There and Back Again? – The unexpected journey of EU-UK Judicial Cooperation finally leads to The Hague

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Today marks a significant step towards the reconstruction of EU-UK Judicial Cooperation. As neither House of Parliament has raised an objection by 17 May 2024,[1] the way seems to be paved for the Government’s ambitious plans to have the HCCH 2019 Judgments Convention[2] implemented and ratified by the end of

June 2024.[3] For the first time since the withdrawal of the United Kingdom from the European Union (so-called *Brexit*) on 31 January 2020, a general multilateral instrument would thus once again be put in place to govern the mutual recognition and enforcement of judgments in civil and commercial matters across the English Channel.

We wish to take this opportunity to look back on the eventful journey that the European Union and the United Kingdom have embarked on in judicial cooperation since Brexit (I.) as well as to venture a look ahead on what may be expected from the prospective collaboration within and perhaps even alongside the HCCH system (II.).

I. From Brexit to The Hague (2016-2024)

When the former Prime Minister and current Foreign Secretary *David Cameron* set the date for the EU referendum on 23 June 2016, this was widely regarded as just a political move to ensure support for the outcome of his renegotiations of the terms of continued membership in the European Union.[4] However, as the referendum results showed 51.9% of voters were actually in favour of leaving,[5] it became apparent that *Downing Street* had significantly underestimated the level of voter mobilisation achieved by the *Vote Leave* campaign. Through the effective adoption of their alluring “take back control” slogan, the Eurosceptics succeeded in framing European integration as undermining Britain’s sovereignty – criticising *inter alia* a purportedly dominant role of the Court of Justice (CJEU) – while simultaneously conveying a positive sentiment for the United Kingdom’s future as an autonomous country[6] – albeit on the basis of sometimes more than questionable arguments.[7]

http://www.voteleavetakecontrol.org/why_vote_leave.html

Whatever the economic or political advantages of such a repositioning might be (if any at all), it proved to be a severe setback in terms of judicial cooperation. Since most – if not all – of the important developments with respect to civil and commercial matters[8]in this area were achieved within the framework of EU Private International Law (PIL) (e.g. Brussels Ibis, Rome I-II etc.), hopes were high that some of these advantages would be preserved in the subsequent negotiations on the future relationship after Brexit.[9] A period of uncertainty in forum planning for cross-border transactions followed, as it required several rounds of negotiations between EU Chief Negotiator *Michel Barnier* and his changing UK counterparts (*David Frost* served for the final stage from 2019-2020) to discuss both the Withdrawal Agreement[10] as well as the consecutive Trade and Cooperation Agreement (TCA).[11] While the first extended the applicability of the relevant EU PIL Regulations for proceedings instituted, contracts concluded or events occurred during the transition period until 31 December 2020,[12] the latter contained from that point onwards effectively no provision for these matters, with the exception of the enforcement of intellectual property rights.[13] Thus, with regard to civil judicial cooperation, the process of leaving the EU led to – what is eloquently referred to elsewhere as – a "sectoral hard Brexit".[14]

With no tailor-made agreement in place, the state of EU-UK judicial cooperation

technically fell back to the level of 1973 before the UK's accession to the European Communities. In fact, – in addition to the cases from the transition period – the choice of law rules of the Rome I and Rome II-Regulations previously incorporated into the domestic law, remained applicable as so-called *retained EU law* (REUL) due to their universal character (*loi uniforme*).[15] However, this approach was not appropriate for legal acts revolving around the principle of reciprocity, particularly in International Civil Procedure.[16] Hence, a legal stocktaking was required in order to assess how *Brexit* affected the status of those pre-existing multilateral conventions and bilateral agreements with EU Member States that had previously been superseded by EU law.

First, the UK Government has been exemplary in ensuring the "seamless continuity" of the HCCH 2005 Choice of Court Convention throughout the uncertainties of the whole withdrawal process, as evidenced by the UK's declarations and *Note Verbale* to the depositary Kingdom of the Netherlands.[17] The same applies *mutatis mutandis* to the HCCH 1965 Service Convention, to which all EU Member States are parties, and the HCCH 1970 Evidence Convention, which has only been ratified so far by 23 EU Member States. Second, some doubts arose regarding an *ipso iure* revival of the original Brussels Convention of 1968,[18] the international treaty concluded on the occasion of EU membership and later replaced by the Brussels I Regulation when the EU acquired the respective competence under the Treaty of Amsterdam.[19] Notwithstanding the interesting jurisprudential debate, these speculations were effectively put to a halt in legal practice by a clarifying letter of the UK Mission to the European Union.[20] Third, there are a number of bilateral agreements with EU Member States that could be reapplied, although these can hardly substitute for the Brussels regime, which covers most of the continental jurisdictions.[21] This is, for example, the position of the German government and courts regarding the German-British Convention of 1928.[22]

It is evident that this legal patchwork is not desirable for a major economy that wants to provide for legal certainty in cross-border trade, which is why the UK Government at an early stage sought to enter into a more specific framework with the European Union. First and foremost, the *Johnson Ministry* was dedicated to re-access the Lugano Convention[23] which extended the Brussels regime to certain Member States of the European Free Trade Association (EFTA)/European Economic Area (EEA) in its own right.[24] Given the strong resentments

Brexiteers showed against the CJEU during their campaign this move is not without a certain irony, as its case law is also crucial to the uniform interpretation of the Lugano Convention.[25] Whereas Switzerland, Iceland and Norway gave their approval, the European Commission answered the UK's application in the negative and referred to the HCCH Conventions as the "framework for cooperation with third countries".[26] What some may view as a power play by EU bureaucrats could also fairly be described as a necessary rebalancing of trust and control due to the comparatively weaker economic and in particular judicial integration with the United Kingdom *post-Brexit*.[27] At the very least, the reference to the HCCH reflects the consistent European practice in other agreements with third countries.[28]

Be that as it may, if *His Majesty's Government* implements its ratification plan as diligently as promised, the HCCH 2019 Judgments Convention may well be the first new building block in the reconstruction what has been significantly shattered on both sides by the twists and turns of *Brexit*.

II. (Prospective) Terms of Judicial Cooperation

Even if the path of EU-UK Judicial Cooperation has eventually led to The Hague, there is still a considerable leeway in the implementation of international common rules.

Fortunately, the UK Government has already put forward a roadmap for the HCCH 2019 Judgments Convention in its responses to the formal consultation carried out from 15 December 2022 to 9 February 2023[29] as well as the explanatory memorandum to the Draft Recognition and Enforcement of Judgments Regulations 2024.[30] Generally speaking, the UK Government wants to implement the HCCH Convention for all jurisdictions of the United Kingdom without raising any reservation limiting the scope of application. Being a devolved matter, this step requires the Central Government to obtain the approval of a Northern Ireland Department (*Roinn i dTuaisceart Éireann*) and the Scottish Ministers (*Mhinistearan na h-Alba*).[31] Furthermore, this approach also implies that there will be no comparable exclusion of insurance matters as under the HCCH 2005 Convention.[32] However, the Responses contemplated making use of the bilateralisation mechanism in relation to the Russian Federation upon its accession to the Convention.[33]

Technically, the Draft Statutory Instrument employs a registrations model that has already proven successful for most recognition and enforcement schemes applicable in the UK.[34] However, registration within one jurisdiction (e.g. England & Wales) will on this basis alone not allow for recognition and enforcement in another (e.g. Scotland, Northern Ireland), but is rather subject to re-examination by the competent court (e.g. Court of Session).[35] This already constitutes a significant difference compared to the system of automatic recognition under the Brussels regime. Moreover, the draft instrument properly circumvents the peculiar lack of an exemption from legalisation in the HCCH 2019 Convention by recognizing the seal of the court as sufficient authentication for the purposes of recognition and enforcement.[36] It remains to be seen if decisions of third states "domesticated" in the UK under the common law *doctrine of obligation* will be recognized as judgments within the European Union. If the CJEU extends the position taken in *J. v. H Limited* to the HCCH 2019 Judgments Convention, the UK may become an even more attractive gateway to the EU Single Market than expected.[37] Either way, the case law of the CJEU will be mandatory for 26 Contracting States and thus once again play – albeit not binding – a dominant role in the application of the HCCH legal instrument.

As far as the other legal means of judicial cooperation are concerned, the House of Lords does not yet appear to have given up on accession to the Lugano Convention.[38] Nevertheless, it seems more promising to place one's hopes on continued collaboration within the framework of the HCCH. This involves working towards the reconstruction of the remaining foundational elements previously present in EU-UK Judicial Cooperation by strengthening the HCCH *Jurisdiction Project* and further promoting the HCCH 1970 Evidence Convention in the EU.

III. Conclusion and Outlook

After all, the United Kingdom's withdrawal from the European Union has dealt a serious blow to judicial cooperation across the English Channel. A look back at the history of *Brexit* and the subsequent negotiations has revealed that the separation process is associated with an enormous loss of trust. Neither could the parties agree on a specific set of rules under the TCA, nor was the European Union willing to welcome the United Kingdom back to the Lugano Convention.

Against this background, it is encouraging to see that both parties have finally agreed on the HCCH as a suitable and mutually acceptable forum to discuss the

future direction of EU-UK Judicial Cooperation. If *Brexit* ultimately brought about a reinvigorated commitment of the United Kingdom to the HCCH Project, this might even serve as an inspiration for other States to further advance the Hague Conference's ambitious goal of global judicial cooperation. Then the prophecies of the old songs would have turned out to be true, after a fashion. Thank goodness!

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[1] HL Int. Agreements Committee, 11th Report of 8 May 2024 "Scrutiny of international agreements: 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters" (HL Paper 113), para. 1. According to sec. 20 (1) (a) and (2) of the Constitutional Reform and Governance Act 2010 (c. 25) is a treaty not ratified unless a Minister of the Crown has laid a copy before parliament for a period of 21 sitting days.

[2] Convention on the recognition and enforcement of foreign judgments in civil or commercial matters (HCCH 2019 Judgments Convention) of 2 July 2019, UNTS I-58036 and Tractatenblad 2024, 42 (Verdragsnr. 013672).

[3] Civil Procedure Rule Committee, Minutes of 1 December 2023, para. 28

[4] See *inter alia*, *Mason*, "How did UK end up voting to leave the European Union?", The Guardian of 24 June 2016; *Boffey*, "Cameron did not think EU referendum would happen, says Tusk", The Guardian of 21 January 2019; *Duff*, "David Cameron's EU reform claims: If not 'ever closer union', what?", Blogpost of 26 January 2016 on Verfassungsblog | On Matters Constitutional; *von Lucke*, "Brexit oder: Die verzockte Demokratie", Blätter 8/2016, 5 et seq.

[5] UK Electoral Commission, "23 June 2016 referendum on the UK's membership of the European Union", Report of September 2016, p 6.

[6] Compare *Haughton*, "Ruling Divisions: The Politics of Brexit", Perspectives on Politics 19 (2021), 1258, 1260; *Özlem Atikcan/Nadeau/Bélanger*, "Framing Risky Choices: Brexit and the Dynamics of High-stakes Referendums", p. 44.

[7] E.g. *Rankin*, "Is the leave campaign really telling six lies?", The Guardian of 7 June 2016.

[8] This finding might look different for International Family Law, according to *Beaumont*, "Private International Law concerning Children in the UK after Brexit: Comparing Hague Treaty Law with EU Regulations", Child & Fam. L. Q. 29 (2017), 213, 232: "In all these matters students, practitioners and judges will be grateful to have fewer operative legal regimes post-Brexit".

[9] For example, on this blog *Fitchen*, "Brexit: No need to stop all the clocks", Blogpost of 31 January 2020 or *Lutzi*, "Brexit: The Spectre of Reciprocity Evoked Before German Courts", Blogpost of 13 December 2020.

[10] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (Withdrawal Agreement) of 24 January 2020, OJ EU CI 384/1.

[11] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (TCA) of 30 December 2020, OJ EU L 149/10.

[12] Art. 126 of the Withdrawal Agreement.

[13] Compare Chapter 3: Art. 256-273 of the TCA.

[14] *Bert*, "Judicial Cooperation in Civil Matters: Hard Brexit After All?", Blogpost of 26 December 2020 on Dispute Re§olution Germany.

