# Online Symposium on Recent Developments in African PIL (II) – The Recognition and Enforcement of Foreign Judgments within the CEMAC Zone




*As part of the second online symposium on **recent developments in African private international law**, we are pleased to present the second contribution, kindly prepared by **Boris Awa (Kigali Independent University, Rwanda)**, on **The Recognition and Enforcement of Foreign Judgments within the CEMAC Zone**.*

### I. Introduction

The Central African Economic and Monetary Community (CEMAC) is a regional intergovernmental organization comprising Cameroon, the Central African Republic, Chad, the Republic of Congo, Equatorial Guinea and Gabon. It was created by the Treaty establishing CEMAC on 16 March 1994 and revised in 2008 (Hereinafter referred to as the CEMAC Treaty). All CEMAC Member States also

belong to the Organisation for the Harmonisation of Business Law in Africa (OHADA),[i] which aims to harmonise business law among its Member States. OHADA is composed of 17 Member States, all with legal systems rooted in the civil law tradition.

As regional integration and the harmonization of laws in CEMAC deepened, issues related to the recognition and enforcement of judgments became more prominent than ever before. This came in handy through the entry into force of the Judicial Cooperation Agreement of 28 January, 2004 (hereafter the "CEMAC Agreement").[ii] Closely linked to the CEMAC Agreement are other multilateral initiatives, such as the General Convention on Judicial Cooperation in matters of Justice, 12 September 1961 in Tananarive (hereafter the "Tananarive Convention")[iii], as well as bilateral treaties and domestic legislations of Member States, all of which are relevant in this context.

Against this background, we shall in turn discuss the conditions for the recognition of judgments under the laws of member States (II), under the relevant multilateral instruments, namely the Tananarive Convention and the CEMAC Agreement (III), and the hurdles that impede the recognition of foreign judgments under the CEMAC Agreement (IV).

## II. Recognition and Enforcement under Domestic Legal Regimes

Most Member States in CEMAC have black letter laws on the recognition and enforcement of judgments. The table below outlines the relevant laws and provisions governing this area in each CEMAC Member State.

| Jurisdiction | Code/Act | Provision |
|---|---|---|

| | | |
|---|---|---|
| Cameroon | Law No 2007/001 of 19 April 2007 to Institute a Judge in Charge of Litigation Related to the Execution of Judgements and lay down Conditions for the Enforcement in Cameroon of Foreign Court Decisions, Public Acts and Arbitral Awards | Articles 5-9 |
| Gabon | Civil Code (1972) | Articles 71-77 |
| | Civil Procedure Code (1977) | Articles 967-971 |
| Tchad | N/A | N/A |
| Central African Republic | Code of Civil Procedure (1991) | Articles 469-471 |
| Equatorial Guinea | Spanish Civil Procedure Code (1881) | Articles 951-958 |
| The Republic of Congo | Code of Civil, Commercial, Administrative and Financial Procedure (1983) (CCCAFP). | Articles 298-310 |

It emerges that five of the six CEMAC Member States have codified provisions on the recognition and enforcement of judgments. Moreover, the conditions for the recognition and enforcement of judgments in three Member States (namely, Cameroon, Gabon and Central African Republic) are similar. These include indirect jurisdiction, the right of defence, inconsistent judgments, public policy and finality. On the other hand, Congolese law provides no formal conditions for the recognition and enforcement of foreign judgments. In the Republic of Congo, the judgment debtor must seize the court that would have had subject matter jurisdiction to hear the claim, to render the foreign judgment executory in the Republic of Congo (art. 298 of the CCCAFP).

Apart from the aforementioned requirements for recognition and enforcement common to CEMAC member states, only Gabonese law (article 75 of the Civil Code) recognizes reciprocity as a condition for the enforcement of foreign

judgments.

## III. Recognition and Enforcement under the Applicable International Instruments

Two principal legal instruments govern the recognition and enforcement of judgments in the CEMAC zone: the 1961 Tananarive Convention and the 2004 CEMAC Agreement.

### 1. The Tananarive Convention

The Tananarive Convention presents the first efforts towards the harmonisation of judgment enforcement in francophone Africa. This convention mirrors the zeal to set up a common legal regime among Francophone African countries on judgement enforcement immediately after obtaining their independence.

The Tananarive Convention provides five (5) conditions for the enforcement of judgments in contentious and non-contentious decisions in civil and commercial matters under the treaty. These conditions are set out in article 30 and include:

(1) competent court according to the rules set out in the Convention (art. 38),

(2) the decision was rendered following the laws on conflict of law applicable in the state of where enforcement in sought,

(3) the judgment has, under the law of the state of origin, acquired the force of res judicata and is capable of enforcement

(4) the right of defence must have been respected and

(5) the judgment is not contrary to public order in the state where enforcement is sought, and does not conflict with a final judicial decision rendered in that State.

### 2. The CEMAC Agreement

The CEMAC Agreement is the first legal instrument establishing a unified legal

framework for the enforcement of judgments within the CEMAC zone. Based on the principle of supremacy of community legislation over national laws, it follows that the CEMAC Agreement sits above local legislations in the hierarchy of legal norms. Thus, the legislation to be applied by the courts for the recognition and enforcement of judgments within the zone should be derived from CEMAC law – namely, the CEMAC Agreement – rather from local legislations.

There are five (5) conditions for the recognition and enforcement of judgments under the CEMAC Agreement. These requirements are set out in article 14 of the Agreement which states that the judgement must satisfy the following conditions:

(1) the decision emanates from a competent court of the country where it was rendered

(2) the decision is not contrary to case law in the member state where enforcement is sought,

(3) the decision has acquired the force of res judicata

(4) the judgment was rendered in a fair trial that guarantees the equitable presentation of parties, and

(5) the judgement is in conformity with public policy in the member state where enforcement is sought.

### 3. Brief Comparative Overview of the Two Instruments

While the conditions for allowing enforcement under the CEMAC Agreement may appear similar to those provided under the Tananarive Convention, several differences exist. Substantively, the Tananarive Convention allows the control of the law applied in the state where enforcement is sought, but this is not the case with the CEMAC Agreement. Also, while the CEMAC Agreement provides for the determination of the competent court based on the law of the rendering state, the Tananarive Convention provides controlling criteria for the determination of competent court in article 38 based on the type of civil or commercial dispute. Procedurally, under the CEMAC Agreement, the judgment creditor, by a petition (*requête*), seizes the president of the court in the place where enforcement is sought, provided that the court would have had subject matter jurisdiction to hear

the dispute (art. 16). Under the Tananarive Convention, the request for enforcement is brought, by petition (*requête*), before the president of the court of first instance or a corresponding jurisdiction at the place where enforcement is sought (art. 32).

It is worth noting that article 37 of the CEMAC Agreement abrogates treaties, bilateral agreements, and conventions among CEMAC members states insofar as they are contrary to the CEMAC Agreement. Thus, the Tananarive Convention ceases to be a source of law for purposes of the recognition and enforcement of judgments within the CEMAC zone to the extent that its provisions conflict with the CEMAC Agreement.

## IV. Hurdles Besetting the Recognition of Foreign Judgments within the CEMAC Zone

### 1. Fragmentation of laws

The CEMAC region is characterized by the coexistence of multiple applicable legal frameworks governing the recognition and enforcement of foreign judgments, including domestic laws, bilateral conventions, multilateral conventions (notably the CEMAC Agreement and the Tananarive Convention). This raises questions as to the rationale for the continued conclusion of bilateral treaties on the recognition and enforcement of judgments, given that the enforcement regimes found under various instruments in the region are sometimes similar, with few differences.

### 2. Judicial neglect of the CEMAC Agreement

Given the superiority of CEMAC law over local legislation, the enforcement of judgments within the CEMAC zone should be governed by the CEMAC Agreement rather than by the domestic laws of the Member States. In practice, however, courts in several CEMAC Member States have not consistently adhered to this principle. Instead, judges often resort to domestic legislation with which they are more familiar when dealing with the recognition and enforcement of judgments

from member states within the CEMAC zone.

This approach has received judicial endorsement. in a number of cases decided by Cameroonian courts. One such example is *La succession Levy représentée par ses administrateurs, sieurs Levy Jesus Cyril et Levy Ishaï, commerçants demeurant à Bangui en République Centrafricaine,* which concerned the recognition and enforcement in Cameroon of a jugdment from the High Court in Bangui (Central African Republic) attributing letters of administration (*administrateurs)* to the plaintiffs. In that case, the court applied Cameroonian domestic law rather than the CEMAC Agreement (*Court of First Instance Douala-Bonanjo, Ordonnance of 31 January 2019 (Unreported)*).

A similar approach was followed in *Dame Tchagang Edo Ovono N'do Eyebe, Sieur Sandjong Mezui Verdier C/ Monsieur le Greffier en Chef du TPI Douala Bonanjo*, where a Gabonese judgment appointing the plaintiff as the heir and successor of the deceased Gabonese national was recognised and enforced in Cameroon on the basis of domestic law, in disregard of the CEMAC Agreement (*Court of First Instance Douala-Bonanjo, Ordonnance N°42 of 19 February 2019 (Unreported)*). Needless to say that the judgments referred to above are, in principle, legally flawed, as they disregard the hierarchy of norms established by the CEMAC Treaty.

Also, despite the fact that article 37 of the CEMAC Agreement abrogates treaties, conventions among others among member states which are contrary to the CEMAC Agreement, some courts in Chad continue to use the Tananarive Convention against the CEMAC Agreement. The Chadian case of *Etat du Cameroun, Représenté par Monsieur le Ministre des Finances C/ Fotso Yves Michel* mirrors this example where the Chadian High Court of Ndjamena enforced a judgment from the Supreme Court of Cameroon in Chad using the Tananarive Convention thereby disregarding the CEMAC Agreement (*High Court of Ndjamena, Repertoire No 78/2024 of 23 July 2024 (Unreported)*).

Several factors may explain this state of affairs. One particularly relevant in our view relates to is the scarcity of sufficient legal literature, with a regional or community-law focus on the recognition and enforcement of foreign judgments within the CEMAC zone. Conflict of law scholarship in the region continues to place predominant emphasis on domestic private international law, often overlooking the relevant community-law framework. As a result, judges are

deprived of adequate doctrinal guidance, and developments in CEMAC law in this field often go unnoticed.

## V. Conclusion

The reception and application of the rules governing the mutual recognition and enforcement of judgments within the CEMAC zone is not uniform. While some judges in Cameroon disregard the CEMAC Agreement and apply domestic legislation in enforcing judgments rendered from CEMAC member states, others in Chad continue to rely on the Tananarive Convention. As a result, despite of its twenty-one years (21) of existence, the CEMAC Agreement has – to the author's best knowledge – yet to be effectively tested in judicial practice. This situation stems from the complexity of the applicable legal frameworks – domestic, bilateral, multilateral and regional integration frameworks – which operate concurrently.

Against this backdrop, it is recommended that academics within the CEMAC zone engage more actively with regional case law, increase scholarly output, and help raise the visibility of legal developments in the region. Such efforts would provide judges with doctrinal guidance and foster the development of private international law in the region in line with international standards and best practices.

*Previous contributions:*

**1. Online Symposium on Recent Developments in African Private International Law**, *by Béligh Elbalti & Chukwuma S.A. Okoli* (Introductory post)

**2. Recognition and Enforcement of International Judgments in Nigeria**, *by Abubakri Yekini & Chukwuma Samuel Adesina Okoli*

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[i] For an overview from the perspective of models of trust management in private international, see Matthias Weller, '"Mutual Trust": A Suitable Foundation for Private International Law in Regional Integration Communities and Beyond?' 423

*Collected Courses* (2022) 203

[ii] On CEMAC and the 2004 CEMAC Agreement, see Weller, *op. cit.*, 184 ; E-A T. Gatsi, 'L'espace judiciaire commun CEMAC en matière civile et commerciale' 21 *Uniform Law Review* (2016) 101.

[iii] Ratified by 12 African States including, Cote d'Ivoire, Benin, Burkina-Faso, Madagascar, Mauritania, Niger, Senegal and all the CEMAC Member States, except for Equatorial Guinea. This is likely because Equatorial Guinea had its independence seven years after the adoption of the Convention. On this Convention, see Weller, *op. cit.*, 199.

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# Article V(1)(e) of the 1958 New York Convention in Light of a Decision of the Turkish Court of Cassation

*Posted on behalf of Erdem Küçüker, an attorney-at-law registered at the Istanbul Bar Association and a private law LL.M student at Koç University. Mr. Küçüker specializes in commercial arbitration, arbitration-related litigation and commercial litigation, and acts as secretary to arbitral tribunals.*

Article V of the 1958 New York Convention ("NYC") lists the grounds of non-enforcement of a foreign arbitral award. Accordingly, Article V(1)(e) provides that when "[t]*he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made*" the award's enforcement may be refused.

In 2024, the Turkish Court of Cassation quashed the lower courts' decision that declared an International Centre for Dispute Resolution of the American Arbitration Association ("ICDR") award as enforceable, stating that the courts

should have further investigated whether the award is final, enforceable and binding (Court of Cassation, 11th Civil Chamber, Docket No: E. 2022/5986, Decision No: K. 2024/2257, Date: 20.03.2024). This article explains the decision of the Turkish Court of Cassation and comments on the final, enforceable and binding character of an arbitral award in relation to Article V(1)(e) of the NYC.

**Decisions of the Lower Courts and the Court of Cassation**

The underlying dispute relates to the enforcement of an ICDR award with the seat located in the United States. In the arbitral award, the three respondents were ordered to pay a certain amount to the claimant. The claimant sought the enforcement of this arbitral award in Türkiye.

In the First Instance Court proceedings, the respondents did not submit an answer to the statement of claim. The court noted, amongst others, that (i) all documents in the arbitration, including the award, were validly notified to respondents, (ii) the award is final as per Article 30 of the ICDR Arbitration Rules ("Rules"), (iii) there is no means of appeal against the award, (iv) the respondents did not argue for the denial of the enforcement request. Thus, the court granted the enforcement of the award.

