Reciprocity and the Enforcement of Foreign Judgments in Egypt – A Critical Assessment of a Recent Supreme Court Decision



I. Introduction

Reciprocity is probably one of the most controversial requirements in the field of the recognition and enforcement of foreign judgments. While its legitimacy appears to be on the wane (see Béligh Elbalti, "Reciprocity and the Recognition and Enforcement of Foreign Judgments: A Lot of Bark but Not Much Bite," 13 JPIL 1 (2017) 184), reciprocity can still strike hard – particularly when it is applied loosely and without sufficient consideration.

The case presented here, decided by the Egyptian Supreme Court (Appeal No. 11434 of 21 June 2025), provides a good illustration. Despite the Court's well-established case law imposing certain restrictions on the use of the reciprocity requirement, this recent judgment shows that, when not applied with the

necessary rigor, reciprocity can still produce significant effects that undermine the legitimate expectations of the parties.

II. Facts

The case concerned the enforcement of a Canadian divorce judgment rendered in Quebec, ordering the appellant (Y) to pay a specified sum of money with interest.

X, in whose favor the judgment was issued, sought to have the Canadian judgment enforced in Egypt. The Court of First Instance rejected the claim. X then appealed to the Court of Appeal, which overturned the first-instance judgment and ordered the enforcement of the Canadian decision.

Dissatisfied with this outcome, Y brought an appeal before the Supreme Court.

In support of his appeal, Y argued that the Court of Appeal had ordered the enforcement of the Canadian judgment without establishing the existence of any legislation in Canada permitting the enforcement of Egyptian judgments there, as required under Article 296.

III. The Ruling (Summary)

> *It is established in the case law of this Court that Article 296 of the Code of Civil Procedure makes clear that the rule is founded on the principle of reciprocity or mutual treatment. Accordingly, foreign judgments in Egypt must receive the same treatment that Egyptian judgments receive in the foreign country whose judgment is sought to be enforced. In this respect, the legislature limited the requirement to legislative reciprocity and did not require diplomatic reciprocity established by treaty or convention. The court must ascertain the existence of legislative reciprocity on its own initiative.*
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> *In the present case, the Court of Appeal ordered the enforcement of the Canadian decision on the basis that a foreign judgment may be relied upon before Egyptian courts so long as no Egyptian judgment between the same parties on the same matter has been issued and become enforceable, without determining whether any convention exists between Egypt and Canada concerning the enforcement of judgments that provides for reciprocity, as*

required under Article 296 of the Code of Civil Procedure.

This constitutes a violation of the law and requires that the judgment be quashed and the case remanded.

IV. Comments

The Court's decision raises significant concerns.

First, the Supreme Court appears to contradict itself. After reiterating its longstanding position that "diplomatic reciprocity" – that is, reciprocity established through a treaty – is not required under Egyptian law, it nevertheless held that reciprocity with Canada was not established because the Court of Appeal did not determine whether any convention with Canada exists. This is not the first time the Court has adopted such reasoning. In a previous case decided in 2015, the Supreme Court relied on a similar approach when evaluating the enforcement of a Palestinian judgment (*Appeal No. 16894 of 4 June 2015*). Such reasoning is difficult to reconcile with the Court's own affirmation that treaty-based reciprocity is irrelevant under Article 296.

Second, the Court's ruling is inconsistent not only with the prevailing view in the literature (for an overview, see Karim El Chazli, "Recognition and Enforcement of Foreign Decisions in Egypt," 15 *YBPIL* (2013/2014) 400–401), but also with the Court's prior stance affirming reciprocity on the basis of "legislative reciprocity". Under this approach, reciprocity exists if, according to the enforcement law of the State of origin, Egyptian judgments would be enforceable there. Indeed, in earlier cases, the Court conducted a comparative analysis of the enforcement requirements under the law of the State of origin and under Egyptian law, and concluded that reciprocity was satisfied when the two sets of requirements were broadly comparable (see, e.g., *Appeal No. 1136 of 28 November 1990*, admitting reciprocity with Yemen; *Appeal No. 633 of 26 February 2011* and *Appeal No. 3940 of 15 June 2020*, both admitting reciprocity with Palestine). In addition, in some cases involving the recognition or enforcement of judgments rendered in a country with which Egypt has not concluded any international convention, the Supreme Court did not examine the issue of reciprocity as required under Article 296 of the Code of Civil Procedure, nor did it invoke it *sua sponte* as the Court has

repeatedly affirmed. Instead, it directly examined the requirements for recognition or enforcement under the conditions laid down in Article 298 of the Code of Civil Procedure (see, e.g., *Appeal No. 2014 of 20 March 2003* regarding the enforcement of a New Jersey judgment ordering the payment of damages resulting from breach of contract; *Appeals No. 62 and 106 of 25 May 1993* regarding the recognition of a Californian divorce judgment. In both cases, however, recognition and enforcement were rejected, *inter alia*, on the ground of public policy).

Third, the Court's stance in this case is likely to create more problems than it solves. Even setting aside the contradiction noted above, the Court gave no indication on how "legislative reciprocity" should be established when the foreign judgment originates from a federated province or a state within a federal system, each having its own autonomous legal regime (on the difficulty of establishing reciprocity emanating from federal states, notably the United States, see Béligh Elbalti, "La Réciprocité en matière de réception des décisions étrangères en droit international privé tunisien – observations critiques de la décision de la Cour d'appel de Tunis n°37565 du 31 janvier 2013" 256/257 *Infos Juridiques* (mars-2018) 20 (Part I), 258/259, *Infos Juridiques* (avril-2018) 18 (Part II)).

The situation of Canada is particularly striking. In Quebec, where a civil-law approach prevails in the field of private international law, the rules on the recognition and enforcement of foreign judgments are comprehensively codified (see Gérald Goldstein, "The Recognition and Enforcement of Foreign Decisions in Québec," 15 *YBPIL* (2013/2014) 291) and differ substantially from those applicable in the common-law provinces (see Geneviève Saumier, "Recognition and Enforcement of Foreign Judgments in Canadian Common Law Provinces," 15 *YBPIL* (2013/2014) 313). If the Court insists on applying the criterion of "legislative reciprocity," how are Egyptian courts to assess reciprocity in relation to a province such as Quebec? Would it be sufficient that Egyptian judgments are enforceable in another Canadian province where enforcement is governed by common-law principles? Does it matter that, in the common-law provinces, recognition and enforcement are not codified and are largely based on case law? And if, as would be expected, "legislative reciprocity" had to be established by reference to Quebec law, would it be relevant that under Quebec law, reciprocity is not a requirement for the recognition and enforcement of foreign judgments at all? In this respect, Egyptian courts would be well advised to consider the

generous approach followed in Tunisia, whereby the Supreme Court established a presumption in favor of reciprocity, placing the burden on the party challenging enforcement to prove its non-existence (for details, see Béligh Elbalti, "La réciprocité en matière d'exequatur?: Quoi de nouveau?? Observations sous l'arrêt de la Cour de cassation n° 6608 du 13 mars 2014"published in *Arab Law Quarterly* (2025) as an online-first publication. For an overview from a comparative perspective in the MENA Arab jurisdictions, see Béligh Elbalti, "Perspective from the Arab World", *in* M. Weller et al. (eds.), *The HCCH 2019 Jugements Convention – Cornerstones, Prospects; Outlook* (Hart, 2023) 193-194).

Finally, this case, along with several others concerning the enforcement of foreign judgments, illustrates the difficulty of enforcing such judgments in Egypt in the absence of an applicable treaty (for recent examples, see *Appeal No. 25178 of 17 November 2024*, which rejected the enforcement of an Irish judgment on the ground of public policy, and *Appeal No. 3493 of 4 December 2024*, which rejected the enforcement of an Austrian judgment because the various conditions laid down in Article 298 were not satisfied). By contrast, where a bilateral convention exists, enforcement is generally somewhat easier (see, e.g., *Appeal No. 200 of 14 May 2005*, which allowed the enforcement of a French custody judgment pursuant to the bilateral convention between the two countries; but *contra*, *Appeal No. 719 of 8 October 2013*, which rejected the enforcement of a similar French judgment).

It must be admitted, however, that the conclusion of such a convention does not necessarily guarantee smoother enforcement (see, for instance, my previous comments on the enforcement of judgments rendered in Saudi Arabia and Kuwait, available on this Blog here and here).

The WTO TRIPS Agreement and

Conflict-of-Laws Rules in Intellectual Property Cases

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It is neither new nor surprising that international treaties affect the design and application of conflict-of-laws rules; not only international conventions on private international law but also other international treaties shape conflicts rules, with human rights treaties being the primary example. But a recent decision concerning the interpretation of the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement") could have profound and arguably unprecedented effects on the conflict rules that are applied in intellectual property ("IP") cases, such as cross-border cases concerning copyright infringement, trademark ownership, and patent licenses.

In July 2025, an arbitration panel decided in a WTO dispute between the European Union and China that the Chinese anti-suit injunction policy that led Chinese courts to issue anti-suit injunctions in disputes involving standard-essential patents violated the TRIPS Agreement (*China—Enforcement of Intellectual Property Rights*, WTO, Award of Arbitrators, WT/DS611/ARB25, 21 July 2025). The decision, which concerned the Chinese version of anti-suit injunctions, which are referred to as "behavior preservation orders," was rendered on appeal from a panel report from April 2025. In the absence of a functioning WTO Appellate Body, the appellate decision was rendered under the alternative Multi-Party Interim Appeal Arbitration Arrangement that was concluded pursuant to Article 25 of the WTO dispute settlement understanding.

