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

I. Introduction

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

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

II. Facts:

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

X (appellant) obtained a judgment in the United States against Y (appellee), which then sought to enforce it in Canada (Ontario) via a motion for summary judgment. After the Ontario court ordered enforcement of the American judgment, X sought enforcement of the Canadian judgment in Dubai by filing an application with the Execution Court of the Dubai Court of First Instance.

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

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

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

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

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

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

III. The Ruling

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

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

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

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

Moreover, the appealed decision did not clarify the basis for its conclusion that the [foreign] judgment was a "summary judgment" (*hukm musta'jil*) enforceable only in the rendering State. [This is more so], especially since the submitted documents on the Canadian civil procedure law and the Regulation No. 194 on [the Rules of Civil Procedure] show that Canadian law recognizes the system of "*Summary judgment*"[viii] for issuing judgments through expedited procedures, and that the [foreign] judgment was indeed rendered following expedited procedures after Y's participation by submitting rebuttal memoranda and hearing of the witnesses.[…]

Considering the foregoing, and upon reviewing the [Canadian] judgment…

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

IV Comments

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

However, the DSC's understanding of the Canadian proceedings and the nature of the summary judgment granted by the Canadian court, as well as its attempt to align common law concepts with those of UAE law are rather questionable. In this respect, the DSC's decision shows a degree of remarkable confusion in the using the appropriate legal terminology and understanding fundamental legal concepts. These include (i) the treatment of foreign summary enforcement judgments as ordinary "enforceable titles" (*sanadat tanfidhiyya – titres exécutoires*) under domestic law including domestic judgments rendered in criminal matters; (ii) the

assimilation between summary judgment in common law jurisdictions and *hukm musta'jil* ("summary interlocutory proceedings order" – "*jugement en référé*"); and (iii) the confusion between summary judgment based on substantive legal issues and summary judgment to enforce foreign judgments.

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

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

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

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

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

of 1990 [para. 6].

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

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

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

Interestingly, before the Canadian court, Y argued that the "Restitution Order" made against him *was not* a "fine" because it was a "*compensatory-type*" order [para. 27]. However, it is clear that it was an attempt to exclude the enforcement of Restitution Order from the scope of application of the Mutual Legal Assistance in Criminal Matters Act. In any event, despite the crucial theoretical and practical importance of the issue, this is not the place to discuss whether the "Restitution Order" was penal or civil in nature. What matters here is the nature of the proceeding brought before the Canadian court which is a summary proceeding to recognize and enforce a foreign judgment. This leads us to the next point.

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

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

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

It is widely known that the procedural aspects of the enforcement of foreign judgments largely differ across the globe. However, it is fair to say that there are, at least, two main models (although other enforcement modalities do also exist). Generally speaking, civil law jurisdictions adopt the so-called "*exequatur*" proceeding the main purpose of which is to confer executory power to the foreign judgment and transforms it into a local "enforceable title". On the other hand, in common law jurisdictions, and in the absence of applicable special regimes, the enforcement of foreign judgments is carried out by initiating a new and original

action brought before local court on the foreign judgment.[xvi] The purpose of this action is to obtain an enforceable local judgment that, while recognizing and enforcing the foreign judgment, is rendered as if it were a judgment originally issued by the local court.[xvii] Both procedures result in similar outcome:[xviii] what has been decided by the foreign court will be granted effect in the form. However, *technically*, in civil law jurisdiction it is the foreign judgment itself that is permitted to be enforced in the forum,[xix] while in common law jurisdictions, it is the local judgement alone which is enforceable in the forum.[xx]

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

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

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[i] In my previous post, I translated the term "*hukm musta'jil*" as "summary judgment to highlight the nature of the Canadian procedure. However, from the purpose of UAE law, I think it is better that this word be translated as "summary interlocutory judgment – *jugement en référé*". This being said, for the purpose of this post the terms "summary judgment" will be used to highlight the terminological confusion committed by the DSC.

[ii] In my previous post, I was misled by the inappropriate terminology used in the DSC's decision which referred to this American order as "Rehabilitation order"

(*hukm rad i'tibar*). The term "rehabilitation order" is maintained here as this is the term used by the DSC.

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

[iv] Ibid.

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

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

[vii] *Supra* n (3).

[viii] In the original. Italic added.

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

[x] *Supra* n (3).

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

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

[xiii] *Supra* n (2).

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

[xv] On this case see, Janet Walker, "*Beals v. Saldanha:* Striking the Comity Balance Anew" 5 *Canadian International Lawyer* (2002) 28; *idem*, "The Great

Canadian Comity Experiment Continues" 120 *LQR* (2004) 365; Stephen G.A. Pitel, "Enforcement of Foreign Judgments: Where *Morguard* Stand After *Beals*" 40 *Canadian Business Law Journal* (2004) 189.

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

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

[xviii] Briggs, *ibid*.

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

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

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

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

Conflict of Laws and Diversity of Opinions—A View of The Nigerian Jurisdiction

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Introduction

At the core of Conflict of Laws or Private International Law (hereinafter PIL) is reconciling rules across jurisdictions for dispute settlement and the broader concerns of justice and public policy. PIL rules are used as a toolbox to assist litigants in resolving these problems that arise from complex litigations. This has immense significance regarding the security of contracts, enforcement of obligations, and overall predictability of solutions on these issues. Recent debates and academic discourse about the Nigerian Judiciary, its decisions, and opinions on PIL have inspired even more contemplation on the institution's place, expertise, and contribution to the evolution of PIL rules and practices in the region.[1] In this intervention, I situate these discussions in the larger structure of the judicature in Nigeria, the institution and system rather than individual opinions and expertise, and draw some lessons that should mediate academic, judicial, and legislative deliberations on this topic. I conclude that a scholarly engagement with the issues should be more robust than looking for limited answers that conform with precedents elsewhere—especially where these precedents do not help to address the contextual challenges. Equally, one should be mindful of the danger of incoherent transplants of norms and potential poor transplant effects. It is essential to stay focused on institutional capacities, expertise and competence and how to enhance them—instead of individualized expertise, which, though important, are weak foundations for enduring legal evolution and a reliable PIL regime.

I.The Supreme Court of Nigeria and the Judicature

The Nigerian Supreme Court is necessary for the legal system's stability, coherence, and sustainable evolution.[2] On the other hand, the Court of Appeal

and the High Courts (High Courts of States and the Federal Capital Territory, and the Federal High Courts) have a vertical relationship with the Supreme Court. Except where matters can commence directly at the Supreme Court, these lower courts serve as clearing houses for disputes on most commercial subjects within the country. This means that the Court of Appeal intervenes in many respects, and often, these matters do not go beyond the Court of Appeal. These courts also have several divisions across the country, and their jurisdictions and general adjudicatory competencies are recognized in the Constitution or as stipulated in their establishment laws. For instance, the Court of Appeal established by *section 237* of the Constitution of the Federal Republic of Nigeria 1999 (as amended) has 20 Judicial Divisions spread across the six geopolitical zones of the country.[3]

Therefore, with 36 states and a Federal Capital Territory, Abuja, Nigeria has a complex judicature with subsystems designed to serve the needs of communities and regions, which are often peculiar to the regions. Indeed, there are many jurisdictions within Nigeria, although the country is also a jurisdiction. The complexity is also illustrated by the embeddedness of Sharia law, and customary law, in private law in different parts of the country. For example, a court may be called upon to interpret contracts and commercial transactions on religious and customary interests. These must be situated in the broader contexts of the legal systems and the specific dispute.[4] In that regard, although the Supreme Court is one institution, cases are heard and determined by different judges and judicial panels that are usually constituted to hear appeals and original disputes before the court.[5] Foreign investors who may not have a sense of the complex system may become excited by the so-called "expertise in conflict of laws," which has recently formed part of the debate about PIL in Nigeria and the African region.

The case-by-case (ad-hoc) constitution of judicial panels to hear and determine causes before the Supreme Court has significant ramifications for appreciating the different workings of the institution and how to render justice to parties, even in problematic PIL circumstances. The rotation, in terms of panel constitution, increases the individual and collective mastery of all matters that come before the court for adjudication—including commercial transactions, which have broad ramifications for PIL. It also eliminates the possibility of predicting which justices may sit on a matter before each panel is constituted. This can potentially insulate the court as an institution from compromise by targeting specific justices ahead of time. The fundamental nature of this approach—rotation of judges and

constituting different panels for different cases—is even more perceptive when situated within the larger problem of corruption within the Nigerian judiciary.[6] The daily debate about corruption in the Nigerian judiciary makes it imperative that the public should not predict which judges would sit on a matter because of their "expertise" as this would serve the institution better and contribute to the ongoing efforts to curb corruption within the judiciary.[7] Individual efforts can then augment this institutional capacity and competence.

