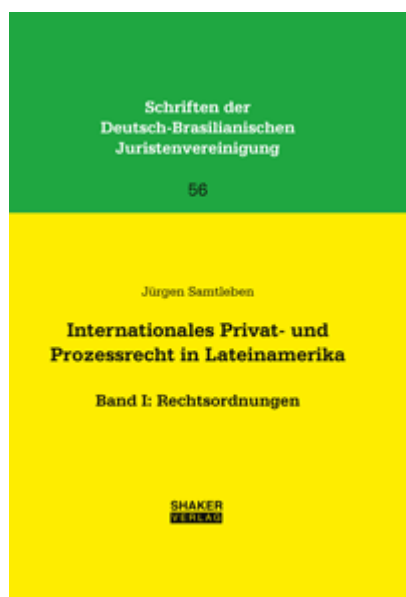


# Out Now: Internationales Privat- und Prozessrecht in Lateinamerika by Jürgen Samtleben

Jürgen Samtleben just published a collection of his work on the PIL of Latin America; he kindly shared the following announcement with us:

*Jürgen Samtleben has authored numerous articles over the years on private international law and international civil procedure in Latin America. These contributions have now been updated and systematically organized into a single volume, thereby offering a unique overview of the conflict of laws in Latin American countries. The collection of articles in German, Spanish and English is supplemented by a comprehensive volume containing the relevant statutory materials in their original language as well as in German translation.*



The indices of volume I ('Rechtsordnungen') and volume II ('Gesetzestexte') can be found [here](#) and [here](#). More information is available [here](#).

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# Judicial Application of the 1980 HCCH Convention in Morocco

The question of the accession (or reluctance to accede) of Muslim countries to the 1980 HCCH Convention has attracted the interest of scholars from Muslim countries and abroad. Scholars who have addressed this issue have come to different (sometimes contradictory) conclusions, especially when it comes to the influence of classical Islamic rules and principles on the attitudes and policies of Muslim states. Unfortunately, it is not uncommon that the available studies on this subject do not take into account the actual judicial practice of Muslim jurisdictions and focus more on the (theoretical) compatibility (or not) of Islamic rules and principles underlying the 1980 HCCH Convention. This post briefly presents some decisions dealing with the issue of cross-border child abduction under the 1980 HCCH Convention in a Muslim state, **Morocco**, but without going into too much into details or assessment, as this deserves to be done properly in a dedicated article.

Morocco became a member state of the HCCH in 1993 and a party to the 1980 HCCH Convention in 2010. It is often presented in literature as the first Islamic country to ratify the 1980 HCCH Convention. The Convention effectively entered into force in Morocco on March 1, 2012, with the publication of the text of the Convention in the Official Gazette (No. 6026). Since then, and for more than a decade, Moroccan courts have been dealing with cross-border abduction cases under the Convention. To my knowledge, there are so far **seven** Supreme Court decisions on the application of the 1980 HCCH Convention. Surprisingly, these cases have not been included in the database maintained by the HCCH (INCADAT), nor (apparently) have they been reported or commented on elsewhere, although they provide extremely valuable material for the study of the operation of the 1980 HCCH Convention in an Islamic context.

The seven cases are summarized in the following tables:

<b>Case 1</b>	<b>Ruling No. 283 of 2 June 2015 (Case No. 443/2/1/2014)</b>
Taking Parent	Mother (M), Moroccan national
Left behind Parent	Father (F), Moroccan national, domiciled in France
Child(ren)	1 (son) Moroccan national born in France
Age (at the time of the return order application as deduced from the facts)	4
Return requested to	France
Cited Articles	Art. 3, Art. 12, Art. 13
Legal Issue(s)	Whether there was a wrongful removal of the child and whether the 1980 HCCH Convention should apply
Ruling (loose summary)	<p>M and F had their habitual residence in France with their child before M returned to Morocco with the child. According to French law (Art. 371-1 and 2 Civil Code), which is the law of the child's place of habitual residence prior to its removal to Morocco, custody (<i>hadhana</i>) is a right jointly shared by the parents during their marriage</p> <p>Morocco has ratified the 1980 HCCH Convention, thus its application should take precedence over national law upon its publication. The court of the appealed decision which failed to apply the HCCH Convention violated the Constitution and the provisions of the Convention</p>
Outcome	Appeal admitted. The appealed decision rejecting the return of the child overturned

<b>Case 2</b>	<b>Ruling No. 90 of 26 January 2016 (Case No. 286/2/1/2015)</b>
Taking Parent	Father (F), Moroccan national, domiciled in Morocco
Left behind Parent	Mother (M), German national, domiciled in Germany
Child(ren)	4 (3 sons and 1 daughter). All Moroccan nationals
Age (At the time of the return order application as deduced from the facts)	13, 11, 9, and 6
Return requested to	Germany
Cited Articles	Art. 2, art. 3
Legal Issue(s)	Whether there was child abduction in the meaning of the 1980 HCCH Convention
Ruling (loose summary)	The children's habitual residence is in Morocco (as they have been living there with their father since M decided to return to Germany). Therefore, the conditions for the application of the Convention are not met.
Outcome	Appeal admitted. The appealed decision ordering the return of the children overturned

<b>Case 3</b>	<b>Ruling No. 196 of 27 March 2018 (Case No. 660/2/1/2016)</b>
Taking Parent	Mother (M), Muslim Moroccan
Left behind Parent	Father (F), non-Muslim Italian

Child(ren)	2 (sons) born out of wedlock in Italy
Age (at the time of the return order application as deduced from the facts)	One has 7, the age of the other is not unclear due to confusing details in the judgment
Return requested to	Italy
Cited Articles	Art. 3, Art. 12, Art. 14
Legal Issue(s)	Whether the application of the 1980 HCCH Convention depends on the existent of a legitimate filiation between the children and their father
Ruling (loose summary)	It was established that the two children had been removed from their habitual residence in Italy to Morocco in violation of the provisions of the 1980 HCCH Convention, which does not require the existence of legitimate bond (filiation) between the parents and the child.
Outcome	Appeal rejected. The appealed decision ordering the return of the children affirmed

<b>Case 4</b>	<b>Ruling No. 303 of 28 July 2020 (Case No. 629/2/2/2018)</b>
Taking Parent	Mother (M), Moroccan
Left behind Parent	Father (F), Moroccan, domiciled in Belgium
Child(ren)	1 (daughter)
Age (at the time of the return order application as deduced from the facts)	unclear

Return requested to	Belgium
Cited Articles	Art. 3, Art. 5, Art. 16
Legal Issue(s)	Whether the mother's action for custody can be admitted despite the ongoing proceedings for the return of the child return under the 1980 HCCH Convention
Ruling (loose summary)	By rendering a decision on the custody despite the ongoing proceedings to order the return of the child, the court of the appealed decision violated the provisions of the Convention
Outcome	Appeal admitted. The appealed decision conferring custody to the mother overturned

<b>Case 5</b>	<b>Ruling No. 38 of 2 February 2021 (Case No. 1226/2/1/2019)</b>
Taking Parent	Father (seems to be Moroccan)
Left behind Parent	Mother (seems to be Canadian)
Child(ren)	2 (daughters)
Age (at the time of the return order application as deduced from the facts)	11, 5
Return requested to	Canada (Ontario)
Cited Articles	Art. 13(4)
Legal Issue	Whether the opinion of the children who refused to return with their mother should be heard and taken into account

Ruling (loose summary)	The court of the appealed decision which disregarded the father's arguments according to which his daughters refuse to return to Canada and that they suffer from their mother's mistreatment and refused to accept his request to initiate an investigation in order to find the truth violated the provisions the Convention
Outcome	Appeal admitted. The appealed decision ordering the return of the children overturned with remand

<b>Case 6</b>	<b>Case 6: Ruling No. 297 of 8 June 2021 (Case No. 61/2/1/2020)</b>
Taking Parent	Mother (M) (nationality unclear, but seems to be Moroccan)
Left behind Parent	Father (F) (nationality unclear, but seems to be Moroccan) domiciled in Belgium
Child(ren)	1 (son). The child in this case had a brother
Age (at the time of the return order application as deduced from the facts)	8
Return requested to	Belgium
Cited Articles	Art. 3, Art. 17
Legal Issue	Whether the judgment conferring custody to the taking parent in the State where the child was wrongfully retained could justify the refusal to order the return of the child to the State of its habitual residence