The respondents appealed this decision by claiming that they did not duly receive notification on the arbitration proceedings. However, the Regional Court of Appeal, as the second instance court, agreed with the first instance court that the respondents were duly notified on the proceedings and the award. The Regional Court of Appeal also held that it is the respondent who bears the burden of proof to establish that the award is not final or non-binding. It further incorporated the findings of the first instance court and stated that the award is final and binding according to the Article 30 of the Rules. The Regional Court of Appeal thereby dismissed the appeal on the first instance court decision.

Following the final appeal by the respondents, the case was brought before the Turkish Court of Cassation ("Court"). The Court initially referred to Articles 60-61 of the Turkish Private International Law Act numbered 5718 ("TPILA") and noted that to enforce a foreign arbitral award, the latter should be final and this requirement shall be considered by the court *ex officio*. The Court concluded that the finality of the award was not clearly established, based on the information available in the case file. Thus, the Court revoked the lower courts' decision,

holding that the lower court shall render a decision following a further investigation as to whether the award is final, enforceable and binding.

**Comments**

Article V(1)(e) of the NYC provides that:

"*Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that* […] [t]*he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made*".

Accordingly, this provision lists three grounds for the refusal of the enforcement of a foreign arbitral award, which are (i) the non-binding character of the award, (ii) the setting aside of the award and (iii) the suspension of the enforcement of the award. NYC provides that these should be established by the party against whom the enforcement is sought.

In relation to the first of the said grounds, an award shall be deemed to be binding if there is no possibility of appeal on merits. Parties can freely characterize an arbitral award as binding between them. This can be made through an explicit agreement in the arbitration clause. The parties can also refer to arbitration rules or laws, which govern that the arbitral award shall be binding. If the parties have such an agreement, the award shall gain binding character in the sense of Article V(1)(e) of the NYC.

In relation to the *enforceable character* of the award, an arbitral award shall be deemed as enforceable, once it is rendered unless the arbitration agreement/rules/laws provide otherwise. Some jurisdictions provide remedies against the award, in which case the competent authority may decide to suspend an award's enforcement.

In terms of the *final character*, an award shall be deemed as final if, (i) there are no possible remedies foreseen against the award or parties waived to resort to such remedies, or (ii) parties initiated these remedies and these are rejected. Notably, for this ground, the NYC considers whether the award is set aside or not.

In the underlying dispute, the principle question discussed is whether the award was final, enforceable and binding on the parties. Before analysing the binding, enforceable and final character of an award it should be noted that in the present case the Court's application of TPILA to revoke the lower courts' decision was systematically wrongful. Türkiye and the USA (i.e., the seat of arbitration) are parties to the NYC. As per Article 90(5) of the Constitution of the Republic of Türkiye and Article 1(2) of the TPILA, the provisions of the NYC prevail over the TPILA. Thus, the author considers that the Court should have applied the provisions of the NYC, instead of the TPILA.

Regarding the determination of the binding, enforceable and final character of an award, the lower courts relied on Article 30 of the Rules (2014 version), which provides under its paragraph 1 that:

"*Awards shall be made in writing by the arbitral tribunal and shall be final and binding on the parties.* […] *The parties shall carry out any such award without delay and, absent agreement otherwise, waive irrevocably their right to any form of appeal, review, or recourse to any court or other judicial authority, insofar as such waiver can validly be made.* […]".

Starting with the *binding character*, in the present case, the parties had agreed in the arbitration agreement that the Rules shall be applicable in the arbitration proceedings. As stated above, Article 30 of the Rules provide that the award shall be binding on the parties. Consequently, in the author's view, unlike the Court's findings, this gives the award the binding character and the respondents did not establish the contrary.

In terms of the *enforceable character*, the respondents did not seem to argue that the award's enforcement is suspended. Thus, the author considers that the award is enforceable as well.

For the *final character*, Article 30 of the Rules, as agreed between the parties, provide that the award shall be final and the parties waive any form of appeal against the award. The validity of such waiver can be further discussed in light of the applicable law. Notwithstanding this, as explained above, the NYC places emphasis on whether the award is set aside, and it is the respondent who carries such burden of proof. In the case at hand, respondents neither argued that they brought a setting aside action against the award nor that the latter was set aside.

Thus, the author is of the view that the final character of the award was also established in the case at hand, unlike the ruling of the Court.

To summarize, the author initially finds that the Court's application of the TPILA, instead of the NYC, was systematically wrongful in light of the Turkish Constitution Article 90. Additionally, the lower courts' decision on the award's binding and enforceable character was rightful, which, in the author's view, did not require any further investigation. In terms of the finality of the award, the lower courts' reliance to the arbitration rules may be debated; however, since the respondents did not prove that the award was set aside, the author argues that the award should have been regarded as final and binding on this final ground as well.

For further discussions on the topic, see also: Erdem Küçüker, '*Binding and Final Character of Arbitral Awards in the Enforcement of Foreign Arbitral Awards in Türkiye – Recurring Need for Clarity*', Daily Jus Blog, 4 November 2025 (available at: https://dailyjus.com/world/2025/11/binding-and-final-character-of-arbitral-awards-in-the-enforcement-of-foreign-arbitral-awards-in-turkiye-recurring-need-for-clarity).

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# Online Symposium on Recent Developments in African PIL (I) – Recognition and Enforcement of International Judgments in Nigeria




*As previously announced, we are launching the second online symposium on* ***recent developments in African private international law****. As part of this symposium, a series of blog posts addressing various aspects of recent developments in African private international law will be published on this platform over the coming days.*

*We open the series with a blog post by Abubakri Yekini (Senior Lecturer in Law at the University of Manchester) and Chukwuma Samuel Adesina Okoli (Assistant Professor in Commercial Conflict of Laws at the University of Birmingham and Senior Research Associate at the Centre for Private International Law in Emerging Countries at the University of Johannesburg), focusing on* ***the recognition and enforcement of international judgments in Nigeria.***

## 1. Introduction

Questions surrounding the recognition and enforcement of judgments have become increasingly prominent in Nigeria, both in academic writing and in practice (Yekini, 2017; Okoli and Oppong, 2021; Olawoyin, 2014; Adigun, 2019; Bamodu, 2012; Olaniyan, 2014; Amucheazi et al, 2024; PN Okoli, 2016). This development is not surprising. Nigerian individuals, companies, and public authorities are now routinely involved in disputes with cross-border elements, whether arising from international trade, investment, migration, or human rights litigation.

Nigeria operates a common law system governed by a written Constitution. The

Constitution carefully allocates governmental powers among the three branches of government. Section 6 vests judicial power in the courts, while section 4 assigns legislative power to the National Assembly and State Houses of Assembly. Courts therefore play a central role in the interpretation and development of the law, but always within clearly defined constitutional limits. The Constitution and statutes enacted by the legislature form the bedrock of domestic law.

This constitutional structure has direct implications for the status of international law in Nigeria. Section 12 of the Constitution makes it clear that treaties and other international legal instruments do not become part of Nigerian law merely because Nigeria has signed or agreed to them at the international level. For such instruments to have domestic force, they must be enacted by an Act of the National Assembly. This position has long been settled and repeatedly affirmed by the courts (see *Abacha v Fawehinmi* (2000) NGSC 3).

Private international law in Nigeria largely remains judge-made, inherited from English common law as part of the received English law. Within this framework, courts have articulated principles governing when foreign judgments may be recognised, when they may be enforced, and when enforcement must be refused (*Toepher Inc of New York v. Edokpolor* (1965) All NLR 301; *Macaulay v RZB of Austria* (2003) 18 NWLR (Pt. 852) 282; *Mudasiru & Ors v. Onyearu & Ors* (2013) LPELR; *GILAR Cosmetics Store v Africa Reinsurance Corporation* (2025) LPELR-80701 (SC)).

Alongside these common law principles, there are two principal statutory regimes dealing with the recognition and enforcement of foreign judgments (*Willbros West Africa Inc v Mcdonnel Contract Mining Ltd* (2015) All FWLR 310, 342). The statutory registration scheme is governed by the Reciprocal Enforcement of Judgments Act 1922 ("1922 Ordinance") and the Foreign Judgments (Reciprocal Enforcement) Act 1960 ("1960 Act"), but the latter is not yet in force (*Macaulay v RZB of Austria* (2003) 18 NWLR (Pt. 852) 282; *Ekpenyong v. A.G and Minister of Justice of the Federation* (2022) LPELR-57801(CA)). These frameworks have traditionally been applied to judgments of courts established under the laws of foreign states.

More recently, Nigerian courts have been confronted with judgments of international and regional courts created by treaty, most notably the ECOWAS Court of Justice (*CBN v Gegenheimer & Anor (*2025) LPELR-81477 (CA)). These

courts are not courts of foreign states in the ordinary sense. Their jurisdiction derives from agreements between states, and they operate within legal systems that exist alongside, rather than within, national judicial structures. The fact that the ECOWAS Court sits in Abuja does not alter this position; it is not part of the Nigerian judicature as enumerated under section 6(5) of the Constitution.

Judgments of international courts therefore raise questions that are different in kind from those posed by judgments of foreign national courts. International courts increasingly hear cases involving Nigerian parties and Nigerian institutions. Claimants who succeed before such bodies understandably would seek to enforce their judgments before Nigerian courts, particularly where the international legal framework does not provide a direct enforcement mechanism.

It is against this background that this short article examines the recognition and enforcement of international court judgments in Nigeria. It does so by situating recent judicial developments within Nigeria's existing constitutional and legal framework and by questioning whether current approaches are consistent with the limits imposed by that framework.

## 2. The Existing Enforcement Frameworks in Nigerian Law

There are two main mechanisms for recognition and enforcement of foreign judgments in Nigeria. A brief overview of these mechanisms is necessary to appreciate the kinds of judgments Nigerian law already recognises and, equally importantly, those it does not.

### a. Common law enforcement of foreign judgments

At common law, a foreign judgment may be enforced in Nigeria by bringing an action on the judgment itself. The judgment is treated as creating an obligation, often described as a debt, which the judgment creditor may seek to recover (*Toepher Inc of New York v. Edokpolor* (1965) All NLR 301; *Willbros West Africa Inc v Mcdonnel Contract Mining Ltd* (2015) All FWLR 310, 342). Over time, Nigerian courts have identified conditions that must be satisfied before this route is available. These include whether the foreign court had jurisdiction over the

judgment debtor, whether the judgment is final and conclusive, and whether it was obtained in circumstances consistent with basic requirements of fairness (Yekini; Okoli and Oppong)).

This common law route has always been limited in scope. It was developed to deal with judgments of foreign national courts operating within recognised state legal systems. Its underlying assumptions are rooted in territoriality and sovereignty. Jurisdiction at common law is assessed through concepts such as presence, residence, or submission within the territory of a sovereign state (*Adams v. Cape Industries plc* [1990] Ch. 433). Service of process, which founds the jurisdiction of the foreign court, is itself an exercise of sovereign authority.

The common law therefore assumes a relationship between two national legal orders: the foreign court that issued the judgment and the Nigerian court asked to give it effect. International courts do not fit easily within this framework. They are not organs of any single state. Their authority derives from treaties through which states agree to submit particular categories of disputes to an international judicial body. The legal force of their judgments exists, first and foremost, at the international level. Whether such judgments can have domestic effect depends on how each state structures the relationship between its domestic law and international obligations.

Some commentators have suggested that common law principles could be extended to accommodate international court judgments (Adigun, 2019). Others have acknowledged this possibility while also highlighting the uncertainties it would create (Oppong and Niro, 2014). Whatever the merits of these arguments, the critical point for present purposes is that the common law enforcement of judgments was never designed with international courts in mind. Extending it in this direction would require courts to resolve questions for which the common law offers no clear answers. Which international courts would qualify? Would ratification of the relevant treaty be sufficient, or would domestication be required? What defences would be available, and whose public policy would apply? (Oppong and Niro).

In the absence of legislative guidance, courts would be left to answer these questions on an ad hoc basis. That would place courts in the position of deciding which international obligations should have domestic force and on what terms. In Nigeria’s constitutional framework, that is a role more properly reserved for the

legislature. Unlike jurisdictions where courts are constitutionally mandated to engage in continuous development of the common law, Nigerian courts have traditionally exercised caution, particularly where the subject matter is affected by express constitutional provisions such as section 12 (cf Art 39(2) of the Constitution of the Republic of South Africa, 1996; *Government of the Republic of Zimbabwe v Fick 2013 (5) SA 325 (CC)* where the South African Constitutional Court enforced a judgment of the Southern African Development Community Tribunal against Zimbabwe by developing the common law regime. See also the Zimbabwean case of *Gramara (Private) Ltd v Government of the Republic of Zimbabwe,* Case No: X-ref HC 5483/09 (High Court, Zimbabwe, 2010).

**b. Statutory regimes for foreign judgments**

The limitations of the common law action on a judgment have long been recognised. Because the judgment creditor must commence fresh proceedings, jurisdiction must be established against the judgment debtor, and procedural obstacles may delay or frustrate enforcement (Yekini, 2017; Okoli and Oppong). To address these concerns, Nigerian law provides for statutory registration of foreign judgments in defined circumstances.

Two principal statutes govern this area. The first is the Reciprocal Enforcement of Foreign Judgments Ordinance 1922, Cap. 175, Laws of the Federation of Nigeria, 1958 ("1922 Ordinance"). This statute applies on a reciprocal basis to judgments from a limited number of jurisdictions, including the United Kingdom Ghana, Sierra Leone, The Gambia, Barbados, Guyana, Grenada, Jamaica, Antigua and Barbuda, St Kitts & Nevis, St Lucia, St Vincent, Trinidad & Tobago, Newfoundland (Canada), New South Wales and Victoria (Australia). Its scope is narrow and largely historical, but it remains in force.

The second is the Foreign Judgments (Reciprocal Enforcement) Act 1960, Cap. F35, Laws of the Federation of Nigeria, 2004 ("1960 Act"). The Act was intended to replace the 1922 Ordinance and to provide a more comprehensive framework for reciprocal enforcement. It proceeds on the basis of reciprocity. Judgments from foreign countries may be registered and enforced only where the Minister of Justice is satisfied that reciprocal treatment will be accorded to Nigerian judgments and issues an order designating the relevant country and its superior

courts (section 3(1)(a)).