The above structure and approaches to judicial deliberations mean that there is a strong institutional capacity and competence regarding subjects upon which the Supreme Court is seized by law, practice, and tradition to adjudicate. This capacity pervades the entire judicature through such capillaries as precedents, rules of courts, practice directions, law reports, and memories accumulated over time that provide valuable guidance for judicial deliberations and determination of questions before the court, albeit PIL questions. Justices are also trained across different (sub)areas of law and often have significant statutorily required practice experience in various contexts within the jurisdiction before assuming judicial offices. In essence, the weight of the expertise lies more on the experience accumulated both as individuals and, more importantly, as custodians of the institutional capacity of the Supreme Court.

Sometimes, for example as in the case of the Court of Appeal, the different judicial divisions may reach different opinions on subjects ranging from marriage to child custody, service of processes, and enforcement of awards and judgments. This aligns with the general notion that courts of equal standing (coordinate jurisdiction) may depart from the opinion of their peers. Equally, state court systems have their respective rules of procedure, which have ramifications for the outcomes of dispute settlements in the states. The differences in the rules of courts further consolidate the necessity for a diverse knowledge base, a broad experience portfolio, and a flexible approach because of the complexity of the Nigerian legal system, the complicated court structure, and the breadth of judicial constitution. These factors also advance the argument that case-by-case issues that may need to be resolved by the courts are best dealt with not only by an independent knowledge base, but also drawing from the collective knowledge reservoir and diversity that the justices of the Supreme Court bring to the court to address issues as may be appropriate.[8] Thus, the differences, approaches, plurality of views, conflicts of opinions, and diversity of questions are not unusual,

considering the vastness of the jurisdiction and the interaction of different aspects of law and society.

The horizontal relationship between the courts of a particular subsystem, such as the Appeal Court divisions, does not mean there is chaos in the system or that they must depend on individual expertise to reconcile the PIL questions. Instead, it is an invitation to look to the institutional frameworks fashioned over time to manage disputes and achieve justice in cases. The wisdom of these institutional designs is more enduring because individual judges and their brilliance cannot sustain the long-term needs of any legal system. Thus, bright stars that stud the Nigerian Supreme Court's history (such as Chukwudifu Oputa, Kayode Eso, Muhammed Bello, Ignatius Pats-Acholonu, Akinola Aguda, Udo Udoma, and many others), while invaluable for the growth and evolution of the system, must be seen as part of the overall institutional structure for sustainable dispute resolution—especially on PIL—in the Nigerian legal system.

Arguably, it is potentially counterproductive to focus solely on individual judicial PIL expertise in trying to resolve PIL questions in Nigeria. This is so because it would be considerably difficult to find evidence of a fundamental miscarriage of justice merely because a preponderance of individual expertise is lacking. Furthermore, the U.S.—a bit similar to Nigeria in terms of federalism—does not do that either. In *J. McIntyre Machinery Ltd. v. Nicastro*, although there is no evidence of individualized PIL expertise of the judges, the U.S. Supreme Court resolved the issue regarding the rules and standards for determining jurisdiction over an absent party in a fair, just and reasonable manner.[9] The court came to a reasonable and just answer despite arriving at the majority judgment from a plurality of views. It is, therefore, the collective quality of judicial deliberations and opinions that is the distinctive standard for measuring the capacity and competence of a court on matters of PIL. There are other examples of this display of institutional capacity and competence in the U.S. Supreme Court in cases such as *The Bremen v. Zapata Off-Shore Co.,****[10]*** where Petitioner Unterweser agreed to tow respondent's drilling rig from Louisiana to Italy, with a forum-selection clause stipulating that any disputes would be litigated in the High Court of Justice in London. When the rig was damaged, the respondent instructed Unterweser to tow the rig to Tampa. Subsequently, the respondent filed a lawsuit in admiralty against petitioners in Tampa. Unterweser invoked the forum clause and initiated a lawsuit in the English court, which asserted its jurisdiction under the

contractual forum provision. It was held that forum selection in the contract was binding unless the respondent could discharge the heavy burden of showing that its enforcement is unreasonable, unfair, or unjust.[11]

In *Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC,* Raiders, a Pennsylvania company insured a yacht for up to $550,000 with Great Lakes, a UK-based company.[12] In 2019, the yacht ran aground in Florida. Raiders submitted a claim to Great Lakes for the loss of the vessel, but Great Lakes rejected it, citing Raiders' failure to recertify or inspect the yacht's fire-extinguishing equipment on time. Great Lakes sought a declaratory judgment to void the policy. The district court dismissed Raiders' counterclaims, applying New York law per the policy's choice-of-law provision. Raiders argued that this provision was unenforceable under *The Bremen v. Zapata Off-Shore Co.**[13]*** The U.S. Supreme Court disagreed, holding that choice of law provisions are enforceable unless under some narrow exception that is not applicable in the circumstance. There is therefore great wisdom in attributing competence, expertise and capacity to the institution instead of individuals.

Thus, quality judicial deliberations and decisions reflect institutional competence. In the next section, I further the discussion on the issue of diversity, looking at subject matter diversity, diversity of views, and the place of stare decisis and precedents in light of the current debates about PIL and expertise in the Nigerian Supreme Court and its resonance for the legal system.

II. *Judex,* Expertise, and Diversity of Opinions

Quot homines tot sententiae—as there are peo, so are their opinions. A combination of factors including training, age, experience, temperament, and general background of judges affect their overarching nature and contributions to the making of legal institutions such as courts. These combinations of factors also influence the diversity of voices and views, opinions, individual competencies, and expertise. The ramification of these factors is even more vigorous and visible in PIL issues where there is a confluence of complex questions that could inspire

diverse judicial decisions and plurality of opinions on controversies affecting commerce or other transnational/cross-border activities. Sometimes, this diversity can come as dissenting opinions. At other times, they may be reckoned with in the general *obiter* of superior courts such as the Supreme Court of Nigeria.

Regarding subject matter diversity, courts are usually confronted with different types of cases. These cross-cutting cases often mean that PIL rules must guide the courts in reaching a fair and reasonable dispute settlement. Equally, the rules to be applied may be implicated by background agreements or indemnities in bilateral and multilateral treaties, such as investment agreements, conventions, and soft law policies relevant to the dispute. Besides the subject matter diversity, which necessarily implicates PIL and opinion of courts, there is also procedural diversity, which affects the decisions of a court. In such situations, methods of service of processes, certification, and recognition of awards and judgments create a sort of complicated interaction between legislation and rules of court regarding how best to resolve disputes between litigants and in line with established precedents. In Nigeria's legal tradition, the rules of court support the rules of justice. Thus, the use of these tools can lead to different outcomes regarding diversity of procedure and diversity of opinion, and these have important implications for dispute settlement in PIL. For instance, a rule of court on limitation of time can influence the speed of hearing pretrial motions one way or another.

Yet, the dispute resolution system in Nigeria is not a rudderless ship. It has anchorage on doctrines such as *stare decisis* and precedents. The primacy of precedents established by the Supreme Court provides the guardrails for making sense of the respective diversities within the legal system as it concerns PIL. *Stare decisis* and precedents ensure that the law remains strong, stable, reliable, and predictable without standing still. Overall, the stability, security, and predictability that come from this means that the broader answers to PIL questions lie in institutional and systemic resilience and capacities rather than individual efforts, expertise, or resilience. In light of all these, the doctrine of *stare decisis* and precedents further reinforce institutional competence and expertise. Individualized expertise can quickly become a weak point in the judicial institutional amour—especially if given undue prominence. For instance, judicial empaneling cannot wait for individualized expertise and competence.[14]

Equally, courts do not generally operate like that. Rather, courts must function

with available human resources. Justice does not recline on individual expertise but on the entire institutional outlook of the courts. When citizens seek justice, they look up to the courts and not individual judges who may come and go at different intervals in the history of the court. Thus, even where divisions such as commercial divisions are established, the wisdom of such divisions is *functional*—to facilitate access to justice and enhance institutional competencies and efficiency for all manner of persons that appear before the court including corporate and other associated interests. Expertise in empaneling a tribunal is often a luxury preserved for arbitration tribunals or other alternative dispute resolution mechanisms. In those instances, parties can appoint their arbitrators or mediators based on their expertise. On the other hand, courts often have a set of judges already appointed by the appropriate authorities in the respective jurisdictions as at the time of commencement of actions.

Even then, expertise or expert views and opinions—whether in law or other spheres—are often subjects of evidence, and courts have procedural and institutional capacities to gain or leverage such expertise for fair and just settlement of disputes. When courts face certain difficulties, they can invite counsel to address the subject of controversy—usually through briefs. They can also invite *amicus* briefs or expert witnesses, such as professors of PIL, to testify on a matter in controversy with a view to answering critical questions for dispute resolution. These procedural safeguards reinforce the institutional competence and capacity and anticipate the limits of individual expertise. For example, *amici curiae* (friends of the court) have since become an established tradition available to courts to assist them in understanding and applying rules, principles, doctrines, and laws that may have PIL significance.