The EU complaint to the WTO in the case was certainly not the first, or the only, attack on anti-suit injunctions that national courts have issued in patent cases in order to stop parties from litigating in parallel in foreign jurisdictions. Opponents of anti-suit injunctions have been successful, for example, in the Paris Court of Appeal and in the Munich Local Division of the Unified Patent Court; these courts found that in the particular cases, U.S. court-issued anti-suit injunctions violated

parties' rights under the European Convention of Human Rights and the Charter of Fundamental Rights of the European Union (*IPCom GmbH & Co. Kg v. Lenovo (United States) Inc*, No 14/2020, Paris Court of Appeal, 3 March 2020; *Huawei v. Netgear*, UPC, Munich Local Division, Order of 11 December 2024, File No. ACT_65376-2024 UPC_CFI_791-2024). But while the effects of those decisions have been limited and focused on anti-suit injunctions, the arbitral panel decision in the WTO case could have much wider implications.

The arbitral panel in the WTO case found that TRIPS Agreement Article 1.1, according to which WTO "[m]embers shall give effect to the provisions of [the TRIPS] Agreement," creates a corollary obligation for WTO members "to do so without frustrating the functioning of the systems of protection and enforcement of IP rights implemented by other Members in their respective territories." Because the anti-suit injunctions policy at issue affected the patent holders' ability to enforce their rights that WTO member countries provided for in compliance with the TRIPS Agreement, the panel held that the policy violated the TRIPS Agreement. The panel acknowledged that "the TRIPS Agreement does not address issues of private international law," but concluded that "the TRIPS Agreement … requires that Members not frustrate the effective protection of trade-related IP rights in the territories of other Members." It explained that "[t]he provisions of the TRIPS Agreement would be rendered inoperative if Members were allowed to frustrate the implementation by other Members of their obligations under the TRIPS Agreement."

Although the arbitral panel decision concerns anti-suit injunctions in patent cases, its reasoning raises the question whether the panel's interpretation of the TRIPS Agreement could affect the application of other conflict-of-laws rules and affect the rules in *any* cases involving IP rights covered by the Agreement. Anti-suit injunctions are not the only means through which conflicts rules can impact the ability of a foreign country to protect the IP rights that the foreign country provides. Justiciability of foreign IP rights violations allows courts to adjudicate IP rights infringements arising under foreign countries' laws, which foreign countries could perceive as depriving their own courts of the opportunity to vindicate the countries' IP law violations and preventing the countries from fulfilling their obligation to "give effect to the provisions of [the TRIPS] Agreement." Choice-of-law rules that direct courts to apply the law of the forum to remedies in cases of foreign IP rights infringements could also be viewed as

diminishing or frustrating foreign countries' protection of their IP rights, and any denials of the recognition and enforcement of foreign judgments concerning foreign IP rights, which might, for instance, be because of their repugnancy with the public policy of the recognizing court's forum, clearly frustrate foreign countries' enforcement and protection of their IP rights.

A pessimistic reading of the decision could lead to the conclusion that the arbitral panel's interpretation forecloses the application of many principles and rules of conflict of laws that assist or could assist in the cross-border litigation of IP cases. In the past two decades, teams of conflicts & IP law scholars in the United States, Europe, and Asia have proposed sets of conflicts principles and rules that would overcome strictly territorial approaches to IP rights enforcement and promote greater flexibility in cross-border IP litigation, such as wider justiciability of foreign IP rights violations, greater numbers of courts with broader jurisdiction over IP disputes, concentrations of proceedings of related causes of action concerning IP rights in different countries, and the application of a single country's law for ubiquitous (such as online) IP rights infringements. Among the several proposals, the projects by the American Law Institute, the European Max Planck Group, and the International Law Association have been the most detailed. Much of this work could now seem to be to no avail in light of the arbitral panel's interpretation of the TRIPS Agreement.

An optimistic reading of the arbitral panel decision could offer support for the current conflicts principles and rules, and at least for some of the principles and rules proposed by the projects. Conflicts rules should support collaboration among courts in their enforcement of each other's national laws, including IP laws, and thus contribute to countries meeting their obligations under the TRIPS Agreement. For example, justiciability of foreign IP rights violations can frustrate the ability of foreign courts to adjudicate violations in their jurisdictions, but in some cases, the justiciability rule can pave the way for the only available avenue for effective enforcement of the rights, such as when a rights holder can afford to litigate only once, and a concentration of proceedings, facilitated by the rules of justiciability, of parallel violations of IP rights under multiple countries' laws provides the only realistic possibility for a rights holder to enforce his rights. Certainly, any rules that aim to maximize the recognizability and enforceability of foreign judgments in IP cases should be consistent with a requirement that a foreign country's ability to "give effect to the provisions of [the TRIPS]

Agreement" not be frustrated.

Not all conflicts rules, and not the rules in all circumstances, will live up to the corollary obligation that the arbitral panel identified in Article 1.1 of the TRIPS Agreement. Detailed analyses should study the compliance of different conflicts rules with the obligation, and also contemplate the role that the rules might play in achieving the overall goals of the TRIPS Agreement when a foreign country's IP laws and/or judgments do not comply with the Agreement. Rules such as the public policy exception and internationally mandatory rules might pose interesting questions in this regard.

The durability of the arbitral panel's interpretation is unclear; because it is a product of the Multi-Party Interim Appeal Arbitration Arrangement, the arbitral panel's decision is binding only on the parties and is not precedential for all WTO members, and future decisions within the WTO dispute settlement could produce other interpretations. For now, the interpretation by the arbitral panel suggests that courts should be looking closely at the TRIPS Agreement when addressing conflict-of-laws issues in cross-border IP cases.

Kairos Shipping II LLC (appellant) v Songa Product and Chemical Tankers III AS (respondent), The interpretation of natural language on charter contracts

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The decision in Kairos Shipping II LLC v Songa Product and Chemical Tankers III

AS [2025] EWCA Civ 1227 represents a pivotal clarification in the interpretation of repossession clauses within standard-form bareboat charterparties, particularly under the BIMCO Barecon 2001 framework. Arising from a dispute over the early termination of a charter for a 49,708 DeadWeight Tonnage (DWT) chemical/oil tanker, the case underscores the English courts' commitment to contextual and purposive contract interpretation, balancing textual fidelity with commercial practicality. This analysis expands on the case's significance, the interpretive principles it embodies, and its ultimate resolution, drawing from judicial reasoning and industry commentary.[1]

Why This Case Matters

In the realm of maritime law, where standard-form contracts like BIMCO Barecon 2001 are ubiquitous, this ruling matters profoundly because it clarifies how courts interpret seemingly simple phrases such as "*port or place convenient to them*" in clause 29, which governs vessel repossession following early termination. Bareboat charters, by their nature, grant charterers full operational control akin to ownership during the charter period, but termination (often due to events like insolvency under clause 28(d)) shifts the dynamic dramatically.

Upon termination, the vessel becomes uninsured and unmaintained by the charterers, who assume the role of gratuitous bailees, bearing risks and costs until repossession. The case arose when charterers terminated the agreement in May 2021 after the owners' guarantor's insolvency, offering repossession at the vessel's current port in Stockton, California. The owners' insistence on sailing to Trogir, Croatia (a 37–45-day voyage costing around US$500,000) highlighted the potential for abuse if such phrases were read broadly.[2][3][4]

This interpretation dispute illustrates broader implications for the shipping industry. Standard forms like Barecon 2001 are designed for efficiency and predictability in global trade, yet ambiguous language can lead to costly litigation. The decision reinforces that courts will not permit interpretations that impose unrecoupable burdens on charterers, especially in insolvency contexts where recovery from owners may be impossible. Commentators note that it aligns with principles from cases like China Pacific on unrecoupable costs and Capital

Finance Co v Bray on minimal bailee duties, emphasizing that gratuitous bailees are not obligated to undertake extensive actions like long voyages unless explicitly required. For owners, it strengthens their repossession rights but tempers them with timeliness obligations, per BIMCO's explanatory notes.

Practically, the case could influence future drafting by encouraging more precise language around repossession locations and obligations, potentially prompting BIMCO to amend forms for greater clarity. In an industry reliant on international arbitration and English law, this precedent promotes fairness, reduces standoffs like the one leading to the vessel's arrest in Gibraltar, and minimizes economic disruptions in termination scenarios. It also serves as a cautionary tale on the risks of over-relying on "convenience" clauses without considering commercial imperatives, potentially affecting negotiations in bareboat, time, and voyage charters alike.

Principle of Contract Interpretation Illustrated

At its core, this case illustrates the orthodox principles of English contract interpretation as articulated in Arnold v Britton [2015] UKSC 36 and Wood v Capita Insurance Services Ltd [2017] UKSC 24, which advocate an iterative process starting with the natural and ordinary meaning of words but integrating the full documentary, factual, and commercial context. The Court of Appeal, led by Lord Justice Phillips, emphasized that ambiguous or opaque provisions (like clause 29's reference to "*a port or place convenient to them*") must be construed holistically to avoid textual absurdities, such as rendering "current or next port of call" superfluous. This approach rejects isolated literalism, instead checking interpretations against the contract's purpose and commercial consequences.[5]

In applying these principles, the courts treated clauses 28 and 29 as a self-contained regime for termination and repossession, applicable neutrally to defaults by either party. The obligation to board "as soon as reasonably practicable" was seen as integral, curtailing the owners' repossession right to ensure prompt relief for charterers from their bailee burdens. Commercial common sense played a key role: an unfettered owner choice could prolong charterer exposure to risks and costs, especially unrecoverable in insolvency,

which was deemed contrary to reasonable party intentions. The High Court and Court of Appeal avoided rewriting the contract but departed from the tribunal's broader reading, which ignored these contextual imperatives.[6]

This method echoes Arnold's warning against departing from natural meaning without justification and Wood's call to balance text with context. It demonstrates how courts resolve ambiguity by favoring constructions that promote business efficacy, such as swift repossession, over those creating "highly prejudicial" outcomes. For standard forms, it highlights that even industry-drafted clauses are subject to rigorous scrutiny, encouraging drafters to anticipate contextual applications.[7]

Bottom-Line Outcome

The Court of Appeal unanimously dismissed the owners' appeal on 7 October 2025[8], endorsing the High Court's reversal of the arbitral tribunal's award and holding that owners must repossess at the vessel's current port unless impracticable or impossible. Specifically, clause 29 requires owners to arrange boarding "as soon as reasonably practicable," making the current port (Stockton) the default, with "convenient to them" as a contingency only if needed for prompt action[9], e.g., diverting a vessel at sea to a nearby port. The owners' demand for Trogir breached this, as Stockton was accessible, safer, and cheaper, per uncontested facts. No broad implied duty was placed on charterers to sail distant voyages, limiting their bailee role to minimal care. The award was remitted for reconsideration, with charterers entitled to expenses from the standoff, affirming the need for efficiency in maritime terminations.[10]

This outcome not only resolved the US$2.19 million claim but sets a benchmark for interpreting repossession clauses, prioritizing practicality over unilateral convenience.