Although Nigerian courts have, in practice, permitted registration under the 1960 Act notwithstanding the absence of formal designation (*Kerian Ikpara Obasi v. Mikson Establishment Industries Ltd* [2016] All FWLR 811), the structure of the Act would still not accommodate international courts judgments. It is concerned with judgments of courts of foreign states. It does not purport to regulate the enforcement of decisions of international courts created by treaty. The requirement of designation reflects a deliberate choice to tie enforcement to prior executive action i.e designation, rather than leaving the matter to judicial discretion. A similar conclusion was reached by the Ghanaian court in *Chude Mba v The Republic of Ghana*, Suit No HRCM/376/15 (decided 2 February 2016), where the applicant sought to enforce an ECOWAS Court judgment in Ghana. The court noted that "the ECOWAS Community Court is not stated as one of the courts to which the legislation applies" (see Oppong, 2017) for a fuller discussion of the case).

**c. Treaty-based enforcement**

Beyond these reciprocal regimes, Nigerian law recognises that international judgments may be enforceable where the National Assembly has chosen to give direct effect to international obligations through legislation. Arbitration provides the clearest illustration.

Nigeria signed the ICSID Convention in 1965 and enacted the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act in 1967 to give domestic effect to its obligations. That Act provides that ICSID awards are enforceable as if they were judgments of the Supreme Court of Nigeria. The result is a clear and mandatory enforcement regime that leaves little room for doubt or judicial improvisation. A similar approach is reflected in the Arbitration and Mediation Act 2023, which governs the recognition and enforcement of international arbitral awards more generally.

These examples reflect the dualist framework set by the Constitution. Where international obligations are intended to produce direct domestic effects, legislation provides the necessary legal authority. The legislature defines the scope of enforcement and the procedures to be followed. Courts are then required

to apply the law as enacted. Therefore, it is crystal clear that Nigerian law has always treated the enforcement of judgments as a matter requiring domestic legal framework. This provides the backdrop against which the enforcement of international court judgments must be assessed.

### 3. CBN V. Gegenheimer & Anor (2025) LPELR-81477(CA) – The Nigerian Case

In May 2025, the Nigerian Court of Appeal had the opportunity, for the first time as far as we are aware, to engage directly with the question of the enforcement of international court judgments in Nigeria. The case arose from a monetary judgment of ?63,650,925.00 and USD 10,000 made by the ECOWAS Court of Justice against Nigerian authorities following a successful human rights claim. The judgment creditor subsequently approached the Federal High Court to register and enforce that award, which ultimately led to garnishee proceedings against funds held by the Central Bank of Nigeria.

For present purposes, the central issue was whether Nigerian courts had jurisdiction to enforce a judgment of the ECOWAS Court. More specifically, one of the complaints before the Court of Appeal was whether the 1st Respondent had complied with the conditions precedent for the enforcement the ECOWAS judgment, notwithstanding the requirements stated in section 4 of the 1960 Act, particularly the requirement relating to the conversion of foreign currency into Naira, and whether the judgment could be enforced in the absence of express domestic legislation authorising such enforcement.

The Court of Appeal answered these questions in the affirmative. In doing so, it reasoned as follows:

> *It is of common knowledge that the ECOWAS Court of Justice, established in 1991 and located in Abuja, hears cases from West African States, including Nigeria. It was created pursuant to Articles 6 and 15 of the Revised Treaty of ECOWAS. Its organisational framework, functioning, powers, and applicable procedures are set out in Protocol A/P1/7/91 of 6 July 1991; Supplementary Protocol A/SP21/01/05 of 19 January 2005; Supplementary Protocol A/SP.2/06/06 of 14 June 2006; Regulation of 3 June 2002; and Supplementary Regulation C/Reg.2/06/06 of 13 June 2006. In other words, its jurisdiction*

> *covers Nigeria. Accordingly, the argument by learned counsel for the Appellant that Nigeria did not domesticate the ECOWAS Court Treaty, Protocol, and Supplementary Protocols is lame.*

The Court further observed that the ECOWAS Court Protocol, particularly the 1991 Protocol as amended by the 2005 Supplementary Protocol, establishes the ECOWAS Community Court of Justice as the principal legal organ of ECOWAS, outlines its mandate, jurisdiction, functioning, and procedures, grants it competence over human rights violations within member states, and allows individuals to approach the Court directly without exhausting local remedies.

The Court also upheld the trial court's conclusion that non-compliance with section 4(3) of the 1960 Act does not rob the court of jurisdiction to enforce the judgment.

What appears clear from the decision is that the ECOWAS judgment was effectively registered and enforced on the basis of the ECOWAS Supplementary Protocol A/SP21/01/05 of 19 January 2005, Supplementary Protocol A/SP.2/06/06 of 14 June 2006, Regulation of 3 June 2002, and Supplementary Regulation C/Reg.2/06/06 of 13 June 2006, with a passing reference to the 1960 Act to indicate that the judgment nothing under the Act robs the court off its jurisdiction.

That reasoning is difficult to sustain. The first difficulty lies in the Court's treatment of domestication. The fact that Nigeria has accepted the jurisdiction of the ECOWAS Court answers the international question of competence; it does not answer the domestic question of enforcement. Jurisdiction determines whether the Court may hear a case and issue a judgment at the international level. It does not determine whether that judgment can be enforced within Nigeria. These are distinct matters. In a dualist constitutional system, the latter inquiry depends on the existence of domestic law authorising enforcement.

The Court did not identify any Nigerian statute that performs this function. Instead, it relied on the existence of ECOWAS instruments themselves. This approach blurs the distinction between international obligation and domestic law. It assumes that once Nigeria is bound internationally, domestic courts may act

without further domestication. That assumption runs directly against Nigeria's constitutional structure, particularly section 12 of the Constitution.

Equally problematic is the suggestion that the physical location of the ECOWAS Court in Abuja makes any legal difference. International courts frequently sit within the territory of member states without becoming part of the host state's judicial system. The ECOWAS Court is not a Nigerian court, at least within the meaning of section 6 of the 1999 Constitution, and its judgments are not Nigerian judgments. Treating them as such because the Court sits in Abuja has no legal foundation. Jurisdiction at the international level determines whether a court may hear a case; it does not determine whether its judgment can be executed against assets or institutions within Nigeria. Physical location is therefore irrelevant. A court may sit in Abuja and still operate entirely outside the Nigerian legal system, as is the case with the ECOWAS Court.

The second difficulty concerns the Court's reference to the 1960 Act. The proceedings proceeded as though the ECOWAS judgment could be situated within Nigeria's foreign judgment enforcement regime. Yet, as discussed earlier, the Act was designed to deal with judgments of courts of foreign states and operates on the basis of reciprocity. The ECOWAS Court does not, and could not realistically, fall within that category. It is not a court of a foreign country, and it has never been designated under the Act. One would therefore have expected the Court to be explicit that the Act does not apply to the judgment in question. Instead, citing provisions of the Act in determining whether the trial court had jurisdiction risks creating the impression that the statutory regime is equally applicable to questions arising from the enforcement of international court judgments. This is an impression that is difficult to reconcile with the structure of the legislation.

This critique should not be misunderstood. It is not a denial of Nigeria's international obligations, nor is it an argument that successful claimants before international courts should be left without remedies. The point being made is that domestic courts must act within the established legal framework, particularly in an area where foreign judgments do not have direct force of law except as permitted by statute or common law.

Ghanaian courts have consistently emphasised the country's dualist constitutional structure, under which international and regional judgments are not binding domestically unless the underlying treaty or enforcement framework has been

incorporated into Ghanaian law by legislation. In *Republic v High Court (Commercial Division), ex parte Attorney General and NML Capital Ltd* Civil Motion No. J5/10/2013 (unreported), the Supreme Court held that, in the absence of domestic legislation giving effect to the United Nations Convention on the Law of the Sea ("UNCLOS"), orders of the International Tribunal for the Law of the Sea were not binding on Ghana, notwithstanding Ghana's international obligations. Similarly, in *Chude Mba v Republic of Ghana* (*supra*), where enforcement of an ECOWAS Community Court judgment was sought, the High Court confined its analysis strictly to the statutory regime, namely the Courts Act 1993, the High Court (Civil Procedure) Rules 2004, and the Foreign Judgments and Maintenance Orders (Reciprocal Enforcement) Instrument 1993, and concluded that enforcement was unavailable because the regime depends on reciprocity and presidential designation of the foreign court, which were absent. Notably, in both instances the courts did not consider the common law regime for the recognition or enforcement of foreign or international judgments, treating the issue as one governed exclusively by statute and constitutional principles of dualism.

A similar outcome was reached in a very recent case in *Anudo Ochieng Anudo v Attorney General of the United Republic of Tanzania,* where the High Court of Tanzania declined to register and enforce a judgment of the African Court on Human and Peoples' Rights, holding that such judgments fall outside the scope of Tanzania's Reciprocal Enforcement of Foreign Judgments Act (Cap. 8 of the Laws of Tanzania, 2019). The court, *inter alia*, ruled that the Act applies only to judgments of foreign superior courts designated by ministerial notice and does not extend to international or regional courts established by treaty, including the African Court. Because the applicant anchored his claim exclusively on the Act and did not plead constitutional or international law as an independent basis for enforcement, the court held itself bound by the pleadings and precedent confirming that African Court judgments cannot be enforced under the statutory regime absent express legislative authorisation.

The decision of the Court of Appeal in *CBN v Gegenheimer*, with respect, is therefore a misnomer, as it lacks a solid legal foundation within Nigeria's existing constitutional and statutory framework. Whether judgments of international courts ought to be enforceable in Nigeria is ultimately a question for the legislature. Until such laws are enacted, courts should be cautious about

assuming powers they have not been granted.

## 4. Conclusion

It is clear that judgments of international courts are not enforceable in Nigeria in the absence of specific legal framework permitting their enforcement. The position is well illustrated by the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act 1967 and, more recently, the Arbitration and Mediation Act 2023, both of which demonstrate how Nigeria gives domestic effect to international obligations when it intends to do so.

The common law route is ill-suited to international court judgments. It was developed for judgments of foreign state courts and rests on assumptions of territorial jurisdiction and sovereignty that do not translate easily to treaty-based international courts. Extending it in this direction would leave courts to determine, without legislative guidance, which international judgments are enforceable and on what terms.

The decision in *CBN v Gegenheimer* is distinctive because it concerns the ECOWAS Court, a regional court whose jurisdiction Nigeria has accepted and whose role in access to justice is well recognised. Even so, acceptance of jurisdiction at the international level does not resolve the domestic enforcement question. Section 12 of the Constitution remains a barrier to direct enforcement in the absence of domestication. For that reason, the decision may yet face serious difficulty if the issue reaches the Supreme Court.

Beyond the ECOWAS context, it is difficult to see how judgments of other international courts could presently be enforced in Nigeria without similar legislative intervention. If international court judgments are to have domestic effect, the solution lies not in judicial improvisation, but in clear legislative action.

# Online Symposium on Recent Developments in African Private International Law




It is not uncommon for African and foreign scholars of private international law (PIL) to lament the current state of the field in Africa. Until the early years of the 21st century, PIL was widely regarded, often with little hesitation, as 'a neglected and highly underdeveloped subject in Africa'.[i] Professor Forsyth famously described it as a 'Cinderella subject, seldom studied and little understood'.[ii] This limited scholarly attention is reflected, for instance, in the treatment of African PIL in the Hague Academy courses, which include only 4 courses specifically devoted to PIL in Africa, the most recent of which dates back to 1993.[iii] Since then, a number of pleas for greater attention to PIL in Africa,[iv] as well as calls for enhanced cooperation with African countries to ensure better involvement and inclusiveness,[v] have been voiced.[vi]

The last fifteen years, however, have witnessed a noticeable increase in scholarly interest and institutional engagement with PIL in Africa. This is reflected first in the growing body of academic publications,[vii] and the emergence of initiatives

aimed at articulating and strengthening an African perspective on the discipline. These include, among others, the publication of the African Principles on the Law Applicable to International Commercial Contracts, and the organization of a series of online workshops on 'Private International Law in Africa'.

At the institutional level, since 2011, 6 African States have become Members of the HCCH, with Namibia and Rwanda joining respectively in 2021 and 2025, bringing the total number of African HCCH Member States to 9. The recent opening of a regional office for Africa in Morocco further underscores the growing institutional presence and engagement of the HCCH on the African continent.

More importantly, 33 years after the last Hague Academy Course devoted to PIL in Africa, the subject will once again be addressed within the framework of the Hague Academy. In the forthcoming Summer Courses, Prof. Richard Oppong will indeed deliver a course on the 'Internationalism in Anglophone Africa's Commercial Conflict of Laws' This undoubtedly marks a significant milestone in the renewed visibility and recognition of PIL on the African continent.

There is, however, one aspect that remains relatively underemphasised: the rich and diverse, yet still understudied, body of African case law on PIL. This 'hidden treasure' demonstrates a simple, but often overlooked, fact: Africa is deeply connected to the rest of the world. From Chinese and Brazilian judgments being recognised in Mozambique, to Indonesian and Texan judgments being considered by courts in Uganda, or Canadian judgments sought to be enforced in Egypt; from Malawian courts applying the doctrine of *forum non conveniens* to many other remarkable decisions across the continent, African courts are actively engaging with transnational legal issues, including international jurisdiction and applicable law in employment contracts, the validity of foreign marriages, and cases of international child abduction. This case law also reveals the challenges faced by courts across the continent, which are often called upon to deal with complex issues using outdated or inadequate legal frameworks. Far from confirming the widespread perception of a stagnating field, judicial practice in Africa shows that important, and often fascinating, developments are taking place across the continent, developments that deserve far greater scholarly attention and engagement. Only through sustained scholarly engagement, by studying, commenting on, and comparing judicial approaches, and by highlighting shortcomings in existing legal frameworks and practices, can Africa develop a

strong and distinctive voice in the field of PIL.

This is precisely the purpose of the present online symposium. Building on an established tradition of this blog, Conflictoflaws.net will host the **second online symposium** on African private international law.[viii] The main objective of the symposium is to shed light on selected aspects of recent developments in private international law in Africa. A number of scholars known for their active commitment to the development of private international law on the African continent have kindly agreed to comment on some of these cases or to share their views on what, in their opinion, best illustrates the diversity of private international law in Africa.

