciprocity (New Art. 299 of the PRC Civil Procedure Law [former article 288 of the 2021 Amendment of the PRC Civil Procedure Law]).[2]

Determining whether reciprocity exists between China and Thailand is, therefore, a crucial first step.

As Judge Huayan Wang of the Nanning Court explained, "We (the court) examined two issues: the time limit of the application for recognition and enforcement, and the existence of reciprocity. The key to this case is the determination of reciprocal consensus, in the absence of *de jure* reciprocity and *de facto* reciprocity".

In doing so, the Nanning Court referred to the presumptive reciprocity test proposed in the Nanning Statement as a form of reciprocal consensus, and ultimately determined that reciprocity existed between China and Thailand.

III. Comments

1. "Presumptive reciprocity" in this case

Interestingly, the Nanning Statement was adopted in Nanning in June 2017, and seven years later, in a striking coincidence, a local intermediate court in the same city confirmed the reciprocity between China and Thailand, relying on presumptive reciprocity proposed the Nanning Statement.

Simply put, the so-called "presumptive reciprocity" means that, unless proven otherwise, reciprocity is presumed to exist between the requested State and the State of origin, to the extent permitted by domestic law of the requested State.[3] Here, "proven otherwise" refers to any existing case where the judgments from the requested State have been refused enforcement in the State of origin on the ground of the lack of reciprocity. Since no such cases were found by the Nanning Court, reciprocity is presumed to exist between Thailand and China.

It is, however, still unclear how Thai courts would react to the "first move" from Chinese courts: will they follow suit or not? Given that it is unlikely, if not

impossible, to have any foreign judgment recognized and enforced in Thailand, as discussed in an post provided by Asian Business Law Institute (ABLI), should a Thai court refuse to recognize and enforce a Chinese judgment on the ground of lack of reciprocity one day, the presumed reciprocity might have to be reviewed, or even revoked. By then, will there be any other way out? More issues need to be clarified and settled in future cases.

2. Wider Implication: reciprocal understanding or consensus in China-ASEAN region

What is more noteworthy is that the reciprocity consensus applied by Nanning court is considered to be a subcategory of "reciprocal understanding or consensus", which is one of the three new reciprocity tests in addition to de jure reciprocity and reciprocal commitment.

Chart – Reciprocity tests in China

Compared to the other two current reciprocity tests—de jure reciprocity and reciprocal commitment—reciprocal understanding or consensus is a more easily overlooked test, because it is neither as well-known as *de jure* reciprocity nor as novel as the reciprocal commitment (cf. other related posts including: (i) De jure reciprocity – The First Time China Recognizes English Judgment, Implementing 2022 Judicial Policy in Full; (ii) Reciprocal commitment – First Case of Reciprocal Commitment: China Requests Azerbaijan to Enforce its Judgment Based on Reciprocity; (iii) How Chinese Courts Determine Reciprocity in Foreign Judgment Enforcement – Breakthrough for Collecting Judgments in China Series (III); (iv)

China’s 2022 Landmark Judicial Policy Clears Final Hurdle for Enforcement of Foreign Judgments.)

Although the presumptive reciprocity proposed in the Nanning Statement is considered the best example of reciprocal consensus, from the time the Nanning Statement was adopted in 2017 until June 2024, the “presumptive reciprocity” remained largely theoretical. Prior to this case, there were no publicly reported cases indicating whether, and if so, how, Chinese courts applied “presumptive reciprocity” when dealing with cases involving the recognition and enforcement of judgments from ASEAN countries.

This case changed this situation.

The “presumptive reciprocity” outlined in the Nanning Statement, as a form of reciprocal consensus between China and ASEAN countries, has been confirmed by the Chinese court in this case. This means that for the ten ASEAN countries, apart from Laos and Vietnam, which already have applicable bilateral treaties with China, the remaining eight countries—Brunei Darussalam, Burma, Cambodia, Indonesia, Malaysia, the Philippines, Singapore, and Thailand—can have their civil and commercial judgments recognized and enforced in China based on the presumptive reciprocity.

In addition, for monetary judgments from Singapore, there is also the China-Singapore Memorandum of Guidance (MOG), which can be considered another example of “reciprocal understanding or consensus”. This MOG serves as a practical guideline for Chinese courts on how to recognize and enforce Singaporean monetary judgments. (Cf. other related posts including: (i) Series – Singapore-China Judgments Recognition and Enforcement; (ii) Chinese Court Recognizes Singaporean Judgment Again: No Bilateral Treaty But Only Memorandum?).

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[1] Since the 2000s, the standards to establish reciprocity have evolved significantly, reflecting China’s efforts to liberalize its rules on the recognition and enforcement of foreign judgments. The 2021 “Conference Summary of the Symposium on Foreign-related Commercial and Maritime Trials of Courts

Nationwide" issued by China's Supreme People's Court introduces new standards for determining reciprocity that replace the previous de facto reciprocity test. The new reciprocity standards include de jure reciprocity, reciprocal understanding or consensus, and reciprocal commitment. These standards coincide with possible outreaches of legislative, judicial, and administrative branches.

[2] Art. 299: "After examining an application or request for recognition and enforcement of a legally effective judgment or ruling of a foreign court *in accordance with an international treaty concluded or acceded to by the People's Republic of China or under the principle of reciprocity*, a people's court shall render a ruling to recognise the legal force of the judgment or ruling and issue an order for enforcement, as needed, to enforce the judgment or ruling in accordance with the relevant provisions of this Law, if the people's court deems that the judgment or ruling neither violates the basic principles of the laws of the People's Republic of China nor damages the sovereignty, security, and public interest of the State" (emphasis added).

[3] Below is the original statement from the Nanning Statement:"If two countries have not been bound by any international treaty on mutual recognition and enforcement of foreign civil or commercial judgments, both countries may, subject to their domestic laws, *presume the existence of their reciprocal relationship*, when it comes to the judicial procedure of recognizing or enforcing such judgments made by courts of the other country, provided that the courts of the other country had not refused to recognize or enforce such judgments on the ground of lack of reciprocity."(emphasis added)

Travel destination in another (Member) State's territory in an otherwise purely domestic case

triggers application of Art. 18(1) Brussels Ia

By Salih Okur, University of Augsburg

Earlier today, the CJEU rendered its long anticipated decision in Case C-774/22 (FTI Touristik) on whether Art. 18(1) Brussels Ia Regulation concerns "matters relating to a travel contract where both the consumer, as a traveller, and the other party to the contract, the tour operator [,] have their seat in the same Member State, but the travel destination is situated not in that Member State but abroad […]".

In accordance with the Opinion of AG Emiliou, the Court held that it does.

1. International Scope of the Brussels Ia Regulation

The question goes straight to the problem of the international scope of the Brussels Ia Regulation. In Case C-281/02 (Owusu), the CJEU had held that the application of the Brussels Ia Regulation always required an "international element" – otherwise the national rules of the Member State apply.

Whether this international element exists is particularly problematic in cases like the one at hand, where the parties of the dispute are domiciled in the same Member State but certain elements of the case are situated abroad.

With today's decision, the CJEU has now adjudicated on two of the most practically relevant situations in quick succession: Only recently, in Case C-566/22 (Inkreal), the CJEU held that the **choice of another Member State's court** is enough to establish the international element of a case, even if the parties are both domiciled in the same Member State, triggering the application of Art. 25 Brussels Ia Regulation.

In the present Case C-774/22 (FTI Touristik), the CJEU had to decide whether the **travel destination** of consumer package travel contracts is enough to establish an international element in the sense of the Brussels Ia Regulation, which would open up the consumer forum of Art. 18 Brussels Ia Regulation.

2. Facts

The parties to the dispute, JX, a private individual domiciled in Nuremberg (Germany), and FTI Touristik, a tour operator established in Munich (Germany), concluded a package travel contract for a trip to Egypt. JX brought proceedings against FTI before the Local Court of Nuremberg, claiming that he was not informed properly of the visa requirements in Egypt.

JX claimed that the Local Court of Nuremberg has international and territorial jurisdiction pursuant to Art. 18(1) Brussels Ia Regulation. FTI, on the other hand, argued that the case lacked any international element, meaning that not the Brussels Ia Regulation but the German Code of Civil Procedure (*ZPO*) was applicable. Under the latter, the Local Court of Nuremberg would not have had jurisdiction over the dispute as German law does not contain a general consumer forum.

3. The Court's decision

According to previous decisions of the CJEU, the existence of the international element is not only reserved to cases where the parties to the dispute are domiciled in different Member States (**para. 29**).

Thus, according to the Court, the place of performance being abroad can on its own raise questions relating to the determination of international jurisdiction and thus establish an international element, triggering the application of the Brussels Ia Regulation (**para. 30**).

Specifically for consumer contracts, this interpretation is confirmed by Art. 18(1) Brussels Ia Regulation, which applies "regardless of the domicile of the other party" (**para. 31**) and by Art. 19(3) Brussels Ia Regulation, which addresses choice of law agreements entered "by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State" (**para. 32**).

Finally, the Court refers to the general purpose of the Brussels Ia Regulation, which seeks to establish rules of jurisdiction which are highly predictable and thus pursues an objective of legal certainty which consists in strengthening the legal protection of persons established in the European Union, by enabling both the applicant to identify easily the court before which he or she may bring

proceedings and the defendant reasonably to foresee the court before which he or she may be sued (**para. 33**).

These arguments lead the Court to the conclusion that the foreign travel destination of a package travel contract triggers the application of the Brussels Ia Regulation even if both parties are domiciled in the same Member State (**para. 40**).

4. Commentary

While this interpretation of the international element in the sense of the Brussels Ia regulation is in line with the opinion of AG Emiliou, it is difficult to square with the Court's interpretation in Case C-566/22 (Inkreal): There, the Court primarily relied on the existence of a conflict of (international) jurisdiction to establish the international element (**para. 31**): if the courts of two or more different Member States could find international jurisdiction under their domestic rules, it would disturb legal certainty. In that case, the application of the Brussels Ia Regulation is justified as it restores said legal certainty by unifying the rules on international jurisdiction.

Case C-774/22 (FTI Touristik) lacks this potential for a conflict of international jurisdiction. Within the European Union, no other court would have international jurisdiction under Art. 18(1) and 18(2) Brussels Ia Regulation as the domiciles of the parties to the consumer contract are situated in the same Member State – pursuant to Art. 17(1) Brussels Ia Regulation, Art. 7(1) Brussels Ia Regulation doesn't apply. Thus, within the European Union there cannot be a conflict of international jurisdiction; consequently, the Brussels Ia Regulation shall not apply. This argument does not seem to resonate with the Court, though; instead, the Court argues that the nature of the relevant provision of the Brussels Ia Regulation does not play a role when establishing the international element (**para. 39**).

Still, it cannot be denied that this decision immensely benefits consumers. The Brussels Ia Regulation now applies to all (package) travel contracts for trips abroad, meaning that pursuant to Art. 18(1) Brussels Ia Regulation, consumers may at all times bring proceedings against the tour operator at their domicile.

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

*Written by Aguada, Yasmín*** [1]– *Jeifetz, Laura Martina****[2]

This post will be divided into two Views. This is Part I.

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

Keywords: private international law, international judicial cooperation, new technologies, videoconferencing, Iber@, Apostille.

I. INTRODUCTION

In an increasingly interconnected context, international judicial cooperation (IJC) and the advancement of new technologies have been linked in a notable way, reshaping the landscape of private international law (PIL). The dynamic interaction between these two elements has triggered a profound change in how cross-border legal issues are treated and resolved.

Since ancient times, IJC has been essential to address disputes involving multiple jurisdictions. From the harmonization of laws to the enforcement of judgments in foreign countries, the interaction of legal systems has been a constant challenge.

However, in recent times, the emergence of technologies has brought with it revolutionary tools and approaches that are transforming IJC.

As borders become more transparent in the digital world, the implications for PIL are immense. Direct judicial communications, videoconferencing, and other technological innovations are streamlining cross-border legal processes. These technological solutions are not only overcoming traditional obstacles in international judicial cooperation but are also giving way to new challenges that require careful evaluation.

This work explores the convergence between these two fields: assistance between jurisdictions and adopting technological innovations. In this way, we propose researching their intersections and how the transnational legal scenario is transformed, with some specific references to Argentine PIL. Collaboration between nations in the search for legal solutions and the potential of new technologies to accelerate these processes are intertwined in a dynamic symbiosis that redefines PIL's scope and very nature. In this framework, it is essential to understand the joint evolution of IJC and new technologies to anticipate how this relationship will continue to shape this discipline in the future.