[15] Sec. 3 (1) European Union (Withdrawal) Act 2018, Chapter 16/2018, sec. 10, 11 The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019, SI 2019/834; For the current status of the Retained EU Law, see House of Commons Library "The end of REUL? – Progress in reforming retained EU law", Research Briefing No.°09957 of 2 February 2024 (author: *Leigh Gibson*).

[16] Implicitly *Dickinson*, "Realignment of the Planets – Brexit and European Private International Law", IPRax 2021, 213, 217 et seq.

[17] See Notes Verbales of the United Kingdom to the Kingdom of the Netherlands in its capacity as depositary of the HCCH 2005 Judments Convention from 28 December 2018 to 28 September 2020 in the Treaty Database.

[18] Convention on jurisdiction and the enforcement of judgments in civil and commercial matter (Brussels Convention) of 27 September 1968, OJ EU L 229/31; See e.g. *Rühl*, "Judicial Cooperation in Civil and Commercial Matters after Brexit: Which Way Forward?", ICLQ 67 (2018), 99, 104 et seq.

[19] Art. 73m of the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts of 2 October 1997, OJ EU C 340/1.

[20] UK Mission to the European Union, Letter to the Council of the European Union of 29 January 2021, NO 17/2021.

[21] See, for example, the Agreement on the continued Application and Amendment of the Convention between the Government of the United Kingdom and the Government of Norway providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters singed at London on 12 June 1961, SI 2020 No. 1338.

[22] Convention on the Facilitation of Legal Proceedings in Civil and Commercial Matters between His Majesty and the President of the German Reich of 20 March 1928; RGBl. 1928 II Nr. 47; for the position of the German Government, please refer to German Federal Government "Response to the parliamentary enquiry on judicial cooperation in civil matters with the United Kingdom post-Brexit", BT-Drucks. 19/27550 of 12 March 2021, p. 3, for a recent decision of the German Judiciary, see Higher Regional Court of Cologne, Decision of 2 March 2023, I-18 U 188/21, paras. 60 et seq.

[23] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention) of 30 October 2007, OJ EU L 339/3.

[24] With the notable exception of Liechtenstein.

[25] Art. 64 Lugano Convention as well as the Protocol concerning the interpretation by the Court of Justice of 3 June 1971, OJ EU L No°204/28.

[26] For the consent of the other Contracting State (except Denmark), see Swiss FDFA, "Communications by the depositary with respect to the application of accession by the United Kingdom", Notification of 28 April 2021,

612-04-04-01 – LUG3/21; for the rejection of the EU Commission, Note Verbale to the Swiss Federal Council of 22 June 2021 and, "Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention", COM(2021) 222 final of 4 May 2021, pp. 3 et seq. However, this decision was not without criticism, for example by the Chair-Rapporteur of the OHCHR Working Group on the issue of human rights and transnational corporations and other business enterprises in a letter to the EU Commission of 14 March 2024.

[27] For these arguments see EU Commission, "Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention", COM(2021) 222 final of 4 May 2021, p. 3 and European Parliamentary Research Service (EPRS), "The United Kingdom's possible re-joining of the 2007 Lugano Convention" Briefing PE 698.797 of November 2021 (author: *Rafa? Ma?ko*), pp. 3 et seq. For a theoretical foundation, see *M. Weller*, " 'Mutual Trust': A Suitable Foundation for Private International Law in Regional Integration Communities and Beyond", RdC 423 (2022), 37, 295 et seq.

[28] See e.g. Art. 24 of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other par, OJ EU No°L 161/3: "The Parties agree to facilitate further EU-Ukraine judicial cooperation in civil matters on the basis of the applicable multilateral legal instruments, especially the Conventions of the Hague Conference on Private International Law in the field of international Legal Cooperation and Litigation as well as the Protection of Children". Until recently, the regulation of judicial cooperation specifically in and for extra-EU trade relations appeared to be aout of sight, see *M. Weller*, "Judicial cooperation of the EU in civil matters in its relations to non-EU States – a blind spot?", in Alan Uzelac/Rhemco van Rhee (eds.), Public and Private Justice (PPJ) 2017: The Transformation of Civil Justice, Intersentia 2018, pp. 63 et seq.

[29] UK Ministry of Justice, The Hague 2019 – Response to Consultation of 23 November 2023 ("Responses").

[30] Draft Statutory Instruments 2024 No. XXX Private International Law: The Recognition and Enforcement of Judgments (2019 Hague Convention etc.) Regulations 2024 ("Draft Guidelines"). The competence to make regulations in that respect is based on sec. 2 (1) of the Private International Law

(Implementation of Agreements) Act 2020 (c. 24). According to sec. 2 (11) read in conjunction with sched. 6 paras. 4 (2) (a) and (d) draft regulations need to be laid before parliament for approval of each House by a resolution.

[31] Sec. 2 (12) Private International Law (Implementation of Agreements) Act 2020 (c. 24); see also Letter from the Scottish Minister for Victims and Community Safety of 19 March 202 regarding the "UK SI Notification – The Recognition and Enforcement of Judgments (2019 Hague Convention etc) Regulations 2024".

[32] See Response, para. 51; a similar discussion took place regarding "mixed litigation issues", where only certain elements are within the scope of the HCCH 2019 Judgments Convention.

[33] Responses, para. 53.

[34] See *inter alia* the Administration of Justice Act 1920, Chapter 81/1920 (Regnal. 10 & 11 Geo 5) or the Foreign Judgments (Reciprocal Enforcement) Act 1933, Chapter 13/1933 (Regnal. 23 & 24 Geo 5.

[35] Sec. 15 Draft Guidelines and Draft Explanatory Memorandum, para. 5.5.5.

[36] Sec. 12 Draft Guidelines; *Garcimartin/Saumier*, HCCH 2019 Judgments Convention: Explanatory Report, para. 307.

[37] See CJEU, Judgment of 7 April 2022, *J. v. H. Limited*, C-568/20, para. 47. However, there is a certain chance that this case law will be corrected in the upcoming revision process of the Brussels Ibis-Regulation, see e.g. *Hess/Althoff/Bens/Elsner/Järvekülg*, "The Reform of the Brussels Ibis Regulation", MPI Luxembourg Research Paper Series N.°2022 (6), proposal 15.

[38] HL Int. Agreements Committee, 11th Report of 8 May 2024 "Scrutiny of international agreements: 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters" (HL Paper 113), para. 17: "Many stakeholders have called for the Government to continue its efforts to join the Lugano Convention in addition to ratifying Hague 2019. We agree that the Government should do so."

Way Out West? Understanding The CISG's Application in Australia

In 2009, Associate Professor Lisa Spagnolo observed – based upon her census of Australia's CISG case law at that time – that the Convention was effectively 'in the Australian legal outback'. For those unfamiliar with Australia's geography, most of its population is concentrated on the continent's eastern coast. Australia's outback extends, amongst other places, across much of Western Australia. With that geographic imagery in mind, one might not be surprised to hear that a recent decision of the County Court of Victoria – in Australia's east – overlooked the Vienna Sales Convention's application.

Abu Dhabi Supreme Court on the Applicability of Law on Civil Marriage to Foreign Muslims

I. Introduction

Recent developments in the field of family law in the UAE, in particular the adoption of the so-called "Civil Marriage Laws", have aroused interest, admiration, curiosity, and even doubt and critics among scholars and practitioners of family law, comparative law and private international law around the world.[1] First introduced in the Emirate of Abu Dhabi,[2] and later implemented at the federal level,[3] these "non-religious" family laws, at least as originally enacted in Abu Dhabi, *primarily* intend to apply to foreign non-Muslims.[4] The main stated objective of these laws is to provide foreign expatriates with a modern and flexible family law based on "principles that are in

line with the best international practices" and "close to them in terms of culture, customs and language".[5] One of the peculiar feature of these laws is that their departure from the traditional family law regulations and practices in the region, particularly in terms of gender equality in pertinent matters such as testimony, succession, no-fault divorce and joint custody.[6]

Aside from the (critical) judgment that can be made about these laws, their application raises several questions. These include, *inter alia*, the question as to whether these laws would apply to "foreign Muslims", and if yes, under which conditions. The decision of the Abu Dhabi Supreme Court (hereafter "ADSC") reported here (*Ruling No. 245/2024 of 29 April 2024*) shed some light on this ambiguity.

II. The Facts:

The case concerns a unilateral divorce action initiated by the husband (a French-Lebanese dual national, hereafter "X") against his wife (a Mexican-Egyptian dual national, hereafter "Y"). Both are Muslim.

According to the facts reported in the decision, X and Y got married in the Emirate of Abu Dhabi on 11 September 2023, apparently in accordance with the 2021 Abu Dhabi Law Civil Marriage Law[7] although some aspects of the Islamic tradition regarding marriage appear to have been observed.[8] On 6 November 2023, X filed an action for no-fault divorce with the Abu Dhabi Civil Family Court (hereafter ADCFC) pursuant to the 2021 Abu Dhabi Law Civil Marriage Law using the prescribed form.[9] Y contested the divorce petition by challenging the jurisdiction of the court. However, the ADCFC admitted the action and declared the dissolution of the marriage. The decision was confirmed on appeal.

Y then appealed to the ADSC primarily arguing that the Court of Appeal had erred in applying the 2021 Abu Dhabi Law Civil Marriage Law to declare the dissolution of the marriage because both parties were Muslim. Y's main arguments as summarized by the ADSC are as follows:

1. The Abu Dhabi courts lacked international jurisdiction because she was foreigner and did not have a place of residence in Abu Dhabi and that her domicile was in Egypt,

2. The Court of Appeal rejected her argument on the ground that X had a known domicile in Abu Dhabi,
3. Both parties were foreign Muslims and not concerned with the application of the 2021 Abu Dhabi Law Civil Marriage Law knowing that the marriage fulfilled all the necessary requirement for Islamic marriage and was concluded with the presence and the consent of Y's matrimonial guardian (her brother *in casu*).

III. The Ruling

The ADSC accepted the appeal and ruled that the ADCFC was not competent to hear the dispute, stating as follows:

"Pursuant to Article 87 of the [2022 Federal Act on Civil Procedure, hereafter "FACP"], challenges to the court's judicial jurisdiction or subject matter jurisdiction may be raised by the courts *sua sponte* and may be invoked at any stage of the proceedings. On appeal, Y argued that the court lacked subject matter jurisdiction to hear the case because she was Muslim […] and a dual national of Mexico and Egypt, while X was also a Muslim […] and holder of French and Lebanese nationalities.

[However,] the Court of Appeal rejected Y's arguments and confirmed its jurisdiction based on Articles 3 and 4 of [the Procedural Regulation]; [although] the opening of Article 3 relied on [by the court] states that "the court is competent to hear civil family matters for non-Muslim foreigners regarding civil marriage, divorce and their effects". In addition, Article 1(1) of Federal Legislative Decree No. 41/2022 states that "The provisions of the present Legislative Decree shall apply to non-Muslim citizens of the UAE and to foreign non-Muslims residing in the UAE, unless they invoke the application of their own law in matters of marriage, divorce, succession, wills and establishment of filiation."

[Given that] it was judicially established by the parties' acknowledgement that they were Muslim, the Court of Appeal violated the Law No. 14/2021, as amended by Law No. 15/2021, and its Procedural Regulation [No. 8/2022], as well as Federal Legislative Decree No. 41/2022 by upholding the appealed decision without ascertaining the religion of the parties and ruling as it did, [therefore its

decision] must be reversed".

IV. Comments

The main legal question referred to the ADSC concerned the applicability of the 2021 Abu Dhabi Civil Marriage Law and its Procedural Regulation to foreign Muslims. The ADSC answered the question in the negative, stating that the ADCFC was not competent to declare the dissolution a marriage between foreign Muslims. Although the case raises some interesting issues regarding the international jurisdiction of the ADCFC, for the sake of brevity, only the question of the applicability of the 2021 Abu Dhabi Civil Marriage Law will be addressed here.