Ruling (loose summary)	The judgment rendered in the State where the child was retained attributing custody of the child should not be taken into account. The court of the appealed decision which considered that the M's refusal to return the child constituted a wrongful retention within the meaning of article 3, overturned the first instance decision of the CFI and ordered the return of the child to Belgium, exercised its discretion in assessing the facts and correctly took into account the best interests of the child
Outcome	Appeal dismissed. The appealed decision ordering the return of the child affirmed

<b>Case 7</b>	<b>Ruling No. 421 of 26 July 2022 (Case No. 200/2/1/2019)</b>
Taking Parent	Father (F) (nationality unclear but seems to be Moroccan)
Left behind Parent	Mother (M) (nationality unclear but seems to be Moroccan) domiciled in Belgium
Child(ren)	3 (1 daughter and 2 sons)
Age (at the time of the return order application as deduced from the facts)	10 and 8 for the sons, 3 for the daughter
Return requested to	Belgium
Cited Articles	Art. 13 [(1)(b)]
Legal Issue	Whether there was grave risk that could justify the refusal to return the children to their place of habitual residence



Ruling (loose summary)	The evidence and testimony presented to the court show that the mother, who was prosecuted for adultery, verbally and physically abused the children and lacked moral integrity and rectitude (as she used to invite a stranger into the home and cheated on the father in front of the children); therefore, returning the children to their mother would expose the children to grave risks.
Outcome	Appeal admitted. The appealed decision which ordered the return of the children overturned

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# Overview of the 2023 Amendments to Chinese Civil Procedure Law

Written by NIE Yuxin, Wuhan University Institute of International Law

## 1. Background

China's Civil Procedure Law was enacted in April 1991 by the Fourth Session of the Seventh National People's Congress. Since then, it had undergone four revisions in 2007, 2012, 2017, and 2021. However, no substantial revisions were

made to the provisions concerning foreign-related civil litigation. The latest amendments to the Civil Procedure Law in 2023, referred to as the new CPL, involve 26 amendments, including 14 modified articles and 15 new additions. Notably, 19 changes deal with the special provisions on cross-border procedures.

## 2. Jurisdiction

### 2.1 Jurisdiction grounds

**Special jurisdiction:** The new CPL expands the scope of jurisdiction by introducing additional connecting factors and fall-back provisions. The new law widens the category of disputes previously covered from “contractual disputes or other property rights disputes” to “litigation other than disputes involving personal relationships” (Art. 276, para. 1). Compared to the previous CPL, this expansion encompasses non-property rights disputes involving personal relationships, such as foreign-related marriage, adoption, maintenance, and guardianship disputes, thereby addressing the previous omission of non-property rights disputes. Further, the new CPL introduces “the place of torts committed within the territory of China” as a new connecting factor for jurisdiction. Additionally, a new fall-back provision of “other appropriate connections” is included, granting Chinese courts greater flexibility over foreign-related cases. Article 276 stipulates that the Chinese court may have jurisdiction if the dispute is of other appropriate connections with China (Art. 276, para. 2).

It is worth noting that the “other appropriate connections” provision has a certain degree of openness. What constitutes an appropriate connection is ambiguous. Previously, the Supreme People’s Court established judicial guidance on this issue regarding standard-essential patents cases. For instance, in *Godo Kaisha IP Bridge 1 v. Huawei*, the Supreme People’s Court found an appropriate connection between the city of Dongguan and the dispute, citing evidence that Huawei Terminal Co., Ltd. – being primarily responsible for manufacturing and selling Huawei’s smart terminal products – was domiciled there. Dongguan would also be a key location for implementing the essential patents at issue following any agreement between the parties. On this basis, the Supreme People’s Court deemed Dongguan to have an appropriate connection to the case. By incorporating the principle of appropriate connection into the new CPL, its application scope expands beyond intellectual property cases to other foreign-related cases. However, determining the standards for appropriate connection in

practice will undoubtedly pose a significant challenge going forward.

To some extent, this provision allows Chinese courts the flexibility to exercise jurisdiction in appropriate circumstances, providing a channel for Chinese enterprises and citizens to seek remedies from domestic courts when their interests are harmed abroad. In practice, courts should take caution when assessing jurisdiction based on the appropriate connection. From a systematic perspective, the appropriate connection should bear some resemblance to the jurisdictional connecting factors listed in this article, such as the place of contract, place of performance, location of the subject matter of the litigation, location of attachable assets, place of the tort, and the domicile of the defendant's representative. In addition, China could consider deriving insights from the indirect jurisdiction grounds established in the Hague Judgement Convention 2019. These grounds represent a consensus and are accepted by the majority of countries. If China were to refer to the Convention's standards when considering appropriate connection, it would gain greater predictability and reciprocity. This could facilitate the recognition and enforcement of Chinese judgments abroad, especially among Convention contracting states.

Choice of court agreement: Prior to this amendment, except for disputes related to foreign maritime matters, choice of court agreements designating Chinese court were subject to the prerequisite that the case has a practical connection with China. While China established two international commercial courts to specially hear international commercial cases, the cases they can accept are still limited by the requirement of actual connection under the legal framework of previous CPL. This overly conservative jurisdiction regime hampered the international commercial courts from taking jurisdiction over offshore cases without connection to China.

The newly introduced Article 277 of the CPL breaks this constraint. It allows the parties to choose Chinese courts by writing even if Chinese courts do not have any connection with the dispute. This legislative change provides a clear legal basis for Chinese courts to exercise jurisdiction over offshore cases, expands both the types of cases they can accept and their geographical reach. Moving forward, this change will benefit Chinese courts by enabling them to actively exercise jurisdiction and provide judicial support for the Belt and Road Initiative, positioning China as a preferred location for international litigation. Ultimately, it will enhance the international competitiveness and influence of Chinese judiciary. However, the amendment does not specify whether parties can choose foreign

courts without any connections with the dispute. To align with international common practice and promote reciprocity, it is recommended to clearly state that parties have the freedom to choose any courts, Chinese or foreign, to hear cross-border disputes even if the courts lack practical connections with the dispute.

The amendment does not address some matters that remain unclear in Chinese law. For example, which law applies to determine the substantive validity of jurisdiction agreements? In practice, courts may apply either the law of the forum or the law governing the main contract to this matter, leading to uncertainty.

**Responding jurisdiction:** Article 278 of the new CPL introduces the rule of responding jurisdiction. It stipulates that if a party does not raise an objection to the jurisdiction and participates in the proceedings by submitting a defence or filing a counterclaim, the Chinese court shall be deemed to have jurisdiction (Art. 278). Further, in contrast to the previous draft amendment, the new CPL expands the scope of jurisdiction by appearance from the defendant to all parties involved.

**Exclusive jurisdiction:** Under the previous CPL, exclusive jurisdiction covered 1 disputes related to immovable property, port operations, succession, and contracts involving Sino-foreign joint ventures, Sino-foreign cooperative business enterprises, and Sino-foreign cooperative exploration and development of natural resources. The new CPL adds two additional categories of cases under exclusive jurisdiction: disputes arising from the establishment, dissolution, liquidation of legal persons or other organizations established within China's territory, and disputes related to the validity of intellectual property rights granted through examination within China's territory (Art. 279). These amendments are consistent with international common practice.

## 2.2 Conflict of jurisdiction, *Lis pendens* and *Forum Non Conveniens*

**Parallel proceedings:** The new CPL formally adopts the rule for parallel proceedings. First of all, the law accepts parallel proceedings. Article 280 explicitly provides that: "For the same dispute arises between the parties involved, if one party initiates a lawsuit in a foreign court and the other party initiates a lawsuit in a Chinese court, or if one party files lawsuits in both a foreign court and a Chinese court, the Chinese court may accept the case if it has jurisdiction according to this law." However, if the parties have entered into an exclusive jurisdiction agreement selecting a foreign court, provided it does not violate the provisions of the CPL regarding exclusive jurisdiction and does not involve China's sovereignty, security, or public interests, the Chinese court may

decide not to accept the case; if the case has already been accepted, the court shall dismiss the lawsuit (Art. 280). This amendment reflects the respect for the parties' autonomy in cases where it does not violate the principle of exclusive jurisdiction and demonstrates China's active implementation of international judicial cooperation through legislation.