II. INFLUENCE OF TECHNOLOGY ON PIL

There is no doubt that the phenomenon of globalization has impacted all branches of the law without distinction. Historically, the primary purpose of PIL was to ensure the continuity of legal relations across different jurisdictions[3]. However, we must recognize that the impact of globalization, the emergence of telecommunications, and the widespread growth of the use of the means of transportation, have led to the movement of people beyond borders. Added to these phenomena is the rise of electronic commerce and online contracting platforms. All these conditioning factors generate a multiplication of private legal relations with foreign elements.

As indicated by Calvo Caravaca and Carrascosa González,[4] the emergence of the Internet produces a shock wave in all branches of law, but more specifically in PIL, a subject that is revealed as the main protagonist in the repercussions of cyberspace in the legal field. The use of online tools globalizes international private legal situations and, therefore, increases their number and variety.

It is a fact: internationalization is not foreign to the eyes of a jurist. However, from the perspective of our subject, the virtualization of borders through the Internet has managed to put classic concepts established since the Middle Ages in crisis. Undoubtedly, the environment has been transformed, and the law – although always behind – has accompanied the new demands of an increasingly digital society at its own pace.

These trends expand with the increase in regional integration processes, by which States generate agreements to promote the circulation of goods, people, diplomatic relations, reduction of customs fees, etc. Without hesitation, these processes even check the basic foundations of the States. And with this, transnational relations achieve an ever greater increase, so their extension requires their inclusion in legislative agendas.[5]

To this complex panorama of challenges and questions, disruptive technologies are now added that are already seen as the protagonists of the new era. Artificial intelligence, smart contracts, the blockchain, the Internet of Things (IoT), and the analysis of large volumes of data (big data) are demanding an exhaustive examination of the basic paradigms of law in general and the PIL in particular.

These technologies are rapidly transforming procurement methods, the way business relationships are established, and governance systems, raising fundamental questions about applying PIL rules and protecting the rights and interests of the parties involved.

International organizations have also echoed these modern challenges. Organizations such as the World Trade Organization (WTO)[6], the Institute for the Unification of Private Law (UNIDROIT)[7] and the United Nations Commission on International Trade Law (UNCITRAL)[8] are taking a leading role in the development of practical guides intended to harmonize solutions to the possible legal consequences derived from the use of these tools.

III. IMPACT OF NEW TECHNOLOGIES ON INTERNATIONAL JUDICIAL COOPERATION

In recent years, a series of tools and mechanisms have been consolidated that, promoted by the benefits derived from the use of technology in the process, seek

to generate a more direct connection between authorities to provide assistance. Clear examples of this are direct judicial communications, electronic requests, and the use of videoconferences. These innovations are accompanied by different cooperation networks: the central authorities, key actors in the operation of the agreements, which facilitate legal cooperation; judicial networks[9] and contact point networks.

Although the application of new technologies was not considered when most of the regulations and agreements that we have today were negotiated, there is no regulatory obstacle to their use since the operation of such instruments is substantially optimized through the application of these modern tools.

In the field of soft law, the Principles of the American Association of Private International Law (ASADIP), Chapter 4, *"Interjurisdictional Cooperation"*, article 4.7, provides in this regard: *"As long as the security of the communications can be guaranteed, judges and other judicial officials shall promote and foster the use of new information and communication technologies, such as telephone communications, videoconferencing, electronic messaging and any other means of communication appropriate for effecting the requested cooperation"*.

Most of the current regulations contain requirements incompatible with the communication technologies we have available today. In pursuit of a more favorable interpretation of the implementation of ICT, article 4.5 of the ASADIP Principles on Transnational Access to Justice (TRANSJUS Principles), approved by the Assembly of the American Association of Private International Law, in its meeting held in Buenos Aires, on November 12, 2016, points out that:

"*…the requested State shall interpret and apply the rules on inter-jurisdictional cooperation in a particularly flexible manner, minimizing the relevance of formalities. The courts of the requested State may act ex officio, making normative adjustments as necessary in order to carry out the corresponding procedural measures. Where the law does not prescribe a specific form, method or means for the cooperation sought by the requesting State, the courts of the requested State shall have the authority to adopt any appropriate measures to carry out the requested assistance, always with a view to protecting the fundamental procedural safeguards."*

It follows from this principle "*the need to seek the delicate balance between the*

duty of cooperation, through available and suitable means, and respect for the guarantees of due process".[10]

III.I. Electronic transmission of requests. Iber@.

Firstly, electronic requests are those that are transmitted within the framework of an international judicial procedure by which the court of one State requires a court of another State to provide judicial assistance or the execution of a procedural act (*e.g.,* notification, evidence), and which is formalized through electronic means.

A vitally important tool in the context of international judicial cooperation is the Iber@ electronic communication platform. This system, characterized by its confidentiality, security, ease of use, and access, is used both by the contact points of the Ibero-American Network for International Legal Aid (IberRed) [11], and by other relevant networks, such as Eurojust, the General Secretariat of INTERPOL and the Ibero-American Network of Specialized Prosecutors Against Trafficking in Human Beings.

User access is required, as provided by the General Secretariat of IberRed, previously designated by the institutions that make up the Network. Then, each user generates a private password, which must be renewed every six months. It should be noted that Iber@ does not impose specific requirements beyond a computer and an internet connection, allowing one to log in from anywhere in the world.[12]

Once the user is authenticated in the system, he or she accesses the platform through the IberRed portal and select the institution to which to direct their query: a Contact Point, a Liaison, or a National Member of Eurojust. After submitting the query, the designated recipient receives an email notification. Subsequently, he or she is asked to enter the platform to view the request.

An important boost for this platform came with the ratification of the Treaty on the Electronic Transmission of Requests for International Legal Cooperation between Central Authorities, which took place in Medellín in July 2019, commonly known as the Medellín Treaty. For the full status, click here.

As Mercedes Albornoz and Sebastián Paredes point out[13], this instrument does

not regulate the formal, procedural, or substantial requirements of the request but instead offers a renewing and perfected perspective of the existing treaties on international cooperation. The proposed innovation, in line with current times, involves eliminating the traditional transmission of requests for international assistance in paper format and instead favoring the Iber @ electronic platform as the main means (Article 1). However, its use is not mandatory (Article 4).

Unquestionably, cross-border cooperation demands the incorporation of new technologies to guarantee effective judicial protection, which requires collaborative efforts on the part of States. The ultimate objective is to achieve the digitalization of existing mechanisms in the field of international judicial cooperation. In this trajectory, the Iber@ platform presents a significant opportunity, considering its distinctive security characteristics, immediacy, and friendly accessibility.

III.II. e-Apostille. Digitization of evidence and documents.

Another fundamental tool in the framework of international judicial cooperation is the digitization of evidence and documents. At that level, and explicitly concerning public instruments, the electronic apostille is a simplification and streamlining mechanism for the circulation of such documents. Broadly speaking, it is a digital document that is transmitted electronically, allowing a country to expedite the authentication of public documents to produce their effects in other States[14]. This is the electronic implementation of the Hague Apostille, the single and simplified authentication process for public documents provided for by the 1961 Hague Convention[15]. It is carried out by electronic means and on an electronic public document.

Regarding the use of technological tools, the Special Commission, when evaluating the practical operation of the Apostille Convention, reiterated in several meetings that the spirit and letter of the Convention *"do not constitute an obstacle to the use of modern technology"*, even affirming that the use of said technology can significantly improve the application and operation of the Convention.

In 2006, the Hague Conference (HCCH), together with the National Notary Association of the United States of America (NNA), officially launched the electronic Apostille Pilot Program (e-APP), which was a pilot program until 2012,

when it became a permanent program.

The e-APP allows for a much more effective performance of the Convention, considerably increasing security. It can be used with any type of technology and does not privilege the use of one technology over another, so the state parties can freely choose the one that best suits their needs and structures. The e-APP comprises two components: the issuance of e-Apostilles and the operation of e-registers.

The Hague Conference periodically organizes International Fora on the e-APP to discuss and promote its implementation. In 2021, the twelfth Forum on the e-APP was held via videoconference for the first time, and during its celebration, the effects of the COVID-19 pandemic on the operation of the Apostille Convention were pointed out, and the e-APP. Specifically, the number of (e-)Apostilles requested and issued decreased, and public services were hampered by restrictions, prompting a transition towards online services. However, they also noted that Contracting Parties that had already implemented the e-APP, particularly the e-Apostille component, reported fewer issues.

Currently, 53 countries have implemented one or two components of the e-APP. Faced with technologies in constant innovation, the 1961 Hague Convention *"remains in force and has even increased its number of ratifications by designing the electronic Apostille Program (e-APP) with the objective of guaranteeing that the Convention functions in a manner effective, safe and uninterrupted, we opted for the incorporation of technology, in this case, through the issuance of electronic apostilles (e-Apostilles) and the use of electronic records (e-Registrie*s)[16]." The e-APP provides the Apostille Convention with renewed energy and relevance, ultimately seeking to extend the scope of the Convention to the electronic medium and strengthen its important benefits by making its operation more effective and secure. In this way, we see how the incorporation of new technologies is possible to optimize the operation of existing agreements and facilitate international judicial and administrative cooperation, and thus promote access to justice.

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[6] The World Trade Organization prepared a work directed by Emmanuelle Ganne in which the impacts of blockchains on global trade are analyzed. GANNE, Emmanuelle. Can blockchains revolutionize international trade? 2018.

Available at: https://www.wto.org/spanish/res_s/booksp_s/blockchainrev18_s.pdf. Accessed: 7 July 2024.

[7] For its part, since 2020, UNIDROIT has commissioned a specialized group, at the initiative of some European countries, to prepare a regulatory instrument that contains principles and practical guides on Digital Assets and Private Law. For more details: https://www.unidroit.org/work-in-progress/digital-assets-and-private-law/#1456405893720-a55ec26a-b30a . Accessed: 7 July 2024.

[8] Since 2022, the UNCITRAL Working Group on Electronic Commerce has been analyzing legal issues related to the digital economy. They have especially dedicated themselves to making a legislative proposal for artificial intelligence and automated contracting. More information at:

https://uncitral.un.org/es/working_groups/4/electronic_commerce. Accessed: 7 July 2024.

[9] As an example, we mention the International Hague Network of Judges, a group of judges who jointly cooperate on requests for international return of children. For more details: International Network of Judges of The Hague. Available at: https://www.hcch.net/es/instruments/conventions/specialized-sections/child-abduction/ihnj. Accessed: 7 July 2024.

[10]SCOTTI, LUCIANA . op. cit., 2020, p. 428.

[11]The Ibero-American Network of International Judicial Aid (IberRed) constitutes a valuable collaboration network in areas of civil and criminal law. The Network is made up of Central Authorities and members of the Ministries of Justice, and other judicial bodies from 22 Ibero-American countries. It is also made up of the Supreme Court of Puerto Rico. The basic objective is to optimize the operation of the current civil and criminal assistance agreements, and to strengthen cooperation between the member countries of the Ibero-American Community of Nations. Such a structure constitutes a fundamental advance in the construction of an Ibero-American Judicial Space. In order to safeguard effective judicial protection, it aims to strengthen international legal cooperation mechanisms and, in addition, simplify the instruments and tools currently in force. Its official languages are Spanish and Portuguese IBERO-AMERICAN NETWORK OF INTERNATIONAL JUDICIAL AID. https://iberred.notariado.org/, 2014. Accessed: 7 July 2024.

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[14] Private documents, in order to be apostillised, require prior certification by a notary public.

[15] It is worth remembering that the 1961 Hague Convention eliminated the requirement for legalization of foreign public documents, replacing it with the apostille. This Convention is one of the most accepted and applied international treaties globally. It is currently in force in 126 States, making it one of the most successful international instruments in the field of international legal and administrative cooperation.

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This week at The Hague: A few thoughts on the Special Commission on the HCCH Service, Evidence and Access to Justice Conventions

Written by Mayela Celis, Maastricht University [updated on 19 July 2024]

The Special Commission on the practical operation of the 1965 Service, 1970 Evidence and 1980 Access to Justice Conventions will take place in The Hague from 2 to 5 July 2024. For more information (incl. all relevant documents), click here. Particularly worthy of note is that this is the first meeting in the history of the Hague Conference on Private International Law (HCCH) in which Spanish is an official language – the new language policy entered into force on 1 July 2024.