Factual and Procedural Background

The dispute arose under a bareboat charter dated 11 February 2013 (BIMCO Barecon 2001)[11] between Brodotrogir DOO ("BDOO"), as original owner, and Songa Shipping Pte Ltd (charterer) for a chemical/oil tanker (49,708 DWT) to be built. By novation on 17 December 2013, Kairos Shipping II LLC (a Marshall Islands SPV of BDOO) became owner and Songa Product and Chemical Tankers III AS (affiliated with Songa Group) became charterer, with BDOO guaranteeing Kairos's obligations. The vessel was delivered on 23 December 2016[12][13].

Under clause 28(d) of the charter (insolvency of a party), the charterers were entitled to terminate with immediate effect.[14] On 16 October 2020 a Restructuring Plan in respect of BDOO was confirmed in Croatia. In May 2021 the charterers purported to terminate the charter under cl.28(d), notifying the owners they would repossess the vessel, then in Stockton, California, **"***as soon as…practicable***"** (the vessel's current port of call). The owners refused to take repossession in Stockton, insisting instead that the vessel be sailed to Trogir, Croatia (their yard and home port). After a standoff, the charterers began the voyage under protest on 16 August 2021. The vessel was arrested in Gibraltar after 37 days at sea (20 September 2021), and the owners ultimately took physical possession on 7 January 2022[15], providing security as required by the Gibraltar court.

The charterers then commenced LMAA (London Maritime Arbitrators Association) arbitration on 13 January 2022, claiming USD 2,190,277.81 in expenses for crewing and operating the vessel from 14 May 2021 (Stockton) until the repossession, on the basis that the owners breached clause 29 by not taking possession "*as soon as reasonably practicable*" at Stockton.

The owners denied the termination and counterclaimed lost hire but admitted for present purposes that if terminated by cl.28(d) then charterers were entitled to expenses incurred in sailing to Gibraltar (and therefore downplayed costs of anchoring in Mexico). A 26 March 2024 Partial Final Award[16] held that the charterparty was validly terminated on 14 May 2021[17] and that clause 29 entitled the owners to insist on repossession in Trogir as a "*place…convenient to them*".

The charterers challenged that award in the Commercial Court as a point of law under s.69 Arbitration Act 1996[18]. On 13 December 2024 HHJ Pelling KC (Commercial Court, QBD)[19] allowed the charterers' appeal, holding that clause 29 required the owners to repossess "*as soon as reasonably practicable*" – meaning at Stockton (the vessel's current port) unless impracticable. The owners (Kairos) obtained permission to appeal to the Court of Appeal. On 7 October 2025[20] the Court of Appeal (Phillips LJ, Nugee and King LJJ)[21] dismissed the appeal, endorsing the High Court's interpretation.

Clause 29 and the Interpretative Dispute

Clause 29 of the Barecon 2001[22] charter governs the process of repossession after early termination. In the events of clauses 28(a)–(d)[23] (default or insolvency) it provides (emphasis added):

"…the Owners shall have the right to repossess the Vessel from the Charterers at her current or next port of call, or at a port or place convenient to them without hindrance or interference by the Charterers… Pending physical repossession…the Charterers shall hold the vessel as gratuitous bailee only to the Owners. The Owners shall arrange for an authorised representative to board the vessel as soon as reasonably practicable following the termination… The Vessel shall be deemed to be repossessed… upon [boarding] by the Owners' representative… All …wages, disembarkation and repatriation of the charterers' Master, officers and crew shall be the sole responsibility of the Charterers.".

The dispute centred on the words "*a port or place convenient to them.*" The charterers argued that clause 29 requires owners to repossess at the first opportunity (the vessel's current port, or if at sea its next scheduled port) unless those are unsuitable, in which event the vessel can be diverted only to a convenient port to facilitate immediate repossession. The owners contended that the clause expressly allows them to elect *any* port that is "convenient to them" (i.e. objectively convenient), so long as the choice is not irrational, even if this means a long voyage. Under the owners' interpretation, they could require the charterers (as unpaid bailees) to take the vessel to any distant port convenient to the owners (subject only to reasonableness) and then repossess. In this case, they

asserted that Trogir (their yard in Croatia) was “convenient”, whereas the charterers said the trip to Trogir (37–45 days, ~$500,000) made Stockton the only practicable repossession point, therefore by the interpretation of the clause 29[24] by the charterer, Croatia is not a reasonable point to repossess the vessel.

The Arbitral Award

The LMAA tribunal sided with the owners on construction. The Tribunal held that clause 29 gave owners a right (but not a duty) to repossess at the vessel’s current port, the next port, *or* at a place convenient to them. It treated “convenient” in its natural and ordinary sense, meaning any location that objectively suited the owners’ purpose of repossession. An owner’s choice would be set aside only if irrational or arbitrary. The tribunal read clause 29 as granting owners a menu of locations, and “*convenient to them”* was a distinct option chosen by owners for their purposes.[25]

Critically, the tribunal held that the owners’ obligation to board “as soon as reasonably practicable” did **not** override the choice of location. It rejected the notion that the immediate repossession duty confined owners to the current port. Convenience of a place was to be judged “objectively against the parties’ express intention that the vessel be repossessed as soon as reasonably practicable”. The tribunal emphasised that timing (the period to arrange boarding) is relevant to whether a place is “convenient” for prompt repossession, but it did not make practicability a separate obligation overriding location choice.

In short, the owners had the option of choosing Trogir and still had to board “as soon as practicable” once there; it was not that they had to repossess at Stockton just because it was closer.[26]

Applying this to the facts, the Tribunal found that while the transatlantic voyage to Trogir would cost ~$500,000 and take about 45 days, owners (using a ship-management company) could probably have taken longer even to crew and board at Stockton. In the absence of evidence on how quickly a crew or representative could be flown to Stockton and given that the owners had a yard and personnel in Trogir (where their principal was insolvent), the tribunal found Trogir was

nonetheless “objectively convenient”. It concluded it would *not* have been reasonably practicable to repossess at Stockton on 14 May 2021, and so clause 29 entitled owners to insist on Trogir. The owners’ choice was therefore upheld in the award.[27]

Commercial Court (HHJ Pelling KC) Judgment [2024] EWHC 3452 (Comm)

The High Court reversed the tribunal. HHJ Pelling analysed clause 29 against the commercial background of a bareboat charter.[28] He noted that on termination under cl.28 the vessel becomes uninsured and without crew support from charterers, placing charterers in the position of *gratuitous bailees* to owners. It is therefore critical that the owners take physical repossession promptly to relieve charterers of this risk and cost. Repossession at the vessel’s current port achieves that imperative[29]; requiring a longer unpaid voyage would prolong the charterers’ burden, possibly unrecoverable if the owner is insolvent (citing *China Pacific*) [30] [31].

Pelling J held that the natural reading of clause 29 must be considered in context. He observed that if owners had an unfettered right to choose *any* convenient port, the words “current or next port” would be superfluous[32]. Those phrases must be read as referring to the vessel’s actual location (in port at termination, or its next port if at sea).

The judge rejected the owners’ argument that the first sentence of cl.29 purely allocates *location* and the third sentence addresses *timing* (board as soon as practicable).[33] Instead, he read the clause holistically: the first sentence gives a right to repossess and the third imposes the corresponding obligation to board promptly. He explained: “the right to repossess… in the first sentence should be read in the light of… the obligation… to place a representative on board as soon as reasonably practicable”. [34]

Crucially, Pelling J found that if the owners' representative could have boarded the vessel at Stockton, then the owners could not nonetheless demand an additional prolonged voyage.[35] He wrote:

"If the owners' representative was able to board the vessel at her *"current port of call"*, then it would not follow that the owner was entitled nonetheless to insist that the vessel be taken… to a place… where the voyage time… would take materially longer than if the owners' representative had boarded at its original port… Concluding that an owner was entitled to act in this manner would mean ignoring the owner's obligation to repossess… as soon as reasonably practicable.".[36]

Pelling J saw that point as decisive. He concluded that the vessel had to be repossessed at Stockton (the current port) unless it was impossible or impractical to board there. The tribunal had in fact found it *reasonably practicable* to board at Stockton. The judge held as a matter of fact (uncontested on appeal) that boarding at Stockton would have been faster and cheaper than sailing to Trogir.[37] Because the owners insisted on Trogir for their own convenience (yard and crew there, or personal financial motives) rather than out of necessity, the owners had breached their obligation. On true construction, clause 29 "requires the [owners] to repossess the vessel by causing [their] representative to board… as soon as reasonably practicable", and that duty could be performed in Stockton without unreasonable delay.[38]

Pelling J also explicitly applied established interpretation principles.[39] He noted that the meaning of clause 29 was "neither clear nor precise" in isolation, so he gave weight to context and purpose.[40] [41] The judge stressed that clause 29 was part of a self-contained code for termination under clause 28, and must be read to protect each party fairly in all default scenarios.[42] He cautioned against imposing any broad, implied obligation on charterers (as unpaid bailees) to sail the vessel to a far port absent necessity. Noting that a gratuitous bailee's duty is generally only to make the bailed item available, he held that any duty to sail must be "strictly confined" to what is needed for repossession.[43] Imposing a broad duty on charterers to sail the vessel at their own cost to a distant port,

where owners' insolvent, was unnecessary and commercially problematic.[44] [45]