The symposium will run over the coming days and will feature contributions addressing a wide range of themes and African jurisdictions. These include the following:

1. **Chukwuma Okoli (University of Birmingham) and Abubakri Yekini (University of Manchester, Uk)**, on the recognition and enforcement of international court judgments in Nigeria
2. **Boris Awa (Kigali Independent University, Rwanda)**, on the recognition and enforcement of foreign judgments in the CEMAC region
3. **Béligh Elbalti (The University of Osaka, Japan)**, on the enforcement of a Chinese judgment in Mozambique
4. **Anam Abdul-Majid (Advocate and Head of Corporate and Commercial Department, KSM Advocates, Nairobi, Kenya) and Kitonga Mulandi (Lawyer, KSM Advocates, Nairobi, Kenya)**, on choice of court agreements in in Kenya
5. **Solomon Okorley (University of Johannesburg, South Africa)**, on the application of the 1980 HCCH Convention in South Africa
6. **Theophilus Edwin Coleman (University at Buffalo School of Law, New York)**, on proof of foreign law and fragility of foreign marriages in Ghanian courts
7. **Elisa Rinaldi (University of Pretoria, South Africa)**, on Cross-border employment, contract and delictual liability merge in the South Africa

As aptly pointed out by Professor Oppong, 'there is a need for greater international engagement with African perspectives on [PIL]. There is also a need to attract more people to researching and writing on the subject in Africa.'[ix] In

line with these observations, we likewise hope that this initiative 'will contribute to both greater international engagement with, and increased participation in, private international law in Africa'.[x] Therefore, we encourage readers, in Africa and elsewhere, to actively engage with this initiative by sharing their views or by highlighting other developments of which they are aware. We also hope that this initiative will encourage researchers in Africa and beyond to make fuller use of the available resources and case law, and to comment on them, whether in the form of blog posts or scholarly contributions in academic journals.

This platform remains open and welcoming to such contributions.

Béligh Elbalti & Chukwuma S.A. Okoli

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[i] Richard F. Oppong, 'Private International Law in Africa: The Past, Present, and Future' 55 *AJCL* (2007) 678.

[ii] Christophe F. Forsyth, *Private International Law – The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (5th ed., Juta, 2012) 46-47.

[iii] Abd-El-Kader Boye, 'Le statut personnel dans le droit international privé des pays africains au sud du Sahara: conceptions et solutions des conflits de lois: le poids de la tradition négro-africaine personnaliste', 238 *Recueil des Cours* (1993) ; U U. Uche, 'Conflict of Laws in a Multi-Ethnic Setting: Lessons from Anglophone Africa', 228 *Recueil des Cours* (1991) ; Salah El Dine Tarazi, La solution des problèmes de statut personnel dans le droit des pays arabes et africains 159 *Recueil des Cours* (1978) ; and Ph. Francescakis, 'Problèmes de droit international privé de l'Afrique noire indépendante', 112 *Recueil des Cours* (1964).

[iv] Richard F. Oppong, 'Private International Law and the African Economic Community: A Plea for Greater Attention' 55 *ICLQ* (2006) 911.

[v] Richard F. Oppong, 'The Hague Conference and the Development of Private International Law in Africa: A Plea for Cooperation' 8 *YPIL* (2006) 189.

[vi] Orji Agwu Uka, 'A call for the wider study of Private International Law in Africa: A Review of Private International Law In Nigeria', on this blog; Chukwuma Okoli, 'Private International Law in Africa: A Comparative Lessons', on this blog.

[vii] Jan Neels, 'List of Publications on South African Private International Law as from 2020', on this blog; Chukwuma Okoli, 'Private International Law in Africa: A Comparative Lessons', on this blog.

[viii] The first online symposium organized on this blog was devoted to Private international law in Nigeria. The symposium features interesting contributions by Chukwuma S. A. Okoli and Richard Oppong, Anthony Kennedy,Richard M. Mlambe, Abubakri Yekini and Orji Agwu Uka.

[ix] Richard F. Oppong, 'Private International Law Scholarship in Africa (1884-2009)' 58 *AJCL* (2010) 326.

[x] Oppong, Ibid.

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# The Titanium Brace Tightens: Rome II and Director Liability after Wunner



*By Luisa Cassar Pullicino and Krista Refalo, Ganado Advocates*

In the preliminary reference Case C-77/24 *Wunner* (the Titanium Brace case), the CJEU was asked to determine whether a damages claim brought by a consumer directly against company directors for losses suffered from unlicensed online gambling fell within the scope of the Rome II Regulation (Regulation (EC) No 864/2007), or whether it was excluded under Article 1(2)(d) as a "*non-contractual*

*obligation arising out of the law of companies*".

The practical stakes were considerable. If Rome II applied, Article 4(1) would designate the law of the place where the damage occurred — which, for online gambling losses, would normally be the habitual residence of the consumer. If excluded, the applicable law would instead be determined by national conflict-of-laws rules, typically, the *lex societatis*.

## 1. Facts and Reference

The case arose from losses suffered by an Austrian consumer who participated in online games of chance offered by Titanium Brace Marketing Limited, a Maltese-registered online gambling company that did not hold a licence under Austrian gambling law. Following the company's insolvency, the consumer brought an action for damages directly against two former directors, alleging that they were personally liable for having allowed or caused the unlicensed offering of gambling services in Austria.

The Austrian Supreme Court referred questions to the CJEU concerning: first, whether such a claim is excluded from the scope of Rome II under Article 1(2)(d); and secondly, if Rome II applies, how the applicable law should be determined.

## 2. The Court's Reasoning: A Functional Interpretation of Article 1(2)(d)

### 2.1 Structural vs Functional approach

The Court reaffirmed that the exclusion in Article 1(2)(d) is not confined to 'structural aspects' of companies, but must be interpreted functionally, by reference to the nature of the obligation giving rise to liability. Drawing on its earlier case law, including *BMA Nederland*, the Court held that the decisive question is whether the non-contractual obligation arises from reasons specific to company law or external to it.

Where a director's liability flows from obligations "*incumbent on them owing to the creation of the company or to their appointment and linked to the management, operation or organisation of the company*", it is considered a company law matter, and is excluded from Rome II.

By contrast, where liability arises from the breach of an obligation external to the company's affairs, the exclusion does not apply.

### 2.2 Application to unlicensed online gambling

Applying that test, the CJEU held that Article 1(2)(d) does not cover actions seeking to establish the tortious liability of company directors for breaches of national prohibitions on offering games of chances to the public without the requisite license. The Court reasoned that the directors' alleged liability did not arise from company law. The claim was based on an alleged infringement of a general statutory prohibition under Austrian gambling law, applicable to '*any person*' offering games of chance without a licence. As such, the action did not concern the internal relationship between the company and its directors, but the breach of a regulatory norm protecting the public.

The consequence was that the action fell within the scope of Rome II, with the applicable law determined in accordance with Article 4.

## 3. The Consequence: Consumer Habitual Residence as the Applicable Law

The consequence of the ruling is significant. In online gambling cases, the "*place where the damage occurs*" will often coincide with the habitual residence of the consumer, since that is where participation in the gambling activity takes place and where the financial loss is suffered.

As a result, any action for damages brought directly against a director will, in principle, be governed by the law of the consumer's residence, regardless of where the company is incorporated, where the directors reside, or where the relevant management decisions were taken.

Following the preliminary ruling, the case will now be remitted to the Austrian court which is responsible for applying the CJEU's guidance and determining whether the directors actually incur liability under applicable Austrian law.

## 4. Analysis

### 4.1 A Tense Separation of Office and Obligation

The Court's distinction between obligations "*specific to company law*" and

obligations "*external*" to it may be potentially difficult to sustain in this context.

A director's decision to offer online gambling services in a Member State without holding the requisite licence is not a general act performed *erga omnes*. It is a paradigmatic management decision, taken precisely because the individual holds the office of director and exercises control over the company's commercial strategy. The duty to ensure regulatory compliance in market entry is closely bound up with corporate governance and risk allocation, particularly in highly regulated sectors such as gambling.

The Court relies on the fact that the prohibition is framed as a general rule applicable to "any person". However, in practice, only those directing the activities of the undertaking are capable of infringing the prohibition in the manner alleged.

### 4.2 The generic 'duty of care' analogy

The Court relies heavily on the distinction drawn in earlier case law between:

- a specific duty of care owed by directors to the company (company law), and
- a generic duty of care *erga omnes* (tort law).

However, this analogy sits uneasily with regulatory breaches in highly regulated sectors such as gambling. Unlike ordinary negligence, compliance with licensing regimes is inseparable from corporate governance. Treating such obligations as "external" significantly limits the operation of Article 1(2)(d) in regulated industries.

## 5. Consumer Protection Without a Consumer Contract?

The ruling confirms the applicability of Rome II while, in substance, applying the consumer-protective logic of Article 6 of the Rome I applicable to contractual obligations:

> *51. In the present case, those requirements militate also in favour of designating the place where the player is habitually resident as the place where the alleged damage occurred…*

The CJEU justifies the approach as analogous to the determination of the 'place where the harmful event occurred or may occur' in Article 7(2) of Regulation No 1215/2012 for the purposes of jurisdiction. However, this approach may risk encroaching on the distinction between contract and tort that has traditionally been treated as structurally decisive in EU private international law.

There are several preliminary rulings delineating the parameters of the 'place where the damage occurred' for the purposes of Article 4(1) of Rome II, and yet the CJEU saw fit to propose a specific sub-connecting factor within the umbrella of Article 4(1), for claims brought by the players of games offered by gambling companies. The sub-connecting factor identified essentially reproduces the one in Article 6 of Rome I for consumer claims in contract: the habitual residence of the consumer.

The outcome may be defensible from a consumer-protection perspective, but it raises questions of doctrinal coherence and legal certainty. Once the Court characterises the claim as non-contractual, the consequences of that classification should follow. Consumer protection under Article 6 Rome I is not triggered by consumer status alone, but by participation in a consumer contract meeting specific conditions. Its rationale – derogation from general connecting factors in favour of the consumer's habitual residence – is inseparable from the existence of a contractual relationship with a professional acting in the course of its business. Rome II, by contrast, contains no equivalent consumer-specific rule, suggesting a deliberate legislative choice not to extend such protection to non-contractual obligations. Applying that logic here might have prompted closer engagement with the reliance on a conflict rule whose rationale depends on the existence of a contract in the absence of one.

## 6. Veil-Piercing Through Conflict-of-Laws

While the Court insists that the imputation of liability is a matter for the applicable tort law rather than the *lex societatis*, the choice-of-law outcome itself has unmistakable substantive consequences.

By designating the consumer's habitual residence as the applicable law, the Court enables claimants to:

- bypass the insolvent company,
- sue directors personally, and

- subject them to a foreign legal system with which their corporate conduct may have only an indirect connection.

This functionally might be compared to a form of veil-piercing, where the corporate shield of separate juridical personality is not pierced by substantive company law doctrines, but by re-characterising managerial conduct as 'external' to company law for the purposes of Rome II. The result may be an expansion of directors' personal exposure as a by-product of the determination of applicable law.

## 7. Conclusion

The judgment in *Wunner* undoubtedly strengthens consumer protection and curtails the avoidance of host-state gambling controls through cross-border structuring. Yet it does so by drawing a distinction that is debatable. Do directors decide whether the company should hold a licence as private individuals, or as corporate officers?

Treating these decisions as external to company law risks blurring the boundary between corporate responsibility and personal liability, and in doing so, transforms Rome II from a neutral conflict-of-laws instrument into a powerful substantive lever. Whether this functional carve-out can be confined to gambling cases, or will spill over into other regulated sectors, remains an open and important question.

Directors of gaming companies should therefore carefully assess their personal and corporate risk profile when deciding which jurisdictions to offer online games in, as jurisdictional and applicable law rules may result in implications well beyond traditional frameworks.

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# 'Salami-slicing' and Issue

# Estoppel: Foreign Decisions on the Governing Law

One of the requirements for issue estoppel is identity of issue. However, the process of 'refining down' or 'salami-slicing'[1] is not always clear. The argument that the issue is different because the two courts would arrive at different conclusions on the governing law is increasingly being utilised as a litigation strategy. If the first court applied its choice of law rules to determine that the governing law of the claim is Utopian law, would an issue estoppel arise over this decision in the second court if under the second court's choice of law rules, Ruritanian law is the governing law? The answer depends on whether the 'slice' is thick or thin. Is the relevant issue 'What law governs the dispute or issue?' or 'What law is identified by our (forum) choice of law rules to govern the dispute or issue?'

For example, there is considerable difference in tort choice of law rules. Some jurisdictions apply the double actionability rule.[2] Most jurisdictions adopt the *lex loci deliciti* or *lex loci damni* rule,[3] with differences on how the relevant *locus* is identified and whether a flexible exception in favour of the law of closer connection is present. Party autonomy is also permitted in certain jurisdictions.[4] Thus, in tort claims, the issue could be framed in different ways: eg, 'what is/are the law(s) governing the tort?', 'what is the lex loci delicti?', 'where in substance did the tort arise?', or 'where was direct damage suffered'? It will be obvious that only the first, broad, framing of the issue, or, in other words, a 'thick' slice, will result in there being identity of issue. In essence, the question is: does a difference in choice of law rules matter for issue estoppel purposes?

The Hong Kong Court of Final Appeal in *First Laser v Fujian Enterprises (Holdings) Co Ltd*[5] took the view that an issue estoppel can arise over a foreign decision on the governing law of the dispute. However, there is a suggestion in the Singaporean Court of Appeal decision of *Gonzola Gil White v Oro Negro Drilling Pte Ltd* that a difference in the two laws is relevant.[6] Arguably, the Court's views were limited to the specific situation where the Singaporean court as the second court would have arrived at Singaporean law after application of Singaporean choice of law rules. This is because the Singaporean court views it as part of its constitutional responsibilities to safeguard the application of

Singaporean law.[7]  If this is correct, it is doubtful that the same approach would be adopted by at least the English courts, as English courts are prepared accord preclusive effect to a judgment of a foreign court even where that foreign court had made an error on English law in its judgment.[8]

The English Court of Appeal in *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)*[9] held that no issue estoppel will arise over a question involving forum international public policy. This is entirely explicable as each country's public policy differs. It has also been suggested that no estoppel arises over an issue which is subject to a forum overriding mandatory rule.[10] Decisions on sensitive matters which give rise to comity considerations should also be excluded.[11]

The question is whether decisions on the governing law merit the same treatment. It is argued that for most private law claims, a foreign decision on the governing law of the dispute or on a specific issue in the claim is generally capable to giving rise to an issue estoppel. A contrary conclusion would disregard the policies underlying estoppel and allow forum shopping. However, some choice of law categories – eg, choice of law for consumer contracts or employment contracts, or for environmental torts – are underpinned by public policy considerations. For these special choice of law categories, it is suggested that the forum court retains the prerogative to decide on the issue of the governing law for itself, despite a prior foreign decision on the same point. In other words, a narrow 'slice' is appropriate.