A wide range of documents has been drafted for this Special Commission, such as the usual questionnaires on the practical operation and the summary of responses of Contracting States. These documents are referred to as Preliminary Documents

(Prel. Doc.). Particularly interesting is the document relating to **Contractual Waiver and the Service Convention** (*i.e.* when the parties opt out of the Convention), the conclusions of which I fully endorse (Prel. Doc. No. 12, click here, p. 10).

Country profiles have also been submitted for approval (Prel. Docs 9 and 10), a practice which is in line with what has been done with other HCCH Conventions. A document on **civil and commercial matters** has also been issued and while it basically restates previous Conclusions and Recommendations, it includes the suggestion made by some States to develop "a list-based approach to identify the scope of "civil or commercial matters"" and recommends not following that route but rather take a case-by-case approach (Prel. Doc. 11, click here) – a very wise approach.

Moreover, it is worth noting that **revised versions of the Service and Evidence Handbooks** have been submitted for approval. A track changes version of each has been made available on the website of the Hague Conference. The Handbooks are usually only available for purchase on the HCCH website so this is a unique opportunity to view them (although not in final form).

For ease of reference, I include the links below:

Service Handbook (track version, clean version)

Evidence Handbook (track version, clean version)

With regard to the **Service Handbook**, a few changes are worth underscoring. I will refer to changes in comparison to the **4th edition of the Handbook**. While I will refer to the track changes version, please note that not all changes have been marked as changes as this version refers to changes made to an intermediate version circulated internally:

1. **P. 61 of the track changes version – Service on an agent** – The clarification of the two lines of cases that have emerged regarding service on an agent (*e.g.* the US Secretary of State) and whether the document should be sent abroad is particularly interesting.
2. **P. 66 of the track changes version – Service by postal channels on Chinese defendants** – The emphasis on China's opposition to postal channels is particularly significant, given the litigation regarding service

on Chinese defendants through postal channels.

3. **P. 69 *et seq.* of the track changes version – Substituted service** – a welcome addition to underscore that this type of service is also used when the Convention does *not* apply.
4. **P. 87 *et seq.* of the track changes version – a practical example from Brazil on how to locate a person to be served –** this is an interesting example and it enriches the Handbook by including an example from Latin America.
5. **P. 101 *et seq* of the track changes version and glossary – EU digitalisation** – a fleeting reference is made to the modernization initiative of the European Union.
6. **P. 145 *et seq* of the track changes version – Water Splash, Inc. v Menon decision by the US Supreme Court** – The position of the US regarding article 10(a) has been updated and all the previous case law of lower and appeal courts has been deleted.

The above-mentioned changes are very welcome and will be very useful to practitioners.

On a more critical note, it should be noted that it is unfortunate that the **Annex on the use of information technology** featured in a previous edition of the Service Handbook has been deleted (previously **Annex 8**). In this Annex, there were references to the latest case law on electronic service by electronic means (approx. 26 pages), including email (incl. references to the first case and the evolution in this regard), Facebook, X previously known as Twitter, message board, etc. and an analysis whether the Service Convention applied and why (not).

Unfortunately, very few excerpts of this Annex have been included throughout the Handbook. The concept of address under Article 1(2) of the Service Convention vs email address is of great importance and it has remained in its place (p. 88 of the track changes version).

As a result, the Service Handbook contains now very few references to “service by e-mail” (1 hit), “electronic service” (3 hits), “e-service” (2 hits) or “service by electronic means” (10 hits, see in particular, p. 100) and no hits for “service by Facebook” or “service by Twitter”. It also seems to focus on e-service executed by Central Authorities of the requested State according to domestic laws (as opposed to direct service by email across States). And in this regard, see for example the

comment from China (Prel. Doc. 15, click here, p. 41).

Having said that, an **additional document on IT** was drafted (Prel. Doc. No 13, click here), which summarises the way in which information technology can be used to enhance the above-mentioned Hague Conventions and focuses specifically on electronic transmission, electronic service and video-link.

With regard to **e-service**, Preliminary Document No 13 notes among other things that Contracting Parties remain divided as to whether or not service – of process or otherwise – via e-mail or other forms of e-service is within the scope of Article 10(a) postal channels (p. 9). See in this regard the comment from the European Union (Prel. Doc. 15, click here, p. 38). This casts a shadow on the 'functional equivalence' approach of this Convention. Moreover, this document only discusses e-service very briefly and the literature referred to in the Prel. Doc. is outdated pertaining to one or two decades ago. On the other hand, however, reference is made to the 2022 responses to the Questionnaire and two recent cases.

Another perhaps unfortunate deletion is the **relationship between the Service Convention and the applicable EU regulation** (No. 2020/1784). The Handbook merely dedicates a half page to this important relationship (p. 169 of the track changes version) and does not analyse the similarities and the differences between them, as was the case in previous versions. A missed opportunity.

On a positive note, the graphs and tables have been improved and made more reader-friendly and a new Annex has been included "Joining the Convention" (new States can only accede to the Convention).

With regard to **Evidence Handbook**, it could be noted that this Handbook has been subject to a more recent update in 2020, as well as the publication of a Guide to Good Practice on Video-Link in the same year. Therefore, in a way there are less new developments to include. In particular, it has been noted that sections of the Guide to Good Practice on Video-Link have been included into the Evidence Handbook. A question may then arise as to whether the Guide will remain a stand-alone document (but apparently, it will not – for now the free version of the GGP can be downloaded. Hopefully, the Handbook will also be translated into as many languages as the Guide was).

As with the Service Handbook, the graphs and tables have been improved and

made more reader-friendly.

Of great significance is the delicate split of views with regard to the possibility of obtaining direct taking of evidence by video-link under Chapter I of the Evidence Convention. In my view, this is the Achilles' heel of the Evidence Convention since without direct taking of evidence under Chapter I, there is a real danger that this instrument has become obsolete. Let alone the fact that the Evidence Convention has no specific safeguards for the direct taking of evidence.

In sum, the Service and Evidence Conventions work well in a paper environment. However, these Conventions are struggling to keep up with technological developments as some States are reluctant to accept the 'functional equivalence' approach of some of their provisions, in particular art. 10(a) of the Service Convention and art. 9(2) of the Evidence Convention (direct service by postal channels and direct taking of evidence by the requesting State). An easier implementation of IT is the electronic transmission of requests, something that is left as a long-term goal (see below), the effecting of e-service by the Central Authority of the requested State or the use of video-link in the indirect taking of evidence. A question then arises as to how fit are these Conventions for the future and that is something that only time will tell.

This aside – the updating of the Handbooks and the drafting of the preliminary documents is a huge enterprise. The drafters should be congratulated, as these documents will certainly be of great benefit to the users of both Conventions.

At the end of a meeting of the Special Commission, Conclusions and Recommendations are adopted. In this regard, Prel. Doc. No. 13 submits a few proposals regarding information technology (see pages 15-17). In particular, it stands out [for the long-term] "the proposal for the development of an international system to facilitate the e-transmission of requests or alternatively, to propose how a decentralised system of platforms for the transmission of requests may function effectively." In that respect, a question arises as to how to combine synergies and avoid overlapping efforts at the international and the EU level.

[Update of 19 July 2024]

The Special Commission (SC) adopted 138 Conclusions & Recommendations (C&R), some of which paraphrase previous C&R – and are identified as such – with some updated text.

Below I include the most relevant C&R with regard to this post. For the full version, click here (also available in French and Spanish, click here).

> ***General Conclusions and Recommendations regarding IT [information technology]***
>
> *C&R 10-14, see in particular:*
>
> ***13*** *The SC emphasised that the Conventions operate in an environment which is subject to important technological developments, which have been further stimulated by the COVID-19 pandemic. Although the evolutionary use of IT could not be foreseen at the time of the adoption of the Conventions, the SC reiterated that IT is an integral part of today's society and its usage is a matter of fact. In this respect, the SC recalled that the spirit and letter of the Conventions do not constitute an obstacle to the usage of IT, and that the application and operation of the Conventions can be further improved by relying on such technology. [See C&R No 4 of the 2003 SC, C&R No 3 of the 2009 SC].*
>
> ***Use of IT – taking evidence by video-link***
>
> *C&R 46-51, see in particular:*
>
> ***51*** *The SC acknowledged the different views regarding the use of video-link to take evidence directly under Chapter I [Letters of Request], despite the benefits that it can bring. The SC encouraged Contracting Parties which permit the direct taking of evidence by video-link under Chapter I [Letters of Requests] to provide more information to the PB [Permanent Bureau of the HCCH] about how this occurs in practice so that examples can be summarised and included in the Evidence Handbook and, if required, further information can be developed to inform Contracting Parties on this issue. (Our emphasis as this is precisely the problem highlighted above).*
>
> ***Use of IT (service by digital means – the Service Convention)***
>
> ***73*** *The SC also recognised that in some domestic legal systems the relevant legal procedures and technological conditions do not allow for service by electronic means, although in certain systems the use of e-mail and online platforms is permitted in certain circumstances, particularly where approved by*

the judicial authority in advance or there is prior consent by the addressee. [See C&R No 64 of the 2003 SC]. (Our emphasis, same as above).

***74** The SC noted that, subject to the domestic law of the requested State, requests for service transmitted under the main channel of transmission (the Central Authority) may be executed by electronic means under Article 5. The SC also noted developments in the use of IT under the alternative channels of Article 10. [See C&R No 37 of the 2014 SC].*

Alternative channels of transmission – Service by e-mail

***105** The SC noted that Article 10(a) [of the Service Convention] includes transmission and service by e-mail, insofar as such method is provided by the law of the State of origin and permitted under the law of the State of destination. The SC reiterated that service by e-mail under Article 10(a) [of the Service Convention] must meet the requirements established under Article 1 of the [Service] Convention, in particular that the addressee's physical address in the State of destination is known. The SC noted that e-mail domains are not sufficient for locating the person to be served under Article 10(a). (Our emphasis, as this is particularly complex to determine and prove).*

***106** The SC reiterated that Contracting Parties may impose other requirements and safeguards regarding the use of e-mail under Article 10(a) [of the Service Convention] and encouraged Contracting Parties to indicate any such requirements in their Country Profiles.*

Relationship of the [Service] Convention with other instruments

***110** Recalling the relationship of the [Service] Convention with other instruments, the SC recommended greater elaboration in the Service Handbook on such relationship, including with regional and bilateral instruments. The SC encouraged Contracting Parties to provide information about all other instruments that would apply in parallel with the Service Convention in their Country Profiles.*

This is in line with what I stated above. See also C&R No 58, which replicates this Conclusion regarding the Evidence Convention

Contractual waivers and the Convention

111 *The SC took note of a case reported by one Contracting Party in which the court found that the parties' agreement to use alternative means of notification constituted a waiver of formal service of process under the applicable law. The SC recalled the Convention's non-mandatory, but exclusive, character, according to which the [Service] Convention will only apply if the domestic law of the forum determines that there is occasion to transmit a document for service abroad; if so, one of the available channels under the Convention must be used. The SC also stressed the potentially negative impact of such contractual agreements, namely, in relation to the protection of defendants under Articles 15 and 16 of the [Service] Convention, and the recognition and enforcement of judgments in the Contracting Party. The SC further questioned the effect of privately negotiated agreements in light of Contracting Parties' declarations and reservations. (As suggested by the relevant Preliminary Document).*

"Civil or commercial matters" under the Service and Evidence Conventions

125 *The SC noted that some Contracting Parties do not regard as "civil or commercial matters" claims in relation to acts of States in the exercise of State authority.*

126 *The SC recommended that rather than Contracting Parties developing a list-based approach to identify the scope of "civil or commercial matters", Contracting Parties consider requests on a case-by-case basis, with the aim of providing the broadest possible cross-border judicial cooperation. (As suggested by the relevant Preliminary Document).*

Handbooks

131 *The SC approved, in-principle, the fifth edition of the Handbooks, while noting that further amendments will be made, including incorporating the discussions at the SC meeting and relevant C&R, in cooperation with the Working Groups. The SC recommended to CGAP to approve the Handbooks.*

Future work

137 *The SC encouraged Contracting Parties to meet online to further discuss and exchange experiences to develop a deeper understanding of the use of IT*

and to develop further guidance for e-transmission and associated matters. These discussions will be supported by, or conducted under the auspices of, the PB. Such meetings will be held by way of online workshops for Central Authorities and other users of the Service and Evidence Conventions.