1. Unlike the 2022 Federal Civil Personal Status, which explicitly states that its provisions "apply to *non-Muslim UAE citizens*, and to *non-Muslim foreigners* residing in the UAE" (article 1, emphasis added), the law in Abu Dhabi is rather ambiguous on this issue.

i. It should be indicated in this respect that, the 2021 Abu Dhabi Civil Marriage Law, which was originally enacted as "The Personal Status for *Non-Muslim Foreigners* in the Emirate of Abu Dhabi" (Law No. 14/2021 of 7 November 2021, emphasis added) clearly limited its scope of application to foreign non-Muslims. This is also evident from the definition of the term "foreigner" contained in the former article 1 of the Law, according to which, the term (foreigner) was defined as "[a]ny male or female *non-Muslim* foreigner, having a domicile, residence or place of work in the Emirate." Former article 3 of the Law also defined the scope of application of the Law and limited only to "foreigners" in the meaning of article 1 (i.e. non-Muslim foreigners). Therefore, it was clear that the Law, in its original form, did not apply to "foreign Muslims" in general.[10]

ii. However, only one month after its enactment (and even before its entry into force), the Law was amended and renamed "The Law on Civil Marriage and its Effects in the Emirate of Abu Dhabi" by the Law No. 15/2021 of 8 December 2021. The amendments concerned, *inter alia* the scope of application *rationae personae* of the Law. Indeed, the Law No. 15/2021 deleted the all references to "foreigners" in the Law No. 14/2021 and replaced the term with a more neutral one: *"persons covered by the provisions of this Law [al-mukhatabun bi hadha al-*

qanun]". This notion is broadly defined to include both "foreigners" (without any particular reference to their religious affiliation) and "*non-Muslim* citizens of the UAE" (New Article 1).

Article 5 of the Procedural Regulation provides further details. It defines the terms "persons covered by the provisions of this Law" as follows:

1. Non-Muslim [UAE] citizens.
2. A foreigner who holds the nationality of a country that *does not primarily apply the rules of Islamic Sharia in matters of personal status* as determined by the Instruction Guide issued by the Chairman of the [Judicial] Department […] (emphasis added).

The wording of article 5(2) is somewhat confusing, as it can be interpreted in two manners:

(i) if read *a contrario,* the provision would mean that foreigners, irrespective to their religion (including non-Muslims), would *not* be subject to the 2021 Abu Dhabi Civil Marriage Law and its Procedural Regulation if they hold the nationality of a country that *does* "primarily apply the rules of Islamic Sharia in matters of personal status". As a result, family relationships of Christian Algerian or Moroccan, for example, would not be governed by the 2021 Abu Dhabi Civil Marriage Law and its Procedural Regulation. However, this interpretation seems to be in opposition with the very purpose of adopting the Law, which, in its own terms, applies to non-Muslim UAE citizens.

(ii) Alternatively, the word "foreigner" here could be understood to mean "*Muslim* foreigners", but only those who hold the "the nationality of a country that does *not* primarily apply the rules of Islamic Sharia in matters of personal status". As a result, the family relationships of Muslim Canadian, French, German or Turkish (whether Tunisian would be included here is unclear) would be governed by the Law.

The latter interpretation seems to be prevalent.[11] In addition, the Abu Dhabi Judicial Department (ADJD)'s official website (under section "Marriage") presents even a broader scope since it explains that "civil marriage" is open to "anyone, *regardless of their religion*" including "*Muslims*" "as long as they are not UAE citizens".

iii. The situation becomes more complicated when the parties have multiple nationalities especially when, as in the reported decision, one is from of a predominantly Muslim country and the other from a non-Muslim country. Here, article 5 of the Procedural Regulation provides useful clarifications. According to paragraph 2 *in fine*, the nationality to be taken into account in such situation is the one used by the parties according to their [status] of residence in the UAE. If interpreted literally, family law relationships of foreign Muslims who, in addition to their nationality of a non-Muslim country, also hold a nationality of a country whose family law is primarily based on Islamic Sharia (as in the reported decision) would be governed by the 2021 Abu Dhabi Civil Marriage Law and its Procedural Regulation if, according to their status of residence, they use the nationality of their non-Muslim country nationality.

iv. In the case commented here, the parties have dual nationality (French/Lebanese, Mexican/Egyptian). Although the parties are identified as "Muslim", they appear to have used the nationality of their non-Muslim countries.[12] Accordingly, contrary to the ADSC's decision, it can be said that the 2021 Abu Dhabi Civil Marriage Law and its Procedural Regulation were applicable in this case.

2. In addition to the religion of the parties, the 2021 Abu Dhabi Civil Marriage Law and its Procedural Regulation determine other situations in which the Law applies.

i. These include, with respect to the effect of the marriage and its dissolution, the case where *"the marriage is concluded in accordance with"* the Law and its provisions (Article 3 of the 2021 Abu Dhabi Civil Marriage Law;[13] Article 5(4) of the Procedural Regulation).[14] The application of this rule does not seem to be dependent on the religion of the parties concerned. Consequently, since the marriage *in casu* was concluded pursuant to the provisions of the 2021 Abu Dhabi Civil Marriage Law,[15] its dissolution should *logically* be governed by the provisions of the same Law.

ii. However, it must be acknowledged that such a conclusion is not entirely self-evident. The confusion stems from the ADJD's official website (under section "Divorce") which states as a matter of principle that, normally, "anyone who

obtained a Civil Marriage through the ADCFC" is entitled to apply for divorce in application of the 2021 Abu Dhabi Civil Marriage Law. However, the same website indicates that "[f]or applicants holding citizenship of a *country member of the Arab League countries* [sic], an official document proving the religion of the party may be required" when they apply for divorce" (emphasis added).[16] Although the ADSC made no reference to the Arab citizenship of the parties in its decision, it appears that it adheres to the idea of dissociation between *the conclusion* and the *dissolution* of marriage in dispute involving Muslims. In any case, one can regret that the ASDC missed the opportunity to examine the rule on dual nationality under article 5(2).

Concluding Remarks

1. To deny the jurisdiction of the ADCFC, the ASDC relied on article 3 of the Procedural Regulation, which the Court quoted as follows: "The [ADCFC] is competent to hear civil family matters for *foreign non-Muslims* in relation to civil marriage, divorce and its effects (emphasis added)." The problem, however, is that the ADSC *conveniently* omitted key words that significantly altered the meaning of the provision.

The provision, properly quoted, reads as follows: "The [ADCFC] is competent to hear civil family matters for *foreigners or non-Muslim citizens* in relation to civil marriage, divorce and its effects (emphasis added)." In other words, article 3 does not limit the scope of application of the Law and its Regulation exclusively to "foreign non-Muslims" as outlined above.

2. Moreover, it is quite surprising that the ADSC also referred to Article 1 of the 2022 Federal Civil Personal Status in support of its conclusions, i.e. that the taking of jurisdiction by the ADFCF "violated the law". This is because it is accepted that the 2022 Federal Civil Personal Status does not apply to Abu Dhabi.[17] In addition, some important differences exist between the two laws such as age of marriage which fixed at 18 in the 2021 Abu Dhabi Civil Marriage Law (article 4(1)), but raised to 21 in the 2022 Federal Civil Personal Status (article 5(1)).[18] The combined (mis)application of 2021 Abu Dhabi Civil Marriage Law and the 2022 Federal Civil Personal Status appears opportunistic and reveals the ADSC's intention to exclude *contra legem* foreign Muslims (or at

least those who are binational of both a Muslim and Non-Muslim countries) from the scope of application of 2021 Abu Dhabi Civil Marriage Law and its Procedural Regulation.

[1] see on this blog, Lena-Maria Möller, "Abu Dhabi Introduces Personal Status for non-Muslim Foreigners, Shakes up Domestic and International Family Law". See Also, *idem*, "One Year of Civil Family Law in the United Arab Emirates: A Preliminary Assessment", 37 *Arab Law Quarterly* (2023) 1 ff. For a particularly critical view, see Sami Bostanji, "Le droit de statut personnel au service de l'économie de marché! Reflexoins autour de la Loi n°14 en date de 7 novembre 2021 relative au statut personnel des étrangers non-musulmans dans l'Emirat d'Abou Dhabi" *in Mélanges offerts en l'honneur du Professeur Mohamed Kamel Charfeddine* (CPU, 2023) 905 ff.

[2] Law No. 14/2021 of 7 November 2021 on the "Personal Status for Non-Muslims" as modified by the Law No. 15/2021 of 8 December 2021 which changed the Law's title to "Law on Civil Marriage and its Effects" (hereafter "2021 Abu Dhabi Civil Marriage Law") and its Procedural Regulation issued by the Resolution of the Chairman of the Judicial Department No. 8/2022 of 1 February 2022, hereafter the "2022 Procedural Regulation"

[3] Federal Legislative Decree No. 41/2022 of 3 October 2022 on "Civil Personal Status" (hereafter "2022 Federal Civil Personal Status") and its Implementing Regulation issued by the Order of the Council of Ministers No. 1222 of 27 November 2023.

[4] See below IV(1)(i). On the difference between the 2021 Abu Dhabi Law Civil Marriage Law the 2022 Federal Civil Personal Status on this particular point, see below IV(1).

[5] Article 2 of the 2021 Abu Dhabi Law Civil Marriage Law.

[6] Article 16 of the 2021 Abu Dhabi Law Civil Marriage Law; article 4 of the 2022 Federal Civil Personal Status.

[7] The text of the decision is not clear on this point. Some comments online explain that the marriage was concluded pursuant to 2021 Abu Dhabi Civil

Marriage Law.

[8] The text of the decision particularly mentions the presence and consent of Y's matrimonial guardian (*wali*), which is a necessary requirement for the validity of marriage between Muslims, but not a requirement under the 2021 Abu Dhabi Civil Marriage Law.

[9] The ADCFC, which was established specifically to deal with family law matters falling under the purview of the 2021 Abu Dhabi Civil Marriage Law, holds subject-matter jurisdiction in this regard.

[10] cf. Möller, "Abu Dhabi Introduces Personal Status for non-Muslim Foreigners" *op. cit.*

[11] For an affirmative view, see Möller, "One Year of Civil Family Law in the United Arab Emirates", *op. cit.*, 7.

[12] Some comments online explain that the marriage was concluded using foreign passports with no-Arabic names and no indication of the parties' religion.

[13] On the problems of interpretation of this provision, see Möller, "One Year of Civil Family Law in the United Arab Emirates", *op. cit.*, 7.

[14] The Procedural Regulation further expands the scope of application of the Civil Marriage Law to cover cases where "the marriage was concluded abroad in a country whose family law is not primarily based on Islamic Sharia as determined by Abu Dhabi authorities" (Article 5(3)) and in any other case determined by the Chairman of the Judicial Department and about which an order is issued (Article 5(5)).

[15] See *supra* n (7).

[16] However, this rule appears to be devoid of any legal basis.

[17] Möller, "One Year of Civil Family Law in the United Arab Emirates", *op. cit.*, 2.

[18] For a comparision, see Möller, "One Year of Civil Family Law in the United Arab Emirates", *op. cit.*, 13-15.

Advocate General in Case Mirin (C-4/23): Refusal of recognition of a new gender identity legally obtained in another Member State violates the freedom of movement and residence of EU citizens

The following case note has been kindly provided by *Dr. Samuel Vuattoux-Bock*, LL.M. (Kiel), University of Freiburg (Germany).

On May 7, 2024, Advocate General Jean Richard de la Tour delivered his opinion in the case C-4/23, *Mirin*, concerning the recognition in one Member State of a change of gender obtained in another Member State by a citizen of both States. In his opinion, Advocate General de la Tour states that the refusal of such a recognition would violate the right to move and reside freely within the Union (Art. 21 TFEU, Art. 45 EU Charter of Fundamental Rights) and the right of respect for private and family life (Art. 7 EU Charter of Fundamental Rights).