The individual expertise of judges will not provide answers to several PIL issues that arise in complex cross-jurisdictional disputes. Moreover, the expertise of individual judges from Nigeria is attested to in several jurisdictions as such judges have, at different times, dispensed justice in Gambian, Ugandan, and Namibian courts.[15] Therefore, the current fad of trying to prop up individual judges as PIL experts is mistaken—that expertise is better attributed to the institution, else scholars unwittingly set the judges up to fail and, in the process, diminish the established tradition of competence and expertise which the Nigerian judicature has managed to curate over time.

Conclusion

The judicature in Nigeria has often been a subject of intense scholarly deliberations. What has never been doubted is the expertise and competence of the courts in all matters within their assigned jurisdiction—both institutionally and in terms of the individuals who occupy the high judicial offices of the country. Individually, Nigerian judges serve with distinction and occupy high judicial offices even in countries such as the Gambia, Namibia, Botswana, Eswatini, and Uganda. These positions often require critical competence in the cross-border application of the law on matters relating to PIL. Therefore, there is no evidence to show that the expertise and capacities attributable to the judicature and its *judex* have been suspended at any time. Thus, the idea that "an expert in conflict of laws is now at the Supreme Court after a long time"[16] is potentially misleading—especially for persons, businesses, and investors who may not know the inner workings of complex legal systems such as Nigeria.

[1] Some of the interesting debates and discourse on the courts and PIL in Nigeria include, Folabi Kuti, SAN, *Critiquing the Critique: X-raying Dr. Okoli's restatement of the Court of Appeal's decision in TOF Energy Co. Ltd & Ors. v. Worldpay LLC & Another* (2022) LPELR -57462(CA) August 14, 2023, https://lawpavilion.com/blog/critiquing-the-critique-x-raying-dr-okolis-restatement-of-the-court-of-appeals-decision-in-tof-energy-co-ltd-ors-v-worldpay-llc-anor-2022-lpelr-574/>. Chukwuma Samuel Adesina Okoli, *A Critique of the Nigerian Court of Appeal's Recent Restatement of the Principles and Decisions on the Enforcement of Foreign Jurisdiction Clause in Nigeria*, November 8, 2022< https://lawpavilion.com/blog/a-critique-of-the-nigerian-court-of-appeals-recent-restatement-of-the-principles-and-decisions-on-the-enforcement-of-foreign-jurisdiction-clause-in-nigeria/> ; The Nigerian Court of Appeal declines to enforce a Commonwealth of Virginia (in USA) Choice of Court Agreement, March 10, 2021https://conflictoflaws.net/2021/the-nigerian-court-of-appeal-declines-to-enfor

ce-a-commonwealth-of-virginia-in-usa-choice-of-court-agreement/. Anthony Kennedy, The Recognition and Enforcement of Foreign Judgements at Common Law in Nigeria, December 15, 2020 (on why the common law action should be revived) https://www.afronomicslaw.org/2020/12/15/the-recognition-and-enforcement-of-foreign-judgments-at-common-law-in-nigeria ;Richard Mike Mlambe, *Presence as a basis for International Jurisdiction of a Foreign Court Under Nigerian Private International Law,* December 16, 2020 https://conflictoflaws.net/2020/presence-as-a-basis-for-international-jurisdiction-of-a-foreign-court-under-nigerian-private-international-law/.

[2] *Section 230* of the Constitution of the Federal Republic of Nigeria 1999 (as amended) establishes the Supreme Court as the apex judicial institution in the country.

[3] Divisions of the Court of Appeal in Nigeria < https://www.courtofappeal.gov.ng/divisions> (last visited May 29, 2024). The Federal High Court of Nigeria has 35 Judicial Divisions < https://www.nextfhc.fhc.gov.ng/court/divisions>. (last visited May 29, 2024).

[4] Pontian Okoli, *Former British Colonies: The Constructive Role of African Courts in the Development of Private International Law,* 7 University of Bologna Law Review, 2, 126 (2022). https://bolognalawreview.unibo.it/article/view/15830

[5] Original disputes before the Supreme Court are often questions of controversy between the states as among themselves or between the states and the Federal Government of Nigeria. See *Section 232* of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

[6] Ameh Ejekwonyilo, *Corruption in Nigerian Judiciary is extensive—UNODC,* Premium Times March 1, 2024.

[7] Joseph Onyekwere, *ICPC Corruption Verdict Unsettles Judiciary*, The Guardian January 26, 2021; Punch: Editorial, *Uprooting Corrosive Corruption in the Judiciary*, August 24, 2023.

[8] Computation of time can be used to show some of the differences. For example, Order 48 rule (5) of the Rivers' State High Court Civil Procedure Rules 2019 provides that time will not run when the courts are under lock and key. This

unique provision arises from the difficult Chief Judge succession experience in that state in the 2015/2016 legal year. In comparison, Lagos State High Court and the High Court of the Federal Capital Territory, Abuja, have no similar provision regarding when the court is under lock and key. See *Order 49 of the High Court of the Federal Capital Territory Abuja,* 2018; *Cf* Order 48 of the Lagos State High Court Civil Procedure Rules 2019. But to show flexibility of approaches, in responding to such a situation of courts being under "lock and key" as seen in the case of Rivers State, the Chief Judge of the High Court of the Federal Capital Territory, adopted a different approach by issuing a practice direction regarding computation of time to cover the period of industrial action by judicial workers. *[S]ee* High Court of the Federal Capital Territory, FCT Computation of Time and Exemption from payment of Default fees) Practice Direction No 1, 2021 (for the period April 6th, 2021 – June 14, 2021) < https://www.fcthighcourt.gov.ng/download/PRACTICE-AND-PROCEDURE/COMPUTATION-OF-TIME-AND-EXEMPTION-FROM-PAYMENT-OF-DEFAULT-FEES-PRACTICE-DIRECTION-NO.-1-2021-FOR-THE-PERIOD-APRIL-6TH-14TH-JUNE.pdf>. See also High Court of Delta State (Exemption of Payment of Default fees for filing of processes) Practice Direction (No 2) of 2021 for the Period of JUSUN Strike from April 6, 2021, to June 14, 2021. < https://thenigerialawyer.com/wp-content/uploads/2021/06/Practice-Direction_JUSUN-strike_cover-001-converted-delta.pdf>.

[9] 564 U.S. 873 (2011). Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery, Ltd. V. Nicastro*, 63 S. C. L. Rev. 481 (2011) https://scholarship.law.ua.edu/fac_articles/291/ ; Elisabeth A. Beal, *J. McIntyre Machinery Ltd v. Nicastro: The Stream of Commerce Theory of Personal Jurisdiction in A Globalized Economy*, 66 University of Miami Law Rev. 233 (2011). https://repository.law.miami.edu/umlr/vol66/iss1/9/

[10] *407 U.S. 1 (1972).* Ronald A. Brand*, M/S Bremen v. Zapata Off-Shore Company: US Common Law Affirmation of Party Autonomy,* The Common Law Jurisprudence of Conflict of Laws (2023) https://scholarship.law.pitt.edu/fac_book-chapters/50/ ; Harold G. Maier, *The Three Faces of Zapata: Maritime Law, Federal Common Law, Federal Courts Law*, 6 Vand. J. of Transnational Law 387 (1972-1973). https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=2618&context=vjtl ; K. M. Edwards, *Unterweser: Choice Not Chance in Forum Clauses,* 3

California Western International Law Journal 397 (1973).

[11] See also *Carnival Cruise Lines Incorporated v. Shute*, 499 US 585, 593-594 where the Court noted that the enforcement of forum selection clauses has the salutary effect of removing confusions and reducing the time and expense of pre-trial motions.

[12] *Great Lakes Insurance SE v. Raiders Retreat Realty Co.*, 601 U.S. (2024).

[13] Supra note 10.

[14] *Sonnar (Nig.) Ltd. & Anor. V. Partenreedri M. S. Nordwind Owners of the Ship M.V. Nordwind & Anor.* (1987) LLJR –SC. (courts can elicit expertise through evidence as in this case where the opinion of German lawyers as to the law in Germany was relevant in reaching a fair, just and reasonable decision. The courts also decide on what probative value to give the expert evidence considering the interest of justice).

[15] For instance, Hon. Justice Emmanuel Agim served in the Gambia and Swaziland (Eswatini) at the highest judicial levels in those countries < https://triplenet.com.ng/lawparliament/law_body.php?myId=2699&myView=259>. Justice Akinola Aguda was also the Chief Judge of the Supreme Court of Botswana. < https://www.news24.com/news24/renowned-african-jurist-dies-20010908>.

[16] *See* Chukwuma Okoli and Abubakri Yekini, *The Nigerian Supreme Court now has a Specialist in Conflict of Laws*, Conflict of Law.Net. January 7, 2024. https://conflictoflaws.net/2024/the-nigerian-supreme-court-now-has-a-specialist-in-conflict-of-laws/

The Conflict-of-Laws Provision in

the French Influencer Legislation

by Ennio Piovesani

Certain EU Member States have enacted special rules governing the activities of content creators and influencers. In this context, the French legislature passed Law No. 2023-451 on June 9, 2023, aimed at regulating influencer marketing and addressing potential misconduct by influencers on social media platforms (1). Article 8, I, of Law No. 2023-451 requires that contracts between influencers and (influencer marketing) agents or advertisers, or their representatives, must be made in writing and include a specified set of clauses; failure to comply results in the contract being null.