First Case of Reciprocal Commitment: China Requests Azerbaijan to Enforce its Judgment Based on Reciprocity

It has been a hot topic to explore the recognition and enforcement of judgments between China and other countries. The core issue of the topic is the role of reciprocity under Chinese law and practice concerning the recognition and enforcement of foreign judgments in China. Reciprocity was narrowly interpreted by Chinese courts in the past, blocking the circulation of lots of foreign judgments in China. Encouragingly, China's Supreme People's Court (SPC) is adopting new rules to interpret reciprocity, which is now far more favorable to establishing the reciprocal relationship between China and foreign countries. Then it is up to lower Chinese courts to follow up and the new reciprocity rules established by the SPC are tested in practice.

This piece of comment is written by Dr. Meng Yu, lecturer at China University of Political Science and Law, and co-founder of China Justice Observer.

In 2019, in the Zhou et al. v. Vusal case, China's request to Azerbaijan for

judgment recognition and enforcement was accompanied by its reciprocal commitment through a diplomatic note, marking the first time China made a reciprocal commitment to a foreign country regarding recognition and enforcement of foreign judgments.

Key takeaways:

- In the field of recognition and enforcement of foreign judgments (REFJ), the new reciprocity criteria in China include three tests, namely, de jure reciprocity, reciprocal understanding or consensus, and reciprocal commitment.
- In 2019, in the Zhou et al. v. Vusal case, China's request to Azerbaijan for judgment recognition and enforcement was accompanied by its reciprocal commitment through a diplomatic note, marking the first time China made a reciprocal commitment to a foreign country regarding REFJ.
- A reciprocal commitment is essentially a unilateral promise that takes effect upon being made.
- Before making such a commitment, China's Supreme People's Court (SPC) examines and decides on the matter. This is logically consistent with the requirement from the Conference Summary that Chinese courts need to examine, on a case-by-case basis, the existence of reciprocity, on which the SPC has the final say.

Reciprocity is not new but reciprocal commitment is.

Readers familiar with the topic of recognition and enforcement of foreign judgments (REFJ) will undoubtedly be familiar with the concept of "reciprocity". Although its manifestations and extent vary, the principle of reciprocity serves as the basis or precondition for REFJ in many countries, including China.

However, few countries have developed the concept of reciprocity as creatively as China, which has had at least five different standards for its determination—*de facto* reciprocity, presumptive reciprocity, *de jure* reciprocity, reciprocal understanding or consensus, and reciprocal commitment.

Among these, Reciprocal Commitment, as the most recently developed reciprocity criterion, often leaves people puzzled. What exactly is this unicorn-like criterion?

In 2019, in the case of *Zhou et al. v. Vusal* (hereinafter the "Vusal Case"), China requested Azerbaijan to recognize and enforce a judgment, making a commitment through diplomatic notes. This was the first reported case in which China made a reciprocal commitment to a foreign country regarding REFJ. This case will unveil to us the nature of Reciprocal Commitment.

I. What is "Reciprocal Commitment"?

Since the 2000s, reciprocity criteria have evolved significantly, reflecting China's efforts to liberalize its REFJ rules.

Over a decade, the early, high-threshold reciprocity criterion—*de facto* reciprocity, was abandoned. One after another, more pragmatic and flexible criteria such as presumptive reciprocity and *de jure* reciprocity have emerged in the form of judicial policies, declarations, and memoranda. Following the release of the "Conference Summary of the Symposium on Foreign-related Commercial and Maritime Trials of Courts Nationwide" (hereinafter the "Conference Summary") of the Supreme People's Court (SPC), a new generation of more open reciprocity criteria[1] has been established.

The new reciprocity criteria include three tests, namely, *de jure* reciprocity, reciprocal understanding or consensus, and reciprocal commitment, which also coincide with possible outreaches of legislative, judicial, and administrative branches.

Related Posts:

- How Chinese Courts Determine Reciprocity in Foreign Judgment Enforcement – Breakthrough for Collecting Judgments in China Series (III)[2]
- China's 2022 Landmark Judicial Policy Clears Final Hurdle for Enforcement of Foreign Judgments[3]

It then begs the question, what exactly is reciprocal commitment?

According to the Conference Summary, the test of reciprocal commitment means that when trying a case applying for recognition and enforcement of a foreign judgment or ruling, the people's court may recognize the existence of reciprocity, if "the country where the judgment-making court is located has made reciprocal

commitments to China through diplomatic channels or China has made reciprocal commitments to the country where the judgment-making court is located through diplomatic channels, and there is no evidence that the country where the judgment-making court is located has refused to recognize and enforce a Chinese judgment or ruling on the ground of lack of reciprocity".

For a while, reciprocal commitment was like a mysterious unicorn—because there were almost no cases or reports mentioning it. In contrast, the other two reciprocity tests have well-known instances, including the SPAR case, which involved the *de jure* reciprocity, where an English judgment was recognized and enforced in China for the first time[4]; the China-Singapore MOG, which demonstrated reciprocal understanding[5]; and the Nanning Statement, which involved reciprocal consensus[6].

One year after the Conference Summary, the first public document on reciprocal commitment finally appeared. This is the Vusal case, which was introduced as a typical case of reciprocal commitment in "Understanding and Application of the *Conference Summary*" authored by the SPC's Fourth Civil Division, published in June 2023.

II. The Case of Vusal: First Case of Reciprocal Commitment

In July 2018, Yiwu Primary People's Court, Zhejiang (the "Yiwu Court"), issued a first-instance civil judgment (2018) Zhe 0782 Min Chu No. 8836, in the case of a sales contract dispute between Zhou et al. and the defendant Vusal (a national of Azerbaijan). The judgment ordered the defendant Vusal to pay the plaintiffs Zhou et al. for the goods. The defendant Vusal failed to appear in the court after being duly summoned, and did not appeal during the appeal period. The judgment became effective in August of the same year.

After the judgment took effect, Vusal refused to satisfy the judgment, and the plaintiff applied to the court for enforcement of the judgment. The Yiwu Court filed the case for enforcement but did not find any of Vusal's enforceable asset in China.

In October 2019, the Yiwu Court reported to the SPC to request the competent court of the Republic of Azerbaijan to recognize and enforce the judgment.

Upon review, SPC decided to submit the judicial assistance request to Azerbaijan,

and to make a reciprocal commitment.

Finally, when making a judicial assistance request, the Chinese Embassy in Azerbaijan made a commitment to Azerbaijan in a diplomatic note that "it will provide equal assistance to Azerbaijan under similar circumstances in accordance with the law".

III. Comments

This case marks the first time that China has proactively made a reciprocal commitment to a foreign country regarding REFJ. It is still unclear whether Azerbaijan has acted on China's judicial assistance request for REFJ. There is also no available report or discussion on how Azerbaijan views the reciprocal commitment made by China through diplomatic notes.

One thing is certain: combined with the Vusal case, the meaning and application of reciprocal commitment have become clearer.

First, a reciprocal commitment is essentially a unilateral promise that takes effect upon being made. This "unilateral" commitment can be made by a foreign country (the future country where the judgment-making court is located) to China (the future requested country), or by China to the foreign country, as exemplified by China's commitment to Azerbaijan in the Vusal case.

Second, a reciprocal commitment can be regarded as a presumption of the existence of reciprocity. Since the commitment is unilateral and differs from the bilateral reciprocity understanding or consensus, the making of such a commitment does not automatically prove the existence of reciprocity. Instead, reciprocity is presumed unless there is evidence to the contrary (i.e., the other country has previously refused to recognize and enforce a Chinese judgment on the grounds that a reciprocal relationship does not exist).

Third, reciprocal commitments are made through diplomatic channels, as in the Vusal case where the Chinese Embassy in Azerbaijan made the commitment through a diplomatic note. Before making such a commitment, the SPC examines and decides on the matter. This is logically consistent with the requirement from the Conference Summary that Chinese courts need to examine, on a case-by-case basis, the existence of reciprocity, on which the SPC has the final say.

[1]
https://conflictoflaws.net/2022/chinas-2022-landmark-judicial-policy-clears-final-hurdle-for-enforcement-of-foreign-judgments/

[2]
https://www.chinajusticeobserver.com/a/breakthrough-for-collecting-judgments-in-china-series-3

[3]
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[4]
https://www.chinajusticeobserver.com/a/chinese-court-recognizes-english-commercial-judgment-for-the-first-time

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The Abu Dhabi Civil Family Court on the Law on Civil Marriage – Applicability to Foreign Muslims

and the Complex Issue of International Jurisdiction

The Indian Satellite Saga and Retaliation: Recognizing the Supreme Court of India's Judgment Abroad?

Introduction

As one of the most complex and fiercely contested recent investment disputes, the Indian Satellite Saga originated from India's annulment of an agreement for leasing S-band electromagnetic spectrum on two satellites (Satellite Agreement) to Devas Multimedia Private Ltd. (Devas). The Saga involved multiple international arbitrations and domestic litigations. In 2022, the Supreme Court of India made a judgment (SCI Judgment) to wind up Devas. Devas and its foreign investors allege the SCI Judgment is a retaliatory measure against them for enforcing arbitration awards.

Since 2023, courts worldwide, including those in Australia, Canada, Germany, Mauritius, the Netherlands, Singapore, Switzerland, and the US, rendered decisions regarding whether to recognize the SCI Judgment and to allow it as a defence against the enforcement of arbitration awards.[1] This Insight analyzes these courts' judgments and reflects on the decentralized judgment/award recognition and enforcement system for addressing alleged state retaliation measures.

Investment Disputes and Alleged Retaliatory Measures

Devas was an Indian telecommunications company with investors from Germany and Mauritius. Antrix Corporation Ltd. (Antrix) was under the direct control of the Department of Space of India. In 2005, Antrix concluded the Satellite Agreement with Devas but unilaterally terminated it in 2011 on the ground of force majeure because the Government of India decided not to provide orbital slots in S-band for commercial activities.[2]

Consequently, Devas initiated a commercial arbitration seated in India before an International Chamber of Commerce (ICC) Tribunal against Antrix.[3] The ICC Tribunal rejected Antrix's force majeure argument and awarded damages to Devas, reasoning that the Chairman of Antrix failed to do everything in his power to ensure that the Satellite Agreement would remain on track.[4] Devas's investors from Mauritius and Germany also brought UNCITRAL investment arbitrations against India separately in the *CC/Devas (1)*[5] and *DT*[6] arbitrations. Both tribunals rejected, at least in part, India's defense that it had annulled the Satellite Agreement to protect essential security interests.[7]

The three arbitration tribunals rendered billion-dollar awards in favor of Devas and its investors.[8] Devas and its investors have started to enforce these awards against Indian assets abroad. Devas also entrusted its related US company, Devas Multimedia America Inc., with collecting debts arising from the ICC award.

Meanwhile, the Indian Central Bureau of Investigation filed a First Information Report against Devas and the officers of Devas and Antrix for corruption in 2015.[9] Antrix initiated proceedings to wind up Devas in 2021 at India's National Company Law Tribunal (NCLT). Devas appealed to the National Company Law Appellate Tribunal (NCLAT) and the Supreme Court of India. The Supreme Court upheld the judgments of NCLT and NCLAT to liquidate Devas due to fraudulent activities, including Devas improperly enticing Antrix into the Satellite Agreement.[10] The fraud also involved collusion between Devas, Antrix, and Indian government officials.[11]

The shareholders of Devas were found to be fully aware of the fraud.[12] Notably, Devas and one of its shareholders, namely Devas Employees Mauritius Private Limited, were fully represented in the SCI proceedings. Devas's other

shareholders did not participate in the SCI proceedings.

As a consequence of the SCI Judgment, under its authority at the seat of the ICC arbitration, the High Court of Delhi set aside the ICC award.[13] Devas and its investors initiated the *CC/Devas (2)* investment arbitration against India alleging the latter's retaliation for the enforcement of the ICC award.[14] Upon India's request, the Supreme Court of Mauritius issued an interim anti-arbitration injunction.[15] India also sought to set aside the *DT* and *CC/Devas (1)* awards in their respective seats in Switzerland and the Netherlands.

Devas or its investors have sought to enforce the ICC, *DT*, and *CC/Devas (1)* awards in approximately 6 different countries.[16]

Recognize or not?

In the award-setting-aside proceedings and the award-enforcement proceedings, a critically important defense for India is the finding of fraud in the SCI Judgment.

To determine whether to recognize the SCI Judgment, the focal points are: whether foreign enforcement courts can exercise jurisdiction over India and whether the SCI Judgment should create *res judicata* effects in these courts. The varying approaches taken show how enforcement jurisdictions can independently decide whether retaliation existed and how to address it based on their laws.