**First-in-time rule:** Article 281 of the new CPL adopts the first-in-time rule to address jurisdictional conflicts arising from international parallel litigation. After a Chinese court accepts a case under Article 280, Article 281 then permits the Chinese court to suspend its proceedings if a party applies in writing on the grounds that proceedings involving the same parties and subject matter have already commenced earlier before a foreign court. However, if the first-seized court fails to exercise jurisdiction, the Chinese court may resume the proceedings to protect the parties' legitimate right to litigation. According to this provision, the parties have significant discretion in requesting the suspension or resumption of litigation.

The first-in-time rule includes two exceptions: (1) when the parties agree to the jurisdiction of the Chinese courts, or the dispute falls under the exclusive jurisdiction of the Chinese courts, and (2) when it is clearly more convenient for the case to be heard by the Chinese courts. The issue here is that it is not clear whether the choice of Chinese courts by the parties includes non-exclusive selection. In addition, the determination of whether the Chinese courts are clearly more convenient requires the court to exercise discretionary judgment, which introduces uncertainty.

**Forum Non Conveniens:** The 2023 amendments formally accept forum non conveniens and relaxed the conditions for its application in compared to previous judicial interpretation. In order to apply forum non conveniens the defendant must raise an objection to jurisdiction, and the court will not assess forum non conveniens by its own motion. Article 282 listed five factors for the court to exercise discretion: (1) The underlying facts of the dispute did not occur within China's territory, and it is significantly inconvenient for the Chinese court to hear the case and for the parties to participate in the proceedings; (2) There is no agreement between the parties to submit to the jurisdiction of the Chinese court; (3) The case does not fall under the exclusive jurisdiction of the Chinese court; (4) The case does not involve China's sovereignty, security, or public interests; (5) It is more convenient for a foreign court to hear the case. The standard to apply

forum non conveniens is thus more relaxed than China’s previous practice. The difference between the CPL 2023 and the Judicial Interpretation of CPL 2022 can be found in this table.

Article 530 of the Judicial Interpretation of CPL 2022	Article 282(1) of the CPL 2023
<p>When a foreign-related civil case meets the following conditions simultaneously, the Chinese court may render a ruling to dismiss the plaintiff’s lawsuit and inform them to file a lawsuit with a more convenient foreign court:</p>	<p>For foreign-related civil case accepted by the Chinese court, <b>where the defendant raises an objection to jurisdiction</b>, and simultaneously meets the following conditions, the court may render a ruling to dismiss the lawsuit and inform the plaintiff to file a lawsuit with a more convenient foreign court:</p>
	<p>(1) The underlying facts of the dispute did not occur within China’s territory, and it is significantly inconvenient for the Chinese court to hear the case and for the parties to participate in the proceedings; <i> (“added”)</i></p>
<p>(1) The defendant requests that a more convenient foreign court has jurisdiction over the case or raises an objection to jurisdiction;</p>	<p><i> “deleted”</i></p>
<p>(2) There is no agreement between the parties to submit to the jurisdiction of the Chinese court;</p>	<p>(2) There is no agreement between the parties to submit to the jurisdiction of the Chinese court;</p>

(3) The case does not fall under the exclusive jurisdiction of the Chinese court;	(3) The case does not fall under the exclusive jurisdiction of the Chinese court;
(4) The case does not involve the interests of China, its citizens, legal persons or other organizations;	(4) The case does not involve <b>China's sovereignty, security, or public interests;</b>
(5) The main facts in dispute did not occur within China's territory and Chinese law does not apply to the case, creating significant difficulties for the Chinese court in ascertaining facts and applying the law;	<i>"deleted"</i>
(6) The foreign court has jurisdiction over the case and it is more convenient for it to hear the case.	(5) It is more convenient for a foreign court to hear the case.

In practice, Chinese courts often refuse to apply the doctrine of forum non conveniens due to the criterion that the case does not involve the interests of China, its citizens, legal persons, or other organizations. Courts often assess whether a case involves Chinese interests or parties based on nationality or habitual residence. The removal of this criterion reduces the obstacles to the judicial application of the forum non conveniens doctrine.

Finally, to better safeguard parties' interests, Art. 282 (2) provides: if the foreign court refuses jurisdiction after the plaintiff's claim is dismissed, or fails to take necessary actions or render judgement within a reasonable period, and the plaintiff sues again in China, the Chinese court shall accept it. It aims to protect the claimant's effective access to justice.

### 3. Judicial assistance

Service of process abroad: Compared to domestic service of process, the process

of serving documents in cross-border cases involves more complex procedures, longer duration and lower efficiency. This significantly affects the progress of cross-border judicial procedures. The new CPL enriches the means of cross-border service of process. While retaining the existing methods of service through treaties, diplomatic channels, and embassy channels, the CPL 2023 improves other methods of services and add additional modes of services. See the table below.

Article 274 of the CPL 2022	Article 283 of the CPL 2023
A court may serve process on a party which has no domicile within China’s territory in the following manners:	A court may serve process on a party which has no domicile within China’s territory in the following manners:
(1) in accordance with the provisions of an international treaty concluded or acceded to by the home country of the party to be served and China;	(1) in accordance with the provisions of an international treaty concluded or acceded to by the home country of the party to be served and China;
(2) through diplomatic channels;	(2) through diplomatic channels;
(3) by entrusting the service to Chinese embassy or consulate in the country where the party is domiciled, if the party is a Chinese national;	(3) by entrusting the service to Chinese embassy or consulate in the country where the party is domiciled, if the party is a Chinese national;
(4) by entrusting the service to the litigation agent authorized by the party to be served to receive service of process;	(4) by entrusting the service to the litigation agent <b>appointed by the party in this case;</b>



<p>(5) by delivering the document to the representative office or a branch office or business agent authorized to receive service of process established by the party to be served within China's territory;</p>	<p>(5) by delivering the documents to the <b>solely funded enterprise</b>, representative office, branch office or authorized business agent established by the party to be served within China's territory;</p>
	<p>(6) where the party is a foreigner or stateless person who acts as the legal representative or main person in charge of a legal person or any other organization established within China's territory, and is a co-defendant with such legal person or other organization, by delivering the documents to such legal person or other organization; (<i>added</i>)</p>
	<p>(7) where the legal representative or main person in charge of a foreign legal person or any other organization is within China's territory, by delivering the documents to such legal representative or main person in charge; (<i>added</i>)</p>

<p>(6) by mail, if the law of the country where the party is domiciled permits service of process by mail and a receipt showing the date of delivery has not been returned within three months after the date of mailing, provided that other circumstances sufficiently show the document has been served;</p>	<p>(8) by mail, if the law of the country where the party is domiciled permits service of process by mail and a receipt showing the date of delivery has not been returned within three months after the date of mailing, provided that other circumstances sufficiently show the document has been served;</p>
<p>(7) by fax, email or any other means capable of confirming receipt by the party to be served;</p>	<p>(9) by <b>electronic means</b> capable of confirming the receipt of the documents by the recipient, <b>unless prohibited by the law of the country where the party is domiciled;</b></p>
	<p>(10) by any other means agreed by the party, unless prohibited by the law of the country where the party is domiciled. (“added”)</p>
<p>(8) by public announcement if none of the above means is feasible, in which case the document shall be deemed to have been served after six months from the date of the public announcement.</p>	<p>If none of the above means is feasible, public announcement shall be made, and the documents shall be deemed to have been served after <b>60 days</b> from the date of announcement.</p>

Obtaining evidence abroad: Article 284 of the new CPL introduces provisions for obtaining evidence from abroad. In addition to the traditional methods of obtaining evidence through treaties or bilateral agreements with the country where the evidence is located, as well as through diplomatic channels, the new provision authorises other means to take evidence abroad, including entrusting Chinese embassy or consulate in the country where the party or witness is located to obtain evidence, obtaining evidence through real-time communication tools with the consent of both parties, and by other means agreed upon by both parties.

#### 4. Recognition and enforcement of foreign judgments and arbitral awards

Requirement for the recognition and enforcement of foreign judgments: Articles 297 and 298 of the new CPL retain the principle of reciprocity as a prerequisite of recognition and enforcement of foreign judgement. They state that foreign judgments should be recognized and enforced in accordance with international treaties that China has concluded or based on the principle of reciprocity. However, the reciprocity principle raises the following issues.