The same broad-narrow question arises in other contexts. It could arise in the jurisdictional context: would the first court's decision on the applicability of the personal equities exception for the *Mocambique* rule give rise to an estoppel in subsequent proceedings in a different court? What about a decision on which court is *forum (non) conveniens*? How about arbitration, where the balance of competing considerations may lie differently compared to international litigation? For example, should an issue estoppel arise over a foreign decision on subject-matter arbitrability?[12] Is it relevant if the first court decided this issue at the pre-award stage or at the post-award stage pursuant to proceedings to enforce an arbitral award? Does it matter if the first court is the court of the seat?[13]

These, and other questions, are considered in the open access article Adeline Chong, 'Salami-Slicing' and Issue Estoppel: Foreign Decisions on the Governing Law', International and Comparative Law Quarterly (FirstView).

[1] *Desert Sun Loan v Hill* [1996] 2 All ER 847, 859 (Evans LJ).

[2] Eg, Singapore: *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 (Singapore

CA); Hong Kong: *Xiamen Xinjingdi Group Co Ltd v Eton Properties Ltd* [2020] 6 HKC 451; Japan: Act on General Rules for Application of Laws (Act No 78 of 2006), art 22.

[3] Eg, Rome II Reg, art 4(1).

[4] Eg Rome II Reg, art 14; Swiss Federal Code on Private International Law, art 132.

[5] [2013] 2 HKC 459 (HKCFA).

[6] [2024] 1 SLR 307 [87] (Singapore CA).

[7] Ibid [78]-[79].

[8] *Good Challenger Navegante SA v MetalExportImport SA, (The "Good Challenger")* [2003] EWCA Civ 1668, [54]–[55]. See also *Godard v Grey* (1870) LR 6 QB 139.

[9] [2012] EWCA Civ 855.

[10] *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 [55] (Singapore CA).

[11] See the reference to 'matters of high policy' in *Yukos* [2012] EWCA Civ 855 [151].

[12] *Diag Human SE v Czech Republic* [2014] EWHC 1639 (Comm) [58].

[13] See *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 (Singapore CA).

# The Conflict-of-Law Rules in the UAE's New Civil Transactions Act: Yet Another Missed Opportunity!




**I. Introduction**

On 1 January 2026, the Legislative Decree No. 25/2025 promulgating a new Civil Transactions Act (hereafter 'NCTA') entered into force. The NCTA repeals and replaces the former Federal Civil Transactions Act of 1985 (hereafter 'the 1985 Act'). The adoption of the NCTA forms part of the State's broader and ongoing effort to comprehensively update and modernize its legal system, an effort that has already touched major legislative instruments, including, among many others, the 2022 Civil Procedure Act, the 2024 Personal Status Act, the 2023 Competition Act, and the 2022 Commercial Transactions Act.

Since the 1985 Act contained a codified set of conflict-of-laws rules, its replacement necessarily entails a re-examination of the UAE's private international law framework and, at least in principle, the introduction of new or revised choice-of-law provisions. Against this background, this note offers a preliminary and necessarily tentative assessment of the modifications introduced by the NCTA. It focuses on the main features of the new law in relation to choice-of-law regulation, highlighting both the changes introduced and the limits of the

reform.

## II. The Choice-of-Law System under the 1985 Act and its Evolution

### 1. Choice of Law Rules under the 1985 Act

It is worth recalling that the first codification of conflict-of-laws rules in the UAE was introduced in 1985 as part of the 1985 Act. This codification consisted of 29 provisions (Arts. 10–28), incorporated into the Preliminary Part of the Act. In both structure and substance, the UAE codification closely followed the Egyptian model. Remarkably, despite the 37 years separating the two codifications, most of the Egyptian rules were retained almost unchanged. Some divergences nevertheless existed. For instance, while renvoi is entirely excluded under Egyptian law (Art. 27 of the Egyptian Civil Code), it is permitted under the 1985 Act only where it leads to the application of UAE law (Art. 26 of the 1985 Act).

The codification was relatively simple, comprising general choice-of-law rules structured by reference to broad legal categories, dealing in particular with status and capacity (Art. 11); marriage, its effects, and dissolution (Arts. 12–14); maintenance (Art. 15); guardianship and other measures for the protection of persons with limited capacity and absentees (Art. 16); succession and wills (Art. 17); real rights (Art. 18); contractual obligations (Art. 19); non-contractual obligations (Art. 20); and procedure (Art. 21).

The codification also included general provisions governing characterization (Art. 10); the priority of international conventions (Art. 22); general principles of private international law (Art. 23); national law (Art. 24); multi-jurisdictional legal systems (Art. 25); renvoi (Art. 26); public policy (Art. 27); and the application of UAE law in cases where the content of the applicable foreign law cannot be ascertained (Art. 28).

### 2. The 2020 Reform

It was not until 2020 that the choice-of-law rules were partially reformed through

the Legislative Decree No. 30/2020, which amended certain provisions of the 1985 Act. This reform was not comprehensive but instead targeted four key areas.

First, the rule on substantive and formal validity of marriage was amended to replace the former connecting factor based on the *lex patriae* of each spouse with the *lex loci celebrationis* (Art. 12).

Second, the rule on personal and patrimonial effects of marriage and its dissolution based on the *lex patriae* of the husband was similarly abandoned in favor of the *lex loci celebrationis*.

Third, Article 17, relating to succession and wills, was revised to allow *professio juris* for both the substantive and the formal validity of wills. As regards the former, the will is governed by the law chosen by the testator, failing which the *lex patriae* of the deceased at the time of death applies. As for formal validity, *professio juris* now operates as an additional alternative connecting factor.

Finally, the reform addressed public policy. For reasons that remain unclear, Article 27 expressly limited the operation of the public policy exception by excluding matters traditionally associated with personal status – such as marriage, divorce, filiation, maintenance, guardianship, succession, and wills – from its scope, despite the fact that these matters are generally regarded as having a strong public policy character (Art. 3).

Other provisions, however, were left unchanged, notwithstanding the fact that many of them are outdated and no longer reflect contemporary developments in private international law, in particular the persistence of traditional connecting factors such as the common domicile of the contractors and the *locus contractus* in contractual matters or double actionability rule for non-contractual obligations. More fundamentally, the reform failed to address the interaction between the conflict-of-laws rules contained in the 1985 Act and the provisions delimiting the scope of application of the 2005 Personal Status Act, which was subsequently replaced by the 2024 Personal Status Act. This unresolved issue of articulation continues to generate significant legal uncertainty (for an overview, see my previous posts here).

**III. The New Reform under the NCTA**

It was therefore with genuine enthusiasm that the reform of the existing legal framework was awaited, particularly in light of the ongoing efforts to modernize the UAE legal system and align it with international standards. However, while the reform does present some positive aspects (1), it is with considerable regret that the NCTA appears to have devoted only very limited attention to the modernization of the UAE conflict-of-laws regime (2).

This assessment is grounded in two main observations:

First, the existing system has largely been maintained with only some minor changes, including changes in wording.

Second, the very limited modifications that were introduced reflect a legislative approach that, at best, appears insufficiently informed by contemporary developments in private international law.

### 1. Positive Aspects of the Reform

Three main positive aspects can be identified:

The first concerns the clear affirmation of party autonomy as a guiding principle in contractual matters. Under the 1985 Act, although party autonomy was formally recognized, its formulation tended to present it as an exception rather than as a genuine principle. This shortcoming has now been remedied in the NCTA. The new provision expressly states that *"contractual obligations, as to both form and substance, are governed by the law expressly chosen by the parties."* In addition, the NCTA abolishes the place of conclusion of the contract as an objective connecting factor applicable in the absence of a choice of law by the parties, thereby moving away from a traditional and often criticized criterion.

Second, the questionable rule allowing the application of UAE law when one of the parties has multiple nationalities is now abandoned. According to the new rule, in case a person has multiple nationalities, the law of nationality under which that person entered the UAE would apply.

The third important modification concerns public policy. As noted above, the 2020 reform introduced considerable confusion and ambiguity in the application of the public policy exception by unduly restricting its scope and excluding matters that

have traditionally been regarded as falling within public policy. The NCTA addresses this difficulty by removing the limitation introduced in 2020 and by restoring the public policy exception to its more general function within the UAE conflict-of-laws system.

Another modification of particular significance should also be highlighted, although it must be acknowledged that its practical impact may be more symbolic than substantive. This concerns the abandonment, in the current reform, of any explicit reference to Islamic Sharia in the context of public policy, even though such a reference, which appeared in the original provision in 1985, was expressly maintained in the 2020 reform. This omission marks a notable shift in legislative technique and appears to signal a move toward a more neutral formulation of public policy, at least at the level of statutory language.

The removal of the explicit reference to Islamic Sharia may thus be understood as part of a broader trend toward the modernization and internationalization of the UAE's private international law framework. This interpretation is further supported by the redefinition of the role of Islamic Sharia as a formal source of law under the NCTA. Indeed, whereas former Article 1 of the 1985 Act set out a detailed hierarchy of rules prioritizing specific schools of jurisprudence (most notably the Maliki and Hanbali schools), the new Article 1 of the NCTA adopts a more open-ended formulation, granting judges greater discretion to select "the solution that is most appropriate in light of the interests at stake," without specifying any particular school of reference. A similar approach was adopted in the 2024 reform of the Personal Status Act.

## 2. Limits of the Reform and Persisting Issues

Notwithstanding the positive aspects identified above, the reform also presents a number of significant shortcomings. These concern both certain newly introduced provisions, whose design or content raises serious difficulties, and important issues that the legislature chose not to address or appears to have overlooked altogether. Taken together, these weaknesses considerably limit the extent to which the reform can be regarded as a genuine modernization of the UAE conflict-of-laws regime.

### a) New Solutions Introduced in the NCTA

### i) The The Conflict-of-Law rule in Matters of Marriage and its Dissolution: The Further Extension of the Scope of the Nationality Privilege

As noted above, prior to the entry into force of the NCTA, the *lex loci celebrationis* governed the substantive and formal validity of marriage (Art. 12), as well as its personal and patrimonial effects and its dissolution (Art. 13). Marriages concluded between foreigners, or between a foreigner and a UAE citizen, could also be recognized as valid in form if they complied with the formalities of the place of celebration, or if they respected the formal requirements prescribed by the law of each of the spouses (Art. 12). The application of these rules was, however, subject to an important exception: they did not apply if one of the parties was a *UAE citizen at the time of the marriage*, except with respect to capacity (Art. 14).

First, it should be noted that the NCTA failed to resolve the inconsistency between Articles 12 and 14. While Article 12 allows the formal validity of marriages concluded by UAE citizens abroad to be governed by the *lex loci celebrationis*, Article 14 removes this possibility by subjecting all matters relating to the formation of marriage, its effects, and its dissolution exclusively to UAE law when one of the parties is a UAE citizen.

Second, and more importantly, the NCTA extends the scope of the exception in a problematic manner. Under the new rules, the exception now applies not only to persons who were UAE citizens at the time of the marriage, but also to those who *subsequent to their marriage acquired UAE citizenship, and retained that citizenship up to the time the action is brought*.

On its face, this rule raises two main concerns. First, it introduces retrospective effects by applying UAE law to marriages concluded before the acquisition of citizenship. This potentially affects the validity, formalities, and effects of marriages that were lawfully concluded under foreign law. Second, it may create uncertainty in cross-border matrimonial relations, as spouses who acquire UAE nationality after marriage could inadvertently subject themselves to UAE law even if all formal and substantive requirements were originally satisfied abroad. Such

an extension of the nationality privilege, while it may be of very limited practical relevance, represents a questionable departure from traditional conflict-of-law principles based on the ideas of acquired rights, and the respect of the legitimate expectations of the parties.

### ii) The Conflict-of-Law rule in Contractual Matters

Despite the positive aspects noted above, the new rule suffers from significant shortcomings. These shortcomings relate, first and foremost, to the scope and the regime of party autonomy. In particular, the provision remains silent on several crucial issues: whether the chosen law must have any connection with the parties or the contract; whether an initial choice of law may be modified at a later stage; and whether techniques such as *dépeçage* or the choice of non-State law are permissible. All these uncertainties undermine the effective operation of party autonomy and weaken legal certainty.

Second, in the absence of a choice of law by the parties, the NCTA not only retains the outdated reference to the parties' common domicile as the primary objective connecting factor, but also introduces a new connecting factor whose application is likely, in practice, to lead systematically to the application of UAE law. Under the new rule, where there is neither a choice of law nor a common domicile, the contract is governed by the law of the State in which the *principal obligation* is to be performed. Unlike the traditional test of the "characteristic obligation", which typically leads to the identification of a single governing law presumed to have the closest connection with the contract, the notion of "principal obligation" is inherently problematic in the field of choice of law. This is because bilateral contracts, which constitute the main instruments of international trade, by their very nature involve more than one principal obligation, such as the delivery of goods and the payment of the price in a contract of sale. As a result, in contracts involving a UAE party, whether as obligor or obligee, the performance of at least one principal obligation will often take place in the UAE, thereby triggering the systematic and largely indiscriminate application of UAE law. Even if the term "principal obligation" is understood as referring to the "characteristic obligation," the new provision departs from the general approach adopted in leading recent codifications by designating the place of performance (*locus solutionis*) of that obligation, rather

than the more widely accepted and more predictable connecting factor of the habitual residence of the party performing the characteristic obligation.

Of course, the parties may seek to avoid this difficulty by choosing the law applicable to their contract. However, given the very weak status of foreign law in the UAE, where it is treated as a mere question of fact, and the considerable hurdles imposed on the parties in establishing its content in judicial practice, the practical relevance of party autonomy is largely illusory. This assessment is once again confirmed by several recent Supreme Court decisions in which the law chosen by the parties was not applied on the grounds that the chosen law was not ascertained as required (see Dubai Supreme Court, Appeal No. 720 of 13 August 2025; Appeal No. 1084 of 22 October 2025; Appeal No. 1615 of 23 December 2025). The same difficulties arise in family law matters, as discussed in a previous post, but they are identical in substance in civil and commercial cases as well.