Sovereign Immunity of India

When deciding whether to enforce the *CC/Devas (1)* award, both the Australian Federal Court and the Superior Court of the Province of Quebec in Canada held that India waived its sovereign immunity by ratifying the 1958 New York Convention because of the "clear and unequivocal submission" in Article 3 of the Convention.[17]

When enforcing the *DT* award, the Higher Regional Court of Berlin held that India did not enjoy sovereign immunity because according to the German Code of Civil Procedure, India's liability came from Antrix's commercial activities, and it was thus irrelevant that the Satellite Agreement was revoked partially due to national

security concerns.[18] Taking another path, the US District Court for the District of Columbia held that it had jurisdiction over India based on the arbitration exception to sovereign immunity, which requires "the existence of an arbitration agreement, an arbitration award, and a treaty governing the award."[19] In discussing the last requirement, the court mentioned the membership of the US and Switzerland (the seat of arbitration), rather than India's membership in the 1958 New York Convention[20] as the Australian Federal Court and the Superior Court of the Province of Quebec had. When rejecting the enforcement of the ICC award, the US Court of Appeals for the Ninth Circuit held that a minimum contacts analysis should be satisfied.[21]

Notably, the Australian Federal Court did not consider the legality of investment under the applicable bilateral investment treaty and the validity of the arbitration agreement because, when determining sovereign immunity, Devas needed only to provide prima facie evidence that a valid arbitration agreement existed.[22] The US District Court for the District of Columbia reached the same conclusion for a different reason: because the legality of investment was an arbitrability issue falling under the merits, not a jurisdictional matter.

Res Judicata

This issue can be analyzed from four aspects:

Preclusion effects of other tribunals' decisions: India was not successful in setting aside the *CC/Devas (1)* Award on Merits at the Hague Court of Appeal, which found that India did not sufficiently substantiate the accusations of fraud.[23] After the SCI Judgment was rendered, India asked the Hague District Court to set aside the Award on Quantum.[24] An important factor for the District Court in rejecting India's request was that the Hague Court of Appeal had already rejected India's assertions of fraud in the setting aside proceedings concerning the Award on Merits, and despite some new evidence, the fraud allegations in the request to set aside the Award on Quantum were virtually identical.[25] Therefore, the Hague District Court found that the SCI Judgment should not be recognized because of the *res judicata* effect of the earlier judgment of the Hague Court of Appeal.[26] In an action to enforce the *DT* arbitration, the Court of Appeal in Singapore similarly declined to consider the SCI Judgment's fraud findings

because the Swiss Federal Supreme Court at the seat of the arbitration had dismissed the setting-aside application and affirmed the *DT* arbitration tribunal's jurisdiction and the validity of the award.[27] Further, based on the competence-competence doctrine, the US District Court for the District of Columbia considered itself precluded from second-guessing the *DT* arbitrators' findings about arbitrability.[28]

Timing: In rejecting the revision proceedings against the *DT* final award, the Swiss Federal Supreme Court found that India's fraud allegation based on the SCI Judgment was time-barred.[29] This was because the 90-day limitation period to request the revision of the *DT* final award started to run when India obtained "sufficiently certain knowledge" of fraud even before the SCI Judgment was issued.[30] Like the Hague District Court, the Swiss Federal Supreme Court held that the SCI Judgment did not provide new evidence of fraud because the Supreme Court of India did not conduct its own fact-finding investigation.

The *(un)due process of* the Supreme Court of India is also hotly debated. In 2023, the Hague District Court declared the request of Devas Multimedia America Inc. to enforce the ICC award on behalf of Devas inadmissible, after a liquidator appointed under the SCI Judgment instructed the company not to act as an agent of Devas in enforcement efforts.[32] The Hague District Court found no evidence showing that the SCI failed to act independently and impartially.[33] In contrast, when deciding to enforce the *DT* award, the Singapore International Commercial Court expressed reservations about the proceedings at the SCI, finding that they had been carried out based on summary evidence without oral evidence or the cross-examination of witness;[34] and the same view was shared by the Higher Regional Court of Berlin.[35]

Divergence of parties is a significant barrier to extending the *res judicata* effects of the SCI Judgment against Devas to its investors. At the Superior Court of the Province of Quebec, India relied on the SCI Judgment arguing that its consent to arbitration was induced by fraud. The Court held that the SCI Judgment could prove only that Devas was liquidated and addressed a different question from that in the enforcement proceeding, because it did not rule on the validity of the *CC/Devas (1)* arbitration agreement, and the Devas investors were precluded from participating in the liquidation proceeding.[36] Similarly, the Singapore International Commercial Court held that the fraud finding in the SCI Judgment should not be binding on Devas's investor, Deutsche Telekom, because it was not

a party to the proceedings at the Supreme Court of India.[37]

Decentralized System to Address States' Retaliatory Measures

As the Indian Satellite Saga demonstrates, private international law and international investment law use a decentralized judgment/award recognition and enforcement system to address alleged states' retaliatory measures against foreign investors.

In terms of practical lessons, one is that fraud allegations should be argued as early as possible in the award-rendering proceedings, rather than waiting for the enforcement proceedings. Notably, India raised fraud late without reasonable justifications, so the claim was rejected by the arbitration tribunals.[38] Although some enforcement courts may allow parties to re-argue a fraud claim that has been fully litigated by a judgment/award-rendering tribunals, the Saga shows that saving these claims for the enforcement proceedings is risky because not every court will allow this practice.

More broadly, although the decentralized system produces inconsistent results, it also has an overlooked benefit of resilience when addressing state retaliatory measures, as it has no choke points and can function regardless of political tensions. This system, although sacrificing consensus and consistency, promotes democracy because each state has its voice. In contrast, some international systems to resolve alleged state retaliatory measures are centralized based on consensus. The centralized systems are supposed to bring authority, consistency, and certainty. However, the malfunction of one choke point can effectively dismantle the whole system. For example, although the WTO can authorize its members to retaliate against another member that continuously adopts non-compliance measures, the "WTO consensus" system enables one member to dismantle the WTO Appellate Body.[39] Another example is the United Nations Security Council, where the "veto privilege" and political tensions among its standing members have impeded international efforts to resolve the Gaza war.[40] The inconsistent outcomes reached over the course of the Indian Satellite Saga should thus be understood in light of the benefits of decentralization and resilience.

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[1] *Devas Multimedia Private Ltd., v. Antrix Corporation Ltd. & Anr.*, Civil Appeal No. 5906 of 2021 (India) [hereinafter SCI Judgment].

[2] *Id.*, ¶ 3.11.

[3] *Devas Multimedia Private Limited v. Antrix Corporation Limited* (Final Award) ICC Case No. 18051/CYK (Sept. 14, 2015).

[4] ICC Case No. 18051/CYK, ¶¶ 230-236, 312.

[5] *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. the Republic of India*, Case No. 2013-09, UNCITRAL, Award on Quantum (Perm. Ct. Arb. 2020) ("*CC/Devas (1)*").

[6] *Deutsche Telekom AG v. India*, Case No. 2014-10, UNCITRAL, Final Award (Perm. Ct. Arb. 2020) ("*DT Arbitration*").

[7] *CC/Devas (1)* Award on Jurisdiction and Merits (July 25, 2016), ¶¶ 354-361, 371-73; *DT* Interim Award (Dec. 13, 2017), ¶¶ 280-286.

[8] Approximately USD 562.5 million (ICC), USD 93.3 million (*DT*), USD 111 million (*CC/Devas (1)*), plus interest and costs.

[9] SCI Judgment, ¶ 3.13.

[10] SCI Judgment, ¶ 12.8 (vi).

[11] *Id.* ¶ 12.8 (xii).

[12] *Id. ¶* 12.8 (xv).

[13] *Devas Employees Mauritius Pvt. Ltd. v. Antrix*, High Court of Delhi at New Delhi, 2023: DHC: 1933-DB.

[14] *CC/Devas v. India (2)*, Case No. 2022-34 (Perm. Ct. Arb. 2022) ("*CC/Devas (2)*").

[15] *India v. CC/Devas (Mauritius) Ltd.,* SC/COM/WRT/000010/2023, Sup. Ct. Mauritius.

[16] *See CC/Devas v. India (I)* on Jus Mundi at https://jusmundi.com/en/document/decision/fr-cc-devas-mauritius-ltd-devas-employees-mauritius-private-limited-and-telcom-devas-mauritius-limited-v-republic-of-india-arret-de-la-cour-dappel-de-paris-22-11819-tuesday-13th-february-2024.

[17] *CC/Devas (Mauritius) Ltd. v. India*, 2022 QCCS 4786, ¶¶ 161 & 167; *CCDM Holdings, LLC v. India (No. 3)* [2023] FCA 1266, ¶¶ 35, 38, 45, and 51.

[18] Lisa Bohmer, *German Court Grants Application for Partial Enforcement of* Deutsche Telekom v India *Award, as Neither Fraud Allegations Nor BIT's Unique Wording on Enforcement Sway the Judges*, Investment Arb. Rep. (Feb. 9, 2023), https://www.iareporter.com/articles/german-court-grants-application-for-partial-enforcement-of-deutsche-telekom-v-india-award-as-neither-fraud-allegations-nor-bits-unique-wording-on-enforcement-sway-the-judges/.

[19] *Deutsche Telekom AG v. India*, Civil Case No. 21-1070 (RJL), Memorandum Opinion (Mar. 27, 2024), at 6.

[20] *Id.*

[21] *Devas Multimedia Private Ltd v Antrix Corp. Ltd.,* No. 20-36024 (9th Cir. 2023), ¶ 1.

[22] *CCDM Holdings, supra* note 17, ¶ 44.

[23] India's set-aside application against the *CC/Devas (1)* Award on Merits was rejected by the District Court of the Hague on November 14, 2018 (ECLI:NL:RBDHA:2018:15532), the Hague Court of Appeal on February 16, 2021 (ECLI:NL:GHDHA:2021:180), and the Dutch Supreme Court on February 3, 2023 (ECLI:NL:HR:2023:139).

[24] *India v. CC/Devas (Mauritius) Ltd.* (C/09/615682/HA ZA 21-674), October 25, 2023 issued by the District Court of the Hague.

[25] *Id.* ¶¶ 4.16, 4.19, and 4.20.

[26] *Id*. ¶ 4.09.

[27] *India v. Deutsche Telekom AG,* [2023] SGCA(I) 10, ¶¶ 142-178; 2023 SGHC(I) 7, ¶¶ 136-155.

[28] *Deutsche Telekom AG v. India*, Civil Case No. 21-1070 (RJL), Memorandum Opinion (Mar. 27, 2024).

[29] Swiss Bundesgericht Tribunal Fédéral (4A_184/2022), Urteil vom 8. März 2023.S.

[30] Lisa Bohmer, *Swiss Federal Tribunal Decides that Revision Proceedings Are not Available against Interim Award that Withstood Set-aside Request, while Finding that Request for Revision on Final Award is Time-Barred and Not Based on New Evidence*, Investment Arb. Rep. https://www.iareporter.com/articles/analysis-swiss-federal-tribunal-decides-that-revision-proceedings-are-not-available-against-interim-award-that-withstood-set-aside-request-while-finding-that-request-for-revision-of-final-award-is-t/.

[31] *Id. India v. CC/Devas (Mauritius) Ltd.*, *supra* note 24, ¶ 4.20.

[32] Order issued by Judge H.J. Vetter at the Hague District Court (July 18, 2023), https://www.iareporter.com/articles/dutch-court-declares-request-for-enforcement-of-devas-antrix-icc-award-inadmissible/.

[33] *Id*.

[34] *India v. Deutsche Telekom,* [2023] SGHC(I) 7, paras¶¶ 126-134.

[35] Bohmer, *supra* note 18.

[36] *CC/Devas (Mauritius) Ltd. v. India*, *supra* note 17, ¶¶ 210-215.

[37] Deutsche Telekom, "would be the victim, rather than a perpetrator" in the alleged fraud, *Deutsche Telekom AG v The Republic of India*, [2023] SGHC(I) 7, ¶¶ 87 and 123.

[38] Prabhash Ranjan, *Corruption and Investment Treaty Arbitration in India*, *in* Corruption and Illegality in Asian Investment Arbitration 235, 248 (Nobumichi Teramura, et al. eds., 2024).

[39] Chad Bown & Joost Pauwelyn, The Law, Economics and Politics of Retaliation in WTO Dispute Settlement 21-86 (2010).