Firstly, the term “reciprocity” is ambiguous, and China’s judicial practice of using the de facto reciprocity has made it difficult for many foreign court judgments to be recognized and enforced in Chinese courts. Secondly, although the “presumed reciprocity” standard has been suggested in the “Opinions of the Supreme People’s Court on Providing Judicial Services and Safeguards for the Belt and Road Initiative” and the “Nanning Declaration” adopted at the Second China-ASEAN Chief Justices’ Roundtable, these documents are not binding and this new standard has limited impact on judicial practice. Further, even if presumed reciprocity is adopted, there may still be arbitrary situations. For example, a foreign court may refuse to recognize a Chinese judgment because that the domestic judgment has already become *res judicata*, but this does not mean that the foreign court will not recognize the Chinese judgment. Nevertheless, the existence of negative precedence may be enough to deny presumed reciprocity.

Notably, Article 49 of the Minutes of the National Symposium on the Foreign-related Commercial and Maritime Trials 2021 establishes a reporting and notification mechanism for recognizing and enforcing foreign court judgments. It requires that in cases where the court needs to examine the application of the reciprocity principle, it should submit the proposed decision to the higher court in its jurisdiction for review. If the higher court agrees with the proposed handling, it should submit its review opinion to the Supreme People’s Court for verification. Only after receiving a response from the Supreme People’s Court can a ruling be made. In March 2022, the Shanghai Maritime Court, after seeking instructions from the Supreme People’s Court, applied the standard of *de jure* reciprocity to determine the existence of reciprocity between China and the United Kingdom in the recognition and enforcement of civil and commercial judgments in the case of *SPAR Shipping Co., Ltd. v. Dalian Xin Hua Logistics Holdings (Group) Co., Ltd.* (2018) Hu 72 Xie Wai Ren 1. This was the first precedent case of reciprocity

recognition by Chinese courts. Subsequently, on December 19, 2022, the High Court of England and Wales issued a summary judgment in the case of Hangzhou J Asset Management Co Ltd & Anor v Kei [2022] EWHC 3265 (Comm), recognizing and enforcing two Chinese judgments. This was the first time that Chinese court judgments were recognized and enforced in the UK. It opens up new possibilities for mutual recognition and enforcement of civil and commercial judgments between China and the UK.

Grounds for refusing to recognize and enforce foreign court judgments: Article 300 of the new CPL stipulates five grounds for refusing to recognize and enforce foreign court judgments. These include: (1) When the foreign court lacks jurisdiction over the case pursuant to Article 301 of the CPL; (2) When the defendant has not been properly served or, even if properly served, has not had a reasonable opportunity to present its case, or when a party lacking litigation capacity has not been adequately represented; (3) When the judgment or ruling was obtained through fraudulent means; (4) When a Chinese court has already rendered a judgment or ruling on the same dispute, or has recognized a judgment or ruling on the same dispute rendered by a court of a third country; (5) When it violates the basic principles of Chinese laws or undermines China's national sovereignty, security, or public interests. The prerequisite for recognizing and enforcing foreign court judgments is that the court rendering the judgment must have jurisdiction over the case.

Article 301 clarifies the three circumstances for determining foreign courts' lack of jurisdiction over a case, namely: (1) the foreign court has no jurisdiction over the case according to its laws, or has jurisdiction according to its laws but lacks an appropriate connection to the dispute; (2) violation of the provisions of the CPL on exclusive jurisdiction; (3) violation of the parties' exclusive choice of court agreement. Among them, the "appropriate connection" requirement in the first provision also echoes the rules for determining special jurisdiction over foreign-related cases under Article 276. Determining appropriate connection will likely be a focus in future foreign civil and commercial litigation disputes.

Article 302 further elucidates the fourth ground for refusing to recognize and enforce judgments. This ground mainly applies to parallel proceedings. According to this provision, the court should review the previously rendered effective foreign court judgment and suspend domestic proceedings. If the foreign judgment meets the requirements for recognition and enforcement, it should be recognized and enforced, and the domestic proceedings should be dismissed. If it does not meet

the requirements for recognition and enforcement, the domestic proceedings should resume. This provision aligns with Article 7(1)(5) and (6) of the HCCH Judgment Convention 2019, which China signed and joined on 2019, but has not yet ratified.

Recognition and enforcement of foreign arbitral awards: A significant change pertaining to arbitration decisions in the new law is that it clearly establishes the “place of arbitration” as the standard for determining the nationality of an arbitration decision. See the table below.

Article 287(2) of the CPL 2022	Article 297(2) of the CPL 2023
<p>Where a party applies for enforcement of an effective arbitration award of an international arbitral institution of China, if the party against whom enforcement is sought or the property thereof is not within China’s territory, the applicant shall apply directly to the foreign court having jurisdiction for recognition and enforcement.</p>	<p>Where a party applies for enforcement of an effective arbitration award <b>which is made within China’s territory</b>, if the party against whom enforcement is requested or its property is not within China’s territory, the applicant may apply directly to the foreign court having jurisdiction for recognition and enforcement.</p>
Article 290 of the CPL 2022	Article 304 of the CPL 2023

<p>Where an arbitration award of a foreign arbitral institution requires recognition and enforcement by a Chinese court, a party shall apply directly to China's intermediate court at the place of domicile of the party against whom enforcement is sought or at the place where the property thereof is located, and the Chinese court shall process the application in accordance with an international treaty concluded or acceded to by China or under the principle of reciprocity.</p>	<p>Where a <b>legally effective arbitral award which is made outside China's territory</b> requires recognition and enforcement by a Chinese court, a party may apply directly to China's intermediate court at the place of domicile of the party against whom enforcement is sought or at the place where the property thereof is located.</p>
	<p>If the domicile of the party against whom the application is made or its property is not within China's territory, the party may apply to the intermediate court of the place where the applicant is domiciled or that has appropriate connection with the dispute adjudicated in the award. (<i>added</i>)</p>
	<p>The Chinese court shall process the application in accordance with an international treaty concluded or acceded to by China or under the principle of reciprocity.</p>

Chinese judicial practice on the nationality of arbitral awards has shifted from the “the location of the arbitral institution” standard to the “place of arbitration” standard. Several landmark cases reflect this change. The new CPL further cements the seat of arbitration standard, aligning with international practices. When parties apply to Chinese courts for recognition and enforcement of arbitration rulings made by foreign arbitration institutions within China, it facilitates their recognition and enforcement. This change not only encourages foreign arbitration institutions to conduct arbitration within China, but is also better enables Chinese courts to exercise judicial supervision.

## 5. Foreign immunity

In this revision of the CPL, a specific provision is added to clarify that in civil litigation involving foreign states, the relevant laws on immunity of foreign states in China shall apply; if no provisions are specified, the CPL shall apply (Art. 305). It is worth noting that the Law on Immunity of Foreign States was promulgated on September 1, 2023, and will be implemented from January 1, 2024. The Law on Immunity of Foreign States primarily stipulates the conditions under which a foreign state can become a defendant in a legal proceeding in China, hence providing a legal basis for when a foreign state cannot claim immunity from the jurisdiction of Chinese courts. On the other hand, the CPL provides the general procedural framework for all civil cases, and determines jurisdictional rules. This includes when and which court in China has the power to hear a case. So, essentially, the CPL determines which specific court has jurisdiction over the case, while the Law on Immunity of Foreign States regulates the separate substantive issue of whether the foreign state defendant is immune from such jurisdiction.

## 6. Conclusion

The 2023 amendments to the CPL have brought about significant improvements to the special provisions governing procedures for foreign-related civil litigation. The new amendment not only takes into account China’s domestic situations but also keeps up with the latest international legislative developments in the field, drawing on the latest achievements in international legislation. Some provisions

have learnt from the latest international framework, such as the HCCH Choice of Court Convention 2005 and HCCH Judgment Convention 2019.

Of course, some new challenges emerge. First, how to define the concept of appropriate connection as a new jurisdiction ground. Second, the asymmetric approach that allows the parties to choose unrelated Chinese courts but requires the chosen foreign court to have practical connection is controversial. Thirdly, the principle of reciprocity as a prerequisite remains a barrier to enforce foreign judgments in China. When the refusal grounds are adopted, which are enough to protect Chinese interests, the requirement of reciprocity becomes unnecessary and redundant. Nonetheless, more clarification will be introduced in practice which hopefully will address some of the above problems.