1. Facts

The underlying case is based on the following facts: a Romanian citizen was registered as female at birth in Romania. After moving with his family to the United Kingdom and acquiring British citizenship, he went through the (medically oriented) gender transition process under English law and finally obtained in 2020 a “Gender Recognition Certificate” under the Gender Recognition Act 2004, confirming his transition from female to male and the corresponding change of his forename. As the applicant retained his Romanian nationality, he requested

the competent Romanian authorities (Cluj Civil Status Service) to record the change on his birth certificate, as provided for by Romanian law (Art. 43 of Law No. 119/1996 on Civil Status Documents). As the competent authority refused to recognize the change of name and gender (as well as the Romanian personal numerical code based on gender) obtained in the United Kingdom, the applicant filed an action before the Court of First Instance, Sector 6, Bucharest. The court referred the case to the CJEU for a preliminary ruling on the compatibility with European law (Art. 21 TFEU, Art. 1, 20, 21, 45 of the Charter of Fundamental Rights) of such a refusal based on Romanian law. In particular, the focus is on the Cluj Civil Status Office's demand that the plaintiff initiates a new judicial procedure for the change of gender in Romania. The plaintiff sees in this request the risk of a contrary outcome to the British decision, as the European Court of Human Rights ruled that the Romanian procedure lacks clarity and predictability (ECHR, *X. and Y. v. Romania*). In addition, the Romanian court asked whether Brexit had any impact on the case (the UK proceedings were initiated before Brexit and concluded during the transition period).

2. Opinion of the Advocate General

Advocate General de la Tour gave his opinion on these two questions. Regarding the possible consequences of Brexit, de la Tour drew two sets of conclusions from the fact that the applicant still holds Romanian nationality. First, an EU citizen can rely on the right to move freely within the European Union with an identity document issued by his or her Member State of origin (a fortiori after Brexit). Second, the United Kingdom was still a Member State when the applicant exercised his freedom of movement and residence. As the change of gender and first name was acquired, the United Kingdom was also still a Member State. EU law is therefore still applicable as the claimant seeks to enforce in one Member State the consequence of a change lawfully made in another (now former) Member State.

On the question of the recognition of a change of first name and gender made in another Member State, Advocate General de la Tour argues that these issues should be treated differently. The fact that the first name may be sociologically associated with a different sex from the one registered should not be taken into account as a preliminary consideration for recognition (no. 61). He therefore answers the two questions separately. Already at this point, de la Tour specifies

that the relevant underpinning logic for this type of case should not be the classical recognition rules of private international law, but rather the implementation and effectiveness of the freedom of movement and residence of EU citizens (nos. 53-55).

a) Change of first name

With regard to the change of the first name, de la Tour states (with reference to the *Bogendorff* case) that the refusal to recognize the change of the first name legally acquired in another Member State would constitute a violation of the freedoms of Art. 21 TFEU (no. 58). Since the Romanian Government does not give any reason why recognition should not be granted, there should be no obstacle to automatic recognition. The Advocate General considers that the scope of such recognition should not be limited to birth certificates but should be extended to all entries in a civil register, since a change of first name, unlike a change of surname, does not have the same consequences for other family members (nos. 63-64).

b) Change of gender

With regard to gender change, Advocate General de la Tour argues for an analogy with the Court's case-law on the automatic recognition of name changes, in particular the *Freitag* decision. Gender, like the name, is an essential element of the personality and therefore protected by Art. 7 of the Charter of Fundamental Rights and Art. 8 ECHR. The jurisprudence on names (in particular *Grunkin and Paul*) shows that the fact that a Member State does not have its own procedure for such changes (according to de la Tour, this concerns only 2 Member States for gender changes) does not constitute an obstacle to the recognition of a change lawfully made in another Member State (nos. 73-74). Consequently, de la Tour sees the refusal of recognition as a violation of the freedoms of Art. 21 TFEU, because the existence of a national procedure is not sufficient for such a refusal (no. 81). Furthermore, the Romanian procedure cannot be considered compatible with EU law, as the judgment of the European Court of Human Rights *X. and Y. v. Romania* shows that it makes the implementation of the freedoms of Art. 21 TFEU impossible or excessively difficult (No. 80). Nevertheless, there is nothing to prevent Member States from introducing measures to exclude the risk of fraudulent circumvention of national rules, for example by making the existence

of a close connection with the other Member State (e.g. nationality or residence) a condition (nos. 75-78).

Unlike the change of first name, the change of gender affects other aspects of personal status and may have consequences for other members of the family (e.g. the gender of the parent on a child's birth certificate before the transition) or even for the exercise of other rights based on gender differentiation (e.g. marriage in States that do not recognize same-sex unions, health care, retirement, sports competition). Imposing rules on the Member States in these areas (in particular same-sex marriage) would not be within the competence of the Union (no. 94), so Advocate General de la Tour proposes a limitation to the effect of recognition in the Member State of origin. If the change of gender would have an effect on other documents, the recognition should only have an effect on the person's birth certificate and the documents derived from it which are used for the movement of the person within the Union, such as identity cards or passports. The Advocate General himself points out that this solution would lead to unsatisfactory consequences in the event of the return of the person concerned to his or her State of origin (no. 96), but considers that the solution leads to a "fair balance" between the public interest of the Member States and the rights of the transgender person.

3. Conclusion

In conclusion, Advocate General de la Tour considers that the refusal to recognize in one Member State a change of first name and gender legally obtained in another Member State violates the freedoms of Art. 21 TFEU. The existence of an own national procedure could not justify the refusal. Drawing an analogy with the Court's case-law on change of name, the Advocate General recommends that the change of first name should have full effect in the Member State of origin, while the change of gender should be limited to birth certificates and derived documents used for travel (identity card, passport).

Although the proposed solution may not be entirely satisfactory for the persons concerned, as it could still cause difficulties in the Member State of origin, the recognition in one Member State of a change of first name and sex made in another Member State should bring greater security and would underline the mutual trust between Member States within the Union, as opposed to third

countries, as demonstrated by the recent decision of the Swiss Federal Tribunal concerning the removal of gender markers under German law

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The Kenyan Supreme Court holds that Scottish Locus Inspection Orders must be Examined by the Kenyan Courts for Recognition and Enforcement in Kenya

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We would like to thank Joy Chebet, Law Student at Kenyatta University, for her research assistance and comments. We would also like to thank Professor Beligh Elbalti for his critical comments on the draft blogpost.

I. INTRODUCTION

Kenya is one of the countries that make up East Africa and is therefore part of the broader African region. As such, developments in Kenyan law are likely to have a profound impact on neighbouring countries and beyond, consequently warranting special attention.

In the recent case of *Ingang'a & 6 others v James Finlay (Kenya) Limited* (Petition

7 (E009) of 2021) [2023] KESC 22 (KLR), the Kenyan Supreme Court dismissed an appeal for the recognition and enforcement of a locus inspection order issued by a Scottish Court. The Kenyan Supreme Court held that 'decisions by foreign courts and tribunals are not automatically recognized or enforceable in Kenya. They must be examined by the courts in Kenya for them to gain recognition and to be enforced' [para 66]. In its final order, the Court recommended that in Kenya:

'The Speakers of the National Assembly and the Senate, the Attorney-General, and the Kenya Law Reform Commission, attended with a signal of the utmost urgency, for any necessary amendments, formulation and enactment of statute law to give effect to this judgment and develop the legislation on judicial assistance in obtaining evidence for civil proceedings in foreign courts and tribunals.'

This Case is highly significant, because it extensively addresses the recognition and enforcement of foreign judgments in Kenya and the principles to be considered by the Kenyan Courts. It is therefore a Case that other African countries, common law jurisdictions, and further parts of the globe could find invaluable.

II. FACTS

The Case outlined below pertained to the enforcement of a foreign judgment/ruling in Kenya, specifically, a Scottish ruling. As a brief overview, the Appellants were individuals who claimed to work for the Respondent, the latter being a company incorporated in Scotland. However, their place of employment was Kenya, namely, Kericho. The nature of the claim consisted of work-related injuries, attributed to the Respondent's negligence due to the Appellants' poor working conditions at the tea estates in Kericho. The claim was filed before the courts in Scotland, where inspection orders were sought by the Appellants and granted by the Courts. The purpose of the locus inspection order was to collect evidence by sending experts to Kenya and submit a report which can be used by the Scottish court to determine the liability of the Respondent. However, the respondent fearing compliance with the Scottish locus inspection order, sought an order from Kenyan Court to prevent the execution of the locus inspection order in Kenya, leading to a petition being filed by the Appellants before the Employment

and Labour Relations Court in Kenya.

Nevertheless, the trial court ruled against the Appellants and stated that the enforcement of foreign judgments in Kenya, especially interlocutory orders, required Kenyan judicial aid to ensure that the foreign judgments aligned with Kenya's public policy. This was further affirmed by the Court of Appeal, which expressed the same views and reiterated the need for judicial assistance in enforcing foreign judgments and rulings in Kenya. The Court of Appeal held that decisions issued by foreign courts and tribunals are not automatically recognised or enforceable in Kenya and must be examined by the Kenyan courts to gain recognition and be enforced.

The matter was then brought before the Supreme Court of Kenya.

III. SUMMARY OF THE JUDGMENT BEFORE THE SUPREME COURT OF KENYA

With regard to the enforcement of foreign judgments, the Supreme Court had to determine 'whether the locus inspection orders issued by the Scottish Court could be executed in Kenya without intervention by Kenyan authorities.'

However, the Appellants argued that the locus inspection orders were self-executing and did not require an execution process. Instead, inspection orders only required the parties' compliance. Conversely, the Respondents argued that any decision not delivered by a Kenyan court should be scrutinised by the Kenyan authorities before its execution.

In its decision, the Supreme Court relied on the principle of territoriality, which it referred to as a 'cornerstone of international law' [para 51], and further elaborated on the importance of sovereignty. Based on the principle of territoriality, while upholding the principle of sovereignty, the Supreme Court stated that the 'no judgment of a Court of one country can be executed *proprio vigore* in another country' [para 52]. The Supreme Court's view was that the universal recognition and enforcement of foreign decisions leads to the superiority of foreign nations over national courts. It likewise paves the way for the exposure of arbitrary measures, which are then imposed on the residents of a country against whom measures have been taken abroad. In its statements, the

Supreme Court concreted the decision that foreign judgments in Kenya cannot be enforced automatically, but must gain recognition in Kenya through acts of authorisation by the Judiciary, in order to be enforced in Kenya.

The Supreme Court grounded the theoretical basis for enforcing foreign judgments in Kenyan common law as comity. It approved the US approach (*Hilton v Guyot*) to the effect that: 'The application of the doctrine of comity means that the recognition of foreign decisions is not out of obligation, but rather out of convenience and utility' [para 59]. The Court justified comity as:

'prioritizing citizen protection while taking into account the legitimate interests of foreign claimants. This approach is consistent with the adaptability of international comity as a principle of informed prioritizing national interests rather than absolute obligation, as well as the practical differences between the international and national contexts.' [para 60]

The Kenyan Supreme Court further established the importance of reciprocity and asserted that the Foreign Judgements (Reciprocal Enforcement) Act 2018 was the primary Act governing foreign judgments. The Court recognised that as a constituent country of the United Kingdom, Scotland is a reciprocating country under the Foreign Judgments (Reciprocal Enforcement) Act. However, the orders sought did not fall under the above Act, as locus inspection orders are not on the list of decisions that are expressly mentioned in the Act. Moreover, locus inspection orders are not final orders. Thus, the Supreme Court's position was that the locus inspection orders could not fall within the ambit of the Foreign Judgments (Reciprocal Enforcement) Act, and the trial court and the Court of Appeal were incorrect in extending the application of the Act to these orders.

Consequently, the Supreme Court highlighted the correct instrument to be relied on for the above matter. It was the Supreme Court's position that although the Civil Procedure Act does not specifically establish a process for the judicial assistance of orders to undertake local investigations, the same process as for judicial assistance in the examination of witnesses could be imitated for local investigation orders. Thus, the Supreme Court stated that:

'The procedure of foreign courts seeking judicial assistance in Kenya for examination of witnesses was the same procedure to be followed for carrying out local investigations, examination or adjustment accounts; or to make a partition.

That procedure was through the issuance of commission rogatoire or letter of request to the High Court in Kenya seeking assistance. That procedure was not immediately apparent. The High Court and Court of Appeal were wrong for extending the spirit of the beyond its application as that was not the appropriate statute that was applicable to the instant case.' [para 26]

The process is therefore as under the Sections 54 and 55 of the Civil Procedure Act, Order 28 of the Civil Procedure Rules, as well as the Practice Directions to Standardize Practice and Procedures in the High Court made pursuant to Section 10 of the Judicature Act. It entails issuing a commission rogatoire or letter of request to the Registrar of the High Court in Kenya, seeking assistance. This would then trigger the High Court in Kenya to implement the Rules as contained in Order 28 of the Civil Procedure Rules, 2010 [92 – 99].