[40] Press Release, United Nations, Security Council passes resolution demanding "an immediate ceasefire" during Ramadan,

https://news.un.org/en/story/2024/03/1147931?_gl=1*1y7ggfh*_ga*MTYxNDY2ODE4Ni4xNzA5NzczMDA4*_ga_TK9BQL5X7Z*MTcxMTQxMzkxNS4xLjAuMTcxMTQxMzkxNS4wLjAuMA.

A Californian Judgment fails the Provisional Sentence test in South African Courts

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Introduction

South Africa is one of the most developed countries on the African continent and a key country in the Southern African Development Community (SADC) and the BRICS (Brazil, Russia, India, China, and South Africa) economic bloc. Its status in private international law on the African continent is evinced as the country on the African continent where two vital instruments of private international law were adopted: the Convention on International Interests in Mobile Equipment (Cape Town Convention) and the Mining, Agricultural and Construction Protocol (MAC Protocol). It is also a member of the Hague Conference of Private International Law. Thus, development in its private international is likely to significantly impact the neighboring countries in the SADC region and the continent.

In the recent case of *Lindsey and Others v Conteh* (774/2022) 2024 (3) SA 68 (SCA), the South African Supreme Court of Appeal dismissed an appeal for the recognition and enforcement of a Californian judgment. The South African Supreme Court of Appeal held that "The California Court Orders do not constitute a liquid document evidencing an unconditional acknowledgment of indebtedness, in a fixed sum of money. The appeal must accordingly fail" (para 35).

This case is significant because the case addresses the recognition and enforcement of foreign judgment in South Africa and matters concerning provisional sentence. It is, therefore, a case that other SADC countries and common law jurisdictions would find helpful when recognizing and enforcing foreign judgments, especially under the common law regime.

Facts

The case outlined below concerns the recognition and enforcement of a Californian foreign judgment in South Africa. The brief facts of the case is as follows: The sixth appellant, African Wireless Incorporated (AWI), is a corporation registered in terms of the laws of the State of Delaware in the United States of America; and the first to fifth appellants are the shareholders of AWI. The respondent is a businessman and citizen of the United States of America and now resides in South Africa. The appellants filed a suit against Mr Conteh, the respondent. The basis of the suit was that the respondent had transferred some shares of AWI to companies belonging to him without the requisite permission of AWI.

Consequently, the appellants obtained a judgment by default. Further, the Californian Superior Court ordered the respondent to turn over the shares to the appellants. The court also placed a value upon the shares 'for bond purposes only'. The appellants then brought an *ex parte* application, which *inter alia* sought to convert the earlier court order to a monetary judgment. However, the application was dismissed.

The case before the High Court

The appellants argued that the foreign default judgment and the post-judgment enforcement orders collectively constituted a final and binding money judgment. They further argued that, by operation of law, the judgment was enforceable in the same manner as a "money judgment for the value of the shares". This is because it had been converted into a liquid and executable money judgment under California law. Therefore, its nonpayment entitled them to seek a provisional sentence. However, the respondent contended that the foreign judgment was not a money judgment; hence, it was not a liquid document. He averred that what was before the courts was merely a judgment for the delivery of shares.

The ruling of the High Court

According to the High Court, 'the judgment does not constitute prima facie proof of a debt enforceable by provisional sentence', as it did not comprise a liquid document. The court determined that extrinsic evidence on Californian law was necessary to prove that the order to turn over the shares had been converted into a debt in monetary terms, thus constituting a money judgment. The court concluded that the need to resort to such extrinsic evidence was inconsistent with South African courts' usual strict adherence to the requirements for granting a provisional sentence. Dissatisfied with this ruling, the plaintiffs appealed to the Supreme Court of Appeal.

Summary of the Judgment of the Supreme Court of Appeal

The Supreme Court of Appeal extolled the importance of recognizing and enforcing foreign judgment 'in a world of ever greater international commerce' (para 26). It reechoed its previous statement in *Richman v Ben-Tovim* 2007 (2) SA 283 (SCA), where it stated that "it is now well established that the exigencies of international trade and commerce require '. . . that final foreign judgments be recognised as far as is reasonably possible in our courts, and that effect be given thereto'" (para 25). The court stated that a court judgment serves as prima facie evidence of a debt owed and constitutes an acknowledgment of the indebtedness for the amount specified in the judgment.

The central issue in this case was whether a series of orders and two writs, granted by the Superior Court of California in the State of California, United States of America, cumulatively constituted a liquid document that can be enforced through provisional sentence in South Africa. Thus, the Supreme Court of Appeal was invited to determine the true nature of the Californian court orders in relation to the granting of a provisional sentence.

The appellants argued that the foreign judgment, when read cumulatively, constitutes a liquid document despite the initial judgment being for the turnover of shares. According to them, because a monetary value was ascribed to the shares and a writ of execution for the monetary value of the shares was issued, it is sufficient to enable them to secure a provisional sentence.

The court referred to the seminal case of *Jones v Krok* 1995 (1) SA 677 (A) to set out the conditions to be met for the recognition and enforcement of a foreign judgment, namely: '(i) that the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by our law with reference to the jurisdiction of foreign courts (sometimes referred to as "international jurisdiction or competence")? (ii) that the judgment is final and conclusive in its effect and has not become superannuated? (iii) that the recognition and enforcement of the judgment by our courts would not be contrary to public policy? (iv) that the judgment was not obtained by fraudulent means? (v) that the judgment does not involve the enforcement of a penal or revenue law of the foreign state? and (vi) that enforcement of the judgment is not precluded by the provisions of the Protection of Businesses Act 99 of 1978, as amended…'. In this case, the parties did not seek to qualify these requirements (para 27).

According to the court, a provisional sentence is a "summary remedy" that allows a judgment creditor with a liquid document to obtain relief quickly without initiating a trial action (para 19). The liquid document relied upon by the judgment creditor "must be a written instrument signed by the defendant acknowledging indebtedness unconditionally for a fixed amount of money," and the judgment debt "must be fixed, definitive, sounding in money," which is "evident on the face of the document" (para 21). Thus, the judgment creditor must satisfy the court that the foreign judgment satisfies these conditions in order to succeed under the proceedings for a provisional sentence. Under the proceedings for provisional sentence, the need for extrinsic evidence nullifies the liquidity requirement. However, over time, there has been a shift away from the

strict application of the principle of "the document must speak for itself" towards the need for "greater flexibility as to what evidence extrinsic to the foreign judgment itself may be permissible" (para 22).

The Supreme Court of Appeal stated that the judgment debt contained in the California Court Orders was for the possession of property. That is, the respondent should turn over the shares to AWI. Although the California court determined the value of those shares, it did not order Mr Conteh to pay an amount; it only required the respondent to deliver up specified shares. On this issue, the Court of Appeal of the State of California had already held that the appellants 'were not entitled to an actual money judgment in the default judgment proceedings' (para 11).

The SCA further made two observations on the relevant provisions of California law. First, court orders for the possession of property cannot be immediately enforced as a money judgment upon issuance. Some steps need to be followed: "The levying officer must have failed to take custody of the property; made demand of the judgment debtor, if the debtor can be located; the levying officer must then make a return that the property cannot be obtained" (para 31). It is only when these steps have been followed that the judgment for the possession of property will be enforced 'in the same manner' (para 31) as a money judgment. Secondly, the Supreme Court of Appeal emphasized that although the relevant provisions of Californian law allow for the enforcement of the Californian Court Orders 'in the same manner' as a money judgment, it does not render the court orders to be a money judgment (para 31).

On why a court order that can be enforced as a money judgment under Californian laws should not be recognised and enforced by a South African court, the Supreme Court of Appeal stated that it "is a matter of sovereignty" (para 33). South African courts are not simply instruments for enforcing California court orders. In addition, the summons by the appellants was for a provisional sentence and did not request a South African court to implement the enforcement procedures of Californian law (para 34).

Most crucially, the court stated that because the cause of action set out in the summons was based on a foreign judgment that is not a money judgment, the provisional sentence cannot be granted (para 35). Also, the California courts did not constitute a liquid document for a fixed sum of money. Thus, the Supreme

Court of Appeal dismissed the case, but on a ground different from that of the high court. The Supreme Court of Appeal reasoned that it was not the recourse of the appellants to extrinsic evidence that rendered provisional sentence unavailable to them. Instead, the foreign judgment they relied upon is not a money judgment, hence not a liquid document (para 36). Consequently, the appeal was dismissed.

Comment

This is a case where the judgment creditors sought the assistance of the South African courts to recognize and enforce the California court orders. It was a typical case of recognition and enforcement of foreign judgments. However, the foreign judgment fell short of the requirements to be satisfied when recognizing and enforcing judgment sounding in money. One of the recognized procedures for recognizing and enforcing foreign judgment in South Africa is by way of provisional sentence. When making this application for a provisional sentence, the judgment creditor should be armed with a liquid document. As a requirement, the judgment in question needs to be a money judgment. However, in this instant case, according to the Supreme Court of Appeal, the California Court Orders do not constitute a liquid document: the judgment obtained in the Californian courts was not a money judgment. Consequently, according to both the High Court and the Supreme Court of Appeal, because this 'necessary' requirement has not been met, the foreign judgment cannot be enforced by way of a provisional sentence.

In most common law legal systems, when recognizing and enforcing a foreign judgment, one of the requirements is that the judgment should be a fixed sum of money. Although it is not stated clearly in SADC countries, it is implicit in the procedure for enforcing foreign judgments through provisional sentence summons, which are summons on liquid documents (para 21). In this case, the South African court upheld this requirement and did not recognize the Californian court orders, which did not constitute a liquid document. Although a monetary value had been placed on the shares the respondent had to transfer, it was not deemed a money judgment. Thus, the fact that a foreign court order can be converted into a monetary value does not change the nature of the judgment into a monetary value. For a judgment to qualify as a fixed sum of money, it needs to be shown clearly in the foreign judgment that the judgment debtor is required to

pay a specific sum of money. In the words of the court, the debt must be "fixed, definitive, sounding in money and evident on the face of the document relied upon" (para 21). Without that, it does not qualify as a monetary judgment and cannot be recognized and enforced. The California judgment was not a money judgment. Thus, it was not recognized and enforced by way of provisional sentence. It is submitted that the Supreme Court of Appeal was right to dismiss the appeal on this ground. This decision by the Supreme Court of Appeal will be of great importance to Southern African courts, which are influenced by the jurisprudence of South African courts (*Standic BV v Petroholland Holding (Pty) Ltd (A 289-2012) [2020] NAHCMD 197).*

This judgment also shows the clinging of South Africa's court to the common law theory of obligation (para 18). Per the theory of obligation, a foreign judgment can be recognized and enforced by initiating a new action for the judgment debt. The rationale is that the foreign judgment imposes an obligation on the individual against whom the judgment was rendered to pay the judgment debt. The claim to pay the judgment debt is separate from the original cause of action that led to the judgment in the foreign jurisdiction. The judgment obtained in this new suit, not the original foreign court judgment, is enforceable as a judgment in the domestic courts. However, one should not be quick to pin this theoretical basis on South Africa's legal regime. This is because, in other cases of recognition and enforcement of foreign judgment that have come before the South African courts, such as *Richman v Ben-Tovim* (para 4) and the *Government of Zimbabwe v Fick* 2013 (5) SA 325 (CC) (para 56-57), other bases such as comity and reciprocity have been mentioned to be the basis for enforcing a foreign judgment. One should thus be guided by the counsel of Booysen J in *Laconian Maritime Enterprises Ltd v Agromar Lineas*1986 (3) SA 509 (D), where she observed rightly that trying to search for a theoretical basis was "a most interesting and somewhat frustrating exercise to attempt to pin it down" (*Laconian Maritime Enterprises Ltd v Agromar Lineas* 1986 (3) SA 509 (D) 513). The court thus observed that the concern should be on the applicable legal regime (that is, whether common law regime or the statutory regime) and the stipulated conditions for the recognition and enforcement of foreign judgment (*Laconian Maritime Enterprises Ltd v Agromar Lineas* 1986 (3) 509 (D) 516).

Another aspect of this case concerns recognizing and enforcing non-monetary foreign judgments. It is submitted that the practice where only judgments sounding in money are recognized and enforced is problematic and does not reflect recent developments in the field of recognition and enforcement of foreign judgment. A foreign judgment, beyond the requirement for the payment of a specific sum of money, might also require that the judgment debtor perform an act that includes the transfer of shares (like in this instant case) or delivery of property. There is a need for development in South Africa's legal regime to enable it to recognize and enforce non-monetary foreign judgments.