**b) Persisting Issues**

Notwithstanding the few positive developments highlighted above, the conflict-of-laws rules incorporated in the NCTA largely preserve the traditional Egyptian model introduced into the region in 1948. As a result, they remain significantly disconnected from contemporary developments and comparative trends in private international law and fail to fully reflect the principles increasingly adopted in other jurisdictions to address the needs of cross-border transactions, family relations, and international commercial practice. The reform also preserved a traditionally rigid approach, leaving little room for flexibility and excluding exception clauses that would allow courts to depart from the designated applicable law in favor of a more closely connected one. In particular, the NCTA does not introduce tailored conflict rules designed to reflect the specific characteristics of certain legal relationships. This omission is especially noticeable with regard to protective regimes for weaker parties, including employees and consumers. Unlike many modern conflict-of-laws systems, the NCTA does not limit the role of party autonomy in these contexts, nor does it provide specific choice-of-law rules for employment or consumer contracts. Similar shortcomings can be observed in the absence of specialized rules governing particular categories of torts or addressing specific aspects of family relationships.

Finally, as was already the case following the 2020 reform, the NCTA fails to resolve the longstanding and fundamental issue concerning the articulation between the rules delimiting the scope of application of the Personal Status Act and the choice-of-law rules set out in the NCTA. This problem has become even more acute with the recent introduction of "civil personal status" legislation at both the federal level and the local level in the Emirate of Abu Dhabi, thereby further complicating the overall normative landscape (for an overview see my previous posts here and here).

## IV. Some Concluding Remarks

Taken as a whole, while the adoption of the NCTA could have provided an opportunity to undertake a thorough and forward-looking reform of the UAE's private international law framework by drawing inspiration from the most recent developments in the field and from general trends observed in comparative law. Such a reform would have helped consolidate the UAE's position and ambitions as a leading hub not only for international finance and business transactions, but also as a melting pot of multiple nationalities living harmoniously within its territory. However, the reform ultimately falls short of this ambition. It largely preserves an outdated structure and introduces only limited, and at times problematic, adjustments. Moreover, the reform does nothing to address the strong *homeward trend* observed in judicial practice, which significantly limits the practical relevance of choice-of-law rules. This trend is particularly evident in personal status legislation and in the very weak status accorded to foreign law. In this respect, the NCTA represents a missed opportunity to align the UAE's conflict-of-laws regime with modern comparative standards and to enhance legal certainty, predictability, and coherence in an increasingly international legal environment.

# Enforceability of foreign judgments for punitive damages under English law and South African law

*This post is posted on behalf of Jason Mitchell, barrister at Maitland Chambers in London and Group 621 in Johannesburg.*

In *Motorola Solutions v Hytera Communications Corporation*, the Court of Appeal held that a judgment that includes a punitive damages component is unenforceable in its entirety (the judgment is available here). The punitive component cannot be severed so that the judgment creditor can enforce non-punitive components.

Motorola sued Hytera in the U.S. One of its causes of action was under the Defend Trade Secrets Act, a federal statute that allows for punitive damages of up to double any compensatory damages. On that cause of action, the U.S. court awarded Motorola compensatory damages of $135 million and punitive damages of $270 million. Motorola tried to enforce the U.S. judgment in England.

Enter the Protection of Trading Interests Act. Section 5 precludes recovery of "any sum payable" under a "judgment for multiple damages" (later defined as "a judgment for an amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favour the judgment is given").

Motorola argued that s.5 did not preclude enforcement of the compensatory component of the judgment, just the punitive component. The Commercial Court and the Court of Appeal rejected that argument: the language of s.5 "is clear and unambiguous in barring enforcement of the whole of multiple damages claim including its compensatory part."

The Court of Appeal also noted that this interpretation of s.5 "acts as a discouragement to the claimant from seeking an award of multiple damages in the first place". One wonders whether that aligns with the usual concern over comity:

why should an English court project its own view of public policy onto foreign litigants and how foreign litigants choose to conduct litigation in foreign courts (and choose to ask for remedies under foreign statutes that expressly allow punitive damages). A few years ago, the Fourth Circuit's Judge Wilkinson did not mince his words about the (in his view, exorbitant) effect of an English anti-suit injunction (here). An English court attempting to apply English public policy to create ex ante incentives and disincentives for how a U.S. litigant litigates under a U.S. statute may again raise eyebrows (and ire).

Motorola would have had better luck if Hytera had had some assets farther south. The equivalent statute in South Africa, the Protection of Businesses Act, also precludes enforcement of a "judgment … directing the payment of multiple or punitive damages". On its plain text, the Act, like the English equivalent, seems to bar a judgment in its entirety. However, South African courts have effectively interpreted the Act out of existence. The Act says it applies to judgments "connected with the mining, production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material, of whatever nature, whether within, outside, into or from the Republic", which seems broad. But courts have interpreted that phrase to mean that the Act applies only to judgments about raw materials used to make other things: *Tradex Ocean Transportation SA v MV Silvergate* 1994 (4) SA 119 (D); see also *International Fruit Genetics LLC v Redelinghuys* 2019 (4) SA 174 (WCC) (here) (holding that the Act does not even apply to a foreign judgment about a licensing agreement over grape varieties: grapes are raw materials, but, apparently, they aren't made to use other things). So it should come as no surprise that, according to the leading practitioner text, "there is in fact no recorded instance in which the Act has been successfully invoked as a defence to enforcement" (C F Forsyth *Private International Law* (5th ed. 2012). The Act is, however, remarkable for this reason: if the Act applies, it precludes enforcement of *any* judgment (not just judgments that include punitive damages) without the permission of the "Minister of Economic Affairs" (now, presumably, the Minister of Trade, Industry and Competition). That is almost certainly unconstitutional (it probably survives only because the narrow interpretation of the Act's ambit means that there has not been any need to challenge it—see *International Fruit Genetics*, above, noting that the constitutionality of the permission requirement is "questionable").

With the Protection of Businesses Act out of the way, the common law would

govern the enforceability of Motorola's U.S. judgment (South Africa has an Enforcement of Foreign Civil Judgments Act, which sounds promising enough, but it applies only to "designated" countries: a list with just Namibia on it). There is no appellate authority on this, but High Courts seem to agree that an order for punitive damages is contrary to South African public policy, but disagree about how to characterise damages as punitive (unenforceable) or compensatory (enforceable). In *Danielson v Human* 2017 (1) SA 141 (WCC) (here), the High Court held (probably on shaky ground) that an order for treble damages under RICO is not punitive but compensatory (based on expert U.S. evidence on how U.S. law characterises treble damages under RICO—query why that should matter to a South African court, and, if so, query also whether that should have been a matter of U.S. federal or state law). *Danielson* distinguished *Jones v Krok* 1996 (1) SA 504 (T), which held that an order awarding punitive damages for breach of contract under California law was punitive and contrary to public policy. *Jones* did, however, still enforce the compensatory component of the order.

So, Motorola would have two arguments in a South African courtroom. It could be argued that an order for 'punitive' damages under the Defend Trade Secrets Act, like treble damages under RICO, is not punitive but compensatory (*Danielson*). Or, as a fallback, it could at least enforce the compensatory component of the U.S. judgment even if the punitive component were unenforceable (*Jones*).

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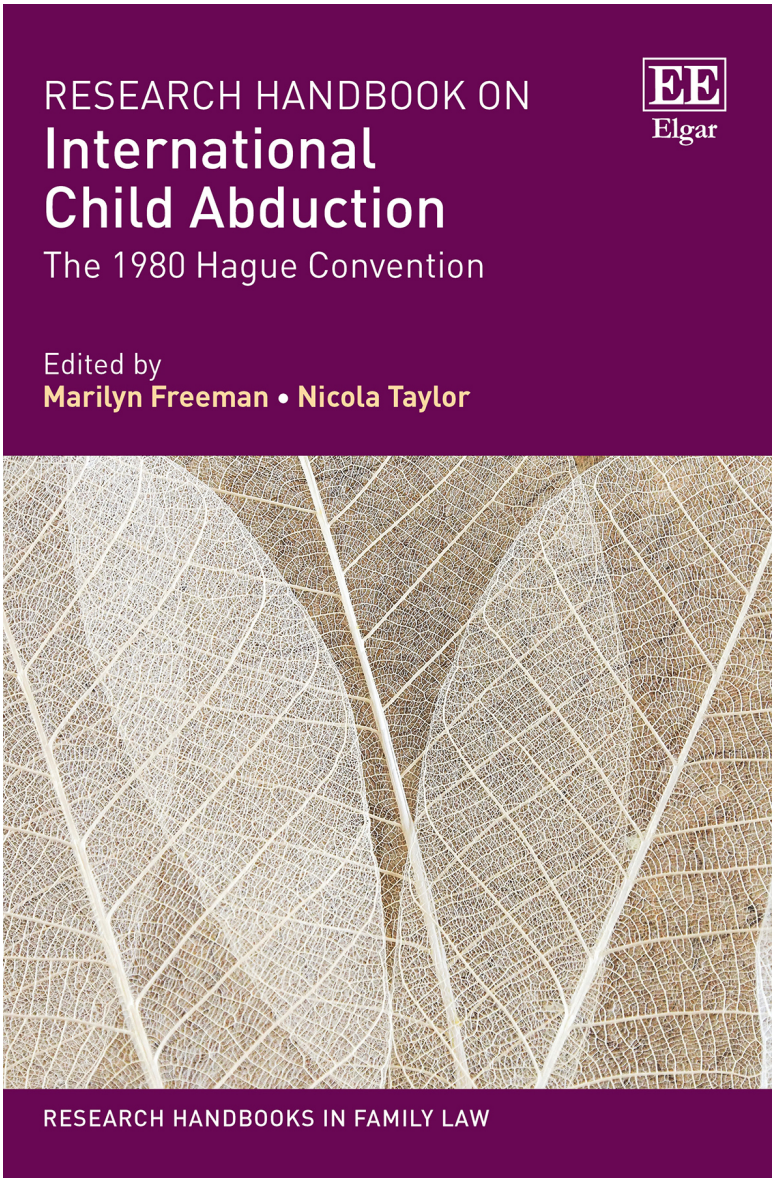
# Book review: Research Handbook on International Child Abduction: The 1980 Hague Convention (Edward Elgar Publishing, 2023) –

# Part I




*Written by Mayela Celis, Maastricht University*

International child abduction is a topic that has given rise to an ever-increasing number of publications (our latest blog post attests to this trend). It easily sparks emotions among experts, sometimes triggering divergent views. However, from a global perspective, there is consensus on the basic principle: States should combat international child abductions and a child should be returned to the State of habitual residence, unless an exception is made out. In 2023, Elgar published the book entitled "*Research Handbook on International Child Abduction: the 1980 Hague Convention*", eds. Marilyn Freeman and Nicola Taylor (Edward Elgar Publishing Limited, 2023). Although published a couple of years ago, it remains poignantly relevant.

This book brings together an adult who was abducted as a child, practitioners, judges, academics, NGO officials and central authority personnel. Many of the authors are at the forefront of this field and their contributions have left a long-lasting legacy in this area of law. While some topics are considered from an academic perspective, others have a more practical focus, striking the right balance between academia and practice.

This book review will be divided into two parts. The present and first post will deal with Part II to Part VI of the book. The second post will consider Parts VII & VIII and will include some personal views. The table of contents is available here.

This book is divided into 8 Parts:

- PART I – Introduction and key themes
- PART II – The impacts of international child abduction
- PART III – The 1980 Hague Convention – History and longitudinal trends
- PART IV – The 1980 Hague Convention – Implementation and operationalisation
- PART V- International child abduction in selected geographical regions
- PART VI – Non-Hague Convention countries
- PART VII – Key perspectives on international child abduction and Hague Convention proceedings
- PART VIII – Reflection and future directions

At the outset, it should be noted that this book has been dedicated to the memory of Anne-Marie Hutchinson for her invaluable contribution to this field.

**Part II – The impacts of international child abduction**

This Part begins with the long-term reflections of a former milk carton kid (Chapter 2 – FINKELSTEIN WATERS). A personal story of a woman who remembered seeing herself on a milk carton, when she was abducted as a child by her father and on the run, as part of a nationwide advertisement to find missing children. She recounts her life after her abduction from Norway to the United States, the previous abduction of her brothers from the United States to Israel and then to Norway, and the actions she has taken against child abduction, which includes speaking widely to the media and working with Lady Catherine Meyer, a left behind parent and founder of PACT.

It then moves on to discuss the psychological issues in child abduction and high conflict cases (Chapter 3 – CALVERT). The Chapter is rightly entitled in part "Ghosts in our Genes", given that children in high conflict cases are haunted by these ghosts (or traumas) way into adulthood. It addresses the impact of developmental issues, parenthood and the voice of the child, noting that children want to be involved and valued, acknowledged and respected.

**Part III – The 1980 Hague Convention – History and Longitudinal Trends**

Part III begins by providing a historical context of the Hague 1980 Child Abduction Convention (subsequently, Child Abduction Convention or Convention), including some notable US developments preceding the treaty and a description of the Hague drafting process (Chapter 4 – ELROD). It also incorporates useful insights into the post-ratification history of the Convention and of the role of the HCCH as a leader in creating international family law.

This Part then continues with the value and challenges of statistical studies on the Child Abduction Convention (Chapter 5 – LOWE, STEPHANS). This article is written by the persons commissioned to draft these statistical studies so it is all the more valuable. After explaining the origin of the global studies, among other topics, it describes the modern statistical studies' findings, such as the number of Hague applications and the outcomes. Beyond the descriptive nature of this article, it also provides useful insider information about funding issues, methodology, difficulties experienced, and challenges ahead. As stated in this article, this contribution was unable to take on board the latest study conducted on the basis of data of the year 2021, which provides valuable information regarding child abduction and the coronavirus pandemic, and which was prepared by the authors of this contribution (for more information, see Prel. Doc. No 3 of January 2023 of the 2023 Special Commission).