IV. COMMENTS

An interesting point of classification in this case might be whether this was simply one of judicial assistance for the Kenyan Courts to implement Scottish locus inspection orders in its jurisdiction. Seen from this light, it was not a typical case of recognising and enforcing foreign judgment. Nevertheless, the case presented before the Kenyan Courts, including the Kenyan Supreme Court was premised on recognition and enforcement of foreign judgments.

The Kenyan Supreme Court has settled the debate on the need for foreign judgments to be recognised in Kenya before they can be enforced. The Court also settled that owing to the principle of finality, interim orders could not fall within the Foreign Judgments (Reciprocal Enforcement) Act. It is owing to this principle of finality that the Supreme Court refused to extend the application of the Act to local investigation orders, but rather proceeded to tackle the latter in the same manner as under the Civil Procedure Act and Civil Procedure Rules.

The Supreme Court was correct in establishing that recognition is necessary before foreign judgments can be enforced in Kenya. The principles upon which the Supreme Court came to this conclusion were also correct since territoriality and sovereignty dictate the same. The Supreme Court set a precedent that the Civil Procedure Act and the Civil Procedure Rules are the correct instruments to be relied upon in issuing orders for local investigations, in contrast to the position

of the Court of Appeal, which placed local investigations in the ambit of the Foreign Judgments (Reciprocal Enforcement) Act. The Supreme Court adopted its position based on section 52 of the Civil Procedure Act, which empowers courts to issue commission orders and lists local investigations under commission orders.

This decision is crucial, because not only did the Supreme Court lay to rest any confusion over what should constitute the applicable law for local investigations, it also sets down the procedure for foreign courts seeking judicial assistance in Kenya with regard to all four commission orders, as under the Civil Procedure Act. The Civil Procedure Act is the primary Act governing civil litigation in Kenya, while the Civil Procedure Rules 2010 are the primary subsidiary regulations for the same. Commission orders under this Act are divided into four as highlighted above: examination of witnesses, carrying out local investigations, examination or adjustment accounts, or making a partition.

This decision thus did not only tackle orders of local investigation but concluded the process for all four commission orders as highlighted above. In doing so, it established a uniform process for all four of the commission orders, in accordance with the Primary Act and Rules governing civil litigation in Kenya. Although it may appear that the Supreme Court has stretched the application of the Civil Procedure Rules, 2010 in the same way that the Court of Appeal stretched the application of the Foreign Judgments (Reciprocal Enforcement) Act; the Civil Procedure Rules, 2010 are more relevant, given that the rules touch on these four commission orders and are tackled in turn, in the same category, under the Civil Procedure Rules, 2010. Moreover, while it is true that there is currently a gap in the law as the process for local investigations has not been outlined in the same way that it has been for examination of witnesses, by parity of reasoning the Supreme Court's reasoning fits, and the logic behind adopting the same process is laudable.

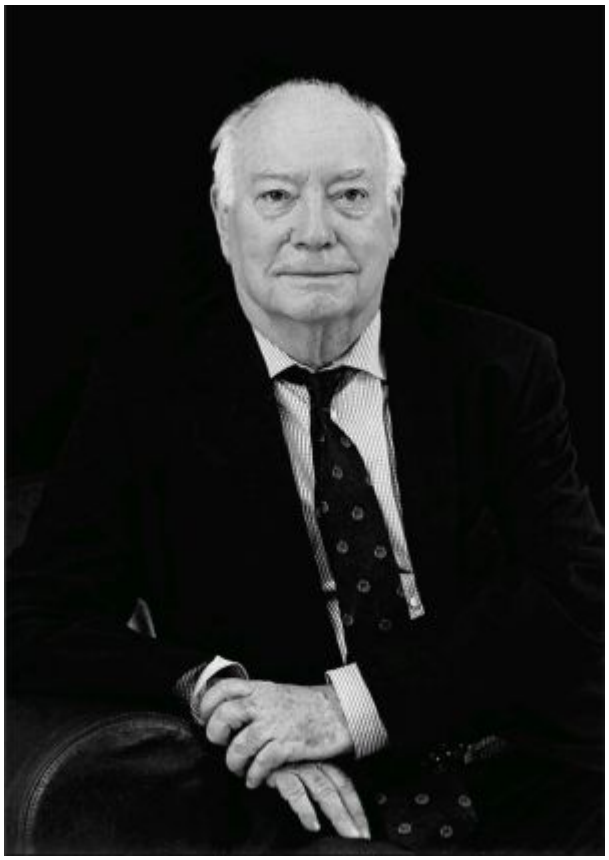
Another interesting aspect of the Supreme Court's decision is the endorsement of the US approach of comity as the basis of recognising and enforcing foreign judgments in Kenyan common law. This is indeed a radical departure from the common law approach of the theory of obligation, which prevails in other Commonwealth African Countries. In an earlier Case, the Kenyan Court of Appeal in Jayesh Hasmukh Shah vs Navin Haria & Anor [para 25 – 26] adopted the US principle of comity to recognise and enforce foreign judgments. The principle of comity also formed the sole basis of enforcing a US judgment in Uganda in

Christopher Sales v Attorney General, where no reciprocal law exists between the state of origin and the state of recognition. Consequently, it is safe to say that some East African judges are aligning more with the US approach of comity in recognising and enforcing foreign judgments at common law, while many other common law African countries continue to adopt the theory of obligation.

An issue that was not explicitly directed to the Kenyan Supreme Court was that this was a business and human rights case, and one involving the protection of weaker parties. This may have provoked policy reasons from the Court that would have been very useful in developing the law as it relates business and human rights issues, and protection of employees in cross-border matters.

On a final note, the robust reasoning of their Lordships must be commended in this recent Supreme Court decision, given that it adds significant value to the jurisprudence of recognising and enforcing foreign judgments in the Commonwealth as a whole, in East Africa overall, and particularly in Kenya. The comparative approach adopted in this judgment will also prove to be edifying to anyone with an interest in comparative aspects of the recognition and enforcement of foreign judgments globally.

In Memoriam Erik Jayme (1934-2024)



With great sadness did we receive notice that *Erik Jayme* passed away on 1 May 2024, shortly before his 90th birthday on 8 June. Everyone in the CoL and PIL world is familiar with and is probably admiring his outstanding and often path-breaking work as a global scholar. Those who met him in person were certainly overwhelmed by his humour and humanity, by his talent to approach people and engage them into conversations about the law, art and culture. Anyone who had the privilege of attending lectures of his will remember his profound and often surprising and unconventional views, paths and turns through the subject matter, often combined with a subtle and entertaining irony.

Erik Jayme was born in Montréal, as the son of a German Huguenot of French origin and a Norwegian. The parents had married in Detroit before a protestant priest. What else if not a profound interest in cross-border relations, different cultures and languages as well as bridging cultural differences and, ultimately, Private International Law could have been the result? "There was no other way", as he put it once. His father, *Georg*, born on 10 April 1899 in Ober-Modau in South Hesse of Germany, passed away on 1 January 1979 in Darmstadt, later became a professor of what today would probably be called chemical engineering, with great success, on cellulose production technologies at the University of

Darmstadt. His passion for collecting Expressionist and 19th century art undoubtedly served as an inspiration for *Erik* to later devote himself to art, art history and finally art law. During his youth, as *Erik* mentioned once, he would use his (exceptionally broad) knowledge on art and any aspect of culture that crossed his mind to draw his tennis partners into sophisticated and demanding conversations on the court. Perhaps not least with a view to his father's expectations, *Erik* decided to study law at the University of Munich, but added courses in art history to his curriculum. He liked to recall, how he approached the world-famous art historian, *Hans Sedlmayr*, to ask him whether he might allow him to attend his seminars, despite being ("unfortunately") a law student. Sedlmayr replied that *Spinoza* had been wise to be grinding optical lenses to earn a living, and in light of a similar wisdom that the applicant showed, he was accepted.

In 1961, at the age of 27, *Erik Jayme* delivered his doctoral thesis on „Spannungen bei der Anwendung italienischen Familienrechts durch deutsche Gerichte" ("Tension in the application of Italian family law by German courts").[1] While clerking at the court of Darmstadt, *Erik Jayme* published his first article in this field, inspired by a case in which he was involved. International family and succession law as well as questions of citizenship became a focus of his academic research and publications for decades, including his Habilitation in 1971 on „Die Familie im Recht der unerlaubten Handlungen" ("The Family in Tort Law"),[2] in particular with a view to relations connected with Italy. This may show early traces of what became more apparent later: More than others, *Erik Jayme* took the liberty to make use of law, legal research and academia to build his own way of life (that should definitely include Italy), inspired by seemingly singularities in a concrete case that would be seen as a sign for something greater and thus transformed into theories and concepts, enriched by a dialogue with concepts from other fields such as art history. Is this way of producing creativity also the source of what later rocked the private international law of South America: the « diálogo das fontes como método »?[3] His research on *Pasquale Stanislao Mancini*,[4] later combined with studies on *Anton Mittermaier*,[5] *Giuseppe Pisanelli* [6] and *Emerico Amari* [7] as well as on *Antonio Canova* [8] were received as leading works on conceptual developments in the fields of choice of law, international civil procedural law, comparative law as well as international art and cultural property law, and over time, *Erik Jayme* became one of the world leading and most influential scholars in the field. The substantial contribution

Erik Jayme provided to the work of The Hague Academy of International law, was perfectly summarized in *Teun Struycken's* « Hommage à Erik Jayme » delivered in 2016 on behalf of the Academy's Curatorium:[9]

> « Vous n'avez cessé de souligner que les systèmes de droit ne s'isolent pas de la société humaine, mais s'y imbriquent. Ils sont même des expressions de la culture des sociétés. La culture s'exprime aussi et surtout dans les beaux arts. »

Speaking of art and cultural property law: It seems to be the year of 1990 when *Erik Jayme* published for the first time a piece in this field, namely a short conference report on what has now become an eternal question: „Internationaler Kulturgüterschutz: lex originis oder lex rei sitae" ("Protection of international cultural property: lex originis or lex rei sitae").[10] In 1991, his seminal work on „Kunstwerk und Nation: Zuordnungsprobleme im internationalen Kulturgüterschutz" ("Artwork and nation: Problems of attribution in the international protection of cultural property")[11] appeared as a report for the historical-philosophical branch of the Heidelberg Academy of Sciences where he traced back the notion of a "home" (« une patrie ») of an artwork to *Antonio Canova*'s activities as the Vatican's diplomate at the Congress of Vienna where *Canova*, a sculptural artist by the way, succeeded in bringing home the cultural treasures taken by *Napoléon Bonaparte* from Rome to Paris (into the newly built Louvre) back to Rome (into the newly built Museo Chiaramonti), despite the formal legalisation of this taking in the Treaty of Tolentino of 1797. "This is where the notion of a lex originis was born". Still in 1991, the *Institut de Droit International* concluded under the leadership of *Erik Jayme*, in its Resolution of Basel « La vente internationale d'objets d'arts sous l'angle de la protection du patrimoine culturel » in its Art. 2: « Le transfert de la propriété des objets d'art – appartenant au patrimoine culturel du pays d'origine du bien – est soumis à la loi de ce pays » . Much later, in 2005, when I had the privilege of travelling with him to the Vanderbilt Law School and the Harvard Law School for presentations of ours on „Global claims for art", he further developed his vision of a work of art as quasi-persons who should be conceived as having their own cultural identity,[12] to be located at the place where the artwork is most intensely inspiring the public and thus is "living". From there it was only a small step to calling for a *guardian ad litem* for an artwork, just as for a child, in legal proceedings. When *Erik Jayme* was introduced to the audiences in Vanderbilt and Harvard, the academic hosts

would usually present him, in all their admiration, as “a true Renaissance man“. I would believe that he felt more affiliated to the 19th century, but this might not necessarily exclude the perception of him as a “Renaissance man“ from a transatlantic perspective, all the more as there seems to be no suitable term in English for the German „Universalgelehrter“ (literally: “universal scholar”).