Current legislative developments in the arena of recognition and enforcement of foreign judgments allow for the recognition and enforcement of non-monetary judgments. For instance, the 2019 Hague Judgments Convention allows for recognizing and enforcing non-monetary judgments. According to the Garcimartín-Saumier Report, recognition and enforcement of foreign judgment "includes money and non-money judgments, judgments given by default.. and judgments in collective actions" (para 95). Further, the Report adds that "Judgments that order the debtor to perform or refrain from performing a specific act, such as an injunction or an order for specific performance of a contract (final non-monetary or non-money judgments) fall within the scope of the Convention". Also, the Commonwealth Model Law on Recognition and Enforcement of Foreign Judgment of 2018 allows for the recognition and enforcement of non-monetary judgments (Art 2). Even before these legislative innovations, the Supreme Court of Canada, in the case of *Pro Swing Inc v Elta Golf Inc* ((2007) 273 DLR (4th) 663), had already held that the traditional common law rule that limits enforcement to fixed sum judgments should be revised to allow for the enforcement on non-monetary judgments. Also, common law countries such as Australia and New Zealand have all, by legislation, done away with the fixed sum of money restriction (Australia: Section 5(6) of Foreign Judgments Act 1991; New Zealand: Section 3B of Reciprocal Enforcement of Judgments Act 1934).

These represent current developments in the law, and thus, the courts in South Africa, as part of their responsibility to develop the common law (section 8(3) of South Africa's 1996 constitution), should incorporate this innovation in order to develop the common law in this regard the next time they are seised with a case which requires them to recognize and enforce a non-monetary foreign judgment.

Suppose South Africa's legal regime recognizes and enforces non-monetary

foreign judgments; the court might have reached a different conclusion rather than outright dismissing the case and the appeal. In that situation, the California court order, which required the respondent to transfer shares to AWI, would have been capable of being recognized and enforced by the South African court. After the recognition and possible enforcement of the order to transfer the shares, the court would subsequently be invited to determine how to handle the monetary value placed on the shares to be transferred. However, such an opportunity was missed because South African courts do not recognize and enforce non-monetary judgments.

A Rejoinder to Dr Cosmas Emeziem's "Conflict of Laws and Diversity of Opinions—A View of The Nigerian Jurisdiction"

In this blog post, I respond to a recent critique by Dr. Cosmas Emeziem of a blog post co-authored by Dr. Abubakri Yekini and myself. Our post celebrated the elevation of Justice H.A.O. Abiru to the Nigerian Supreme Court and highlighted its significance for the development of Nigerian conflict of laws.

Dr. Emeziem argues that institutional expertise should be prioritised over individual expertise. He states, "[I]t is essential to stay focused on institutional capacities, expertise and competence and how to enhance them—instead of individualized expertise, which, though important, are weak foundations for enduring legal evolution and a reliable PIL regime." He concludes that: "Thus, the idea that "an expert in conflict of laws is now at the Supreme Court after a long time" is potentially misleading—especially for persons, businesses, and investors who may not know the inner workings of complex legal systems such as Nigeria."

Yekini and I in our blog post , clearly stated: “Nevertheless, this is not to suggest that Justice Abiru’s expertise is limited to conflict of laws, *nor that other Nigerian judges do not possess expertise in conflict of laws.* The point being made is that his Lordship’s prominence as a judicial expert in conflict of laws in Nigeria is noteworthy.” [emphasis added]. The work of a judge is challenging, and academics should recognize and celebrate their expertise.

Celebrating judicial expertise is beneficial. For instance, Dr. Mayela Celis on 24 November 2021 in one blog post praised the appointment of Justice Loretta Ortiz Ahlf – a private international law expert – to the Mexican Supreme Court. Celis concluded in her blog post that: “This appointment will certainly further the knowledge of Private International Law and Human Rights at the Mexican Supreme Court.”

It is common for judges to specialize in certain legal fields, especially at the appellate level. This specialization enables them to provide leading judgments in relevant cases. This is particularly true in common law jurisdictions, where judges are known for their individual attributes and often provide separate decisions, which can result in a diverse range of opinions even within the same case. For example, in the English case of *Boys v Chaplin*, the House of Lords was unable to provide a coherent ratio decidendi due to differing opinions regarding the law applicable to torts when applying English law to heads of damages.

In *Sonnar (Nig) Ltd v Partenreedri MS Norwind* (1987) 4 NWLR 520 at 544 Oputa JSC of the Nigerian Supreme Court, although concurring, expressed a separate view that as a matter of public policy, Nigerian courts “should not be too eager to divest themselves of jurisdiction conferred on them by the Constitution and by other laws simply because parties in their private contracts chose a foreign forum.” Many other Nigerian judges have since followed this individual approach taken by Oputa JSC, despite the majority of the Nigerian Supreme Court in *Sonnar* unanimously, and repeatedly in Nika Fishing Company Ltd v Lavina Corporation (2008) 16 NWLR 509, and Conoil Plc v Vitol SA (2018) 9 NWLR 463, expressing preference for the enforcement of a foreign jurisdiction clause, except where strong cause is advanced to the contrary. In this context, the influence of an individual judge in decision-making in conflict of laws cannot be undermined.

In England, former United Kingdom Supreme Court Judges like Lord Collins and Lord Mance are renowned for their expertise in conflict of laws. Indeed, Lord

Collins' academic prowess in conflict of laws is internationally renowned, as he is one of the chief editors of the leading common law text on the subject. Nevertheless, this is not to suggest that judges who are not specialists in conflict of laws cannot make significant contributions to the subject. For instance, Lord Goff, known for his expertise in unjust enrichment, significantly contributed to the principle of forum non conveniens, delivering the leading judgment in the seminal case of *Spiliada Maritime Corp v. Cansulex Ltd.* The point being made is that judges' specialization in a subject significantly enhances the quality of judicial decisions, a fact that scholars should celebrate.

The rise of international commercial courts in Asia and the Middle East, which resemble arbitral tribunals, underscores the importance of individual judicial expertise. These courts, including those in Hong Kong, Singapore, Dubai, Qatar, Kazakhstan, and Abu Dhabi attract top foreign judicial experts to preside over and decide cases, thereby instilling confidence in international commercial parties (Bookman 2021; Antonopoulou, 2023). For instance, Lord Collins a former non-permanent Member of the Hong Kong Court of Final Appeal, delivered the leading judgment in the significant cross-border matter of *Ryder Industries Ltd v Chan Shui Woo,* with the agreement of all other judges on the panel.

Yekini and I stated in our blog post, that Justice Abiru's "dissenting opinion *in Niger Aluminium Manufacturing Co. Ltd v Union Bank* (2015) LPELR-26010(CA) 32-36 highlights his commitment to addressing conflict of laws situations even when the majority view falls short." If the bench in the conflict of laws case where Justice Abiru dissented had been conversant with private international principles in Nigeria, a different outcome might have been reached. This is crucial in the context of the numerous per incuriam decisions by Nigerian appellate courts, which hold that in inter-state matters, a State High Court can only assume jurisdiction over a cause of action that arose within its territory, regardless of whether the defendant is present and/or willing to submit to the court's jurisdiction (Okoli and Oppong, Yekini, and Bamodu) . The key point is that having more specialists in conflict of laws in Nigerian courts will significantly enhance the quality of justice delivery in cross-border issues.

In conclusion, while Justice H.A.O. Abiru is not the entire Nigerian Supreme Court for conflict of laws, there is nothing wrong with emphasizing and celebrating his specialization in this field. Therefore, I stand by my co-authored blog post and will continue to highlight such expertise.

The Dubai Supreme Court — Again — on the Enforcement of Canadian (Ontario) Enforcement Judgment

I. Introduction

The decision presented in this post was rendered in the context of a case previously reported here. All of the comments I made there, particularly regarding the possibility of enforcing a foreign enforcement judgment and other related issues, remain particularly relevant. However, as I have learned more about the procedural history preceding the decisions of the Dubai Supreme Court ("DSC"), which was not available to me when I posted my previous comment, greater emphasis will be placed on the general factual background of the case. The decision presented here raises a number of fundamental questions related to the proper understanding of foreign legal concepts and procedures and how they should be integrated within the framework of domestic law. Therefore, it deserves special attention.

I would like to thank Ed Morgan (Toronto, ON Canada) who, at the time when my previous comment was posted, brought to my attention the text of the Ontario judgment whose enforcement was sought in Dubai in the present case.

II. Facts:

1. Background (based on the outline provided by the DSC's decisions)

X (appellant) obtained a judgment in the United States against Y (appellee), which then sought to enforce it in Canada (Ontario) via a motion for summary judgment. After the Ontario court ordered enforcement of the American

judgment, X sought enforcement of the Canadian judgment in Dubai by filing an application with the Execution Court of the Dubai Court of First Instance.

2. First Appeal: DSC, Appeal No. 1556 of 16 January 2024

The lower courts in Dubai admitted the enforceability of the Canadian judgment. Unsatisfied, Y appealed to the DSC. The DSC admitted the appeal and overturned the appealed decision, remanding the case for further review.

According to the DSC, the arguments raised by Y to resist the enforcement of the Canadian judgment – i.e. that the Court of Appeal erred in not addressing his argument that the foreign judgment was a "*summary judgment [hukm musta'jil]*[i] *declaring enforceable a rehabilitation order (hukm rad i'tibar)*[ii] *and an obligation to pay a sum of money rendered in the United States of America that cannot be enforced in the country [Dubai]*" – was a sound argument that, if true, might change the outcome of the case.

3. Second Appeal: DSC, Appeal No. 392/2024 of 4 June 2024

The case was sent back before the court of remand, which, in light of the decision of the DSC, decided to overturn the order declaring enforceable the Ontario judgment. Subsequently, X appealed to the DSC.

Before the DSC, X challenged the remand court's decision arguing that (i) the rules governing the enforcement of foreign judgments do not differentiate by types or nature of foreign judgments; (ii) that under Canadian law, "summary judgment" means a "substantive judgment on the merits"; and that (iii) Y actively participated in the proceedings and the lack of a full trial did not violate Y's rights of defense.

III. The Ruling

The DSC admitted the appeal and confirmed the order declaring enforceable the Canadian judgment.

After stating the general principles governing the enforcement of foreign judgments in the UAE and recalling some general principles of legal interpretation (such as the prohibition of personal interpretation in the presence of an absolutely unambiguous text, and the principle that legal provisions expressed in broad terms should not be interpreted restrictively), the DSC ruled as follows (all quotations inside the text below are added by the author):

"[it appears from the wording of the applicable legal provision[iii] that] *exequatur* decrees are not limited to "judgments" (*ahkam*) rendered in foreign countries but extends to foreign "orders" (*awamir*) provided that they meet the requirements for their enforcement. Furthermore, the [applicable legal provision][iv] has been put in broad terms (*'aman wa mutlaqan*), encompassing all "judgments" (*ahkam*) and "orders" (*awamir*) rendered in a foreign country without specifying their type (*naw'*) or nature (*wasf*) as long as the other requirements for their enforcement are satisfied. Moreover, there is no evidence that any other legal text pertaining to the same subject specifies limitations on the aforementioned [the applicable legal provision]. To the contrary, and unlike the situation [under the previously applicable rules],[v] the Legislator has expanded the concept of enforceable titles (*al-sanadat al-tanfidhiyya*),[vi] which now includes criminal judgments involving restitution (*radd*), compensations (*ta'widhat*), fines (*gharamat*) and other civil rights (*huquq madaniyyah*). [...]

Given this, and considering that the appealed decision overturned the *exequatur* decree of the judgment in question on the ground that the [Canadian] judgment, which recognized a judgment from the United States, was a "summary judgment" (*hukm musta'jil*) enforceable only in the rendering State, despite the broad wording of [the applicable provisions],[vii] which covers all judgments (*kul al-ahkam*) rendered in a foreign State without specifying their type (*naw'*) or nature (*wasf*) provided that the other requirements are met. In the absence of any other specification by any other legal text pertaining to the same subject, the interpretation made by the appealed decision restricts the generality of [the applicable rules] and limits its scope [thereby] introducing a different rule not stipulated therein.