One such clause mandates '[t]he submission of the contract to French law, notably to the Consumer Code, the Intellectual Property Code, and the present Law, when said contract has as its object or effect the implementation of influencer marketing activities through electronic means targeting notably an audience established on French territory' (Article 8, I, 5°, Law No. 2023-451). Scholars have highlighted the 'innovative' nature of the mechanism set forth in Article 8, I, 5°, Law No. 2023-451 and its resemblance to the (more established) concept of overriding mandatory provisions (2).

(1) LOI n° 2023-451 du 9 juin 2023 visant à encadrer l'influence commerciale et à lutter contre les dérives des influenceurs sur les réseaux sociaux

(2) See Sandrine Clavel, Fabienne Jault-Seseke, Droit international privé, Recueil Dalloz 2024, 987, accessed online at Dalloz.fr; see also Ermanno Calzolaio, L'attività pubblicitaria dell'influencer nel diritto francese (Loi n. 451 del 9 giugno 2023), Il Diritto dell'Informazione e dell'Informatica, 2023, no. 6, p. 909, accessed online at Dejure.it).

Israel is not Ukraine: German court orders the return of the child to Israel under the Hague Convention on the Civil Aspects of International Child Abduction

This case note is kindly provided by *Dr. Samuel Vuattoux-Bock*, LL.M. (Kiel), Freiburg University (Germany)

On May 23, 2024, the Stuttgart Higher regional Court (*Oberlandesgericht*), Germany, ordered the return of a child to Israel under the Hague Convention on the Civil Aspects of International Child Abduction. The war waged by Israel following the terrorist attack of October 7, 2023 is not sufficient in itself to establish a concrete risk of physical or psychological harm to the one-year-old child.

1. Facts

The decision is based on the following facts. A couple moved to Israel in 2020. They had a child together in 2023 (with Greek citizenship) in Haifa (northern Israel). In February 2024, the mother of the child (German citizenship) flew to Reutlingen (Germany) without the knowledge and consent of the father. Thereupon, the father filed an application for the return of the child to Israel under the regime of the Hague Convention on the Civil Aspects of International Child Abduction, as Israel is a member state thereof. Both the District Court (*Amtsgericht*) and the Higher Regional Court of Stuttgart ordered the return of the child to Israel.

2. Decision of the Court

The Higher Regional Court ruled that there was no actual, concrete risk of physical or psychological harm within the meaning of Art. 13(1)(b) of the Hague Convention for the child in Israel. The formal state of war in Israel and the region is not sufficient to justify such a risk. Furthermore, the situation is not comparable to the situation in Ukraine, where the same court refused to order the return of the child in 2022. The court based its reasoning on three main points: the alert levels of both the German and Israeli authorities do not indicate a concrete risk to the child's safety; in light of the recent situation in Israel, and in particular the "Iron Dome", there is no concrete risk to the child being in Israel; the situation, despite the state of war in the Middle East, is not comparable to the war situation in Ukraine.

a. Sufficient security level and no concrete danger for the child

The mother argued in court that the threat of "massacres and attacks" in Israel is growing, as is the threat of Hezbollah attacks from Lebanon. The mother also claimed that Hezbollah rockets had been fired into the suburbs of Haifa, where the child lived.

The court first referred to both German and Israeli travel warnings. According to the German authorities, Israel is in a "formal state of war" and an escalation is possible at any time. On the contrary, the Israeli National Emergency Portal of the Home Front Command shows the regions of Tel-Aviv/Haifa/Ashdod-Gimmel and Netanya-West as secured (lowest emergency level "green- full activity"). Since travel warnings alone are not sufficient to establish a danger under Art. 13(1)(b) of the Hague Convention, the Court gave precedence to the security assessment of the Israeli authorities.

For the Court, the risk associated with the current conflict in the Middle East is not sufficiently concrete with respect to the child's situation. To justify its decision, the Court analyzed the various actual security and war events of the past month in Israel. The hostage-taking by the terrorist group Hamas on October 7, 2023 cannot be considered an actual risk today. For the Court, the Israeli offensive in the Gaza Strip makes a repetition of such events "from a realistic point of view" very unlikely (No. 87). Furthermore, the drone and missile attacks

of April 14, 2024, from foreign countries, in particular from Iran, must be analyzed as exceptional and, as such, cannot be taken into account in the assessment of the risk to the child (No. 88). Moreover, the Israeli air defense system “Iron Dome” has been effective in this context (No. 88, 96).
The Court draws the same conclusions with regard to the suicide bombings, explosions and other rocket fire that have occurred on Israeli soil. The Court sees only an abstract risk and a need for increased vigilance. These attacks, as terrorist attacks, are merely “criminal activities of individuals” (No. 91). These events were not presented by the mother in a sufficiently concrete manner to allow the court to see a concrete physical or psychological risk for the child. Finally, the Court bases its decision on the fact that the parents moved to Israel in 2020, informed of the complex situation in the Middle East. The Court cannot ignore that the security situation in Israel has been “tense” for some time (No. 91). For the Court, the situation here is definitely different from the situation in Ukraine.

b. Situation not comparable to Ukraine

The Higher Regional Court of Stuttgart decided in 2022 to refuse the return of a child to Ukraine (specifically Odessa) based on the actual risk according to Art. 13 (1) b) due to the war provoked by Russia. The court explained in detail why the situation in Israel was not comparable.
In contrast to Israel, Ukraine faces a massive, formally organized war, with military troops on its soil (No. 94), coming from a “militarily dominant great power” (No. 97). Israel, on the other hand, faces attacks coming from outside its own country (besides the concrete events around the Gaza Strip). Even taking into account Iran, the concrete threat is not comparable (No. 97). Moreover, the number of victims in the Russian-Ukrainian war since February 2022 is massively not comparable with the (civilian and military) victims in Israel, even taking into account the victims of the Hamas attack on October 7, 2023 (No. 95). Finally, according to the Court, the (so far) efficient Israeli “Iron Dome” provides good security for the entire Israeli territory, in contrast to Ukraine, whose large territory is much harder to defend against air attacks. (No. 96).

3. Comparison with decision from neighbor states toward Israel (France, Belgium)

In the past, some other European courts have found that the explosive situation in the Middle East and Israel constituted a risk within the meaning of Art. 13(1)(b) of the Hague Convention. The Court of Appeal of Brussels, in a decision of 2003, did not find a concrete risk for the child in Israel, but (very similar to the Stuttgart Court) only a general situation for the civilian population, including in view of the then possible war of the USA against Iraq and the training of children with gas masks. A decision of the French Court of Appeal of Chambéry in 2016 (confirmed by the French Cour de Cassation in 2017) decided to order the return of children suffering from AIDS to Israel, justified by the fact that Israel offers a good treatment for AIDS patients and that Israel, even if it experiences difficulties, is "definitely not at war". The question remains whether the court would have made a similar decision today, given the current situation in Israel and the Gaza Strip.

4. Final remarks

It appears that for the Court, the fact that the one-year-old child has not yet experienced a concrete attack in Israel is sufficient to establish a risk under Art. 13(1)(b) of the Hague Convention (this was the case, for example, in the Ukraine decision 2022). In view of the highly unstable situation and the escalation in the region, it is at least questionable to disregard the psychological aspects of experiencing, for example, air defense alerts and such stressful war situations – especially for a very young child. Since the political time is much faster than the judicial time, a strong discrepancy of decision can occur regarding the abduction of children in war zones. On the other hand, the interests of such a young child, who will soon be sent to school and separated from his father for an unknown period of time, must be taken into consideration. It is regrettable that this aspect did not play a major role in the Court's decision. Thus, the state of war in Israel and the Middle East is not only extremely complex in terms of diplomacy and public international law, but also in terms of private international law.

Who is bound by Choice of Court Agreements in Bills of Lading?

According to the doctrine of privity of contract, only parties to a choice of court agreement are subject to the rights and obligations arising from it. However, there are exceptions to the privity doctrine where a third party may be bound by or derive benefit from a choice of court agreement, even if it did not expressly agree to the clause. A choice of court agreement in a bill of lading which is agreed by the carrier and shipper and transferred to a consignee, or third-party holder is a ubiquitous example.