*A note to the reader*: although it was an idea left open by the authors, it should be noted that in 2021 the HCCH Council on General Affairs and Policy (CGAP Conclusion & Decision No 19) mandated the discontinuance of INCASTAT, an electronic statistical database.

**PART IV – The 1980 Hague Convention – Implementation and operationalisation**

Part IV begins with the role of the Permanent Bureau in the operation of the Child

Abduction Convention (Chapter 6 – GOH ESCOLAR). This article starts with the role of the Permanent Bureau, the secretariat of the HCCH, and lists some of its tasks, which include: preparing, organising sessions and meetings, supporting the proper operation of the Child Abduction Convention, providing post-convention assistance (such as country profiles, holding seminars and INCADAT), facilitating communications and maintaining networks (including the International Hague Network of Judges and the Malta Process), organising and participating in international meetings, and maintaining of HCCH Regional Offices (in Latin America – ROLAC – and the Caribbean and Asia Pacific – ROAP -) and their key role.

*A note to the reader*: As of July 2025, there is a new HCCH Regional Office in Rabat, Morocco. For more information, click here.

It then moves on to the extremely relevant chapter on helping battered mothers and their children using Article 13(1)(b) (Chapter 7 – EDLESON, SHETTY, FATA) – . The authors begin by contextualizing the problem and setting forth decades of social research on domestic violence and their effects on battered women and children. This article then continues by analysing court decisions where the grave risk exception has been applied. It also discusses the Hague Domestic Violence project. Finally, it provides concrete recommendations to the Permanent Bureau of the Hague Conference and suggests possible actions for Central Authorities and practitioners. In particular, some recommendations to the Permanent Bureau include: encouraging the recognition that the exceptions to the return of children are an integral part of the Convention, focusing on the protection of children rather than adopting a technical approach to this treaty, and facilitating the drafting of a new revised edition of the Guide to Good Practice on Article 13(1)(b) with more comprehensive information on domestic violence. It should be noted that one of the authors has spearheaded research in this area with the ground-breaking book *Battered Women, Their Children, and International Law: The Unintended Consequences of the Hague Child Abduction Convention* (Northeastern University Press, 2012).

Subsequently, this Part deals with child participation and the child objection exception (Chapter 8, SCHUZ). This Chapter is divided into child participation and the child objection exception. With regard to the child participation, the direct and indirect hearings and separate representation are considered, with the author underscoring the need to convey the views of the child and not only the

perceptions of the child's interest, as well as the benefits of separate representation. Concerning the child objection exception, this chapter analyses the exception in a very structural manner by dividing in age and maturity, child's objection including strength and validity and finally, the tricky question of discretion, which the author divides into welfare and convention considerations. Importantly, the author calls for internalising children's rights when considering this exception and the adoption of a more child-centric approach.

Finally, this Part discusses a 20-year evolution in judicial activism (Chapter 9 – THORPE). The author was the first to table the proposal in 1998, on behalf of the UK, to create the International Hague Network of Judges. This chapter recounts the developments of direct judicial communications and of this network from their origin to up to 2021. With the support of key articles published in the HCCH Judges Newsletter, as he argues certain loss of memory – even to reminiscence his life during the Second World War -, the author takes us on the long journey of these initiatives, providing inside information and interesting details of the conferences held in the southern part of the Netherlands in the late nineties, in Brussels in 2009, and ending with some perspectives and conclusions during the corona pandemic. Importantly, he notes that "this is a history of harmony since, apart from the earliest days, there has been no real dissent and there is not a single case in which miscarriage of justice has resulted from an abuse of the general principles governing direct judicial communications."

**Part V – International child abduction in selected geographical regions**

This Part focuses on the developments in two European regional courts and specific regions or States.

This Part begins with an analysis of the case law of the **European Court of Human Rights** (ECtHR) (Chapter 10 – KRUGER / LEMBRECHTS). This contribution is divided into the court's role in international child abduction and the exceptions to return. The former deals primarily with Article 8 of the ECHR (and to a lesser extent art. 6) in areas such as the voice of the child and the duty to act expeditiously, while the latter provides a summary on the ECtHR case law on the exceptions under the Child Abduction Convention (arts. 12(2), 13(1)(a) and (b), 13(2) and 20). At the outset, this article includes a useful list of cases initiated by left-behind parents and by abducting parents (footnotes 7 and 8), from which conclusions may be drawn as to existing trends (see in particular that the cases

heard before the Grand Chamber were initiated by abducting mothers). Importantly, references are made throughout this contribution to *X v. Latvia* and its impact on the best interests of the child and the exceptions under the Child Abduction Convention. It also includes relevant recent cases and a couple of interesting cases belonging to – what I refer to as – the "twilight zone", that is the uncertain period between the Grand Chamber judgments of *Neulinger* and *X v Latvia*. Among their conclusions, they note that while the case law of the ECtHR is only binding on the members of the Council of Europe, its guidance can be useful to other States.

This Part then goes on to analyse the role of the **Court of Justice of the European Union** and international child abduction (Chapter 11 – HONORATI). It focuses on the relevant provisions of Brussels II ter, putting an emphasis on key concepts such as habitual residence and studying the court's case law on this concept which amounted to 9 decisions as of July 2022 (see footnote 19 – citing benchmark cases such as A and *Mercredi v. Chaffe*, among others). Importantly, a section is devoted to the retention of jurisdiction, in which emphasis is laid on the differences between Brussels II ter and the 1996 Hague Convention. It then moves on to study return proceedings, including the child's safe return and the overriding mechanism. Finally, the author submits that the guidance provided by the CJEU may be of interest to courts located in third States and may be of some value when dealing with similar topics.

Subsequently, Part V delves into the study of specific geographic regions or States: Australasia and the Pacific, United States, Asia, Africa and the Caribbean region.

With respect to **Australasia and the Pacific** (Chapter 12 – HENAGHAN / POLAND / KONG), it makes a recount of the developments of child abduction in Contracting and non-Contracting Parties to the Child Abduction Convention. First, it analyses key concepts such as rights of custody and habitual residence, as well as the most litigated issues under the Child Abduction Convention (in particular, the exceptions) in Australia, New Zealand and Fiji. It underlines the differences and similarities among these jurisdictions. Subsequently, it describes the (national or convention-inspired) procedures adopted by Pacific countries that are not Contracting Parties to the Convention when dealing with international child abduction, including Tonga's steadfast intention not to join this treaty and Samoa's review of family law.

With regard to the **United States** (Chapter 13 – CULLEN, POWERS), it describes the robust interpretation of the Convention in this State, noting that the US Supreme Court has rendered judgments in five key cases so far. The article focuses on two of those cases (*Monasky* and *Golan*), and touches briefly upon *Abbott*. Interestingly, this article pinpoints recent federal court judgments that may have an important impact on the operation of the Convention. It also raises the need to deal with the mature child exception in the United States. This Chapter should be read in conjunction with Chapter 7 (Fleeing for safety…).

With respect to **Asia**, Chapter 14 – NISHITANI focuses primarily on developments in Japan, with some brief references to other Asian countries (such as India and Pakistan). It starts by outlining the reason why it has been a challenge for Asian States to join the Convention. It then analyses the way key Convention concepts have been interpreted in Japan, including two Japanese Supreme Court judgments (2017 and 2020) regarding the change in circumstances when executing return orders and objections of the child. References to other useful Japanese INCADAT cases are included throughout this article. The author also discusses the reform to the Implementation Act and the Civil Executive Act of Japan in 2019 and helpfully suggests improving it by introducing *ex officio* enforcement mechanism (as opposed to relying on a party's initiative). Finally, this article refers to the Malta Process, after sharing an interesting reflection on Islamic countries, the author makes a call for States to join the 1996 and 2007 Hague Conventions and Protocol, arguing that these treaties will support a safe return of the child.

With regard to **Africa**, Chapter 15 (SLOTH-NIELSEN) discusses primarily developments in South Africa, a country with vast jurisprudence on this topic. It begins with an analysis of the benchmark case *Sonderup and Tondelli* and the interplay of the Convention with the best interests of the child, as well as other South African cases. It also briefly mentions two outgoing cases from Morocco, decided in France and the United States, and legislation from Mauritius. Acknowledging that jurisprudence in this region is scant (apart from South Africa), the author suggests further judicial training in the region.

Regarding the **Caribbean region**, Chapter 16 (GORDON HARRISON) provides a summary of the status quo in this region regarding international child abduction. It includes a useful table with a list of 32 countries/territories in the Caribbean region and their status (independent State or a territory/country of a State – *i.e.* UK, France, the Netherlands, USA -). Information is included regarding specific

States parties to the Convention (incl. any acceptances of accessions, which may be challenging to determine in the case of territories. Each State must extend the Convention to that particular dependent territory and this extension must have entered into force), and any designations to the Hague Network Judges. This chapter highlights that even in non-Contracting States, the spirit of the Convention has been persuasive (see p. 240, regarding Jamaica before acceding to the Convention) and that judges have been designated for the Hague Network in non-contracting countries (Suriname, Aruba and Sint Maarten). It ends with a useful list of challenges, recommendations and conclusions, which include judicial training and the development of internal guidelines.

*A note to the reader*: Just for the sake of clarification, it should be noted that St. Kitts and Nevis accepted the accession of Peru and not otherwise, and that Trinidad and Tobago has accepted 5 instead of 6 accessions.

**Part VI – Non Hague Convention Countries**

This Part deals with non-Hague Convention countries and more specifically, with India. Throughout the book reference is made to the fact that India is not a party to the Child Abduction Convention and what that means for children and families, given the mobility of the Indian population.

In this regard, the reader should bear in mind that this Part should be read in conjunction with **Chapter 12** (Australasia and the Pacific), which includes research on Island nations not yet a party to the treaty, such as Samoa and Tonga, **Chapter 14** (Asia), which refers to the hesitancy of India to join and information regarding Islamic States, and **Chapter 16** (the Caribbean region), which refers to non-Contracting Parties, such as Suriname, and the lack of acceptances of accessions – the Convention applies bilaterally for acceding States and thus in the case of a lack of an acceptance to an accession, the Convention does not apply -.

With regard to **non-Hague Convention countries**, Chapter 17 (MORLEY) provides, from a practitioner's perspective, an overview of the existing practices in some non-Contracting States (including in those the author has litigated, such as a case between Japan and Bangladesh). He begins his contribution by noting the existence of bilateral agreements and MOUs on family law matters, the latter of which have proven to be deficient or highly ineffective. The author also

emphasises the Malta process and lists highly useful strategies to recover children from non-Hague countries. This Chapter also deals with India (see pp. 244, 252-253, 256).

With respect to **India**, Chapter 18 (MALHOTRA, MALHOTRA) briefly analyses the Indian legislation under which a return may be requested and concludes that a writ of Habeas Corpus is the only means available. It then moves on to consider the Indian case law, in particular the numerous – and very contrasting throughout the years – judgments of the Indian Supreme Court, which is undoubtedly the more interesting part of the article. It starts with the historical position adopted by the Indian Supreme Court and the dramatic shift in position in 2017, with the abandonment of principles such as "first strike" (first seized) and the primacy of comity of Courts, as well as the concept of *forum conveniens* in these matters. It also analyses Supreme Court decisions rendered in 2019, as well as features the widely publicised case of *Jasmeet Kaur v. Navtej Singh*. Importantly, it briefly explains the Indian failed attempt to gear up to become a party to the Child Abduction Convention and the sterile bill resulting from those efforts. It concludes by praising the emergence of mirror order jurisprudence in child custody matters, which has been adopted in an Indian-USA case.

Part II of this post will be published later on in 2026… stay tuned and Happy New Year!

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# XLK v XLJ: Comity Beyond the Child Abduction Convention

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From the perspective of state participation, the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (the "Child Abduction

Convention") stands as one of the most successful instruments of the Hague Conference on Private International Law (HCCH), boasting 103 Contracting Parties to date. This widespread adherence is largely driven by the pervasive—and increasingly difficult-to-ignore—problem of international child abduction, which affects even non-Contracting States. China, a populous country deeply engaged in globalization, exemplifies this reality. A recent custody ruling in Singapore concerned a child who had been brought to the country by his father in breach of an order issued by a Chinese court—an incident underscoring how cross-border family disputes transcend the formal boundaries of the Convention.

## I. The Brief of XLK v. XLJ

XLK (the Father) and XLJ (the Mother) are both Chinese nationals, with their habitual residence in China. In 2023, a Chinese court rendered a divorce judgment, which provided that the child "shall be raised and educated" by the Mother. After the Father's appeal was dismissed, he removed the child from China to Singapore and enrolled him in school there. As a consequence of these acts, the Father was subjected to detention for non-compliance with the prior judgments, prohibited from leaving China, and had his travel documents declared invalid. These measures, however, did not alter the fact that the child remained in Singapore and was not in the Mother's care, which led the Mother to turn to Singapore in seeking the child's return.

In 2025, a District Judge of the Singapore Family Court, following consolidation of proceedings, heard the Mother's application seeking an order for sole custody and care and control of the Child together with the Father's application for joint custody and liberal access, and rendered a decision ([2025] SGFC 42). In light of the finding that "the facts show clearly that this is a case of outright child abduction" ([2025] SGHCF 50, para. 6), the District Judge identified two core concepts running throughout the case, namely the interests of the child and the comity of nations.

On the one hand, the District Judge emphasized that "[i]s it in interest of the child for him to be returned to the Applicant Mother" constituted "the crux of the matter." Accordingly, "[h]e explained in some detail his analysis of the welfare of the child with reference to" Singapore case law, ultimately concluding that "it was in the best interests of the Child for the Mother to be given care and control,

and to enable the Mother to exercise this right, she should also be given sole custody for the purpose of having the Child returned to her in China" ([2025] SGHC(A) 22, para. 10). On the other hand, the District Judge took the view that, once the Child was returned to China, no Singapore court order would be necessary, as China constituted the proper forum for addressing the Father's application for access, particularly given that the Chinese courts had already rendered a judgment, and that "it would be 'against the comity of nations' for another jurisdiction to make further orders on the same matter" ([2025] SGHC(A) 22, para. 10). The District Judge therefore allowed the Mother's application and dismissed the Father's application.