Moreover, the appealed decision did not clarify the basis for its conclusion that the [foreign] judgment was a "summary judgment" (*hukm musta'jil*) enforceable only in the rendering State. [This is more so], especially since the submitted documents on the Canadian civil procedure law and the Regulation No. 194 on

[the Rules of Civil Procedure] show that Canadian law recognizes the system of "*Summary judgment*"[viii] for issuing judgments through expedited procedures, and that the [foreign] judgment was indeed rendered following expedited procedures after Y's participation by submitting rebuttal memoranda and hearing of the witnesses.[…]

Considering the foregoing, and upon reviewing the [Canadian] judgment… rendered in favor of the appellant as officially authenticated, it is established that the parties (X and Y) appeared before the [Canadian] court, [where] Y presented his arguments … and the witnesses were heard. Based on these proceedings [before the Canadian court], the court decided to issue the aforementioned "summary judgment" (al-*hukm al-musta'jil*) whose enforcement is sought in [this] country. [In addition, the appellant presented] an officially authenticated certificate attesting the legal authority (*hujjiyat*) [and the finality][ix] of the [Canadian] judgment. Therefore, the requirements stipulated [in the applicable provisions][x] for its enforcement have been satisfied. In addition, it has not been established that the courts [of the UAE] have exclusive jurisdiction over the dispute subject of the foreign judgment, nor that the [foreign] judgment is [rendered] in violation of the law of the State of origin or the public policy [in the UAE], or that it is inconsistent with a judgment issued by the UAE courts. Therefore, the [Canadian] judgment is valid as a an "enforceable title" (*sanad tanfidhi*) based on which execution can be pursued.

IV Comments

The decision presented here has both positive and negative aspects. On the positive side, the DSC provides a welcome clarification regarding the meaning of "foreign judgment" for the purposes of recognition and enforcement. In this respect, the DSC aligns itself with the general principle that "foreign judgments" are entitled to enforcement regardless of their designation, as long as they qualify as a "substantive judgment on the merits". This principle has numerous explicit endorsements in international conventions dealing with the recognition and enforcement of foreign judgments[xi] and is widely recognized in national laws and practices.[xii]

However, the DSC's understanding of the Canadian proceedings and the nature of

the summary judgment granted by the Canadian court, as well as its attempt to align common law concepts with those of UAE law are rather questionable. In this respect, the DSC's decision shows a degree of remarkable confusion in the using the appropriate legal terminology and understanding fundamental legal concepts. These include (i) the treatment of foreign summary enforcement judgments as ordinary "enforceable titles" (*sanadat tanfidhiyya – titres exécutoires*) under domestic law including domestic judgments rendered in criminal matters; (ii) the assimilation between summary judgment in common law jurisdictions and *hukm musta'jil* ("summary interlocutory proceedings order" – "*jugement en référé*"); and (iii) the confusion between summary judgment based on substantive legal issues and summary judgment to enforce foreign judgments.

For the sake of brevity, only the third point will be addressed here for its relevant importance. However, before doing so, some light should be shed on the proceedings before the Canadian court.

1. The proceedings before the Canadian Court and the nature of the Canadian Judgment

The unfamiliarity with DSC with the proceedings in Canada and underlying facts is rather surprising for two reasons: i) the proceedings were initiated by the American government in the context of a bilateral cooperation in criminal matters; and ii) the Canadian proceedings was a proceeding to *enforce* a foreign judgment rendered in criminal matters and was not simply a proceeding dealing with substantive legal issues. Therefore, a detailed review of the proceedings before the Ontario is necessary to better understand the peculiarities of the case commented here.

i) Proceedings in the context of mutual cooperation in criminal matters. The case originated in Ontario-Canada as a motion brought by the United States of America represented by the Department of Justice as plaintiff for summary judgment to recognize and enforce a "Restitution Order"[xiii] made against Y (defendant). The Restitution Order was part of Y's sentence in the USA for securities fraud and money laundering. It "*included terms as to payment and listed the victims and amounts to which they were entitled under the order*" [para. 16].

The general procedural context of the Canadian judgment is of utmost relevance.

Indeed, the USA sought the enforcement of the Restitution Order on the basis of the Mutual Legal Assistance in Criminal Matters Act. The Act, as it describes itself, aims "*to provide for the implementation of treaties for mutual legal assistance in criminal matters*". According to the Ontario Court, The Act is a "*Canadian domestic legislation enacted to meet Canada's treaty obligations for reciprocal enforcement in criminal matters*" [para. 6]. These treaty obligations are based on the Canada-USA Treaty on Mutual Legal Assistance in Criminal Matters of 1990 [para. 6].

This is why, before the Canadian Court, one of the main questions [para. 25] was whether the "Restitution Order" could be regarded as "fine" within the meaning of the Act [para. 26]. If this is the case, then the Restitution Order could be enforced as a "*pecuniary penalty* determined by a court of criminal jurisdiction" in the meaning of article 9 of the Act.

On the basis of a "*broad, purposive interpretation of "fine" … aligned with Canada's*" international obligation under the Treaty, the Ontario court considered that "*proceeds of crimes, restitution to the victims of crime and the collection of fines imposed as a sentence in a criminal prosecution*" can be regarded as "fine" for the purpose of the case [para. 30]. In addition, the court characterized the restitution order as "*a pecuniary penalty determined by a court of criminal jurisdiction*" [para. 35], and also described it as an "*order made to repay the individual members of the public who were encouraged to purchase stock at an inflated price by virtue the criminal activity*" [para. 39]. The court ultimately, concluded that "*the Restitution Order made against [Y] is a "fine" within the meaning of… the Act*" [para. 41].

From a conflicts of laws perspective, the question of whether the "Restitution Order" is of a penal nature is crucial. Indeed, it is generally accepted that penal judgments are not eligible to recognition and enforcement. However, nothing prevents derogating from this principle by concluding international conventions or enforcing the civil law component of foreign judgments rendered by criminal courts in criminal proceedings, which orders the payment of civil compensation.[xiv]

Interestingly, before the Canadian court, Y argued that the "Restitution Order" made against him *was not* a "fine" because it was a "*compensatory-type*" order [para. 27]. However, it is clear that it was an attempt to exclude the enforcement

of Restitution Order from the scope of application of the Mutual Legal Assistance in Criminal Matters Act. In any event, despite the crucial theoretical and practical importance of the issue, this is not the place to discuss whether the "Restitution Order" was penal or civil in nature. What matters here is the nature of the proceeding brought before the Canadian court which is a summary proceeding to recognize and enforce a foreign judgment. This leads us to the next point.

ii) Nature of the Canadian judgment. It is clear from the very beginning of the case that the USA did not bring an action on the merits but sought "an order for summary judgment *recognizing and enforcing a judgment a Restitution Order made against [Y] as part of his sentence in [the USA] for securities fraud and money laundering*" [para. 1]. Therefore, the case was about a motion for a summary judgment to *enforce a foreign judgment*. In this respect, one of the interesting aspects of the case is that Y also relied on the enforcement of foreign judgments framework and raised, *inter alia*, "a defence of public policy" at common law [para. 79] citing *Beals v, Saldanha* (2003), a leading Canadian Supreme Court judgment on the *recognition and enforcement of foreign judgments* in civil and commercial matters.[xv] The court however dismissed the argument considering that there was "*no genuine issue for trial on the question of a public policy defence against the enforcement in Canada of the Restitution Order*" [para. 82].

Accordingly, if one puts aside the question of enforceability of foreign penal judgments, it is clear that the Canadian judgment was a judgment declaring enforceable a foreign judgment. The very conclusion of the Canadian court makes it even clearer when the court granted USA's motion for summary judgment by *ordering the enforcement in Canada of the Restitution Order* [para. 84]. Accordingly, as discussed in my previous comment on this case, and taking into account the nature of the Canadian judgment, it can be safely said that the Canadian enforcement judgment cannot be eligible to recognition and enforcement elsewhere based on the adage "*exequatur sur exequatur ne vaut*".

2. No… a summary judgment to enforce a foreign judgment is not a summary judgment based on substantive legal issues!

It is widely known that the procedural aspects of the enforcement of foreign

judgments largely differ across the globe. However, it is fair to say that there are, at least, two main models (although other enforcement modalities do also exist). Generally speaking, civil law jurisdictions adopt the so-called "*exequatur*" proceeding the main purpose of which is to confer executory power to the foreign judgment and transforms it into a local "enforceable title". On the other hand, in common law jurisdictions, and in the absence of applicable special regimes, the enforcement of foreign judgments is carried out by initiating a new and original action brought before local court on the foreign judgment.[xvi] The purpose of this action is to obtain an enforceable local judgment that, while recognizing and enforcing the foreign judgment, is rendered as if it were a judgment originally issued by the local court.[xvii] Both procedures result in similar outcome:[xviii] what has been decided by the foreign court will be granted effect in the form. However, *technically*, in civil law jurisdiction it is the foreign judgment itself that is permitted to be enforced in the forum,[xix] while in common law jurisdictions, it is the local judgement alone which is enforceable in the forum.[xx]

Such an enforcement in common law jurisdictions is usually carried out by way of *summary judgment procedure*.[xxi] However, this procedure *should not* be confused with the standard summary judgment procedure used to resolve disputes on the merits within an ongoing case. In fact, it is a distinct process aimed specifically at recognizing and enforcing foreign judgments,[xxii] which is the functionally equivalent counterpart in common law jurisdictions to the *exequatur* procedure.

This is precisely the confusion that the DSC encountered. The Court regarded the Canadian summary judgment as "a civil substantive judgment on the merits", although it was not. Therefore, – and as already explained – the summary judgment rendered in result of this proceeding *cannot* be regarded as "foreign judgment" eligible for recognition and enforcement abroad in application of the principle *"exequatur sur exequatur ne vaut*".

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[i] In my previous post, I translated the term "*hukm musta'jil*" as "summary judgment to highlight the nature of the Canadian procedure. However, from the

purpose of UAE law, I think it is better that this word be translated as "summary interlocutory judgment – *jugement en référé*". This being said, for the purpose of this post the terms "summary judgment" will be used to highlight the terminological confusion committed by the DSC.

[ii] In my previous post, I was misled by the inappropriate terminology used in the DSC's decision which referred to this American order as "Rehabilitation order" (*hukm rad i'tibar*). The term "rehabilitation order" is maintained here as this is the term used by the DSC.

[iii] The DSC made reference to article 85 of Cabinet Resolution No. 57/2018 on the Executive Regulations of Law No. 11/1992 on Civil Procedure Act (hereafter "2018 Executive Regulation"), which was subsequently replaced by article 222 of New Federal Act on Civil Procedure (Legislative Decree No. 42/2022 of 3 October 2022) (hereafter "New 2022 FACP").

[iv] Ibid.

[v] The DSC referred the former Federal Act on Civil Procedure of 1992 (Federal Act No. 11/1992 of 24 February 1992)

[vi] The DSC referred to article 75(2) of the 2018 Executive Regulation as subsequently supplanted by article 212(2) of the New 2022 FACP.

[vii] *Supra* n (3).

[viii] In the original. Italic added.

[ix] In the words of the DSC, the foreign judgment "was not subject to appeal".

[x] *Supra* n (3).

[xi] See Article 3(1)(b) of the HCCH 2019 Judgments Convention; article 4(1) of the HCCH 2005 Choice of Court Convention; article 25(a) of the 1983 Riyadh Convention.

[xii] See eg. the Japanese Supreme Court Judgment of 28 April 1998 defining foreign judgment as "a final judgment rendered by a foreign court on private law relations… regardless of the name, procedure, or form of judgment" "[e]ven if the judgment is called a decision or order".

[xiii] *Supra* n (2).

[xiv] On UAE law on this issue, see my previous post here and the authorities cited therein.

[xv] On this case see, Janet Walker, "*Beals v. Saldanha:* Striking the Comity Balance Anew" 5 *Canadian International Lawyer* (2002) 28; *idem*, "The Great Canadian Comity Experiment Continues" 120 *LQR* (2004) 365; Stephen G.A. Pitel, "Enforcement of Foreign Judgments: Where *Morguard* Stand After *Beals*" 40 *Canadian Business Law Journal* (2004) 189.

[xvi] Trevor C. Hartley, *International Commercial Litigation* (3rd ed. 2020) 435.

[xvii] Adrian Briggs, "Recognition of Foreign Judgments: A Matter of Obligation" 129 LQR (2013) 89.

[xviii] Briggs, *ibid*.

[xix] Peter Hay, *Advance Introduction to Private International Law and Procedure* (2018) 110.

[xx] Briggs, *supra* n (17).

[xxi] Adeline Chong, *Asian Principles for the Recognition and Enforcement of Foreign Judgments* (2021)13.

[xxii] Cf. Hartley, *supra* n (16) 435 pointing out that "*Procedurally*, therefore, a new action is brought; in *substance*, however, the foreign judgment in recognized and enforced" (italic in the original).