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**Book Launch: International Child Abduction, Mayela Celis (Madrid: Dykinson, 2023) on 5 October 2023 (in Spanish)**



CONVOCATORIA SESIÓN  
MENSUAL

2023

Presentación del libro:

*“Sustracción Internacional de menores. Estudio jurisprudencial, doctrinal y crítico del Convenio de La Haya de 1980. Aspectos clave y soluciones a los problemas de aplicación”*

**Presentadores:** Jorge Alberto Silva Silva, Nuria González Martín y María Virginia Aguilar.

Ingresarán a la conferencia por medio de Zoom mediante el siguiente enlace:

<https://us02web.zoom.us/j/89498755044?pwd=NmFjQjAxZ2pSTW9tNVlqTC81NmM1dz09IDdeYm91bnQ9PjZlc0pScUo9>

Código de acceso: AMEDIP



**Jueves 5 de octubre**

**14:30 hrs (CDMX)**

Transmisión en vivo por la página de facebook AMEDIPMX



**Dra. María Mayela Celis Aguilar**

Ex Oficial Legal Principal de la Conferencia de La Haya de Derecho Internacional Privado (HCCH)

Investigadora de la Universidad de Maastricht, Países Bajos

Abogada admitida en México y en el estado de Nueva York



ACADEMIA MEXICANA DE  
DERECHO INTERNACIONAL  
PRIVADO Y COMPARADO, A.C.

Atentamente

**Dra. Rosa Elvira Vargas Baca**

Presidenta de la junta de Gobierno de AMEDIP

The Mexican Academy of Private International and Comparative Law (AMEDIP) is holding a webinar on 5 October 2023 at 2:30 pm (Mexico City time), 10:30 pm (Europe, CEST time) to launch the book entitled:

*International Child Abduction: jurisprudential, doctrinal and critical study of the 1980 Child Abduction Convention. Key concepts and solutions to application problems* (Madrid: Dykinson, 2023) 604 pp.

For more information about the book, see our previous post here.

The book will be presented by the author and the following AMEDIP members: Professors Jorge Alberto Silva Silva and Nuria González Martín, as well as the family law attorney María Virginia Aguilar.

The webinar will be held in Spanish and the details are:

Link:

<https://us02web.zoom.us/j/89498755044?pwd=NmFjQjAxZ2pSTW9tNVlqTC81Nm1dz09>

Meeting ID: 894 9875 5044

Password: AMEDIP

Participation is free of charge.

This event will also be streamed live: <https://www.facebook.com/AmedipMX>

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## **Book Launch: Blockchain & Private International Law**

The Series Editors of International and Comparative Business Law and Public Policy are hosting a book launch and cocktail party to celebrate the publication of *Blockchain & Private International Law*, edited by Andrea Bonomi, Matthias Lehmann, and Shaheeza Lalani (reviewed here by Christina Blanchet Valle).

~~The **hybrid event** will take place on **5 October, 5pm Swiss Time**, both at the University of Lausanne, IDHEAP, AULA, and online (Zoom-Link; pw: 832357).~~

***The event had originally been scheduled for 11 October (indicated wrongly above) but has been postponed for logistical reasons. The new date will be advertised shortly.***

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# China Adopts Restrictive Theory of Foreign State Immunity

*Written by Bill Dodge, the John D. Ayer Chair in Business Law and Martin Luther King Jr. Professor of Law at UC Davis School of Law.*

On September 1, 2023, the Standing Committee of the National People's Congress promulgated the Foreign State Immunity Law of the People's Republic of China (FSIL) (English translation [here](#)). When the law enters into force on January 1, 2024, China will join those countries—a clear majority—that have adopted the restrictive theory of foreign state immunity. For the law of state immunity, this move is particularly significant because China had been the most important adherent to the rival, absolute theory of foreign state immunity.

In two prior posts ([here](#) and [here](#)), I discussed a draft of the FSIL (English translation [here](#)). In this post I analyze the final version of the law, noting some of its key provision and identifying changes from the draft, some of which address issues that I had identified. I also explain why analysts who see China's new law as a form of "Wolf Warrior Diplomacy" are mistaken. Contrary to some suggestions, the FSIL will not allow China to sue the United States over U.S. export controls on computer chips or potential restrictions on Tiktok. Rather, the FSIL is properly viewed as a step towards joining the international community on an important question of international law.

## The Restrictive Theory of Foreign State Immunity

Under the restrictive theory of foreign state immunity, foreign states are immune from suits based on their governmental acts (*acta jure imperii*) but not from suits based on their non-governmental acts (*acta jure gestionis*). During the twentieth century many countries moved from an absolute theory of foreign state immunity, under which countries could never be sued in another country's courts, to the restrictive theory. Russia and China long adhered to the absolute theory. But Russia joined the restrictive immunity camp in 2016, when its law on the jurisdictional immunity of foreign states went into effect.

In 2005, China signed the U.N. Convention on Jurisdictional Immunities of States and Their Property, which follows the restrictive theory. But China has not ratified the U.N. Convention, and the Convention has not gained enough signatories to enter into force. As I noted in a prior post, China stated in 2009 that, despite signing the U.N. Convention, its position on foreign state immunity had not changed and that it still followed the absolute theory.

China's new FSIL therefore marks a significant shift in China's position on an important question of international law. As I explained in my earlier posts and discuss further below, the FSIL follows the U.N. Convention in many respects. By adopting this law, however, China has extended these rules not only to other countries that may join the Convention but to all countries, even those like the United States that are unlikely ever to sign this treaty.

## Significant Provisions of the State Immunity Law

China's FSIL begins, as most such laws do, with a general presumption that foreign states and their property are immune from jurisdiction. Article 3 says: "Foreign states and their property enjoy immunity from the jurisdiction of PRC courts, except as otherwise provided by this Law." Article 2 defines "foreign states" to include "foreign sovereign states," "state organs or constituent parts of foreign sovereign states," and "organizations or individuals who are authorized by foreign sovereign states to exercise sovereign authority and who engage in activities on the basis of such authorization." These provisions generally track Articles 1 and 2(1)(b) of the U.N. Convention.

### Waiver Exception

Articles 4-6 of the FSIL law provide that a foreign state is not immune from jurisdiction when it has consented to the jurisdiction of Chinese courts. Article 4 sets forth means by which a foreign state may expressly consent to jurisdiction. Article 5 provides that a foreign state is deemed to consent if it files suit as a plaintiff, participates as a defendant and files "an answer or a counterclaim on the merits of the case," or participates as a third party in Chinese courts. Article 5 further provides that a foreign state participating as a plaintiff or third party waives immunity from counterclaims arising from the same legal relationship or

facts. Article 6, on the other hand, says that a foreign state shall not be deemed to have consented to jurisdiction by appearing in Chinese court to assert immunity, by having its representatives testify, or by choosing Chinese law to govern a particular matter. These provisions track Articles 7-9 of the U.N. Convention.

## Commercial Activities Exception

The FSIL also contains a commercial activities exception. Article 7 provides that a foreign state shall not be immune from proceedings arising from commercial activities when those activities “took place in PRC territory, or have had a direct effect in PRC territory even though they took place outside PRC territory.” Article 7 defines “commercial activity” as “transactions of goods or services, investments, borrowing and lending, and other acts of a commercial nature that do not constitute an exercise of sovereign authority.” To determine whether an act is commercial, “a PRC court shall undertake an overall consideration of the act’s nature and purpose.” Like the U.N. Convention, the FSIL deals separately with employment contracts (Article 8) and intellectual property cases (Article 11).

Article 7’s reference to both “nature and purpose” is significant. U.N. Convention Article 2(2) allows consideration of both. But considering “purpose” is likely to result in a narrower exception—and thus in broader immunity for foreign states—than considering “nature” alone. Under the U.S. Foreign Sovereign Immunities Act (FSIA), the commercial character of an act is determined only by reference to its nature and not by reference to its purpose. Applying this definition, the U.S. Supreme Court has held that issuing foreign government bonds is a commercial activity, even if done for a sovereign purpose. It is unclear if Chinese courts applying the FSIL will reach the same conclusion.

## Territorial Tort Exception

Article 9 of the FSIL creates an exception to immunity for claims “arising from personal injury or death or damage to movable or immovable property caused by the relevant act of the foreign state in PRC territory.” This generally tracks Article 12 of the U.N. Convention.

## Property Exception

Article 10 of the FSIL creates an exception to immunity for claims involving

immoveable property in China, interests in moveable or immoveable property arising from gifts, bequests, or inheritance, and interests in trust property and bankruptcy estates. This provision closely follows Article 13 of the U.N. Convention.