Article 25 of the Brussels Ia Regulation does not expressly address the effect of choice of court agreements on third parties. However, CJEU jurisprudence has laid down that the choice of court agreement may bind a third party in some contexts even in the absence of the formal validity requirements. Effectively, this is a context specific harmonised approach to developing substantive contract law rules to regulate the effectiveness of choice of court agreements. Article 25 of the Brussels Ia Regulation prescribes formal requirements that must be satisfied if the choice of court agreement is to be considered valid. Consent is also a necessary requirement for the validity of a choice of court agreement. (Case C-322/14 *Jaouad El Majdoub v CarsOnTheWeb.Deutschland GmbH* EU:C:2015:334, [26]; Case C 543/10 *Refcomp* EU:C:2013:62, [26]). Although formal validity and consent are independent concepts, the two requirements are connected because the purpose of the formal requirements is to ensure the existence of consent (*Jaouad El Majdoub*, [30]; *Refcomp*, [28]). The CJEU has referred to the close relationship between formal validity and consent in several decisions. The court has made the validity of a choice of court agreement subject to an 'agreement' between the parties (Case C-387/98 *Coreck* EU:C:2000:606, [13]; Case C-24/76 *Estasis Salotti di Colzani Aimo e Gianmario Colzani s.n.c. v Ruwa Polstereimaschinen GmbH* EU:C:1976:177, [7]; Case C-25/76 *Galeries Segoura SPRL v Societe Rahim Bonakdarian* EU:C:1976:178, [6]; Case C-106/95 *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravieres Rhenanes SARL* EU:C:1997:70, [15]). The Brussels Ia Regulation imposes upon the Member State

court the duty of examining whether the clause conferring jurisdiction was in fact the subject of consensus between the parties, which must be clearly and precisely demonstrated (ibid). The court has also stated that the very purpose of the formal requirements imposed by Article 17 (now Article 25 of Brussels Ia) is to ensure that consensus between the parties is in fact established (Case 313/85 *Iveco Fiat v Van Hool* EU:C:1986:423, [5]).

In similar vein, the CJEU has developed its case law as to when a third party may be deemed to be bound by or derive benefit from a choice of court agreement. In the context of bills of lading, the CJEU has decided that if, under the national law of the forum seised and its private international law rules, the third-party holder of the bill acquired the shipper's rights and obligations, the choice of court agreement will also be enforceable between the third party and the carrier (C 71/83 *Tilly Russ* EU:C:1984:217, [25]; C-159/97 *Castelletti*EU:C:1999:142, [41]; C 387/98 *Coreck* EU:C:2000:606, [24], [25] and [30], C 352/13 *CDC Hydrogen Peroxide* EU:C:2015:335, [65]; Cf. Article 67(2) of the Rotterdam Rules 2009). There is no separate requirement that the third party must consent in writing to the choice of court agreement. On the other hand, if the third party has not succeeded to any of the rights and obligations of the original contracting parties, the enforceability of the choice of court agreement against it is predicated on actual consent (C 387/98 *Coreck* EU:C:2000:606, [26]; C 543/10 *Refcomp* EU:C:2013:62, [36]). A new choice of court agreement will need to be concluded between the holder and the carrier as the presentation of the bill of lading would not *per se* give rise to such an agreement (AG Slynn in *Tilly Russ*).

Article 17 of the Brussels Convention and Article 23 of the Brussels I Regulation did not contain an express provision on the substantive validity of a choice of court agreement. The law of some Member States referred substantive validity of a choice of court agreement to the law of the forum whereas other Member States referred it to the applicable law of the substantive contract (Heidelberg Report [326], 92). However, Article 25(1) of the Brussels Ia Regulation applies the law of the chosen forum (*lex fori prorogatum*) including its choice of law rules to the issue of the substantive validity of a choice of court agreement ('unless the agreement is null and void as to its substantive validity under the law of that Member State').

The CJEU recently adjudicated on whether the enforceability of English choice of court agreements in bills of lading against third party holders was governed by

the choice of law rule on 'substantive validity' in Article 25(1) of the Brussels Ia Regulation. (Joined Cases C 345/22 and C 347/22 *Maersk A/S v Allianz Seguros y Reaseguros SA* and Case C 346/22 *Mapfre España Compañía de Seguros y Reaseguros SA v MACS Maritime Carrier Shipping GmbH & Co*.) The CJEU held that the new provision in Article 25(1) referring to the law of the Member State chosen in the choice of court agreement including its private international law rules is not applicable. A third-party holder of a bill of lading remains bound by a choice of court agreement, if the law of the forum seised and its private international law rules make provision for this. Notwithstanding, the principle of primacy of EU law precludes Spanish special provisions for the subrogation of a choice of court agreement that undermine Article 25 as interpreted by CJEU case law.

In the three preliminary references under Article 267 TFEU, the enforceability of English choice of court agreements between Spanish insurance companies and maritime transport companies was at issue. The insurance companies exercised the right of subrogation to step into the shoes of the consignees and sued the maritime transport companies for damaged goods. The central issue in the proceedings was whether the choice of court agreements concluded in the original contracts of carriage evidenced by the bills of lading between the carrier and the shipper also bound the insurance companies. The transport companies objected to Spanish jurisdiction based on the English choice of court agreements. The Spanish courts referred questions to the CJEU on the interpretation of choice of court agreements under the Brussels Ia Regulation.

At the outset, the CJEU observed that the Brussels Ia Regulation is applicable to the disputes in the main proceedings as the proceedings were commenced by the insurance companies before 31 December 2020. (Article 67(1)(a), Article 127(1) and (3) of the EU Withdrawal Agreement)

The CJEU proceeded to consider whether Article 25(1) of the Brussels Ia Regulation must be interpreted as meaning that the enforceability of a choice of court clause against the third-party holder of the bill of lading containing that clause is governed by the law of the Member State of the court or courts designated by that clause. The CJEU characterised the subrogation of a choice of court agreement to a third party as not being subject to the choice of law rule governing substantive validity in Article 25(1) of the Brussels Ia Regulation. (C 519/19 *DelayFix* EU:C:2020:933, [40]; C 543/10 *Refcomp* EU:C:2013:62, [25]; C

366/13 *Profit Investment SIM* EU:C:2016:282, [23]) The CJEU relied on a distinction between the substantive validity and effects of choice of court agreements (*Maersk*, [48]; AG Collins in *Maersk*, [54]-[56]). The latter logically proceeds from the former, but the procedural effects are governed by the autonomous concept of consent as applied to the enforceability of choice of court agreements against third parties developed by CJEU case law.

Although Article 25(1) of the Brussels Ia Regulation differs from Article 17 of the Brussels Convention and Article 23(1) of the Brussels I Regulation, the jurisprudence of the CJEU is capable of being applied to the current provision (*Maersk*, [52]; C 358/21 *Tilman*, EU:C:2022:923, [34]; AG Collins in *Maersk*, [51]-[54]). The CJEU concluded that where the third-party holder of the bill of lading has succeeded to the shipper's rights and obligations in accordance with the national law of the court seised then a choice of court agreement that the third party has not expressly agreed upon can nevertheless be relied upon against it (C 71/83 *Tilly Russ* EU:C:1984:217, [25]; C-159/97 *Castelletti* EU:C:1999:142, [41]; C 387/98 *Coreck* EU:C:2000:606, [24], [25] and [30], C 352/13 *CDC Hydrogen Peroxide* EU:C:2015:335, [65]; *Maersk*, [51]; Cf. Article 67(2) of the Rotterdam Rules 2009). In this case, there is no distinct requirement that the third party must consent in writing to the choice of court agreement. The third party cannot extricate itself from the mandatory jurisdiction as 'acquisition of the bill of lading could not confer upon the third party more rights than those attaching to the shipper under it' (C 71/83 *Tilly Russ* EU:C:1984:217, [25]; C-159/97 *Castelletti* EU:C:1999:142, [41]; C 387/98*Coreck* EU:C:2000:606, [25]; *Maersk*, [62]). Conversely, where the relevant national law does not provide for such a relationship of substitution, that court must ascertain whether that third party has expressly agreed to the choice of court clause (C 387/98 *Coreck* EU:C:2000:606, [26]; C 543/10 *Refcomp* EU:C:2013:62, [36]; *Maersk*, [51]).

According to Spanish law, a third-party to a bill of lading has vested in it all rights and obligations of the original contract of carriage but the choice of court agreement is only enforceable if it has been negotiated individually and separately with the third party. The CJEU held that such a provision would undermine Article 25 of the Brussels Ia Regulation as interpreted by the CJEU case law (*Maersk*, [60]; AG Collins in *Maersk*, [61]). As per the principle of primacy of EU law, the national court has been instructed to interpret Spanish law to the greatest extent possible, in conformity with the Brussels Ia Regulation

(*Maersk*, [63]; C 205/20*Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)* EU:C:2022:168) and if no such interpretation is possible, to disapply the national rule (*Maersk*, [65]).

The choice of law rule in Article 25(1) is not an innovation without utility. A broad interpretation of the concept of substantive validity would encroach upon the autonomous concept of consent developed by CJEU case law yet it could avoid the need for a harmonised EU substantive contract law approach to the enforceability of choice of court agreements against third parties. The CJEU in its decision arrived at a solution that upheld the choice of court agreement by the predictable application of its established case law without disturbing the status quo. In practical terms, the application of the choice of law rule in Article 25(1) would have led to a similar outcome. However, the unnecessary displacement of the CJEU's interpretative authorities on the matter would have increased litigation risk in multi-state transactions. By distinguishing substantive validity from the effects of choice of court agreements, the CJEU does not extrapolate the choice of law rule on substantive validity to issues of contractual enforceability that are extrinsic to the consent or capacity of the original contracting parties. On balance, a departure from the legal certainty provided by the extant CJEU jurisprudence was not justified. It should be observed that post-Brexit, there has been a resurgence of English anti-suit injunctions in circumstances such as these where proceedings in breach of English dispute resolution agreements are commenced in EU Member State courts.