In summary, the High Court found in favour of the charterers (Songa). The owners' wide interpretation was deemed to subvert the clause's purpose: "it cannot have been the parties' intention that the owner would [have] an unqualified entitlement to choose where to repossess". Instead, the obligation to board "as soon as reasonably practicable" curtailed the owners' rights to effectively the vessel's current location. The claim was thus allowed, and the arbitral award set aside.[46]

Court of Appeal [2025] EWCA Civ 1227

The owners appealed to the Court of Appeal, but the judgment of Lord Justice Phillips (with King and Nugee LJJ concurring) largely affirmed HHJ Pelling's reasoning. Phillips LJ reiterated that clause 29 must be read as a coherent scheme: owners get the right to repossess and simultaneously have a strict duty to repossess promptly, and charterers' only role thereafter is unpaid caretakers. In context, a *port convenient to the owners* is a fallback if the vessel's current or next port is not suitable for immediate repossession. [47] [48]

Phillips LJ held (para.45–50) that the clause was not drafted so as to give owners an unfettered right to nominate any port. The reference to "her current or next port" shows that the immediate repossession point is normally where the vessel actually is (or is about to be). He agreed with the judge that if the vessel is in port at termination, the phrase *"current or next port"* cannot sensibly be read as giving the owners the right to require sailing to the *next* port – on termination there is no "next" port and owners would have no say in where that was. Instead, it is consistent with repossession at the port where the vessel is (or if at sea its next port of call). [49] [50]

Reading the whole clause together, the Court held that the "convenient to them" provision was meant as a contingency: if the vessel's current/next port is impractical for repossession, then the owners may choose a different port convenient *for carrying out repossession as soon as practicable*. The Court gave

the example that if the vessel were at sea on a long voyage, it might be diverted to a convenient port to facilitate immediate boarding. But if the vessel is already safely in port, the owners' right and obligation coincide in directing repossession there. [51] [52]

Critically, Phillips LJ found no basis to imply a sweeping obligation on charterers. The clause expressly imposes no duty on charterers to sail the vessel to a far port. To imply one, the Court said, would impose on charterers an onerous unpaid voyage at their own risk – an outcome for which there is no express provision or necessity. At most, charterers may have to sail only so far as strictly needed to permit repossession.

In this case the vessel was available in Stockton and could safely be boarded there. Requiring it to sail across the Atlantic was not strictly necessary to effect repossession, so clause 29**[53]** did not entitle the owners to insist on Trogir. [54] [55]

Phillips LJ therefore concluded (paras.50–51): if the vessel is in port at termination, clause 29 means the owners "must repossess at that port unless it is impracticable or impossible". In the present case, Stockton was safe and accessible, and the tribunal had found it reasonably practicable to board there. The appeal was dismissed, affirming that owners must repossess as soon as practicable at Stockton and cannot require the charterers to undertake the long Trogir voyage. [56] [57]

Application of Contract Interpretation Principles

Both courts applied the modern canon of construction articulated in *Arnold v Britton* and *Wood v Capita Insurance Services Ltd*.[58] The Court of Appeal in particular set out (at para.25) the orthodox approach: courts start with the natural and ordinary meaning of the contractual words, consider them in documentary, factual and commercial context, and give effect to clear language.[59] [60] If the clause is unambiguous, it must be applied; if there is ambiguity or absurdity, the court may depart from literal meaning to avoid a result unreasonable to the parties. Commercial common sense may choose between reasonable constructions, but the court will not rescue a party from a bad bargain or rewrite clear terms. [61] [62]

HHJ Pelling expressly identified these principles in his judgment.[63] He found clause 29's language "opaque" and unclear, so he heavily weighted context and purpose.[64] Citing Lord Hodge in *Wood v Capita*, the judge recognized the need to check any interpretation against the contract as a whole and its commercial consequences.[65] In this vein, he considered the consequence of owners' reading – that charterers would bear great cost as unpaid bailee for potentially months with little recourse – and found it pointed against the owners' construction.[66] He applied Arnold's rule against crafting a solution to a bad bargain, refusing to allow literal emphasis on "convenient" to override the parties' likely intent of prompt repossession.

The Court of Appeal similarly observed that the clause must be read as a coherent regime.[67] It emphasized the imperative that owners repossess quickly to relieve charterers of their gratuitous bailee burden. Phillips LJ noted that to accept the owners' interpretation would ignore the obligation to act quickly and would render the references to "current or next port" superfluous – a textual absurdity to be avoided.[68] In doing so, the court was not rewriting the clause from a bad bargain but giving effect to what a reasonable contracting party would have understood: that owners' right to pick a convenient port is subordinated to the duty to repossess as soon as practicable.[69] The judges thus balanced the words of cl.29 with its commercial context, consistent with Arnold's and Wood's guidance.[70]

Commentators have noted this alignment with interpretative canons.[71] As Nail and Khodabandehloo (Burges Salmon) explain, the "ordinary natural meaning" rule requires looking beyond isolated words to the contract, including purpose and context. Here the court zoomed out to see clauses 28–29 as a self-contained code: cl.28 triggers repossession due to termination, and cl.29 governs where and how that occurs.[72] The "convenient to them" option was therefore a mechanism to achieve the owners' prompt repossession obligation, not an unrestricted location choice.[73] This method echoes established authority that ambiguous provisions may yield to context and common sense**.[74]**

Neither court fell into the trap warned by Arnold of imposing a departure from natural meaning without clear justification.[75] Instead, they found the owners' literal reading led to commercial absurdity or a "highly prejudicial" consequence for charterers, which justified a contextual construction. In particular, the courts treated the terms "current or next port" as evidence that immediate repossession location was the intended norm.[76] In short, the decisions manifest a textbook application of current contract interpretation law: respecting clear language but giving it realistic effect when plain meaning would contradict the contract's evident purpose.

Implications and Comparison with Case Law on Charterparties

The result reinforces that courts will not lightly allow a charter clause to impose onerous unrecoupable costs on charterers. It aligns with the general rule that a gratuitous bailee has only minimal duties – notably the duty to make the vessel available for repossession – unless the contract explicitly requires more.[77] [78] The judges declined to imply a broad obligation on charterers to sail the ship to a distant port at their expense.[79] Instead, charterers' obligations remain as stated: hold the vessel as unpaid caretakers, disembark crew at own cost, and permit owners to board.

On the owners' side, the decision confirms that clause 29 indeed strengthens their position (as noted in BIMCO's Explanatory Notes) by giving them an explicit repossession right, but it also emphasizes the built-in limit that repossession must occur "as soon as reasonably practicable".[80] In that sense, this case highlights that even in standard form charters drafted by industry bodies, ordinary words will be tempered by logic and context.[81]

In existing charterparty jurisprudence, this case is notable for its careful line-drawing. It does not depart from precedent so much as apply longstanding rules to the novel clause. English law has long held (e.g. *Capital Finance Co v Bray*) that without contractual obligation a bailee is not responsible for actively returning goods, and that principle underpinned the analysis.[82] Nor does it upset the general liberty of parties to bargain – here owners *did* bargain for the right to repossess and for charterers to pay crew costs – but the bargain was

judged not to include an open-ended repossession location right.[83]

In broader terms, the outcome serves as a reminder of the risk of vague drafting in charterparties. If owners had truly wanted unqualified location choice, they could have omitted the words “current or next port” or phrased an express voyage obligation. Courts will enforce the bargain the parties actually made.[84] As one commentator observes, though the clause’s wording appears unambiguous, focusing too narrowly on “convenient to them” without context “may lead to error”.[85] The decision thus arguably encourages parties to draft repatriation and repossession clauses with precision.

Finally, the case underscores that interpretation doctrines are applied rigorously even in commercial shipping contexts. The judges made clear that receiving a “bad bargain” due to poorly chosen words is not a ground for relief.[86] This reflects *Arnold v Britton* and *Wood v Capita*’s insistence that courts will not “rewrite” a contract under the guise of construction.[87] It also highlights that standard form clauses will be read against their commercial purpose: here, to get owners back into possession swiftly after default, rather than to give owners a windfall location choice.[88]

[1] Hill Dickinson, ‘Court of Appeal Considers Scope of Owners’ Rights to Repossess Vessel Following Early Termination of Bareboat Charter’ (Hill Dickinson, 9 October 2025) < https://www.hilldickinson.com/insights/articles/court-appeal-considers-scope-owners-rights-repossess-vessel-following-early > accessed 10 October 2025.

[2]Hill Dickinson, ‘Court of Appeal Considers Scope of Owners’ Rights to Repossess Vessel Following Early Termination of Bareboat Charter’ (Hill Dickinson, 9 October 2025) < https://www.hilldickinson.com/insights/articles/court-appeal-considers-scope-owners-rights-repossess-vessel-following-early > accessed 10 October 2025.

[3] ‘Songa Product and Chemical Tankers III AS v Kairos Shipping II LLC [2025] EWCA Civ 1227 – Court of Appeal (Lady Justice King, Lord Justice Phillips and Lord Justice Nugee) – 7 October 2025 –
Lloyd’s Maritime Law Newsletter’ (Lloyd’s Maritime Law Newsletter) <
https://www.lmln.com/charterparty/songa-product-and-chemical-tankers-iii-as-v-kairos-shipping-ii-llc-2025-ewca-civ-1227–court-of-appeal-lady-justice-king-lord-justice-phillips-and-lord-justice-nugee–7-october-2025-160310.htm ; accessed 10 October 2025.