This is just a very small fraction of Erik Jayme’s amazingly wide-ranging, rich and influential scholarly life and of his extraordinarily inspiring personality. Many others may and should add their own perspectives, perhaps even on this blog. We will all miss him, but he will live on in our memories!

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[1] *Jayme*, Spannungen bei der Anwendung italienischen Familienrechts durch deutsche Gerichte, Gieseking 1961 (LCCN 65048319).

[2] *Jayme*, Die Familie im Recht der unerlaubten Handlungen, Metzner 1971 (LCCN 72599373).

[3] *Jayme*, « Identité culturelle et intégration: le droit international privé postmoderne », *Recueil des Cours* 251 (1995), 259 (Recueil des cours en ligne).

[4] See e.g. *Jayme*, Pasquale Stanislao Mancini : internationales Privatrecht zwischen Risorgimento und praktischer Jurisprudenz, Gremer 1990 (LCCN 81116205).

[5] *Jayme*, „Italienische Zustände“, in: Moritz/Schroeder (eds.), Carl Joseph Anton Mittermaier (1787-1867) – Ein Heidelberger Professor zwischen nationaler Politik und globalem Rechtsdenken“, Regionalkultur 2009, pp. 29 et seq.

[6] See e.g. *Jayme*, « Giuseppe Pisanelli fondatore della scienza del diritto processuale civile internazionale », in: Cristina Vano (eds.), Giuseppe Pisanelli – Scienza del processo – cultura delle leggi e avvocatura tra periferiae nazione, Neapel 2005, pp. 111 *e seguenti* (LCCN 2006369541).

[7] See e.g. *Jayme*, « Emerico Amari: L’attualità del suo pensiero nel diritto comparato con particolare riguardo alla teoria del progresso », in: Fabrizio Simon (ed.), L’Identità culturale della Sicilia risorgimentale, Atti del convegno per il

bicentenario della nascita di Emerico Amari e di Francesco Ferrara, in Storia e Politica – Rivista quadrimestrale III, N.°2/2011, pp. 60 *e seguenti*.

[8] See e.g. *Jayme*, Antonio Canova (1757-1822) als Künstler und Diplomat: Zur Rückkehr von Teilen der Bibliotheca Palantina nach Heidelberg in den Jahren 1815 und 1816, Heidelberg 1994 (LCCN 95207445).

[9] *V.M. Struycken*, « Hommage à Erik Jayme », Session du Curatorium du 15 janvier 2016 à Paris (disponible ici: https://www.hagueacademy.nl/2016/02/hommage-a-dr-erik-jayme/?lang=fr).

[10] *Jayme*, „Internationaler Kulturgüterschutz: lex originis oder lex rei sitae", IPRax 1990, 347.

[11] *Jayme*, Kunstwerk und Nation: Zuordnungsprobleme im internationalen Kulturgüterschutz, C. Winter 1991.

[12] See e.g. *Jayme*, "Gobalization in Art Law: Clash of Interests and International Tendencies", Vand. J. Int. L. 38 (2005), 927, 938 *et seq*.

Application of Singapore's new rules on service out of jurisdiction: Three Arrows Capital and NW Corp

Application of Singapore's new rules on service out of jurisdiction: *Three Arrows Capital* and *NW Corp*

The Rules of Court 2021 ('ROC 2021') entered into force on 1 April 2022. Among other things, ROC 2021 reformed the rules on service out of jurisdiction (previously discussed here). Order 8 rule 1 provides:

'(1) An originating process or other court document may be served out of Singapore with the Court's approval if it can be shown that the Court has the

jurisdiction or is the appropriate court to hear the action.

…

(3) The Court's approval is not required if service out of Singapore is allowed under a contract between the parties.

…'

A handful of decisions on the application of Order 8 rule 1 have since been delivered; two are discussed in this post. One of them considers the 'appropriate court' ground for service out of jurisdiction provided in Order 8 rule 1(1) and touches on the location of cryptoassets; the other is on Order 8 rule 1(3).

Service out under the 'appropriate court' ground

Cheong Jun Yoong v Three Arrows Capital[1] involved service out of jurisdiction pursuant to the 'appropriate court' ground in Order 8 rule 1(1). As detailed in the accompanying Supreme Court Practice Directions ('SCPD'), a claimant making an application under this ground has to establish the usual common law requirements that:

'(a) there is a good arguable case that there is a sufficient nexus to Singapore;

(b) Singapore is *forum conveniens*; and

(c) there is a serious issue to be tried on the merits of the claim.'[2]

For step (a), the previous Order 11 gateways have been transcribed as a non-exhaustive list of factors.[3] This objective of this reform was to render it 'unnecessary for a claimant to scrutinise the long list of permissible cases set out in the existing Rules in the hope of fitting into one or more descriptions.'[4] As *Three Arrows* illustrates though, old habits die hard and the limits of the 'non-exhaustive' nature of the jurisdictional gateways remains to be tested by litigants. The wide-reaching effect of a previous Court of Appeal decision on the interpretation of gateway (n) which covers a claim brought under statutes dealing with serious crimes such as corruption and dug trafficking and 'any other written law' is also yet to be grasped by litigants.[5]

In *Three Arrows*, the first defendant ('defendant') was a British Virgin Islands

incorporated company (BVI) which was an investment fund trading and dealing in cryptocurrency. It was under liquidation proceedings in the BVI; its two liquidators were the second and third defendants in the Singapore proceedings. The BVI liquidation proceedings were recognised as a 'foreign main proceeding' in Singapore pursuant to the UNCITRAL Model Law on Cross-Border Insolvency as enacted under Singapore law.[6] The claimant managed what he alleged was an independent fund called the 'DC Fund' which used the infrastructure and platform of the defendant and its related entities. After the defendant decided to relocate its operations to Dubai, the claimant incorporated Singapore companies to take over the operations and assets of the DC Fund. Not all of the assets had been transferred to these new companies at the time the defendant went into liquidation. The claimant's case was that the DC Fund assets remaining with the defendant were held on trust by the defendant for the claimant and other investors in the DC Fund and were not subject to the BVI liquidation proceedings. The Liquidators in turn sought orders from the BVI court that those assets were owned by the defendant and subject to the BVI Liquidation proceedings.

The claimant relied on three gateways for service out of jurisdiction: gateway (a) where relief is sought against a defendant who is, inter alia, ordinarily resident or carrying on business in Singapore; gateway (i) where the claim is made to assert, declare or determine proprietary rights in or over movable property situated in Singapore; and gateway (p) where the claim is founded on a cause of action arising in Singapore.

On gateway (a), the defendant was originally based in Singapore before shifting operations to Dubai a few months before the commencement of the BVI Liquidation proceedings. The claimant attempted to argue that residence for the purposes of gateway (a) had to be assessed at the time when the company was 'alive and flourishing'.[7] This was rightly rejected by the court, which observed that satisfaction of the gateway depended on the situation which existed at the time application for service out of jurisdiction was filed or heard. On gateway (p), it was held that there was a good arguable case that the cause of action arose in Singapore because the trusts arose pursuant to the independent fund arrangement between the parties which was negotiated and concluded in Singapore. All material events pursuant to the arrangement took place when the defendant was still based in Singapore and the defendant's investment manager was a Singapore company.

It is perhaps the court's analysis of gateway (i) which is of particular interest as it deals with a nascent area of law. Are cryptocurrencies 'property' and if so, where are they located?

The court confirmed earlier Singapore decisions that cryptocurrencies are property.[8] It held:

'Given the fact that a cryptoasset has no physical presence and exists as a record in a network of computers …. It best manifests itself through the exercise of control over it.'[9]

Between a choice of the identifying the *situs* as the domicile or residence of the person who controls the private key linked to the cryptoasset, the court preferred residence as being the 'better indicator of where the control is being exercised.'[10] Seemingly drawing from the position in relation to debts, one of the reasons for preferring residence was that this was where the controller can be sued.[11] The court was also concerned that there may be difficulties in identifying domicile.[12] On the facts, the controller was one of the Singapore incorporated companies set up by the claimant and the claimant was in turn the sole shareholder of that company. Both the company and claimant were resident in Singapore and thus gateway (i) was satisfied.

On the other requirements for service out with permission of the court under the 'appropriate court' ground, the court was persuaded that there was a serious issue to be tried on the merits and that connecting factors indicated Singapore was *forum conveniens*. The defendants' application to set aside the order granting permission to serve out of jurisdiction and to set aside service of process on them thus failed. The Appellate Division of the Singapore High Court has recently refused permission to appeal against the first instance decision.[13]

It bears pointing out that the same issue of ownership of the assets of the DC Funds was before the BVI court in the insolvency proceedings. The first instance court was unmoved by the existence of parallel proceedings in the BVI, as the BVI proceedings were at a very early stage and hence were not a significant factor in the analysis on *forum conveniens*.[14] However, as mentioned above, the BVI insolvency proceedings had been recognised as a 'foreign main proceeding' by the Singapore court. Under Article 21 of the UNCITRAL Model Law on Cross-Border Insolvency, relief granted pursuant to such recognition can include

staying actions concerning the 'debtor's property'.[15] While the very issue in the Singapore action is whether the assets of the DC Funds are indeed the 'debtor's property',[16] staying the action will clearly be in line with the kinds of relief envisaged under Article 21. Under the Model Law, the issue of *forum conveniens* should take a back seat as the emphasis is on cross-border cooperation to achieve an optimal result for all parties involved in an international insolvency.

Service out pursuant to a contractual agreement

In *NW Corp Pte Ltd v HK Petroleum Enterprises Cooperation Ltd*,[17] the contract between the claimant and defendant, who were Singapore and Hong Kong-incorporated companies respectively, contained this clause:

'This Agreement shall be governed by and construed in accordance with the English law [sic]. Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by Singapore court [sic] without recourse to arbitration and to service of process by registered mail …'

The claimant served process on the defendant in Hong Kong by way of registered post to the defendant's last known address and purportedly pursuant to Order 8 rule 1(3) ROC 2021. The issue whether the service was validly effected arose when the defendant sought to set aside the default judgment that was subsequently approved by the Singapore High Court Registry. The defendant argued that Order 8 rule 1(3) required that the agreement name not only a method of service but also specify a location out of Singapore where service could take place. The Assistant Registrar ('AR') disagreed, holding that this would be too narrow an interpretation of Order 8 rule 1(3). Pointing to the more relaxed modes of service permitted under the ROC 2021[18] in comparison with the predecessor ROC 2014,[19] the AR stated that there was no suggestion in Order 8 rule 1(3) or in the definitions provided elsewhere which suggested that both method and place of service had to be specified in a jurisdiction clause in order for a claimant to avail itself of service out without permission of the court. The AR was of the view that an agreement could come within Order 8 rule 1(3) so long as it provided for service of originating process of the Singapore courts on a foreign defendant.

The reasoning was as follows. First, Order 8 rule 1(3) was a deviation from the

orthodox principles that the Singapore court's jurisdiction was territorial in nature and service on a defendant abroad ordinarily required permission of court. If a foreign defendant agreed that jurisdiction of the court can be founded over them by way of service of originating process, that service necessarily included service out of Singapore. Thus, to come within Order 8 rule1(3), the agreement merely required the foreign defendant to consent to the jurisdiction of the court to be founded over them by way of service of originating process. Secondly, the phrase used in Order 8 rule 1(3) was service 'out' of Singapore, rather than service 'outside' Singapore. Only the latter phrase, in the AR's view, connoted that service of process at a location other than Singapore was required.

On the first rationale, the Singapore court's *in personam* jurisdiction over a defendant is founded on service of process.[20] This is the case ordinarily, with or without the defendant's agreement. If the defendant expressly agrees that this can be done, this could be used to counter a subsequent challenge by the defendant to the existence of jurisdiction of the Singapore court, but it is difficult to see how, without more, an agreement to accept service of Singapore process takes the defendant outside the orthodox territorial framework of the Singapore court's jurisdiction. Surely only the defendant's agreement to service of Singapore process abroad, rather than merely agreement to service of Singapore process, would provide justification for the deviation from orthodox principles? The AR seemed to be suggesting that it is implicit that a foreign defendant, by agreeing to accept service of Singapore process, also consents to service of process out of Singapore, but the second rationale proffered renders any implicit agreement moot as, on the AR's view, Order 8 rule 1(3) does not require the defendant to agree to accept service abroad. However, the legal difference between 'out' and 'outside' is elusive, as 'service out of jurisdiction' is uncontroversially understood to refer to service on a defendant who is abroad and thus not within the territorial jurisdiction of the court.