## Arbitration Exception

Article 12 provides that a foreign state that has agreed to arbitrate disputes is not immune from jurisdiction with respect to certain matters requiring review by a court. These include “the validity of the arbitration agreement,” “the confirmation or enforcement of the arbitral award,” and “the setting aside of the arbitral award.” This provision corresponds to Article 17 of the U.N. Convention.

## Reciprocity Clause

China’s FSIL also contains a reciprocity clause. Article 21 provides: “Where foreign states accord the PRC and its property narrower immunity that is provided by this Law, the PRC will apply the principle of reciprocity.” This means, for example, that Chinese courts could hear claims against the United States for expropriations in violation of international law or for international terrorism, because the U.S. FSIA has exceptions for such claims, even though China’s FSIL does not.

The U.N. Convention does not have a reciprocity provision. Nor do most other states that have codified the law of state immunity. But Russia’s 2016 law on the jurisdictional immunities of foreign states does contain such a clause in Article 4(1), and Argentina’s state immunity law contains a reciprocity clause specifically for the immunity of central bank assets, reportedly adopted at China’s request.

The FSIL’s reciprocity clause is consistent with the emphasis on reciprocity that one finds in other provisions of Chinese law. For example, Article 289 of China’s Civil Procedure Law (numbered Article 282 in this translation, prior to the law’s 2022 amendment of other provisions), provides for the recognition and enforcement of foreign judgments “pursuant to international treaties concluded or acceded to by the People’s Republic of China or in accordance with the principle of reciprocity.”

The example of foreign judgments also shows that reciprocity may be interpreted

narrowly or broadly. China used to insist on “de facto” reciprocity for foreign judgments—proof that the foreign country had previously recognized Chinese judgments. Last year, however, China shifted to a more liberal “de jure” approach, under which reciprocity is satisfied if the foreign country *would* recognize Chinese judgments even if it has not already done so. Time will tell how Chinese courts interpret reciprocity under the FSIL.

## Service

Article 17 of the FSIL provides that Chinese courts may serve process on a foreign state as provided in treaties between China and the foreign state or by “other means accepted by the foreign state and not prohibited by PRC law.” (The United States and China are both parties to the Hague Service Convention, which provides for service through the receiving state’s Central Authority.) If neither of these means is possible, then service may be made by sending a diplomatic note. A foreign state may not object to improper service after it has made a pleading on the merits. This provision also follows the U.N. Convention closely, specifically Article 22.

## Default Judgments

If the foreign state does not appear, Article 18 of China’s draft law requires a Chinese court to “sua sponte ascertain whether the foreign state enjoys immunity from its jurisdiction.” The court may not enter a default judgment until at least six months after the foreign state has been served. The judgment must then be served on the foreign state, which will have six months to appeal. Article 23 of the U.N. Convention is similar but with four-month time periods.

## Immunity of Property from Execution

Under customary international law, the immunity of a foreign state’s property from compulsory measures like execution of a judgment is separate from—and generally broader than—a foreign state’s immunity from suit. Articles 13-15 of the FSIL address the immunity of a foreign state’s property from compulsory measures.

Article 13 states the general rule that “[t]he property of a foreign state enjoys immunity from the judicial compulsory measures of PRC courts” and further

provides that a foreign state's waiver of immunity from suit is not a waiver of immunity from compulsory measures. Article 14 creates three exceptions to immunity: (1) when the foreign state has expressly waived such immunity; (2) when the foreign state has specifically earmarked property for the enforcement of such measures; and (3) "to implement the effective judgments and rulings of PRC courts" when the property is used for commercial activities, relates to the proceedings, and is located in China. Article 15 goes on to identify types of property that shall *not* be regarded as used for commercial activities for the purpose of Article 14(3), including the bank accounts of diplomatic missions, property of a military character, central bank assets, and property of scientific, cultural, or historical value.

As discussed further below, the addition of "rulings" (??) to Article 14(3) is significant because Chinese court decisions that recognize foreign judgments are considered "rulings." This change means that the exception may be used to enforce *foreign* court judgments against the property of a foreign state located in China by obtaining a Chinese court ruling recognizing the foreign judgment. This change brings the FSIL into greater alignment with Articles 19-21 of the U.N. Convention, which similarly permit execution of domestic and foreign judgments against the property of foreign states.

## Foreign Officials

As noted above, Article 2 of the FSIL defines "foreign state" to include "individuals who are authorized by foreign sovereign states to exercise sovereign authority and who engage in activities on the basis of such authorization." The impact of the FSIL on foreign official immunity is limited by Article 20, which says that the FSIL shall not affect diplomatic immunity, consular immunity, special-missions immunity, or head of state immunity. But Article 20 makes no mention of conduct-based immunity—that is, the immunity that foreign officials enjoy under customary international law for acts taken in their official capacities.

Thus, foreign officials not mentioned in Article 20 will be subject to suit in Chinese courts, even for acts taken in their official capacities, if one of the exceptions discussed above applies. If, for example, a foreign official makes misrepresentations in connection with a foreign state's issuance of bonds, the FSIL's commercial activities exception would seem to allow claims for fraud not just against the foreign state but also against the foreign official.



The FSIL's treatment of foreign officials generally tracks the U.N. Convention, both in defining "foreign state" to include foreign officials (Art. 2(1)(b)(iv)) and in exempting diplomats, consuls, and heads of state (Art. 3). But, as I noted in an earlier post, there is no reason China had to follow the U.N. Convention's odd treatment of conduct-based immunity. Doing so in the absence of a treaty, moreover, appears to violate international law by affording some foreign officials less immunity than customary international law requires.

## Some Changes from the Draft Law

The NPC Standing Committee made small but potentially significant changes to the draft law in promulgating the FSIL. The NPC Observer has a helpful chart comparing the Chinese text of the final version to the draft law.

One change that others have noted is the explicit mention of "borrowing and lending" (??) in the commercial activities exception in Article 7. The enormous amounts that China has loaned to foreign states under the Belt and Road Initiative may explain this addition. But the practical effect of the change seems limited for two reasons. First, "borrowing and lending" would have naturally fallen into the catch-all phrase "other acts of a commercial nature" in any event. Second, as noted above, Article 7 instructs Chinese courts to "undertake an overall consideration of the act's nature and purpose." Considering an act's purpose may lead Chinese courts to conclude that some "borrowing and lending" involving foreign states is not commercial if it is done for governmental purposes.

The NPC Standing Committee also helpfully changed Article 9's territorial tort exception to clarify when that exception applies. In an earlier post, I wrote that the draft law did "not make clear whether it is the tortious act, the injury, or both that must occur within the territory of China." The final text of the FSIL now clearly states that the relevant conduct of the foreign state, though not the injury, must occur within China (????????????? ??????????????????). This position is generally consistent with Article 12 of the U.N. Convention but, most importantly, it is simply clearer than the text of the draft law.

Another small but important change is the addition of "rulings" (??) to Article 14(3)'s exception for compulsory measures to enforce judgments. The corresponding provision in the draft law referred to Chinese "judgments" (??) but not to "rulings." As I pointed out before, this omission was significant because

Chinese decisions recognizing foreign court decisions are designated “rulings” rather than “judgments.” Under the draft law, the exception would have allowed execution against the property of a foreign state for Chinese court judgments but not for Chinese rulings recognizing foreign judgments. By adding “rulings” to the final text of the FSIL, the NPC Standing Committee has brought this exception more in line with Article 19(c) of the U.N. Convention and made it available to help enforce foreign judgments against foreign-state-owned property in China if the other requirements of the exception are met.

In another change from the draft law, the NPC Standing Committee has added “PRC Courts” (?????????) to the beginning of Article 17 on service of process. The general practice in China is that courts, rather than litigants, serve process. This is one reason why the practice of some U.S. courts to authorize alternative service on Chinese defendants by email is problematic. For present purposes, the change simply clarifies something that Chinese practitioners would take for granted but non-Chinese practitioners might not.

Article 20 provides that the FSIL does not affect the immunities of certain foreign officials. In its second paragraph, dealing with head-of-state immunity, the NPC Standing Committee has added “international custom” (?????) as well as “PRC laws” and “international agreements.” This makes sense. Although diplomatic immunity, consular immunity, and other immunities mentioned in the first paragraph of Article 20 are governed by treaties, head-of-state immunity is governed not by treaty but by customary international law.