[4] ‘Kairos Shipping II LLC (Appellant) v Songa Product and Chemical Tankers III as (Respondent)’ (*Courts and Tribunals Judiciary*) < https://www.judiciary.uk/live-hearings/kairos-shipping-ii-llc-appellant-v-songa-product-and-chemical-tankers-iii-as-respondent/ > accessed 3 November 2025

[5] Hill Dickinson, ‘Court of Appeal Considers Scope of Owners’ Rights to Repossess Vessel Following Early Termination of Bareboat Charter’ (Hill Dickinson, 9 October 2025) < https://www.hilldickinson.com/insights/articles/court-appeal-considers-scope-owners-rights-repossess-vessel-following-early > accessed 10 October 2025.

[6] L Nail and A Khodabandehloo, ‘Contract Interpretation: The “Ordinary Natural Meaning” Is Perhaps Wider Than You Think (Songa Tankers v Kairos Shipping)’ (Burges Salmon, 9 October 2025) < https://www.burges-salmon.com/articles/102lpa3/contract-interpretation-the-ordinary-natural-meaning-is-perhaps-wider-than-you/ > accessed 9 October 2025.

[7] *Ibid*.

[8] Factual chronology: 17 December 2013 (novations); 23 December 2016 (delivery); 16 October 2020 (BDOO insolvency plan); 14 May 2021 (termination, repossession available at Stockton); August–September 2021 (voyage to Trogir, Gibraltar arrest); January 2022 (owners repossess at Gibraltar); January 2022 (arbitration commenced); March 2024 (partial award); 13 December 2024 (High Court judgment); 7 October 2025 (Court of Appeal judgment).

[9] ‘Kairos Shipping II LLC (Appellant) v Songa Product and Chemical Tankers III as (Respondent)’ (*Courts and Tribunals Judiciary*) < https://www.judiciary.uk/live-hearings/kairos-shipping-ii-llc-appellant-v-songa-product-and-chemical-tankers-iii-as-respondent/ > accessed 3 November 2025

[10] Hill Dickinson, ‘Court of Appeal Considers Scope of Owners’ Rights to Repossess Vessel Following Early Termination of Bareboat Charter’ (Hill Dickinson, 9 October 2025) < https://www.hilldickinson.com/insights/articles/court-appeal-considers-scope-owners-rights-repossess-vessel-following-early > accessed 10 October 2025.

[11] Baltic and International Maritime Council, BARECON 2001 (BIMCO 2001) cl 29.

[12] Factual chronology: 17 December 2013 (novations); 23 December 2016 (delivery); 16 October 2020 (BDOO insolvency plan); 14 May 2021 (termination, repossession available at Stockton); August–September 2021 (voyage to Trogir, Gibraltar arrest); January 2022 (owners repossess at Gibraltar); January 2022 (arbitration commenced); March 2024 (partial award); 13 December 2024 (High Court judgment); 7 October 2025 (Court of Appeal judgment).

[13] Factual chronology: 17 December 2013 (novations); 23 December 2016 (delivery); 16 October 2020 (BDOO insolvency plan); 14 May 2021 (termination, repossession available at Stockton); August–September 2021 (voyage to Trogir, Gibraltar arrest); January 2022 (owners repossess at Gibraltar); January 2022 (arbitration commenced); March 2024 (partial award); 13 December 2024 (High Court judgment); 7 October 2025 (Court of Appeal judgment).

[14] Clause 28(d) refers to termination on insolvency. Clause 29 (quoted) sets out repossession rights upon any Clause 28 termination.

[15] Factual chronology: 17 December 2013 (novations); 23 December 2016 (delivery); 16 October 2020 (BDOO insolvency plan); 14 May 2021 (termination, repossession available at Stockton); August–September 2021 (voyage to Trogir, Gibraltar arrest); January 2022 (owners repossess at Gibraltar); January 2022 (arbitration commenced); March 2024 (partial award); 13 December 2024 (High Court judgment); 7 October 2025 (Court of Appeal judgment).

[16] Arbitral tribunal reasoning in Songa Product and Chemical Tankers III AS v

Kairos Shipping II LLC (Partial Final Award, LMAA, March 2024) paras 124–129 (owners have right to choose "convenient" location; convenience assessed objectively). See also ibid paras 128–129 (ordinary meaning of "convenient" and owners' priority; critique of charterers' proposed construction).

[17] Factual chronology: 17 December 2013 (novations); 23 December 2016 (delivery); 16 October 2020 (BDOO insolvency plan); 14 May 2021 (termination, repossession available at Stockton); August–September 2021 (voyage to Trogir, Gibraltar arrest); January 2022 (owners repossess at Gibraltar); January 2022 (arbitration commenced); March 2024 (partial award); 13 December 2024 (High Court judgment); 7 October 2025 (Court of Appeal judgment).

[18] Arbitration Act 1996, s 69.

[19] Kairos Shipping II LLC v Songa Product and Chemical Tankers III AS [2024] EWHC 3452 (Comm).

[20] Factual chronology (18)

[21] Songa Product and Chemical Tankers III AS v Kairos Shipping II LLC [2025] EWCA Civ 1227 [45]–[52] (Phillips LJ).

[22] Baltic and International Maritime Council, BARECON 2001 (BIMCO 2001) cl 29.

[23] Clause 28(d) refers to termination on insolvency. Clause 29 (quoted) sets out repossession rights upon any Clause 28 termination.

[24] Under cl 29, owners' rights include selecting a convenient location for repossession, but their timing obligation limits that right. The charterers' obligations are limited: they become unpaid bailees caring for the vessel until repossession, owed only minimal duties by law. The court refused to imply any unstated duty on charterers to sail beyond what was necessary to allow repossession.

[25] Arbitral tribunal reasoning in Songa Product and Chemical Tankers III AS v Kairos Shipping II LLC (Partial Final Award, LMAA, March 2024) paras 124–129 (owners have right to choose "convenient" location; convenience assessed objectively). See also ibid paras 128–129 (ordinary meaning of "convenient" and owners' priority; critique of charterers' proposed construction).

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[27] Ibid.

[28] Kairos Shipping II LLC v Songa Product and Chemical Tankers III AS [2024] EWHC 3452 (Comm).

[29] Songa (EWHC) (n 2) [28]–[31] (charterers board at "current port" unless impracticable; owners cannot force longer route at charterers' cost). See also ibid [29]–[30] (Stockton practicable; insisting on Trogir was for owners' convenience, not clause intention).

[30] China Pacific SA v Food Corporation of India (The Winson) [1982] AC 939, 958 (Lord Simon of Glaisdale).

[31] Capital Finance Co Ltd v Bray [1964] 1 WLR 323, 329 (Lord Denning MR).

[32] Kairos Shipping II LLC v Songa Product and Chemical Tankers III AS [2024] EWHC 3452 (Comm).

[33] Songa (EWHC) (n 2) [27] (quoting Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, 912–13 (Lord Hoffmann)).

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[36] Songa (EWHC) (n 2) [28]–[31] (charterers board at "current port" unless impracticable; owners cannot force longer route at charterers' cost). See also ibid [29]–[30] (Stockton practicable; insisting on Trogir was for owners' convenience, not clause intention). (Reference 22)

[37] Kairos Shipping II LLC v Songa Product and Chemical Tankers III AS [2024] EWHC 3452 (Comm). (Reference 23)

[38] Songa (EWHC) (n 2) [28]–[31] (charterers board at "current port" unless impracticable; owners cannot force longer route at charterers' cost). See also ibid [29]–[30] (Stockton practicable; insisting on Trogir was for owners' convenience, not clause intention). (Reference 22)

[39] Arnold v Britton [2015] UKSC 36, [2015] AC 1619 [15], [18]–[20] (Lord Neuberger PSC); Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] AC 1173 [10]–[13] (Lord Hodge JSC).

[40] Kairos Shipping II LLC v Songa Product and Chemical Tankers III AS [2024] EWHC 3452 (Comm).

[41] Songa (EWHC) (n 2) [27] (quoting Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, 912–13 (Lord Hoffmann)).

[42] Songa (EWHC) (n 2) [22]–[30]; Songa (EWCA) (n 1) [25] (note: [850]–[909] appears to be a typographical error, as the judgment extends only to [52]; no such paragraphs exist).

[43] Capital Finance Co Ltd v Bray [1964] 1 WLR 323, 329 (Lord Denning MR).

[44] Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 WLR 2900 [23] (Lord Clarke JSC).

[45] On contractual construction, see Nail and Khodabandehloo (n 5) (applying Arnold v Britton principles of context and purpose). The Court of Appeal reiterated that Arnold v Britton allows no relief from bad bargains and Wood v Capita emphasises drafting quality. The judge echoed Lord Hodge: owners' proposed reading "divorces" cl 29 from its commercial context. Both courts adhered to the rule that "ordinary meaning" yields to context where necessary.

[46] Kairos Shipping II LLC v Songa Product and Chemical Tankers III AS [2024] EWHC 3452 (Comm).

[47] Songa Product and Chemical Tankers III AS v Kairos Shipping II LLC [2025] EWCA Civ 1227 [45]–[52] (Phillips LJ).

[48] Songa (EWCA) (n 1) [45]–[51] (CA confirms Stockton as repossession point unless impracticable; “convenient” is a fallback; no broad duty to sail far).

[49] Songa Product and Chemical Tankers III AS v Kairos Shipping II LLC [2025] EWCA Civ 1227 [45]–[52] (Phillips LJ). (Reference 35)

[50] Songa (EWCA) (n 1) [45]–[51] (CA confirms Stockton as repossession point unless impracticable; “convenient” is a fallback; no broad duty to sail far). (Reference 36)

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[56] Songa Product and Chemical Tankers III AS v Kairos Shipping II LLC [2025] EWCA Civ 1227 [45]–[52] (Phillips LJ). (Reference 35)

[57] Songa (EWCA) (n 1) [45]–[51] (CA confirms Stockton as repossession point unless impracticable; “convenient” is a fallback; no broad duty to sail far). (Reference 36)

[58] Arnold v Britton [2015] UKSC 36, [2015] AC 1619 [15], [18]–[20] (Lord Neuberger PSC); Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017]

AC 1173 [10]–[13] (Lord Hodge JSC).