A parallel provision to Order 8 rule 1(3) can be found in the Singapore International Commercial Court Rules 2021 ('SICC Rules'). Permission of the SICC is likewise not required where the defendant is party to a 'written jurisdiction agreement' for the SICC or 'service out of Singapore is allowed under an agreement between the parties.'[21] Order 8 rule 1(3) is missing the first option. However, it would be unlikely for the parties to have agreed on 'service out of Singapore' without first having agreed on a Singapore choice of court

agreement. Despite this slight oddity, the intention of the drafters is clearly to liberalise the service out(side) of jurisdiction rules. Whether the intention was to liberalise it as much as was held in *NW Corp* is, however, debatable.

[1] [2024] SGHC 21.

[2] SCPD 2021 para 63(2).

[3] SCPD 2021 para 63(3).

[4] Civil Justice Commission Report, Chapter 6, p 16 (29 December 2017).

[5] *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 (CA). The point is explained here.

[6] Insolvency, Restructuring and Dissolution Act 2018 s 252 and Third Schedule.

[7] [2024] SGHC 21 [46].

[8] *CLM v CLN* [2022] 5 SLR 273; *Bybit Fintech Ltd v Ho Kai Xin* [2023] 5 SLR 1748.

[9] [2024] SGHC 21 [60]

[10] [2024] SGHC 21 [63].

[11] [2024] SGHC 21 [63].

[12] [2024] SGHC 21 [63].

[13] *Three Arrows Capital Ltd v Cheong Jun Yoong* [2024] SGHC(A) 10.

[14] [2024] SGHC 21 [82].

[15] Insolvency, Restructuring and Dissolution Act 2018, Third Schedule, Art 21(1)(a).

[16] The respondent was clearly the legal owner; the question was whether the assets belonged beneficially to the applicant.

[17] [2023] SGHCR 22.

[18] ROC 2021 O7 r2(1)(d).

[19] ROC 2014 O10 r3.

[20] Supreme Court of Judicature Act 1969 s16(1)(a). The court also has jurisdiction if the defendant had submitted to the jurisdiction of the court (s16(1)(b)), but submission is normally used to counter a jurisdictional objection by the defendant; in the ordinary course of things, service of process must first take place.

[21] SICC Rules 2021 O5 r6(2).

No role for anti-suit injunctions under the TTPA to enforce exclusive jurisdiction agreements

Australian and New Zealand courts have developed a practice of managing trans-Tasman proceedings in a way that recognises the close relationship between the countries, and that aids in the effective and efficient resolution of cross-border disputes. This has been the case especially since the implementation of the Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement, which was entered into for the purposes of setting up an integrated scheme of civil jurisdiction and judgments. A key feature of the scheme is that it seeks to "streamline the process for resolving civil proceedings with a trans-Tasman element in order to reduce costs and improve efficiency" (Trans-Tasman Proceedings Act 2010 (TTPA), s 3(1)(a)). There have been many examples of Australian and New Zealand courts working to achieve this goal.

Despite the closeness of the trans-Tasman relationship, one question that had remained uncertain was whether the TTPA regime allows for the grant of an anti-suit injunction to stop or prevent proceedings that have been brought in breach of an exclusive jurisdiction agreement. The enforcement of exclusive jurisdiction agreements is explicitly protected in the regime, which adopted the approach of the Hague Convention on Choice of Court Agreements in anticipation of Australia

and New Zealand signing up to the Convention. Section 28 of the Trans-Tasman Proceedings Act 2010 (NZ) and s 22 of the Trans-Tasman Proceedings Act 2010 (Cth) provide that a court must not restrain a person from commencing or continuing a civil proceeding across the Tasman "on the grounds that [the other court] is not the appropriate forum for the proceeding". In the secondary literature, different opinions have been expressed whether this provision extends to injunctions on the grounds that the other court is not the appropriate forum due to the existence of an exclusive jurisdiction agreement: see Mary Keyes "Jurisdiction Clauses in New Zealand Law" (2019) 50 VUWLR 631 at 633-4; Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, 2020) at [2.445].

The New Zealand High Court has now decided that, in its view, there is no place for anti-suit injunctions under the TTPA regime: *A-Ward Ltd v Raw Metal Corp Pty Ltd* [2024] NZHC 736 at [4]. Justice O'Gorman reasoned that the TTPA involves New Zealand and Australian courts applying "mirror provisions to determine forum disputes, based on confidence in each other's judicial institutions" (at [4]), and that anti-suit injunctions can have "no role to play where countries have agreed on judicial cooperation in the allocation and exercise of jurisdiction" (at [17]).

A-Ward Ltd, a New Zealand company, sought an interim anti-suit injunction to stop proceedings brought against it by Raw Metal Corp Pty Ltd, an Australian company, in the Federal Court of Australia. The dispute related to the supply of shipping container tilters from A-Ward to Raw Metal. A-Ward's terms and conditions had included an exclusive jurisdiction clause selecting the courts of New Zealand, as well as a New Zealand choice of law clause. In its Australian proceedings, Raw Metal sought damages for misleading and deceptive conduct in breach of the Competition and Consumer Act 2010 (Cth) (CCA). A-Ward brought proceedings in New Zealand seeking damages for breach of its trade terms, including the jurisdiction clause, as well as an anti-suit injunction.

O'Gorman J's starting point was to identify the different common law tests that courts had applied when determining an application to the court to stay its own proceedings, based on the existence (or not) of an exclusive jurisdiction clause. While *Spiliada* principles applied in the absence of such a clause, *The Eleftheria* provided the relevant test to determine the enforceability of an exclusive jurisdiction clause: at [16]. The alternative to a stay was to seek an anti-

suit injunction, which, however, was a controversial tool, because of its potential to "interfere unduly with a foreign court controlling its own processes" (at [17]).

Having set out the competing views in the secondary literature, the Court concluded that anti-suit injunctions were not available to enforce jurisdiction agreements otherwise falling within the scope of the TTPA, based on the following reason (at [34]):

1. The term "appropriate forum" in ss 28 (NZ) and s 22 (Aus) of the respective Acts could not, "as a matter of reasonable interpretation", be restricted to questions of appropriate forum in the absence of an exclusive jurisdiction agreement. This was not how the term had been used in the common law (see *The Eleftheria*).
2. The structure of the TTPA regime reinforced this point, because it is on an application under s 22 (NZ)/ s 17 (Aus), for a stay of proceedings on the basis that the other court is the more appropriate forum, that a court must give effect to an exclusive jurisdiction agreement under s 25 (NZ)/ s 20 (Aus).
3. Sections 25 (NZ) and 20 (Aus) already provided strong protection to exclusive choice of court agreements, and introducing additional protection by way of anti-suit relief "would only create uncertainty, inefficiency, and the risk of inconsistency, all of which the TTPA regime was designed to avoid".
4. The availability of anti-suit relief would "rest on the assumption that the courts in each jurisdiction might reach a different result, giving a parochial advantage". This, however, would be "inconsistent with the entire basis for the TTPA regime – that the courts apply the same codified tests and place confidence in each other's judicial institutions".
5. Australian case law (*Great Southern Loans v Locator Group* [2005] NSWSC 438), to the effect that anti-suit injunctions continue to be available domestically as between Australian courts, was distinguishable because there was no express provision for exclusive choice of court agreements, which is what "makes a potentially conflicting common law test unpalatable".
6. Retaining anti-suit injunctions to enforce exclusive jurisdiction agreements would be inconsistent with the concern underpinning s 28 (NZ)/ s 22 (Aus) about "someone trying to circumvent the trans-Tasman

regime as a whole".

7. The availability of anti-suit relief would defeat the purpose of the scheme to prevent duplication of proceedings.
8. More generally, anti-suit injunctions "have no role to play where countries have agreed on judicial cooperation in the allocation and exercise of jurisdiction".

The Court further concluded that, even if the TTPA did not exclude the power to order an anti-suit injunction, there was no basis for doing so in this case in relation to Raw Metal's claim under the CCA (at [35]). There was "nothing invalid or unconscionable about Australia's policy choice" to prevent parties from contracting out of their obligations under the CCA, even though New Zealand law (in the form of the Fair Trading Act 1986) might now follow a different policy. The TTPA regime included exceptions to the enforcement of exclusive jurisdiction agreements. Here, A-Ward seemed to have anticipated that, from the perspective of the Australian court, enforcement of the New Zealand jurisdiction clause would have fallen within one of these exceptions, and the High Court of Australia's observations in *Karpik v Carnival plc* [2023] HCA 39 at [40] seemed to be consistent with this. The "entirely orthodox position" seemed to be that the Federal Court in Australia "would regard itself as having jurisdiction to determine the CCA claim, unconstrained by the choice of law and court" (at [35]).

Time will tell whether Australian courts will agree with the High Court's emphatic rejection of anti-suit relief under the TTPA as being inconsistent with the cooperative purpose of the scheme. The parallel debate within the context of the Hague Choice of Court Convention – which does not specifically exclude anti-suit injunctions – may be instructive here: Mukarrum Ahmed "Exclusive choice of court agreements: some issues on the Hague Convention on choice of court agreements and its relationship with the Brussels I recast especially anti-suit injunctions, concurrent proceedings and the implications of BREXIT" (2017) 13 Journal of Private International Law 386. Despite O'Gorman J's powerful reasoning, her judgment may not be the last word on this important issue.

From a New Zealand perspective, the judgment is also of interest because of its restrained approach to the availability of anti-suit relief more generally. Even assuming that the Australian proceedings were, in fact, in breach of the New Zealand jurisdiction clause, O'Gorman J would not have been prepared to grant an injunction as a matter of course. In this respect, the judgment may be seen as

a departure from previous case law. In *Maritime Mutual Insurance Association (NZ) Ltd v Silica Sandport Inc* [2023] NZHC 793, for example, the Court granted an anti-suit injunction to compel compliance with an arbitration agreement, without inquiring into the foreign court's perspective and its reasons for taking jurisdiction. O'Gorman J's more nuanced approach is to be welcomed (for criticism of *Maritime Mutual*, see here on The Conflict of Laws in New Zealand blog).

A more challenging aspect of the judgment is the choice of law analysis, and the Court's focus on the potential concurrent or cumulative application of foreign and domestic statutes (at [28]-[31], [35]). The Court said that, to determine whether a foreign statute is applicable, the New Zealand court can ask whether the statute applies on its own terms (following *Chief Executive of the Department of Corrections v Fujitsu New Zealand Ltd* [2023] NZHC 3598, which I criticised here on The Conflict of Laws in New Zealand blog, also published as [2024] NZLJ 22). It is not entirely clear how this point was relevant to the issue of the anti-suit injunction. The Judge's reasoning seemed to be that, from the New Zealand court's perspective, the Australian court's application of the CCA was appropriate as a matter of statutory interpretation and/or choice of law, which meant that the proceedings were not unconscionable or unjust (at [35]).

Lex Fori Reigns Supreme: Indian High Court (Finally) Confirms Applicability of the Indian Law by 'Default' in all International Civil and Commercial Matters

Written by Shubh Jaiswal, student, Jindal Global Law School, Sonipat (India) and Professor Saloni Khanderia, JGLS.

In the landmark case of *TransAsia Private Capital vs Gaurav Dhawan*, the Delhi High Court clarified that Indian Courts are not automatically required to determine and apply the governing law of a dispute unless the involved parties introduce expert evidence to that effect. This clarification came during the court's examination of an execution petition stemming from a judgment by the High Court of Justice Business and Property Courts of England and Wales Commercial Court. The Division Bench of the Delhi High Court invoked the precedent set by the United Kingdom Supreme Court in *Brownlie v. FS Cairo*, shedding light on a contentious issue: the governing law of a dispute when parties do not sufficiently prove the applicability of foreign law.