The Father's subsequent appeal was dismissed by the Family Division of the High Court ([2025] SGHCF 50). The Family Division stated that it agreed entirely with the District Judge's reasoning on these two concepts, emphasizing that, whether on the basis of the interests of the child or comity, either consideration alone was sufficient to justify dismissing the appeal, as reflected in its statement that "[t]he doctrine of comity of nations has immense force on the facts of this case, and on that basis alone, the appeal ought to be dismissed … I am of the view that the crucial point is that it is in the best interests of the child to be with the mother" ([2025] SGHCF 50, para. 7).

This reasoning prompted the Father to raise objections and to file an application for permission to appeal. Specifically, the Father contended that the emphasis placed on comity, together with the use of the language of "child abduction," indicated that the judge had conflated the circumstances in which the Convention applies with the present case, which did not fall within its scope because China is not a Contracting Party ([2025] SGHC(A) 22, para. 18). On this basis, he alleged a *prima facie* error of law, namely that "the Judge failed to apply [the welfare-of-the-child principle] by reasoning that 'comity overrides welfare'" ([2025] SGHC(A) 22, para. 22). Accordingly, the Father requested that the appellate court address "important questions of law regarding (a) the extent to which considerations of comity may override the welfare principle; and (b) the weight to be accorded to custody decisions of foreign courts" ([2025] SGHC(A) 22, para. 38).

On November 5, the Appellate Division of the High Court rendered its decision ([2025] SGHC(A) 22), dismissing the Father's application. The Appellate Division's central rationale was that "the Father's submission fails to recognise that the Judge did not dismiss the appeal on the sole basis of comity" ([2025]

SGHC(A) 22, para. 23), such that no prima facie error of law arose. In other words, the Appellate Division took the view that, in the present case, taking comity into consideration did not entail overriding the interests of the child, as both the District Judge and the Family Division had treated the interests of the child as "the crux" or "the crucial point." On that basis, the District Judge had correctly applied Singapore law, by testing in detail, with reference to relevant case law, the factors advanced by the Father, an approach which the Family Division expressly endorsed (see [2025] SGHC(A) 22, paras. 21–30).

At the same time, however, the Appellate Division held that the Family Division's statement that "on [the doctrine of comity of nations] alone, the appeal ought to be dismissed" was incorrect. In other words, in the Appellate Division's view, although both courts' application of the law, centering on the interests of the child, was entirely correct and sufficient to justify dismissing the Father's appeal, consideration of comity was unnecessary. Accordingly, "[a]ny error … on the relevance of comity therefore has no impact on the ultimate outcome of the case" ([2025] SGHC(A) 22, para. 37). Proceeding from this position, the Appellate Division concluded that the "important questions of law" advanced by the Father, which in fact presupposed the applicability of comity in the present case, could not be regarded as being of "general importance which would justify granting permission to appeal in the present application" ([2025] SGHC(A) 22, para. 40).

## II. The Comity in XLK v. XLJ

The divergence in judicial positions in *XLK v. XLJ* raises a question: was consideration of comity in this case, as the Appellate Division opined, unnecessary, or, more broadly, should comity be disregarded altogether in cases falling outside the scope of the Child Abduction Convention?

Admittedly, in convention cases, consideration of comity is principled in nature, with comity in this context having been elevated to an obligation under international law. Even though the Convention is "[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody," its practical operation nonetheless rests on comity, which, when the Convention is applied by domestic courts, may occasionally generate tension between comity and the interests of the child. This, however, does not mean that such tension arises from an inherent contradiction between the two concepts. On the contrary, no necessary conflict exists between them. The actual and original

foundation of comity lies in serving the interests of sovereign states (Ernest G. Lorenzen, *Story's Commentaries on the Conflict of Laws—One Hundred Years After*, 48 Harv. L. Rev. 15, 35 (1934)), and, for that very reason, it should not be deployed to challenge the best interests of the child as a human right (Art. 3 of the Convention on the Rights of the Child).

More specifically, according to the Preamble of the Convention, comity may be regarded as being justified by, and oriented toward, the better realization of the interests of the child; pursuant to Articles 13 and 20 of the Convention, comity is suspended in defined exceptional circumstances to secure the interests of the child. Viewed as a whole, comity constitutes an obligation introduced by this interests-of-the-child–oriented international convention by virtue of its nature as an instrument binding states, such that inter-state comity in this context unambiguously serves the realization of the individual interests of the child. This understanding is in fact facilitated by the breadth of the concept of the best interests of the child, as illustrated by Lord McDermott's explanation in the English case *J v. C*, in which consideration of the child's interests was described as "a process whereby, when all relevant facts and relationships, claims and wishes of parents, risks and choices and other circumstances are taken into account and weighed" ([1970] AC 710 (HL)).

However, this results in the realization of the interests of the child under the Convention being less direct than its realization under domestic law, as reflected in the authority cited by the Appellate Division in *XLK v. XLJ*, which observed that "the understanding of the child's welfare under the Convention is not the substantive understanding (as under the domestic law of guardianship and custody) but rather the more limited understanding, that where she has been unlawfully removed from her habitual residence, her welfare is best served by swiftly returning her to her habitual residence" ([2025] SGHC(A) 22, para. 32).

Against this background, it is not difficult to understand why, although *XLK v. XLJ* was a non-convention case, the Appellate Division nonetheless acknowledged that "it might be useful to contrast the present application with applications for the return of a child under the [Convention]" ([2025] SGHC(A) 22, para. 32). Within this Convention-referential reasoning, the child's swift and immediate return appears to be a typical outcome of considering comity under the Convention, yet its essence remains a decision reached after assessing the interests of the child. In other words, while the fact that the Chinese courts had issued subsisting

orders on custody was "connected to the notion of comity of nations," it was, in substance, merely one of the "non-comity-related factors relevant in the assessment of the Child's welfare" ([2025] SGHC(A) 22, para. 36).

Accordingly, the question posed above may be framed more concretely as whether, beyond the Convention, comity should be considered directly and explicitly, or whether courts should instead adopt a Convention-referential logic while avoiding the application of the Convention itself, thereby subsuming comity within the interests of the child and avoiding its direct consideration. In *XLK v. XLJ*, the positions taken by the District Judge and the Family Division clearly reflected the former approach, albeit in a more aggressive form, whereas the Appellate Division adopted the latter. Admittedly, the District Judge and the Family Division should not have treated comity and the interests of the child as parallel and equivalent lines of reasoning, given that, even within the scope of the Convention, the interests of the child remains the paramount consideration, and *a fortiori*, beyond the Convention, comity is not even framed as an obligation. In this sense, the Appellate Division's criticism of the two courts was justified. It nevertheless appears to have moved to the opposite extreme by effectively excluding any consideration of comity. Although the Appellate Division did not expressly state that comity should not be considered, it treated the interests of the child as the sole operative concept in the present case, through its interpretive logic that "comity-connected factors are included in welfare."

## III. Considering Comity beyond the Convention

Before diving into this question, a preliminary point should first be clarified, that the interests of the child is not an exclusive or monopolistic consideration. Under the Convention, comity operates as an independent consideration serving the interests of the child, which is described as being "of paramount importance," and functions at jurisdiction allocation, which explains why, in certain circumstances, it may come into tension with the interests of the child. Outside the scope of the Convention, however, whether expressed as "a primary consideration" in the Convention on the Rights of the Child or as a "paramount consideration" in the Guardianship of Infants Act 1934 of Singapore as applied in the present case, such formulations merely emphasize the preeminent weight of the interests of the child in a comparative sense, rather than conferring upon it an exclusive character. Accordingly, the question is not whether comity can be considered, but whether comity should be considered.

In essence, the Convention elevates comity to a binding obligation, manifested in the relinquishment of jurisdiction; beyond the Convention, by contrast, comity only "persuades; but it does not command" (*Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485 (1900)). Accordingly, the state where the abducted child is located is entirely free, if it so chooses, to disregard comity. From a technical perspective, the nature of a child custody order itself also furnishes the state with a basis for not considering comity, in that such an order is typically not final and may be modified in light of changed circumstances or the interests of the child (Robert A. Leflar, *American Conflicts Law* 490–493 (1977)).

This, however, does not mean that, beyond the Convention, there is no reason at all to take comity into consideration. In other words, outside the scope of the Convention, and while fully respecting the preeminence of the interests of the child, there are both policy and technical reasons for taking account of the role of states.

From a policy perspective, considering comity can extend the Convention's influence even indirectly, which was apparent in Singapore prior to its accession to the Convention, as *AB v. AC* ([2004] SGDC 6) being a paradigmatic example, in which scholars have observed that the court effectively recognised a foreign custody order on the basis that it had been made by the court of the child's habitual residence, thereby reflecting the Convention's spirit, a course of action described as legally questionable but policy-wise correct (See Joel Lee, *Private International Law in the Singapore Courts*, 9 Sing. Y.B. Int'l L. 243, 244 (2005)). It is therefore unsurprising that, now that Singapore has acceded to the Convention, courts may still take the Convention into consideration even in cases where it is inapplicable ([2025] SGHC(A) 22, para. 32). In the recent case, however, the Singapore courts abandoned this policy-driven, indirect application of the Convention, which, while wholly avoiding the risk of applying the Convention to non-Convention cases, to some extent, diminished the Convention's appeal to non-Contracting States by leaving its foundational logic unarticulated.

Even for states that have not acceded to the Convention, comity remains a principle worthy of consideration. For the state of the child's habitual residence, the relevant interests lie not only in the child's being returned to its jurisdiction but also in the jurisdictional interest in adjudicating the substantive custody disputes, both of which amount to the state's expectation of fulfilling its child-protection obligations. If the state where the abducted child is located wholly

disregards comity, it thereby fails to show respect for the jurisdictional interest of the state of the child's habitual residence. That consequence means that, where origin and destination are reversed, culturally divergent interpretations of the interests of the child may dominate judicial discretion, producing a situation in which the child's return is less chance to be a uniform outcome of considering the interests of the child and where such an outcome cannot be influenced by comity to vindicate that interests. Moreover, the absence of comity can render potential bilateral or multilateral cooperation beyond the Convention awkward for lack of reciprocal foundations (see *Blondin v. Dubois*, 189 F.3d 240, 248 (2d Cir. 1999)), thereby inhibiting the emergence of regional alternatives to the Convention.

Globalization has strengthened comity's reciprocal character, such that a state's showing trust in foreign courts' custody determinations is both necessary and not fundamentally at odds with the interests of the child. On the contrary, comity can assist non-Contracting States in obtaining reciprocal comity in custody disputes, thereby giving Contracting Parties greater opportunities to realize their child-protection objectives. The Convention highlights this value of comity in custody matters, yet by hard-wiring comity into a binding obligation, a feature some states find difficult to accept. Outside the scope of the Convention, however, comity is merely persuasive, and for states hesitating to join the Convention, this softer form of comity should be more palatable and may serve as a practicable intermediate step toward accession.

As for the technical benefits of comity, they have, in fact, long been reflected in non-Convention cases, which may be observed through the referential use of the Convention in such cases. According to a Singapore scholar's synthesis, drawing on the practice of the English courts, courts generally adopt four approaches in dealing with non-Convention cases (Chan Wing Cheong, *The Law in Singapore on Child Abduction*, 2004 Sing. J. Legal Stud. 444 (2004)). Two of these take the Convention as a reference. One involves indirectly adopting the Convention's understanding of the interests of the child by presuming that returning the abducted child accords with the child's welfare, an approach reflected in *XLK v. XLJ*. The other involves directly adopting the Convention's policy, under which return is refused only where the foreign court is in principle unacceptable or where one of the Convention's specified exceptions applies. The close linkage of these two approaches to the Convention allows them to be regarded as applications of comity beyond the Convention. The remaining two approaches,

although not involving a direct reference to the Convention, share the same foundation as the Convention, namely, comity. One is the application of *forum non conveniens*, and the other is the treatment of comity as a consideration equal to the best interests of the child. As noted above, the latter should not be accepted, while *forum non conveniens* is likewise closely associated with comity.

The most immediate technical benefit brought about by comity is certainty. This certainty manifests itself, on the one hand, at jurisdiction, thereby to some extent preventing parents from forum shopping through abduction. On the other hand, it manifests itself in the application of laws, as comity can, beyond the Convention, to some degree mitigate divergences in the interpretations of the interests of the child across different legal cultures, thereby contributing to a measure of predictability. Put differently, comity can provide a unifying, inter-state relational context for an issue that would otherwise be subject to divergent interpretations across fragmented legal systems.

In addition, another technical benefit of considering comity beyond the Convention lies in providing a jurisprudential foundation for the development of related legal mechanisms. Beyond the application of *forum non conveniens* noted above, a prominent example is the mirror order. Although, on its face, a mirror order may appear to run counter to comity (see *Danaipour v. Mclarey*, 286 F.3d 1, 22–25 (1st Cir. 2002)), it nonetheless fully reflects the highest regard for the interests of the child, and its "practice… may actually be seen as enhancing comity" (Rhona Schuz, *The Doctrine of Comity in the Age of Globalization: Between International Child Abduction and Cross-Border Insolvency*, 40 Brook. J. Int'l L. 31, 82–83 (2014)).

## IV. Concluding Remarks

In *XLK v. XLJ*, the Appellate Division did not dispute that the application of comity in the present case would not have undermined the correctness of the outcome. Indeed, the two guiding considerations, comity and the interests of the child, did not lead to conflicting results. Rather, they served distinct yet complementary purposes: the former addressed state interests while the latter safeguarded private interests. Even assuming that tension were to arise between them in a non-Convention context, comity would not necessarily impede the interests of the child. A court may duly consider comity while still arriving at a decision fully aligned with the child's interests—thereby simultaneously honoring international

reciprocity and fulfilling its protective duty toward the child.

In sum, comity can serve a significant function in cases falling outside the scope of the Child Abduction Convention. From a policy perspective, it can, to some extent, encourage non-Contracting States to align more closely with the Convention or allow them to benefit from the Convention's advantages without formal accession to the Convention. From a technical perspective, it can, to some degree, alleviate the inherent uncertainty in the interpretation of the interests of the child and provide a jurisprudential foundation for the development of related legal mechanisms. Accordingly, for states that have not yet formed a clear intention to accede to the Convention, comity remains a consideration worthy of serious attention, offering an intermediate approach that approximates the Convention while preserving a measure of sovereign caution.