[59]Songa Product and Chemical Tankers III AS v Kairos Shipping II LLC [2025] EWCA Civ 1227 [45]–[52] (Phillips LJ).

[60] Songa (EWHC) (n 2) [22]–[30]; Songa (EWCA) (n 1) [25] (note: [850]–[909] appears to be a typographical error, as the judgment extends only to [52]; no such paragraphs exist).

[61] Arnold v Britton [2015] UKSC 36, [2015] AC 1619 [15], [18]–[20] (Lord Neuberger PSC); Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] AC 1173 [10]–[13] (Lord Hodge JSC).

[62] On contractual construction, see Nail and Khodabandehloo (n 5) (applying Arnold v Britton principles of context and purpose). The Court of Appeal reiterated that Arnold v Britton allows no relief from bad bargains and Wood v Capita emphasises drafting quality. The judge echoed Lord Hodge: owners' proposed reading "divorces" cl 29 from its commercial context. Both courts adhered to the rule that "ordinary meaning" yields to context where necessary.

[63] Kairos Shipping II LLC v Songa Product and Chemical Tankers III AS [2024] EWHC 3452 (Comm).

[64] Songa (EWHC) (n 2) [22]–[30]; Songa (EWCA) (n 1) [25] (note: [850]–[909] appears to be a typographical error, as the judgment extends only to [52]; no such paragraphs exist).

[65] Arnold v Britton [2015] UKSC 36, [2015] AC 1619 [15], [18]–[20] (Lord Neuberger PSC); Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] AC 1173 [10]–[13] (Lord Hodge JSC).

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[71] L Nail and A Khodabandehloo, 'Contract Interpretation: The "Ordinary Natural Meaning" Is Perhaps Wider Than You Think (Songa Tankers v Kairos Shipping)' (Burges Salmon, 9 October 2025) < https://www.burges-salmon.com/articles/102lpa3/contract-interpretation-the-ordinary-natural-meaning-is-perhaps-wider-than-you/ > accessed 9 October 2025.

[72] On contractual construction, see Nail and Khodabandehloo (n 5) (applying Arnold v Britton principles of context and purpose). The Court of Appeal reiterated that Arnold v Britton allows no relief from bad bargains and Wood v Capita emphasises drafting quality. The judge echoed Lord Hodge: owners' proposed reading "divorces" cl 29 from its commercial context. Both courts adhered to the rule that "ordinary meaning" yields to context where necessary.

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[74] Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 WLR 2900 [23] (Lord Clarke JSC).

[75] Arnold v Britton [2015] UKSC 36, [2015] AC 1619 [15], [18]–[20] (Lord Neuberger PSC); Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] AC 1173 [10]–[13] (Lord Hodge JSC).

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[80] Baltic and International Maritime Council, BARECON 2001 (BIMCO 2001) cl 29.

[81] Hill Dickinson, 'Court of Appeal Considers Scope of Owners' Rights to Repossess Vessel Following Early Termination of Bareboat Charter' (Hill Dickinson, 9 October 2025) < https://www.hilldickinson.com/insights/articles/court-appeal-considers-scope-owners-rights-repossess-vessel-following-early > accessed 10 October 2025.

[82] Capital Finance Co Ltd v Bray [1964] 1 WLR 323, 329 (Lord Denning MR).

[83] cf OCM Maritime Nile LLC v Courage Shipping Co [2022] EWCA Civ 1091, [2022] 2 Lloyd's Rep 93 (allowing owners repossession on default, emphasising contractual rights); The Jotunheim [2004] EWHC 671 (Comm), [2005] QB 234 (similar repossession context); Swiss law cases applying Arnold v Britton on literal meaning and bad bargains.

[84] Hill Dickinson, 'Court of Appeal Considers Scope of Owners' Rights to Repossess Vessel Following Early Termination of Bareboat Charter' (Hill Dickinson, 9 October 2025) < https://www.hilldickinson.com/insights/articles/court-appeal-considers-scope-own

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[85] L Nail and A Khodabandehloo, 'Contract Interpretation: The "Ordinary Natural Meaning" Is Perhaps Wider Than You Think (Songa Tankers v Kairos Shipping)' (Burges Salmon, 9 October 2025) < https://www.burges-salmon.com/articles/102lpa3/contract-interpretation-the-ordinary-natural-meaning-is-perhaps-wider-than-you/ > accessed 9 October 2025.

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Digital Governance, Regimes Theory and Private International Law. A tech diplomacy perspective

By Juliano Alves Pinto, Brazilian tech diplomat; former Deputy Consul of Brazil in San Francisco (2013–2016); State Undersecretary of Science, Technology, and Innovation (2019–2021); HCCH expert on digital economy (2023–2024); and

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Could Private International Law be an answer to digital governance? Though this idea has already been debated among PIL scholars, it must be said that it has not yet broken the bubble of the PIL niche. Diplomats usually overlook PIL as a small part of the larger International Law realm, which embraces Public International Law as the standard bearer of the multilateral framework that has been established ever since the Westphalia Peace in 1648.

However, the uniqueness of digital platforms architecture and its asymmetric relationship with individuals all around the world has made PIL emerge as a relevant normative toolbox to tackle the numerous situations in which the user needs to protect themselves from the leonine contracts and the frequent algorithmic abuses on data extraction, data privacy and, even more often, IA misleading guidance.

A digital platform is usually comprised of a number of layers, which may reflect different jurisdictions according to the territory in which a specific component of the platform architecture is localized. That said, an individual can access a platform in a country A and the platform could be hosted in a country B. Their personal data -collected by the platform- could be stored on a cloud-based server in a country C, not to mention third-party applications used by the platform that could be placed in different jurisdictions. If a lawsuit is set, which law is applicable? Is it the place of business the usual connecting factor?

Instead of long-lasting negotiations to approve an international treaty on a specific emerging technology governance, which usually turns out to be time and resource consuming, a simplified PIL convention that offers an applicable law methodology, defining connecting factors in typical conflict of law situations, as well as the ubiquity of specific platform layers, might be more effective. The current world order on digital governance is a highly fragmented reality, with a number of multilateral initiatives being launched within or without the UN System, from the traditional International Telecommunications Union to the emerging Digital Cooperation Organization, sponsored by Saudi Arabia.

Domestic regulatory frameworks on new technologies are becoming the standard approach in an array of jurisdictions. An example is the digital tokens realm,

which has already been regulated in different countries, from Switzerland (2018) to Brazil (2022) and the EU (2023). Even though it might be difficult for lawmakers to cope with technology change, even a provisional regulation is better than self-regulation alone.

From an International Relations perspective, the International Regimes Theory is often regarded as the go-to approach among diplomats and multilateralism experts, as it deals with the idea that cooperation among countries, regardless of self-interest, should be done by a minimal normative system, not necessarily formalized by treaties or an international organization framework. Stephen Krasner defined international regimes in 1982 as sets of "*principles, norms, rules, and decision making procedures around which actors converge in a given issue-area of the international relations.*" [1] Normally these principles, norms, and rules are established by the actors themselves to make sure goals through cooperation are achieved. From a digital multilateralism point of view, it is no wonder that the very definition of internet governance included in the WSIS Tunis Agenda in 2005 coincides with Krasner's classic approach:

> *34. A working definition of Internet governance is the development and application by governments, the private sector and civil society, in their respective roles, of* ***shared principles, norms, rules, decision-making procedures****, and programmes that shape the evolution and use of the Internet.[2]*

It is worth noting that the WSIS approach embraces multiple actors, beyond the typical state-centered approach, as innovation requires a triple-helix perspective, alongside the private sector and Academia. Still, governance itself cannot be achieved without a minimal rule-based system. The main difficulty of multilateralism and Public International Law is the time needed to reach the necessary consensus to build up international rules by which countries need to abide.

Technology develops in a much faster pace, which means that the already-late-coming domestic norms are often approved quicker than any multilateral framework. In this sense, treaty-based multilateralism might not be the only solution to provide the necessary protection to individuals and digital platforms all around the world.

The other side of the coin is that domestic frameworks alone fail to provide individual protection when cross-border relationships are established through digital platforms and their multiple layers localized in different jurisdictions. PIL in this sense could be the right answer to law efficacy, not only from a multilateral perspective but also from a domestic regulatory system approach.

Interestingly, flexibility and adaptation became one of the main features of International Regimes Theory, not only by embracing new actors but also through the construction of unorthodox multilateral arrangements.[3] That said, PIL institutes, such as applicable law, jurisdiction and judgment recognition, could be included as components of any regime building methodology, whereas domestic regulatory frameworks could become the main normative sources of newly PIL-based regimes of digital governance. The Hague Conference on Private International Law (HCCH) has been tackling this issue since 2022, having successfully established two groups of experts on digital tokens and CBDC's. Though unfamiliar to most tech diplomats and multilateralism specialists, both initiatives might be fundamental to change the current fragile digital governance landscape, as the definition of the law applicable to platforms might shed some light onto a rather obscure international reality.

Hence, it is about time for tech diplomats, scholars, and policy makers to embrace PIL as a relevant digital governance mechanism. At the end of the day, we just need to make sure individuals receive the necessary protection across the globe, regardless of the jurisdiction concerning the multiple layers of a platform's architecture.