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Bahraini Supreme Court on the Enforceability of a Foreign Judgment Ordering the Payment of

Contingent Fees

I. Introduction

Contingency fee agreements are arrangements whereby lawyers agree with their clients to receive a percentage of the final awarded amount in terms of payment of legal services. Such payment typically depends upon the lawyer winning the case or reaching a settlement. The admissibility of contingency fee agreements varies from one jurisdiction to another, ranging from complete prohibition to acceptance. For example, in the MENA Arab region, jurisdictions such as Bahrain prohibit contingency fee arrangements (see below). However, in other jurisdictions such as Saudi Arabia, contingent fees are not only permitted but also have been described as established practice in the country (cf. *Mekkah Court of Appeal, Ruling No. 980/1439* confirming the Ruling of *Jeddah Commercial Court No. 676/1439 of 3 Rajab 1439 [20 March 2018]* considering that receiving a percentage of the awarded amount that ranges between 15% to 30% as "an established judicial and customary practice among lawyers").

With respect to the enforcement of foreign judgments, a crucial issue concerns whether a foreign award ordering the payment of contingent fees would be enforced abroad. In a country where contingent fees contracts are prohibited, the presence of such elements in foreign judgments is likely to affect their enforceability due to public policy considerations. The Bahraini Supreme Court (hereafter 'BSC') addressed this particular issue in what appears to be an unprecedented decision in the MENA region. The Court held that a foreign judgment ordering payment of contingent fees as agreed by the parties is contrary to public policy because contingency fee agreements are forbidden in Bahrain (*Supreme Court, Ruling No. 386/2023 of 20 February 2024*).

II. Facts

The case concerned an action for the enforcement of a Saudi judgment brought by X (a practicing lawyer in Saudi Arabia) against Y (the appellee, owner of a sole proprietorship, but no further indications as to Y's nationality, habitual residence or place of business were mentioned in the judgment).

According to the underlying facts as summarized by the Supreme Court, both X and Y agreed that X would represent Y in a case on a fee of 10% of the awarded amount (105,000 USD). As Y failed to pay, X brought an action in Saudi Arabia to obtain a judgment against Y requiring the latter's sole proprietorship to pay the amount. Later, X sought the enforcement of the Saudi judgment in Bahrain. The first instance court ordered the enforcement of the foreign judgment, but its decision was overturned by the Court of Appeal. There, X filed an appeal to the BSC.

Before the BSC, X argued that the Court of Appeal erred in its decision as it declared the (contingency fee) agreement between the parties null and void on public policy grounds because it violated article 31 of the Bahraini Attorneys Act (*qanun al-muhamat*), which prohibits such agreements. According to X, the validity of the agreement is irrelevant *in casu*, as the court's function was to examine the formal requirements for the enforcement of the Saudi judgment without delving in the merits of the case. Therefore, since the foreign judgment satisfies all the requirements for its enforcement, the refusal by the Court of Appeal to order the enforcement was unjustified.

III. The Ruling

The BSC rejected the appeal by ruling as follows:

"It stems from the text of the provisions of Articles 1, 2 and 7 of the [1995 GCC Convention on the Enforcement of Foreign Judgments] as ratified by Bahrain in [1996], and the established practice of this Court, that judgments of a GCC Member State rendered in civil, commercial, administrative matters as well as personal status matters that become final [in the State of origin] shall be enforced by the courts and competent judicial authorities of the other GCC Member States in accordance with the procedure set forth in [the] Convention if it was rendered by a court having jurisdiction according to the rules of international jurisdiction of the requested State or according to the provision of the present Convention. [In this respect,] the role of the judicial authority of the requested State shall be limited to examination of whether the [foreign] judgment meets the requirement set forth in the Convention without reviewing the merits of the case. [However,] if it appears that the [foreign] judgment is inconsistent with the rules of Islamic

Sharia, the Constitution or the public policy of the requested State, the [requested court] shall refuse to enforce the foreign judgment as a whole or in part.

Public policy is a relative (*nisbi*) concept that [can be interpreted] restrictively or broadly [as it varies with] time, place and the prevailing customs, and it [is closely linked in terms of] existence or not with public interest. It [public policy] encompasses the fundamental principles that safeguard the political system, conventional social agreements, economic rules and the moral values that underpin the structure of the society as an entity and public interest. [In addition,] although public policy is often embodied in legislative texts, however, it transcends these texts to form an overarching and independent concept. [Thus,] when a legislative text contains a mandatory or prohibitive rule related to those fundamental principles and aims at protecting public interest rather than individual interests, [such a rule] should not be disregarded or violated. [This is because, such a rule is] crucial for preserving the [public] interests associated to it and takes precedence over the individual interests with which it conflicts as it falls naturally within the realm of public policy, whose scope, understanding, boundaries and reach are determined in light of those essential factors of society so that public interest is prioritized and given precedence over the interests of certain individuals.

[This being said,] it is established that the judgment whose enforcement is sought in Bahrain ordered Y to pay X 105,000 USD as [contingent fees], which represent 10% of the amount awarded to Y. [It is also established that] the parties' [contingency fee] agreement, which was upheld and relied upon [by the foreign court] violates article 31 of the Attorneys Act, which prohibits lawyers from charging fees based on a percentage of the awarded amount. This provision is a mandatory one that cannot be derogated from by agreement, and judgments inconsistent with it cannot be enforced. Consequently, the [contingency fee] agreement upon which the [foreign] judgment to be enforced is based is absolutely void, [rendering] the [foreign] judgment deficient of one of the legally prescribed requirements for its enforcement. This shall not be considered a review of the merits of the case but rather a [fundamental] duty of the judge to examine whether the foreign judgment meets all the requirements for its enforcement.

IV. Comments

1. General remarks

To the best of the author's knowledge, this is an unprecedented decision not only in Bahrain, but in the MENA region in general. In addition to the crucial issue of public policy (4), the reported case raises a number of interesting questions regarding both the applicable rules for the enforcement of foreign judgments (2) and *révision au fond* (3). (on the applicable rules in the MENA Arab jurisdictions including Bahrain, see Béligh Elbalti, "Perspectives from the Arab World", in M. Weller *et al.* (eds.), *The 2019 HCCH Judgments Convention – Cornerstones, Prospects, Outlook* (Hart, 2023) 182, 196, 199. On *révision au fond*, see *ibid*, 185. On public policy, see *ibid*, 188-190).

2. The Applicable rules

As the reported case shows, the enforcement of the Saudi judgment was examined on the basis of the 1995 GCC Convention, since both Bahrain and Saudi Arabia are Contracting States to it. However, both countries are also parties to a more general convention, the 1983 Riyadh Convention, which was also applicable (on these conventions with a special focus on 1983 Riyadh Convention, see Elbalti, *op. cit.*, 195-198). This raises a serious issue of conflict of conventions. However, this issue has unfortunately been overlooked by the BSC.

The BSC's position on this issue is ambiguous because it is not clear why the Court preferred the application of the 1995 GCC Convention over the 1983 Riyadh Convention knowing that the latter was ratified by both countries in 2000, i.e. *after* having ratified the former in 1996 (see Elbalti, *op. cit.* 196)! In any case, since the issue deserves a thorough analysis, it will not be addressed here (on the issue of conflict of conventions in the MENA region, see Elbalti, *op. cit.*, 200-201. See also my previous post here in which the issue was briefly addressed with respect to Egypt).

3. Révision au fond

In the reported case, X argued that the decision to refuse the enforcement of the Saudi judgment on public policy grounds violated of the principle of prohibition of the review of the merits. The BSC rejected this argument. The question of how to consider whether a foreign judgment is inconsistent with public policy without violating the principle of prohibition of *révision au fond* is very well known in literature. In this respect, it is generally admitted that borderline should be that the enforcing court should refrain from reviewing the determination of facts and application of law made by the foreign court "as if it were an appellate tribunal reviewing how the "lower court" decided the case" (Peter Hay, *Advance Introduction to Private International Law and Procedure* (Edward Elgar, 2018) 121). Therefore, it can be said the BSC rightfully rejected X's argument since its assessment appears to be limited to the examination of whether the judgment, "*as rendered* [was] offensive" without "reviewing the way the foreign court arrived at its judgment" (cf. Hay, *op. cit.*, 121).