The Delhi High Court has established that in the absence of evidence proving the applicability of a foreign law identified as the 'proper law of the contract', Indian law will be applied as the default jurisdiction. This decision empowers Indian courts to apply Indian law by 'default' in adjudicating international civil and commercial disputes, even in instances where an explicit governing law has been selected by the parties, unless there is a clear insistence on applying the law of a specified country. This approach aligns with the adversarial system common to most common law jurisdictions, where courts are not expected to determine the applicable law proactively. Instead, the legal representatives must argue and prove the content of foreign law.

This ruling has significant implications for the handling of foreign-related civil and commercial matters in India, highlighting a critical issue: the lack of private international law expertise among legal practitioners. Without adequate knowledge of the choice of law rules, there's a risk that international disputes could always lead to the default application of Indian law, exacerbated by the absence of codified private international law norms in India. This situation underscores the need for specialized training in private international law to navigate the complexities of international litigation effectively.

Facts in brief

As such, the dispute in *Transasia* concerned an execution petition filed under Section 44A of the Indian Civil Procedure Code, 1908, for the enforcement of a foreign judgment passed by the High Court of Justice Business and Property Courts of England and Wales Commercial Court. The execution petitioner had brought a suit against the judgment debtor before the aforementioned court for

default under two personal guarantees with respect to two revolving facility loan agreements. While these guarantee deeds contained choice of law clauses and required the disputes to be governed by the 'Laws of the Dubai International Finance Centre' and 'Singapore Law' respectively, the English Court had applied English law to the dispute and decided the dispute in favour of the execution petitioner. Accordingly, the judgment debtor opposed the execution of the petition before the Delhi HC for the application of incorrect law by the Court in England.

It is in this regard that the Delhi HC invoked the 'default rule' and negated the contention of the judgment debtor. The Bench relied on the decision rendered by the Supreme Court of the United Kingdom in *Brownlie v. FS Cairo,* which postulated that "*if a party does not rely on a particular rule of law even though it would be entitled to do so, it is not generally for the court to apply the rule of its own motion.*"

The HC confirmed that foreign law is conceived as a question of fact in India. Thus, it was for each party to choose whether to plead a case that a foreign system of law was applicable to the claim, but neither party was obliged to do so, and if neither party did, the court would apply its own law to the issues in dispute. To that effect, the HC also relied on *Aluminium Industrie Vaassen BV,* wherein the English Court had applied English law to a sales contract even when a provision expressly stipulated the application of Dutch law—only because neither party pleaded Dutch law.

Thus, in essence, the HC observed that courts would only be mandated to apply the chosen law if either party had pleaded its application and the case was 'well-founded'. In the present dispute, the judgment debtor had failed to either plead or establish that English law would not be applicable before the Court in England and had merely challenged jurisdiction, and thus, the Delhi HC held that the judgment could not be challenged at the execution stage.

Choosing the Proper Law

The mechanism employed to ascertain the applicable law under Indian private international law depends on whether the parties have opted to resolve their dispute before a court or an arbitral tribunal. In arbitration matters, the identification of the applicable law similarly depends on the express and implied choice of the parties. Similarly, in matters of litigation, courts rely on the common

law doctrine of the 'proper law of the contract' to discern the applicable law while adjudicating such disputes on such obligations. Accordingly, the proper law depends on the express and implied choice of the parties. When it comes to the determination of the applicable law through the express choice of the parties, Indian law, despite being uncodified, is coherent and conforms to the practices of several major legal systems, such as the UK, the EU's 27 Member States, and its BRICS partners, Russia and China – insofar as it similarly empowers the parties to choose the law of any country with which they desire their disputes to be settled. Thus, it is always advised that parties keen on being governed by the law of a particular country must ensure to include a clause to this effect in their agreement if they intend to adjudicate any disputes that might arise by litigation because it is unlikely for the court to regard any other factor, such as previous contractual relationships between them, to identify their implied choice.

Questioning the Assumed: Manoeuvring through the Intricate Terrain of Private International Law and Party Autonomy in the Indian Judicial System

By reiterating the 'default rule' in India and presenting Indian courts with another opportunity to apply Indian law, this judgment has demonstrated the general tendency on the part of the courts across India to invariably invoke Indian law – albeit in an implicit manner – without any (actual) examination as to the country with which the contract has its closest and most real connection. Further, the lack of expertise by the members of the Bar in private international law-related matters and choice of law rules implies that most, if not all, foreign-related civil and commercial matters would be governed by Indian law in its capacity as the *lex fori*. Therefore, legal representatives should actively advocate for disputes to be resolved according to the law specified in their dispute resolution clause rather than assuming that the court will automatically apply the law of the designated country in adjudicating the dispute.

Foreign parties may not want Indian law to apply to their commercial contracts, especially when they have an express provision against the same. Apart from being unclear and uncertain, the present state of India's practice and policy debilitates justice and fails to meet the commercial expectations of the parties by compelling litigants to be governed by Indian law regardless of the circumstance and the nature of the dispute—merely because they failed to plead the application of their chosen law.

This would inevitably lead to foreign parties opting out of the jurisdiction of the Indian courts by concluding choice of court agreements in favour of other forums so as to avoid the application of the Republic's ambiguous approach towards the law that would govern their commercial contracts. Consequently, Indian courts may rarely find themselves chosen as the preferred forum through a choice of court agreement for the adjudication of such disputes when they have no connection to the transaction. In circumstances where parties are unable to opt out of the jurisdiction of Indian courts – perhaps because of the lack of agreement to this effect, the inconsistencies would hamper international trade and commerce in India, with parties from other jurisdictions wanting to avoid concluding contracts with Indian businessmen and traders so as to avert plausible disputes being adjudicated before Indian courts (and consequently being governed by Indian law).

Therefore, Indian courts should certainly reconsider the application of the 'default rule', and limit the application of the *lex fori* in order to respect party autonomy.

Cross-Border Litigation and Comity of Courts: A Landmark Judgment from the Delhi High Court

Written by Tarasha Gupta, student, Jindal Global Law School, Sonipat (India) and Saloni Khanderia, Professor, Jindal Global Law School

In its recent judgment in *Shiju Jacob Varghese v. Tower Vision Limited*,[1] the Delhi High Court ("HC") held that an appeal before an Indian civil court was infructuous due to a consent order passed by the Tel Aviv District Court in a matter arising out of the same cause of action. The Court deemed the suit before

Indian courts an attempt to re-litigate the same cause of action, thus an abuse of process violative of the principle of comity of courts.

In doing so, the Court appears to have clarified confusions arising in light of the explanation to Section 10 of the Civil Procedure Code, 1908 ("CPC"), on one side, and parties' right to choice of court agreements and *forum non conveniens* on the other. The result is that, as per the Delhi HC, Indian courts now ought to stay proceedings before them if the same cause of action has already been litigated before foreign courts.

The Indian Position on Concurrent Proceedings in Foreign and Domestic Courts

In the European Union, Article 33 of the Brussels Recast gives European courts the power to stay proceedings if concurrent proceedings based on the same cause of action are pending before a foreign court. The European court may exercise this right if the foreign court will give a judgment capable of recognition, and such a stay is necessary for the proper administration of justice. By contrast, in India, the Explanation to Section 10 of the CPC provides that the pendency of a suit in a foreign Court does not preclude Indian courts from trying a suit founded on the same cause of action.

The Indian Supreme Court in *Modi Entertainment v. WSG Cricket*[2] upheld parties' right to oust the jurisdiction of Indian courts in favour of a foreign forum through choice of court agreements. Where parties have agreed to approach a foreign forum by a non-exclusive jurisdiction clause, they would have considered convenience and other relevant factors. Therefore an anti-suit injunction cannot be granted.

Notwithstanding this judgment, however, when it came to situations where parties did not confer jurisdiction upon a foreign court through a choice of court agreement, the explanation to Section 10 of the CPC would still apply. Therefore, a party could initiate proceedings before both foreign and domestic courts on the same cause of action, resulting in the possibility of conflicting judgements and creating a nightmare for their enforcement. It would also increase the costs of resolving any dispute, as multiple litigation proceedings may occur simultaneously.

Courts in India tried to mitigate the impacts that could arise from these conflicting judgements through the doctrine of '*forum non conveniens*'. The doctrine permits courts to stay proceedings on the ground that another forum would be more appropriate or convenient to adjudicate the matter. There are no fixed criteria in considering whether to invoke the doctrine. However, courts may consider, *inter alia*, the existence of a more appropriate forum, the expenses involved, the law governing the transaction, the plausibility of multiple proceedings and conflicting judgements.

The doctrine of *forum non conveniens*, however, is only a discretionary power and can only be invoked if the defendant is able to prove that the current proceedings would be vexatious or oppressive to them and the foreign forum is "clearly or distinctly more appropriate than the Indian courts" (clarified by the Indian Supreme Court in *Mayar (HK) Ltd. v. Owners and Parties, Vessels MV Fortune Ltd.*[3]). Thus, it would not be mandatory in every situation for an Indian court to stay a suit pending before it, even if proceedings on the same cause of action are pending or completed in a foreign court.

Dismissal of the Appeal before Indian courts in *Shiju Jacob*

The dispute concerned a Share Entitlement executed in favour of the present Appellant, based on which the Appellant had filed a civil suit before the Tel Aviv District Court. More than two years later, they filed a suit for interim relief that was partially allowed by the Tel Aviv District Court but set aside by the Supreme Court of Israel. After that, the Appellant filed a suit before the Indian court, which was dismissed as a re-litigation and violative of the principle of comity. Consent terms were then filed in the Tel Aviv suit, and the suit was disposed of as settled. Shortly after that, the appellant moved an application to rescind the order to dispose of the suit, which the Tel Aviv District Court dismissed.

The Respondents now claimed, before the Indian court, that the appeal against the previous order by the Indian court was infructuous in view of the consent order passed by the Tel Aviv District Court. The Appellants, on the other hand, argued that the explanation to Section 10 of the CPC allowed them to file a suit in India, even if it was on the same cause of action as the suit before the Israeli courts.

The Delhi High Court held that allowing the appeal to continue would violate the principle of comity of courts, as it could result in conflicting decisions between the Israeli and Indian courts. It would also constitute re-litigation, which, although may not in every case be barred as *res judicata*, depending on the facts and circumstances, could be an 'abuse of process'. The concept of 'abuse of process' is thus more comprehensive than the concept of *res judicata* or issue estoppel. The Court therefore held that a suit or appeal must be struck down as an abuse of process even if the party is not bound by *res judicata* if it is shown that the new proceeding is manifestly unfair or would bring the administration of justice into disrepute.

Implications of the Judgment

The judgment thus provides that Indian courts must dismiss suits which have already been litigated before foreign courts. This is a welcome change, considering that the explanation to Section 10 of the CPC allows such proceedings to occur at the same time.

However, given that this is a High Court judgement, it will not be binding on Courts outside of Delhi and would simply have persuasive value. This difficulty is compounded by the fact that as per the facts of *Shiju Jacob*, the suit had been dismissed by the Tel Aviv District Court by the time the appeal was heard. Thus, it is unclear whether Indian courts will be able to follow the same approach where proceedings in the foreign court haven't been completed yet. In fact, the HC had observed that the effect of the explanation to Section 10 of the CPC did not even arise for consideration in the present case, as the settlement in question was not being executed or enforced in the proceedings before the Indian Court.

That said, the judgment of the Single Judge (which was being challenged in the present appeal) dismissed the suit even before the consent terms were passed because it was violative of the principle of comity of courts and amounted to re-litigation. The judgment signals that the Delhi HC intended for courts to apply the same principle where proceedings on the same cause of action are ongoing in a foreign court.

Ultimately, however, it is unfortunate that this intervention had to come from the judiciary and not the legislature. India still does not have comprehensive

legislation governing transnational disputes, and its position on private international law has been gauged by extending domestic rules by analogy. In the absence of legislation, uncertainty continues to reign as parties must piece together the position of law from hundreds of judgements. Regardless, the judgment in *Shiju Jacob* is an encouraging precedent for improving the finality of transnational litigation in India and ending the difficulties created by the explanation to Section 10 of the CPC.

[1] 2023 SCC OnLine Del 6630.

[2] (2003) 4 SCC 341.

[3] AIR [2006] SC 1828.