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This contribution is a summarized version of a PhD thesis originally written in Portuguese that will soon be included on: https://www3.ufmg.br/pesquisa-e-inovacao/teses-e-dissertacoes

[1] KRASNER, Stephen (1982) Structural Causes and Regime Consequences: Regimes as Intervening Variables

[2] WSIS: Tunis Agenda for the Information Society (2005)

[3] SNIDAL, ABBOTT (2009) The governance triangle: Regulatory standards institutions and the shadow of the state

Tatlici v. Tatlici on Appeal: Defendant Wins as Public Policy Confronts the Financialization of Cross-Border Defamation Award

Written by Fikri Soral, Independant Lawyer, Turkey; and LL.M. student, Galatasaray University, Turkey

The *Tatlici* litigation continues to unfold as one of the most noteworthy examples of how national courts in Europe are responding to transnational defamation judgments obtained in the United States. The previous commentary examined Malta's First Hall Civil Court judgment refusing to enforce the U.S. default award of US$740 million.[1] The Malta Court of Appeal's judgment of 14 October 2025 builds upon that foundation by upholding non-enforcement while clarifying the legal reasoning behind it.[2] The Malta Court of Appeal's judgment came as the second major development, following an earlier first-round enforcement attempt in Turkey that had already failed on venue.[3]

The Malta Court of Appeal upheld the First Hall Civil Court's rejection of enforcement but replaced procedural formalism with a more principled proportionality analysis grounded in *ordre public*. The judges, Chief Justice Mark Chetcuti, Hon. Judge Robert G. Mangion and Hon. Judge Grazio Mercieca, held that the magnitude and moral nature of the award—being damages for defamation—"manifestly" offended Maltese public policy.[4] Such "astronomic" damages, the court reasoned, would have a chilling effect on free expression and thereby upset Malta's constitutional balance between protecting reputation and safeguarding democratic speech.[5]

The court also noted that the absence of a reasoned Florida judgment hindered the court's ability to test the applicant's belated claim that the award represented "real" rather than moral damages.[6]

It is against this backdrop that the Maltese decision must be read alongside the unfolding NEKO 2018 A, LLC receivership before the U.S. District Court for the Southern District of Florida, which is a case that exposes how litigation finance now shapes both litigation conduct and judgment enforcement across borders.[7] The Florida proceedings, captioned *Mehmet Tatlici and Craig Downs v. Ugur Tatlici*—as cited in the Malta Court of Appeal's judgment, directly link the plaintiff, Mehmet Tatlici, with his Florida attorney, Craig Downs, who appeared as co-plaintiff in the U.S. default judgment awarding US$740 million in damages.

Although litigation funding was not part of the Maltese court's formal reasoning, the *Tatlici* dispute shows how financial mechanisms behind litigation are beginning to shape the transnational life of judgments. This connection matters for private international law because recognition and enforcement today concern not only the validity of foreign judgments but also the economic structures that propel those judgments across jurisdictions.

Litigation Funding as a Governance Warning

As Cassandra Burke Robertson observes, third-party funding externalises litigation risk and encourages high-variance, high-quantum claims that might otherwise settle early.[8] Funders' capital increases the number of transnational lawsuits filed, raises settlement values, and spreads litigation across more jurisdictions.[9] This tendency is especially visible in defamation and other reputation-based torts, where damages are inherently subjective and national legal systems diverge sharply on what counts as a proportionate remedy.

Maya Steinitz's governance theory underlines a concern that once funders gain control over budgets and strategic decisions, they develop portfolio-level incentives to pursue outsized awards that maximise aggregate returns—even when enforcement remains uncertain.[10] This creates a structural tension that private international law cannot ignore because enforcement courts are ultimately asked to enforce judgments whose underlying dynamics are driven as much by capital as by legal merit.

The NEKO receivership makes these abstract concerns tangible. In October 2025, NEKO 2018 A, LLC, a litigation funder with an investor's interest, secured a collateral receivership over its funded law firm, the Downs Law Group, the same firm involved in *Tatlici*.[11] The receivership order placed all accounts, rights to payment, proceeds, substitutes, and records under the control of a court-appointed receiver and suspended pre-trial deadlines to "*preserve resources … without the burden of potential protracted litigation.*"[12] This effectively turned litigation receivables into tradable assets by allowing the funder to monetise pending claims and future enforcement proceeds.

Scholars such as John Gotanda and Ronald Brand warn that this financialisation of litigation detaches judgments from substantive justice and proportionality, compelling enforcement courts—like Malta's—to reimpose those limits through *ordre public* review.[13] Seen from a private international law perspective, this convergence between capital markets and cross-border enforcement exposes a governance gap: Article 2(1)(k) of the Hague Judgments Convention 2019 explicitly excludes defamation from its scope, while the Convention remains entirely silent on litigation funding. This dual absence, of both defamation and funded claims, leaves national courts to fill that regulatory void case by case, relying on domestic *ordre public* standards to assess the enforceability of judgments shaped by third-party capital.

Funding Under Scrutiny for Potential Fraud on Court

The relationship between litigation funding and the manner in which a judgment is obtained deserves careful attention. While the Maltese appellate court did not address the issue of fraud, ongoing criminal proceedings in Turkey—where judicial and prosecutorial authorities are examining how the Florida judgment was obtained—illustrate how difficult it can be to distinguish legitimate litigation conduct from actions that are not merely procedural but go to the integrity of the adjudicative process.

In highly financed, cross-border cases, the line between assertive advocacy and excessive pressure can become blurred. When litigation outcomes are closely tied to the financial expectations of external funders, there is a risk that commercial considerations may influence legal strategy or procedural choices. As Steinitz's governance analysis suggests, such dynamics can create "agency costs," where professional judgment becomes constrained by the funder's return-driven

objectives.[14] These constraints indicate that there must be increased protection and openness in recognition and enforcement actions to guarantee that financing efficiency does not compromise procedural integrity in the judicial process. In extreme cases, these forces can blur the line between zealous advocacy and alleged fraudulent conduct, which has been a tension made visible in the *Tatlici* litigation.

Conclusion

The *Tatlici* litigation illustrates how the *ordre public* exception has evolved into a constitutional safeguard within the global enforcement of judgments. The Malta Court of Appeal's 2025 decision affirming the refusal to enforce a US $740 million Florida defamation award and treating "astronomic" moral damages as incompatible with freedom of expression, the court used *ordre public* as an active tool of constitutional governance. This aligns with the argument advanced by Symeon C. Symeonides, who conceptualises the public policy exception as a constitutional checkpoint ensuring that foreign judgments do not erode the forum's fundamental rights.[15]

At the same time, *Tatlici* exposes enduring tensions between litigation finance, procedural integrity, and the enforceability of transnational awards. The claimant's connection to the US federal receivership shows how financial structures can shape litigation strategy and the formation of judgments, while the ongoing Turkish criminal inquiry into the alleged fraudulent procurement of the Florida judgment illustrates the risks that arise when capital-backed claims intersect with procedural fragility.

The case exemplifies a wider paradox in which a claimant secures an extraordinary foreign award yet lacks attachable assets in the rendering state and faces recognition refusals abroad, so the judgment's practical value collapses despite its formal validity. The defendant in the US$740 million action now occupies a jurisdictional and enforcement limbo, subject to a judgment that can neither be executed in *foro domestico* nor circulate transnationally through recognition or exequatur.

Tatlici confirms that public policy, founded on proportionality and constitutional values, still marks the outer boundary of the transnational movement of judgments in a system increasingly exposed to the financialisation of litigation.

[1] Fikri Soral, ‘Tatlici?v?Tatlici: Malta Rejects?$740?Million U.S. Defamation Judgment as Turkish Case Looms’ (Conflict?of?Laws, 28?April?2025) https://conflictoflaws.net/2025/tatlici-v-tatlici-malta-rejects-740-million-u-s-defamation-judgment-as-turkish-case-looms/

accessed 4?November?2025.

[2] *Tatlici v Tatlici* (Court of Appeal, Malta, 14 October 2025) App ?iv 719/20/1. (“**Appellate Judgement**”)

[3] Istanbul Regional Court of Appeal, 4th Civil Chamber, Decision No 2025/3701, File No 2025/2327, 13 October 2025,

[4] Appellate Judgement (n 2) para. 53

[5] ibid. para 47-52

[6] ibid. para. 50.

[7] *NEKO 2018 A, LLC v Downs Law Group, P.A.* (US District Court for the Southern District of Florida, No 1:25-cv-24580, filed 6 October 2025) https://dockets.justia.com/docket/florida/flsdce/1:2025cv24580/698527

[8] Cassandra Burke Robertson, ‘The Impact of Third-Party Financing on Transnational Litigation’ (2011) 44 *Case W Res J Intl L* 159.

[9] ibid at 164

[10] Maya Steinitz, ‘Whose Claim Is This Anyway? Third Party Litigation Funding’ (2011) 95 *Minnesota Law Review* 1268, 1318–25 (discussing funders’ portfolio-level incentives and the resulting agency-cost problems in litigation governance).

[11] *NEKO 2018 A v Downs Law Group* (n 7).

[12] ibid

[13] See Ronald A Brand, ‘Recognition and Enforcement of Foreign Judgments’ (2013) 74 *University of Pittsburgh Law Review* 491, 520–28; John Y Gotanda, ‘Punitive Damages: A Comparative Analysis’ (2004) 42 *Columbia Journal of Transnational Law* 391. Both scholars argue that disproportionate awards, exacerbated by the financialisation of litigation, require recognition courts to

restore proportionality through the *ordre public* exception.

[14] Steinitz (n 10) 1304, 1315.

[15] Symeon C Symeonides, 'The Public Policy Exception in Choice of Law: The American Version' (2025) *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* (forthcoming, also to appear in *Emory Journal of International Law*).

'Paramount clause' in a bill of lading as choice of law under Rome I – the Supreme Court of the Netherlands in Airgas USA v Universal Africa Lines



In Airgas USA v Universal Africa Lines (7/11/2025, ECLI:NL:HR:2025:1665), the Supreme Court of the Netherlands considered the interpretation of a so-called 'Paramount clause' in a bill of lading. Such clauses commonly signpost which rules govern the international carriage of goods by sea. The Court addressed such clause as a choice of law and held that article 3(1) of the Rome I Regulation does not preclude the parties from agreeing on such clause.