4. Public policy in Bahrain

i. Notion & definition. Under both the statutory regime and international conventions, foreign judgments cannot be enforced if they violate "public policy and good morals" in Bahrain. In the case reported here, the BSC provided a lengthy definition of public policy. To the author's knowledge, this appears to be the first case in which the BSC has provided a definition of public policy in the context of the enforcement of foreign judgments. This does not mean, however, that the BSC has never invoked public policy to refuse the enforcement of foreign judgments (see, e.g., *BSC, Appeal No. 611/2009 of 10 January 2011* in which a Syrian judgment terminating a mother's custody of her two daughters upon their reaching the age of 15, in application of Syrian law, was held to be contrary to Bahraini public policy). Nor does this mean that the BSC has never defined public policy in general (see, e.g., in the context of choice of law, Béligh Elbalti & Hosam Osama Shabaan, "Bahrain – Bahraini Perspectives on the Hague Principles", in D. Girsberger et al. (eds.), *Choice of Law in International Commercial Contracts – Global Perspectives on the Hague Principles* (OUP, 2021) 429 and the cases cited therein).

What is remarkable, however, is that the BSC has consistently used for the definition of public policy in the context of private international law the same elements it uses to define public policy in purely domestic cases. This is particularly clear in the definition adopted by the BSC in the case reported here since it described public policy in terms of "ordinary mandatory rules" that the parties are not allowed to derogate from by agreement. It is worth noting in this regard that the BSC's holding on public policy appears, in fact, to have been strongly inspired by the definition given by the Qatari Supreme Court in a purely domestic case decided in 2015 (*Qatari Supreme Court, Appeal No. 348 of November 17, 2015*).

Defining public policy in the way the BSC did is problematic, as it is generally admitted that "domestic public policy" should be distinguished from public policy in the meaning of private international law (or as commonly referred to as "international public policy"). It is therefore regrettable that the BSC did not take into account the different contexts in which public policy operates.

ii. Public policy and mandatory rules. As mentioned above, the BSC associates public policy with "mandatory rules" in Bahrain, even though it recognizes that public policy could "transcend" these rules "to form an overarching and independent concept". This understanding of public policy is not in line with the widely accepted doctrinal consensus regarding the correlation between public policy and mandatory rules. This doctrinal consensus is reflected in the Explanatory Report of the HCCH 2019 Judgments Convention, which makes it clear that "it is not sufficient for [a state] opposing recognition or enforcement *to point to [its] mandatory rule of the law* […] that the foreign judgment fails to uphold. Indeed, this mandatory rule may be considered imperative for domestic cases but not for international situations." (Explanatory Report, p. 120, para. 263. Emphasis added). The Explanatory Report goes on to state that "[t]he public policy defence […] should be triggered *only* where such a mandatory rule reflects a fundamental value, the violation of which would be manifest if enforcement of the foreign judgment was permitted" (*ibid.* emphasis added).

The BSC's holding suggests that it is sufficient that the foreign judgment does not uphold *any* Bahraini mandatory rule to justify its non-enforcement, without a sufficient showing of how that the mandatory rule in question "reflects a

fundamental value, the violation of which would be manifest if enforcement of the foreign judgment was permitted". By holding as it did, the BSC unduly broadens the scope of public policy in a way that potentially undermines the enforceability of foreign judgments in Bahrain.

iii. Contingency fee arrangements and Bahraini Public Policy. As noted above (see Introduction), although contingency fee arrangements are prohibited in Bahrain, they are permitted in Saudi Arabia, where they appear to be widely used. From a private international law perspective, the presence of elements in a foreign judgment that are not permitted domestically does not in itself justify refusal of enforcement. In this sense, the non-admissibility of contingent fees in Bahrain should not in itself automatically lead to their being declared against public policy. This is because contingency fee arrangements should not be assessed on the basis of the strict rules applicable in Bahrain, but rather on whether they appear to be *manifestly* unfair or excessive in a way that violates "fundamental values" in Bahrain. Otherwise, the implications of the BSC's decision could be overreaching. For example, would Bahraini courts refuse to enforce a foreign judgment if the contingent fees were included as part of the damages awarded by the foreign court? Would it matter if the case has tenuous connection with forum (for example, the case commented here, there are no indication on the connection between Y and Bahrain, see (II) above)? Would the Bahraini courts apply the same solution if they had to consider the validity of the contingent fee agreement under the applicable foreign law? Only subsequent developments would provide answers to these questions.

V. Concluding Remarks

The case reported here illustrates the challenges of public policy as a ground for enforcing foreign judgments not only in Bahrain, but also in the MENA Arab region in general. One of the main problems is that, with a few exceptions, courts in the region generally fail to distinguish between domestic public policy and public policy in the context of private international law (see Elbalti, "Perspectives from the Arab World", *op.cit.*, 189, 205, and the references cited therein). Moreover, courts often fail to establish the basic requirements for triggering

public policy other than the inconsistency with the "fundamental values" of the forum, which are often referred to *in abstracto*. A correct approach, however, requires that courts make it clear that public policy has an exceptional character, that it has a narrower scope compared to domestic public policy, and that mere inconsistency with ordinary mandatory rules is not sufficient to trigger public policy. More importantly, public policy should also be assessed from the point of view of the *impact* the foreign judgment would have on the domestic legal order by looking at the *concrete effects* it would have if its recognition and enforcement were allowed. The impact of the foreign judgment, in this case, would largely depend on the intensity of the connection the case has with the forum.

The Corporate Sustainability Due Diligence Directive: PIL and Litigation Aspects

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Introduction

After extensive negotiations, on 24 April 2024, the European Parliament approved the Corporate Sustainability Due Diligence Directive (CSDDD or CS3D) as part of the EU Green Deal. Considering the intensive discussions, multiple changes, and the upcoming elections in view, the fate of the Commission's proposal has been uncertain. The Directive marks an important step in human rights and environmental protection, aiming to foster sustainable and responsible corporate behaviour throughout global value chains. Some Member States have incorporated similar acts already, and the Directive will expand this to the other Member States, which will also ensure a level playing field for companies

operating in the EU. It mandates that companies, along with their associated partners in the supply chain, manufacturing, and distribution, must take steps to avoid, halt, or reduce any negative effects they may have on human rights and the environment. The Directive will apply to big EU companies (generally those with more than 1,000 employees and a worldwide turnover of more than EUR 450 000 000) but also to companies established under the law of a third country that meet the Directive's criteria (Article 2 CSDDD).

Among the CSDDD's key provisions is the rule on civil liability enshrined in Article 29. This rule states that companies shall be held liable for damages caused in breach of the Directive's provisions. Accompanying such a rule are also some provisions that deal with matters of civil procedure and conflict of laws, though as has been pointed out earlier on this blog by Kilimcioglu, Kruger, and Van Hof, the CSDDD is mostly silent on PIL. When the Commission proposal was adopted in 2022, Michaels and Sommerfeld elaborated earlier on this blog on the consequences of the absence of rules on jurisdiction in the CSDDD and referred to the Recommendation of GEDIP in this regard. The limited attention for PIL aspects in the CSDDD is does not mean that the importance of corporate sustainability and human rights is not on the radar of the European policy maker and legislator. In the context of both the ongoing evaluation of the Rome II Regulation and Brussels I-bis Regulation this has been flagged as a topic of interest.

This blog post briefly discusses the CSDDD rules on conflict of laws and (international) civil procedure, which underscore the growing importance of both in corporate sustainability and human rights agendas.

Conflict of laws and overriding mandatory provisions

The role of PIL in the agenda of business and human rights has increasingly received scholarly attention. Noteworthy works addressing this intersection include recent contributions by Lehmann (2020), as well as volumes 380 (Van Loon, 2016) and 385 (Marrella, 2017) of the *Collected Courses of The Hague Academy of International Law*. Additionally, pertinent insights can be found in the collaborative effort of Van Loon, Michaels, and Ruiz Abou-Nigm (eds) in their comprehensive publication, The Private Side of Transforming our World (2021). From an older date is a 2014 special issue of Erasmus Law Review, co-edited by Kramer and Carballo Piñeiro on the role of PIL in contemporary society.

While the CSDDD contains only a singular rule on PIL, specifically concerning overriding mandatory provisions, it should be viewed in the broader EU discourse. The relevance of PIL for the interaction between business and human rights extends beyond this single provision, as evidenced by the Commission's active role in shaping this development. As indicated earlier, this is further indicated by studies on both the Rome II and Brussels I-bis Regulations, both of which delve into the complexities of PIL within the business and human rights debate. Thus, the CSDDD's rule should not be viewed in isolation, but as part of a larger, dynamic conversation on PIL in the EU.

The mentioned Rome II Evaluation Study (2021) commissioned by the Commission, summarised on this blog here, assessed Rome II's applicability to matters pertaining to business and human rights in detail. With regards to overriding mandatory provisions, the study outlines several initiatives at national level in the Member States that were discussed or approved to enact a mandatory corporate duty of care regarding human rights and the environment. Likewise, the Brussels I-bis Evaluation Study (2023) also examined how the Brussels I-bis applies to business and human rights disputes. Within the EU, establishing jurisdiction over EU-domiciled companies is straightforward under the Regulation, but it becomes complex for third-country domiciled defendants. Claims against such defendants are not covered by the Regulation, leaving jurisdiction to national laws, resulting in varied rules among Member States. *Forum necessitatis* and co-defendants rules may help assert jurisdiction, but lack harmonization across Europe. In this context, as explained by Michaels and Sommerfeld, while the CSDDD applies to certain non-EU firms based on their turnover in the EU (Article 2(2)), jurisdictional issues persist for actions against non-EU defendants in EU courts, with jurisdiction typically governed by national provisions. This could result in limited access to justice within the EU if relevant national rules do not establish jurisdiction.