Finally, in Article 21’s reciprocity provision, the NPC standing committee has eliminated the word “may” (?). The effect of this change is to make the application of reciprocity mandatory when foreign states accord China and its property narrower immunity than is provided by the FSIL.

## The Impact on China-U.S. Relations

Recent media coverage has suggested that China views the FSIL as a legal tool in its struggle with the United States. A senior official in China’s Ministry of Foreign Affairs was quoted as saying that the law “provides a solid legal basis for China to take countermeasures” against discriminatory action by foreign courts and may have a “preventive, warning and deterrent” effect. One analyst has even suggested that the FSIL is “an important part of China’s Wolf Warrior diplomacy,

and another step forward in its diplomatic bullying of other countries.” Such comments miss the mark. As Professor Donald Clarke aptly observes: “All China is doing is adopting a policy toward sovereign immunity that is the one already adopted by most other states.”

Professor Sophia Tang points out that, although suits against China in U.S. courts over Covid-19 pushed the issue of state immunity up on Chinese lawmakers’ agenda, the question had been under discussion for years. The Covid-19 lawsuits may explain why China included Article 21’s provision on reciprocity, but it bears emphasis that these suits against China were *dismissed* by U.S. courts on grounds of state immunity. If Congress were foolish enough to amend the FSIA to permit such suits, the FSIL’s reciprocity provision would allow China to respond in kind, but this scenario seems unlikely.

China’s FSIL will not permit suits against the United States for other actions that China has protested, such as U.S. export controls on selling semiconductors to China or potential restrictions on TikTok. These are governmental actions, and the restrictive theory adopted by the FSIL maintains state immunity for governmental actions.

On the other hand, the FSIL clearly will permit suits in Chinese courts against foreign governments that breach commercial contracts. As Professor Congyan Cai points out, the FSIL may play a role in enforcing contracts with foreign governments under China’s Belt and Road Initiative. More generally, Clarke notes, China’s past adherence to the absolute theory meant that Chinese parties could not sue foreign states in Chinese courts even though foreign parties could sue China in foreign courts. “China finally decided,” he continues, “that there was no point in maintaining the doctrine of absolute sovereignty, since other states weren’t respecting it in their courts and the only people it was hurting were Chinese plaintiffs.”

Ultimately, the FSIL is a step in what Professor Cai has called China’s “progressive compliance” with international law, which helps legitimate China as a rising power. The FSIL brings Chinese law into alignment with the law on state immunity in most other countries, ending its status as an outlier in this area.

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

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# “Quasi” Anti-Suit Injunctions and Public Policy under Brussels Regime

## THE CJEU: “QUASI” ANTI-SUIT INJUNCTION JUDGMENTS ARE AGAINST PUBLIC POLICY UNDER BRUSSELS REGIME

*This post is written by Mykolas Kirkutis, a lecturer and PhD student of law at Mykolas Romeris University and visiting researcher at Rotterdam Erasmus School of Law, Erasmus University Rotterdam (EU Civil Justice group).*

The Court of Justice of European Union (CJEU) on 7 of September 2023 in its newest case *Charles Taylor Adjusting Limited, FD v Starlight Shipping Company, Overseas Marine Enterprises Inc.* (case No. C-590/21) 2023 rendered a new preliminary ruling related to a non-recognition of “Quasi” anti-suit injunctions’ judgment under public policy ground of Brussels regime. This case is important because of two aspects. Firstly, CJEU clarified the main elements of “Quasi” anti-suit injunctions’ judgments. Secondly, Court stated what impact such judgments have for mutual trust in EU and if it can be safeguarded by public policy ground.

### **Facts of the case and preliminary question**

The case concerns the maritime accident and dispute deriving from it. In connection with the sinking of a ship owners of the ship (Starlight and OME) demanded the insurers of that ship to pay an insurance claim based on their insurance contracts. After the insurers refused to pay a compensation, Starlight filed a claim against of the insurers to the UK courts and commenced another proceedings against another insurer in arbitration. While the legal action and arbitration were pending, Starlight, OME and the insurers concluded the settlement agreements in the UK court. According to the settlement agreement, it shall end parties’ dispute and insurers had to pay the insurance benefit. The settlement agreements have been approved by the UK court.

Following the conclusion of the settlement agreements, the owners of the vessel (Starlight and OME with the other owners) brought several legal actions before the court in Greece for compensation of material and non-material damage. Legal actions were based insurers and their representatives liability on the publication of false and defamatory statements about the owners at a time when the initial proceedings for the payment of the insurance claim. These actions were based on the fact that the insurers' agents and representatives had informed the National Bank of Greece (the mortgage creditor of one of the shipowners) and had spread false rumours in the insurance market that the ship had sunk due to serious defects of which the shipowners were aware.

While those new legal actions before the Greece court were pending, the insurers of the vessel and their representatives brought another legal actions against Starlight and OME before the UK courts seeking a declaration that those new actions, instituted in Greece, had been brought in breach of the settlement agreements, and requesting that their applications for 'declarative relief and compensation' be granted. The High Court of Justice (England & Wales) on 26 September 2014 (while legal actions before the Greece court were pending) rendered judgment and orders by which the insurers and their representative's obtained compensation in respect of the proceedings instituted in Greece and payment of their costs incurred in England.

After that the issue of non-recognition of these UK court judgment and orders has come before the Greece courts. The Supreme Court of Greece deciding on the question of non-recognition of UK courts judgment and order refered to the CJEU for a preliminary ruling. The main question, which was referred to the CJEU was whether recognition and enforcement of a judgment of a court of another Member State may be refused on grounds of public policy on the ground that it obstructs the continuation of proceedings pending before a court of another Member State by awarding one of the parties interim damages in respect of the costs incurred by that party in bringing those proceedings.

### **Elements of "Quasi" anti-suit injunctions' judgment**

First, in its preliminary judgment the CJEU clarified the elements of the "Quasi" anti-suit injunctions' judgment. Court noted, that in the context of an 'anti-suit injunction', a prohibition imposed by a court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court

undermines the latter court's jurisdiction to determine the dispute. When a court order prohibits a plaintiff from bringing an action before a court in another country, the order constitutes a restriction on the jurisdiction of the court in the other country, which is not compatible with the Brussels regime.

However, it is clear from this CJEU judgment that it is not essential that a prohibition to bring an action before a court of another State would be expressed directly in the such judgment to qualify it "Quasi" anti-suit injunctions' judgment. In this case, the judgment and orders of the UK court did not prohibited to bring an action before the courts of another State (Greece) *expressis verbis*. Although, that judgment and those orders contained grounds relating to the breach settlement agreements, the penalties for which they will be liable if they fail to comply with that judgment and those orders and the jurisdiction of the Greece courts in the light of those settlement agreements. Moreover, that judgment and those orders also contained grounds relating to the financial penalties for which Starlight and OME, together with the natural persons representing them, will be liable, in particular a decision on the provisional award of damages, the amount of which is not final and is predicated on the continuation of the proceedings before the Greece courts.

It is clear from paragraph 27 of the preliminary judgment of CJEU that, in order for a particular judgments of a another Member State to qualify them as a "quasi" anti-suit injunctions' judgments it is enough that they may be regarded as having, at the very least, the effect of deterring party from bringing proceedings before the another Member State courts or continuing before those courts an action the purpose of which is the same as those actions brought before the courts of the United Kingdom. A court judgment with such consequences is contrary to the objectives of the Brussels regime. This leads to the conclusion that such judgment cannot be enforced in another Member states, because it contradicts to mutual trust on which Brussels regime is based.

### **"Quasi" anti-suit injunctions', Mutual Trust and Public Policy**

Secondly, the CJEU considered whether such judgment can be not recognised on the ground of public policy. This means that court had to answer whether mutual trust and the right to access a court fall within the scope of the public policy clause. Court noted that such "quasi" anti-suit injunctions' run counter to the trust which the Member States accord to one another's legal systems and judicial

institutions and on which the system of jurisdiction under Brussels I Regulation (as well as under Brussels Ibis Regulation) is based.