As was mentioned above, the CSDDD is mostly silent on PIL. However, it does include a rule on overriding mandatory provisions enshrined in Article 29(7) and accompanying Recital 90. This rule aims to ensure the application of the (implemented) rules of the CSSDD regardless of the *lex causae.* Under EU private international law rules, the application of overriding mandatory provisions is also enabled by Article 9 Rome I Regulation and Article 16 Rome II Regulation.

Article 29(7) CSDDD states that 'Member States shall ensure that the provisions

of national law transposing' Article 29 CSDDD 'are of overriding mandatory application in cases where the law applicable to claims to that effect is not the national law of a Member State'. A similar provision to that effect can be found in the draft UN Legally Binding Instrument on business and human rights.

This means that the national laws transposing Article 29 CSDDD in their liability systems are applicable irrespective of any other conflict of law provisions in force. This rule also extends to the matters of civil procedure addressed below, as explicitly stated by Recital 90 CSDDD. On this matter, the potential for the CSDDD to become a dominant global regulatory force and overshadow existing and future national regulations, which is only beneficial if effectively prevents and remedies corporate abuses, has been highlighted. However, there is concern that it might mitigate the development of stronger regulatory frameworks in other countries (see FIDH, 2022).

Matters of civil procedure

The rules contained in the CSDDD that pertain to civil procedure are essentially laid down in Article 29(3). These rules on civil procedure naturally apply to both domestic cases and cross-border situations.

Firstly, Article 29(3)(b) CSDDD states that the costs of judicial proceedings seeking to establish the civil liability of companies under the Directive shall not be prohibitively expensive. A report published in 2020 by the EU Agency for Fundamental Rights (FRA) on 'Business and human rights – access to remedy' stressed that private individuals face significant financial risks when resorting to courts due to high costs such as lawyer fees, expert opinions, and potential liability for the opposing party's costs, particularly daunting in cases involving large companies. Suggestions for improvement include making litigation costs proportionate to damages, providing free legal representation through state bodies, and setting thresholds for the losing party's financial obligations, along with supporting civil society organizations offering financial and legal aid to victims of business-related human rights abuses. Secondly, Article 29(3)(c) CSDDD provides the possibility for claimants to seek definitive and provisional injunctive measures, including summarily, of both a restorative or enforcing nature, to ensure compliance with the Directive. Lastly, Article 29(3)(d) and (e) CSDDD, respectively, outline rules on collective actions and disclosure of evidence, the latter two explained below.

Collective actions

The FRA report mentioned above emphasized that many legal systems in the EU lack effective collective redress mechanisms, leading to limited opportunities for claimants to seek financial compensation for business-related human rights abuses. Existing options often apply only to specific types of cases, such as consumer and environmental protection, with procedural complexities further restricting their scope. Article 29(3)(d) CSDDD ensures that collective action mechanisms are put in place to enforce the rights of claimants injured by infringements of the Directive's rules. This provision states that 'Member States shall ensure that […] reasonable conditions are provided for under which any alleged injured party may *authorise*' the initiation of such proceedings. In our view, if this provision is interpreted in a similar way as the alike-rule on private enforcement contained in Article 80(1) GDPR (which uses the synonym 'mandate'), then this collective action mechanism shall operate on an opt-in basis (see Pato & Rodriguez-Pineau, 2021). The wording of both provisions points to a necessity of explicit consent from those wishing to be bound by such actions. Recital 84 CSDDD further underscores this interpretation by stating that this authorisation should be 'based on the explicit consent of the alleged injured party'. Importantly, this is unrelated to the collective enforcement of other obligations, outside the scope of the CSDDD, that may impinge upon the types of companies listed in Article 3(1)(a) CSDDD, like those stemming from financial law and insurance law (e.g. UCITS Directive, EMD, Solvency II, AIFMD, MiFID II, and PSD2). All the latter are included in Annex I Representative Actions Directive (RAD) and therefore may be collectively enforced on an opt-out basis pursuant to Article 9(2) RAD (see Recital 84 CSDDD).

Furthermore, Article 29(3)(d) CSDDD grants the Member States the power to set conditions under which 'a trade union, non-governmental human rights or environmental organisation or other non-governmental organisation, and, in accordance with national law, national human rights' institutions' may be authorized to bring such collective actions. The Directive exemplifies these conditions by mentioning a minimum period of actual public activity and a non-profit status akin to, respectively, Article 4(3)(a) and (c) RAD, as well as Article 80(1) GDPR.

In our view, the most relevant aspect of the collective action mechanism set by the CSDDD is that it provides for the ability to claim damages. Indeed, Article

29(3)(d) CSDDD allows the entities referred therein to 'enforce the rights of the alleged injured party', without making any exceptions as to which rights. This is an important recognition of the potentially pervasive procedural imbalance that can affect claimants' abilities to pursue damages against multinational corporations in cases of widespread harm (see Kramer & Carballo Piñeiro, 2014; Biard & Kramer, 2018; Buxbaum, *Collected Courses of The Hague Academy of International Law* 399, 2019).

Disclosure of evidence

Finally, Article 29(3)(e) CSDDD enacts a regime of disclosure of evidence in claims seeking to establish the civil liability of companies under the Directive. This provision, similar to Article 6 IP Enforcement Directive, Article 5 Antitrust Damages Directive, and Article 18 RAD, seeks to remedy the procedural imbalance of evidentiary deficiency, existent when there is economic disparity between the parties and unequal access to factual materials (see Vandenbussche, 2019).

When a claim is filed and the claimant provides a reasoned justification along with reasonably available facts and evidence supporting their claim for damages, courts can order the disclosure of evidence held by the company. This disclosure must adhere to national procedural laws. If such a disclosure is requested in a cross-border setting within the EU, the Taking of Evidence Regulation also applies.

Courts must limit the disclosure of evidence to what is necessary and proportionate to support the potential claim for damages and the preservation of evidence. Factors considered in determining proportionality include the extent to which the claim or defense is supported by available evidence, the scope and cost of disclosure, the legitimate interests of all parties (including third parties), and the need to prevent irrelevant searches for information.

If the evidence contains confidential information, especially regarding third parties, Member States must ensure that national courts have the authority to order its disclosure if relevant to the claim for damages. Effective measures must be in place to protect this confidential information when disclosed.

Outlook

The CSDDD regime on civil procedure described above largely follows the EU's 'silo mentality' (Voet, 2018) of enacting sectoral-based and uncoordinated collective action mechanisms tied to a specific area of substantive law, such as consumer law, non-discrimination law, and environmental law (e.g. UCTD, RED, UCPD, IED, EIAD, etc.). An important difference being, however, that this time the RAD is already in force and being implemented. On this matter, Recital 84 CSDDD states that Article 29(3)(d) CSDDD 'should not be interpreted as requiring the Member States to extend the provisions of their national law' implementing the RAD.

However, being the first EU-wide collective action mechanism and prompting historically collective action-sceptic Member States to adapt accordingly, it is conceptually challenging to posit that the RAD would not potentially influence regimes on collective actions beyond consumer law, including the CSDDD. In this context, it would not deviate significantly from current developments if some Member States opted for a straightforward extension of their existing and RAD-adapted collective action regimes to the CSDDD, though that demands caution to the latter's specificities and is not legally required.

Another aspect worthy of attention is how these collective actions would be funded. Since such actions may seek damages compensation for widespread harm under Article 29 CSDDD, they can become notably complex and, consequently, expensive. At the same time, a large number of injured persons can mean that these collective actions will ask for high sums in damages. These two factors combined make these collective actions an enticing investment opportunity for the commercial third-party litigation funding (TPF) industry. The CSDDD does not make any reservations in this regard, leaving ample room for Member States to regulate, or not, the involvement of commercial TPF. A report published in mid last year by Kramer, Tzankova, Hoevenaars, and Van Doorn by request of the Dutch Ministry of Justice and Security found that nearly all collective actions seeking damages in the Netherlands make use of commercial TPF. This underscores the crucial role commercial TPF plays in financing such actions, significantly impacting access to justice.

Moreover, the complexities surrounding the integration of PIL into specialized legislation such as the CSDDD, the GDPR, and the anti-SLAPPs Directive reflect a tension between the European Parliament and the Commission. This tension revolves around the extent to which PIL should be addressed within specialized

frameworks versus traditional EU legislation on PIL. So far, a clear direction in this regard is lacking, which will trigger further discussions and potential shifts in approach within the EU legislative landscape.

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

by Achim Czubaiko, Research Fellow („Wissenschaftlicher Mitarbeiter“) and PhD Candidate, supported by the German Scholarship Foundation, Institute for German and International Civil Procedural Law, University of Bonn.

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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.