As well as, the CJEU ruled that the recognition and enforcement of the judgment and orders of the High Court of Justice (England & Wales) may breach public policy in the legal order of the Member State in which recognition and enforcement are sought, inasmuch as that judgment and those orders are such as to infringe the fundamental principle, in the European judicial area based on mutual trust, that every court is to rule on its own jurisdiction. Furthermore, that type of “quasi” anti-suit injunction’ is also such as to undermine access to justice for persons on whom such injunctions are imposed.

The CJEU decided that Article 34(1) of Regulation No 44/2001, read in conjunction with Article 45(1) thereof, must be interpreted as meaning that a court or tribunal of a Member State may refuse to recognise and enforce a judgment of a court or tribunal of another Member State on the ground that it is contrary to public policy, where that judgment impedes the continuation of proceedings pending before another court or tribunal of the former Member State, in that it grants one of the parties provisional damages in respect of the costs borne by that party on account of its bringing those proceedings on the grounds that, first, the subject matter of those proceedings is covered by a settlement agreement, lawfully concluded and ratified by the court or tribunal of the Member State which gave that judgment and, second, the court of the former Member State, before which the proceedings at issue were brought, does not have jurisdiction on account of a clause conferring exclusive jurisdiction.

## **Conclusion**

The above mentioned CJEU preliminary ruling leads to two findings. First, public policy ground includes both the principle of a EU judicial area which is based on mutual trust and the right to access a court, which is an important and fundamental principle of EU law. And second, that “Quasi” anti-suit injunctions’ are against the purpose of Brussels regime, therefore such judgments can be non-recognized in another Member States on the basis of public policy clause.

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# New Volume of the Japan Commercial Arbitration Journal

The Japan Commercial Arbitration Association (JCAA), one of the oldest international arbitration institutions in the world, founded in 1950, has started to publish its annual journal on commercial arbitration - "Japan Commercial Arbitration Journal" - entirely in English. The Journal's Volume 4, which has been published recently, features the following articles:



Miriam Rose Ivan L. Pereira

Combining Interactive Arbitration with Mediation: A Hybrid Solution under the Interactive Arbitration Rules

Masaru Suzuki, Shinya Sakuragi

The Use of Technology in the International Commercial Arbitration and the Consideration of Rulemaking

Kazuhisa Fujita

Current Status of International Arbitration from the Perspective of Corporate Law



and Japan as the Place of Arbitration

Dai Yokomizo

International Commercial Arbitration and Public Interests: Focusing on the Treatment of Overriding Mandatory Rules

Yuji Yasunaga

Extending the Application of an Arbitration Agreement Involving a Corporation to Include its Representative

Kazuhiro Kobayashi

Scope, Amount and Sharing of Arbitration Expenses and Court Costs in Japan

Leon Ryan, Shunsuke Doman

Disputes in India ? Lessons from Mittal v Westbridge

Junya Naito, Motomu Wake

Potential for a New Arb-Med in Japan

Yoshihiro (Yoshi) Takatori

Arbitrator Training and Assessment ? How to Increase and Strengthen Resource of Arbitrators and ADR Practitioners

Shuji Yanase

On Dual Conciliation by Two Conciliators

Takeshi Ueda

Discussions and Challenges in Promoting Online Dispute Resolution

Shinji Kusakabe

Civil Litigation after the Introduction of IT, as Suggested by Scheduled Proceedings in Commercial Arbitration

All volumes can also be freely consulted and downloaded here.

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# **Book Launch: Governance of Artificial Intelligence in the European Union What Place for Consumer Protection?**

Marion Ho-Dac (Artois University) and Cécile Pellegrini (Lyon Catholic University) are hosting a conference at Lyon Catholic University on Friday 29 September 2023 on the occasion of the launch of their book “Governance of Artificial Intelligence in the European Union What Place for Consumer Protection?”.

*The book tackles the interplay between Artificial Intelligence (AI) governance and consumer protection on the European Union (EU) market. An in-depth analysis of the existing and future EU legal framework is conducted in order to assess its capacity to meet the challenges posed by AI. The effectiveness of consumer*

*rights, and more widely of fundamental rights, in the digital single market calls for a regulatory ecosystem that fosters trust and therefore, upstream, transparency and explainability of AI systems. Hence, the book explores different normative paths – from hard law to standardization – as well as monitoring and supervision tools – from ethics to media literacy – that could progressively lead to an inclusive and comprehensive EU governance structure for AI. Several book’s chapters highlight the complexity of balancing conflicting interests such as the protection of consumers against the adverse impacts of AI, supporting AI development and technological innovation and putting AI at the service of empowered consumers. Ultimately, the book offers important insights into thinking about tomorrow’s digital consumer in EU law, inviting a rethinking of European policy boundaries and related legal regimes.*

The full programme for the event can be found [here](#).

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# **International high-tech surrogacy and legal developments in the Netherlands**

This blogpost is an edited version of this blogpost written in Dutch by Stichting IJI (The Hague Institute for private international law and foreign law). We thought it was interesting to also bring it to the attention of the international readership of this blog.

## **Introduction**

In the Netherlands, international high-tech surrogacy is a hot topic, resulting in interesting legal developments. Recently, a Dutch District Court dealt with a case on the recognition of US court decisions on legal parenthood over children born from a high-tech surrogacy trajectory in the US, providing many private international law insights on how to assess such request for recognition. Furthermore, on July 4 a bill was proposed that encloses several private

international law provisions. This blogpost briefly highlights both developments.

## **High-tech surrogacy in the Netherlands**

In the Netherlands, high-tech surrogacy - this involves the use of in vitro fertilization (ivf), often with the use of an ovum of a woman other than the surrogate mother - has been allowed (decriminalized) since 1997, but under strict conditions. Important conditions include having a medical reason and medical, psychological and legal information and counseling. It should be noted that commercial surrogacy is illegal.

It is not well tracked how often surrogacy occurs in the Netherlands. The Dutch government estimates that there are several dozen occurrences annually, but indicates that the number is increasing.

## **High-tech surrogacy abroad**

Because, i.a., there are not always (enough) surrogate mothers to be found in the Netherlands, it occurs that some intending parents search for a surrogate mother abroad. Surrogacy is treated differently abroad, to which roughly three variations apply:

1. Surrogacy is prohibited (e.g. Germany and France);
2. Surrogacy is allowed, through a legal framework with either various safeguards (counseling, legal assistance, judicial review etc.) or rules that provide for the legal parenthood of the intended parents. Thereby, as far as legal parenthood at birth is concerned, roughly two alternatives can be distinguished. For example, the surrogate mother is regarded as the legal mother and her husband or partner as the legal father. But there are also countries where the intended parents are considered to be the legal parents from the birth of the child;
3. There is no specific regulation in place for surrogacy and existing legal regulations are applied by analogy or not (e.g. Belgium and the Netherlands).

In case intended parents enter into a surrogacy trajectory abroad, all kinds of private international law issues arise in the Netherlands regarding, among others, the legal parenthood of the intended parents.

## **District Court decision of January 13, 2023**

Early in 2023, said private international law issues arose before the District Court of The Hague (ECLI:NL:RBDHA:2023:363). The court had to rule on several requests by two married men (hereinafter: husband X and husband Y) regarding legal parenthood over children born from a surrogacy trajectory in the US.

The surrogate mother became pregnant with twins following ivf treatment in the US. Two embryos were transferred to her, using sperm from husband X and an ovum from an ovum donor, and sperm from husband Y and an ovum from an ovum donor. The couple applies in the Netherlands for, among other things, recognition of several court decisions on legal parenthood issued in the US, including a decision on denial of paternity, denial of maternity and establishment of paternity, and a decision on custody.

The District Court ruled that the court decisions from the US could be recognized in the Netherlands, with an extensive assessment of the public policy exception and the question of whether there was a diligent surrogacy trajectory.

## **Dutch bill of July 4, 2023 to regulate (international) surrogacy**

On July 4, 2023, a bill was proposed in the Netherlands. This bill introduces rules for granting parenthood after surrogacy within the Netherlands and further holds rules for recognising parenthood after surrogacy from abroad. The bill indicates there will be a standard for 'responsible surrogacy' that intended parents should consider when choosing a surrogacy route both domestically and abroad. If certain conditions are met and the court has given its consent prior to conception, the intended parents will be considered the legal parents from birth. The bill also provides a specific recognition scheme for decisions made abroad, in which family law relations following surrogacy have been established or modified between the child and the intended parents. Important here is that the surrogacy process has been diligent. The standard will be that comparable requirements have been met that are also set for a 'national' surrogacy trajectory.