Facts

The dispute concerned liability for fire damage that occurred during the discharge of dangerous goods (refrigerated liquid ethylene in containers) transported by sea from the USA to Angola under a bill of lading.

The conditions of the bill of lading provided for jurisdiction of the Dutch courts; this is how the parties Airgas USA (Radnor, Pennsylvania, U.S.) and Universal Africa Lines (Limassol, Cyprus) came to litigate in the Netherlands. These conditions also included a so-called 'Paramount clause'. Such clauses have been used in contracts for the international carriage of goods by sea, primarily to designate which uniform substantive law convention on the carriage of goods by sea applies. The clause in this case provided that Dutch law governed the contract and declared that if the goods were carried by sea from or to a port in the United States, the 1936 Carriage of Goods by Sea Act of the United States (COGSA) applied. The COGSA is the U.S. implementation of the 1924 Hague Rules.

Dispute

As the regimes of liability diverge across the conventions containing uniform law, and across national laws, this dispute revolved around the choice of law. The cassation claim advanced various arguments against the application of COGSA (and in favour of the mandatory application of Dutch law which implied a different limitation of liability).

The main arguments were that COGSA is not a 'law of a country' that may be chosen within the meaning of the Rome I Regulation, that even if the GOGSA applied, its application should not set aside those provisions of Dutch law that may not be modified by contract, and that the lower courts applied the COGSA incorrectly (requiring the Court to review this application, arguing that the COGSA's content was identical to the Hague-Visby Rules and to Dutch law).

Decision

In its decision, the Supreme Court of the Netherlands referred to article 3(1) of the Rome I Regulation. First, it held that, according to this provision, the parties are free to choose the law governing their contract. They may choose either the law applicable to the entire contract or the law applicable to a specific part of the contract. This part of the contract is then governed by the chosen rules of law, which replace national law in its entirety, including those rules of national private law which cannot be modified by contract (at [3.1.2]).

Second, the Court held that article 3(1) of the Rome I Regulation does not preclude the parties from designating a part of a national legal system — and not that system in its entirety — as the applicable law. In this case, the parties had

the right to choose COGSA as applicable law, while for matters not regulated in the COGSA the parties should fall back on Dutch law (at [3.1.3]).

Finally, the Court reminded that the question of whether lower courts correctly applied foreign law cannot, in principle, lead to a claim in cassation under Dutch civil procedure laws. Only if the lower courts had compared the rules of the legal systems potentially applicable and held that the outcome was identical to Dutch law could an exception be made; this was not the case in this dispute (at [3.2.1] e.v.).

Comment

The decision in *Airgas USA v Universal Africa Lines* sheds light on the exact effects, in Dutch courts, of a contract clause widely used in contracts for the international carriage of goods by sea. This enhances legal certainty. At the same time, one inevitably runs into questions on the broader implications of the Court's considerations on partial choice of law that will undoubtedly form themes for further reflection. For inspiration: the clause that gave rise to this litigation, as quoted by the Court at [2.1], is this:

> 'The law of The Netherlands, in which the Hague-Visby Rules are incorporated, shall apply. Nevertheless if the law of any other country would be compulsorily applicable, the Hague-Visby Rules as laid down in the Treaty of Brussels of 25th August 1924 and amended in the Protocol of Brussels of 23rd February 1968 shall apply, save where the Hamburg Rules of the UN Convention of the Carriage of Goods by Sea of 1978 would apply compulsorily, in which case the Hamburg Rules shall apply. If any stipulation, exception and condition of these conditions would be found inconsistent with The Hague-Visby Rules or Hamburg Rules, or any compulsory law, only such stipulation, exception and condition or part thereof, as the case may be, shall be invalid. In case of carriage by sea from or to a port of the USA, this Bill of Lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved 16th April 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. The provisions stated in said Act shall, except as maybe otherwise specifically provided herein, govern before the goods are

> loaded on and after they are discharged from the ship and throughout the entire time the goods are in custody of the carrier. The carrier shall not be liable in any capacity whatsoever for any delay, non-delivery or mis-delivery, or loss of or damage to the goods occurring while the goods are not in the actual custody of the carrier.'

"Without Regard to Principles of Conflict of Laws"

It is common to see some variation of the phrase "without regard to conflict of laws principles" appear at the end of a choice-of-law clause. Here are some examples:

"This Agreement shall be governed by and construed in accordance with the laws of the Republic of China, *without regard to its principles concerning conflicts of laws*."

"This Agreement and all acts and transactions pursuant hereto and the rights and obligations of the parties hereto shall be governed, construed and interpreted in accordance with the laws of the State of Delaware, *without giving effect to principles of conflicts of law*."

"This Note is being delivered in and shall be construed in accordance with the laws of the State of New York, *without regard to the conflict of laws provisions thereof*."

Although this phrase is common, its purpose and origin are poorly understood. In 2020, I published an article, *A Short History of the Choice of Law Clause*, that attempted to demystify these issues.

The original purpose of this language, as best I can tell, was to signal disapproval of decisions such as *Duskin v. Pennsylvania-Central Airlines Corporation*, a 1948 case in which a U.S. court interpreted a clause choosing Pennsylvania law to

select the whole law of Pennsylvania (including its conflicts rules). The court then applied Pennsylvania conflicts rules to conclude that the agreement was, in fact, governed by the law of Alabama. Needless to say, it seems highly unlikely that this is what the parties intended.

When the *Restatement (Second) of Conflict of Laws* was published, it criticized the holding in *Duskin.* The drafters of the *Restatement* took the position that choice-of-law clauses should not be interpreted to select the conflicts rules of the chosen jurisdiction. The prominence assigned to the topic in the section of the new *Restatement* dealing with choice-of-law clauses (Section 187(3)) prompted contract drafters across the United States to think seriously about the issue for the first time. So far as I can determine, the language quoted above did not appear in a single U.S. choice-of-law clause drafted before the late 1960s. In the years that followed the publication of the *Restatement (Second)* in 1971, the number of contracts containing this language exploded.

The irony is that the holding in *Duskin* was widely ignored by U.S. courts. In the decades since that case was decided, these courts have consistently interpreted choice-of-law clauses to exclude the conflicts rules of the chosen jurisdiction even when they omit the phrase "without regard to principles of conflict of laws." Nevertheless, this language continues to be written into thousands upon thousands of choice-of-law clauses each year.

Court-to-court referrals and reciprocity between Chinese and Singapore courts

By Catherine Shen, Asian Business Law Institute

In 2023 Su 05 Xie Wai Ren No. 8 dated March 14, 2025, the Suzhou Intermediate

People's Court of Jiangsu Province in China (**Suzhou Court**) recognized and enforced civil judgment HC/S194/2022 under file number HC/JUD47/2023 by the Supreme Court of Singapore (**Singapore Judgment**). The judgment by the Suzhou Court (**Suzhou Judgment**) was announced in September 2025 by the Supreme People's Court of China (**SPC**) as among the fifth batch of Belt and Road Initiative (**BRI**) model cases.

Background

The applicant, Company Golden Barley International Pte Ltd (legal representative Wu), requested the Suzhou Court to recognize and enforce the Singapore Judgment, including the obligations imposed on the respondent Xiao to make payment.

The applicant claimed, among others, that Xiao, a director of Company Ba, colluded with other defendants of the case and procured Company Golden Barley into signing contracts with Company Ba and another company and making prepayment, without delivering to Company Golden Barley the goods agreed under those contracts. The Singapore Judgement, among others, ordered Xiao to pay over $6.6 million plus interest to Company Golden Barley. The applicant based its application on China's *Civil Procedure Law*, the *Interpretations of the Supreme People's Court on the Application of Law to Interest Accrued on Debt during the Period of Delayed Performance during Enforcement* and the *Memorandum of Guidance between the Supreme People's Court of the People's Republic of China and the Supreme Court of Singapore on Recognition and Enforcement of Money Judgments in Commercial Cases* (**MOG**).

The respondent Xiao, on her part, made several counterclaims. Among others, she contended that service of the Singapore documents was defective as service was forwarded by the International Cooperation Bureau of the SPC rather than the Ministry of Justice which is the competent authority designated by China to transmit foreign judicial documents under the 1965 HCCH Service Convention, and that the documents served on her were copies in the English language. Xiao also pointed out that the MOG is non-binding and that the treaty between China and Singapore on judicial assistance in civil and commercial matters does not cover judgments recognition and enforcement. Further, the respondent argued that the Singapore Judgment was not final and binding because it was pending appeal among some other defendants, making it ineligible for recognition and

enforcement.

Decision

The Suzhou Court noted that courts in China and Singapore have recognized and enforced each other's civil and commercial judgments since the MOG was signed in August 2018. Reciprocity therefore exists between the two jurisdictions which is required under Chinese law for recognizing and enforcing foreign judgments in the absence of any international treaty on judgments recognition and enforcement signed by or acceded to by the jurisdictions concerned.

The Suzhou Court also found that service of the Singapore documents on Xiao was not defective. The Chinese embassy in Singapore had entrusted the International Cooperation Bureau of the SPC to assist with service for case HC/S194/2022 in July 2022. One month later, the Zhangjiagang People's Court in Jiangsu Province (**Zhangjiagang Court**) served those documents on Xiao who acknowledged receipt. Xiao then declined to take delivery of the originals of those documents when contacted again by the Zhangjiagang Court after the originals were subsequently forwarded by the Chinese embassy in Singapore.

Further, the Suzhou Court found that the Singapore Judgment is final and binding. Specifically, the Suzhou Court had requested the SPC to submit a Request for Assistance in Ascertaining Relevant Laws of Singapore to the Supreme Court of Singapore. In its reply issued in December 2024, the Supreme Court of Singapore explained the scope of application of Singapore's Rules of Court and the provisions therein on default judgments, which helped the Suzhou Court reach its conclusion.

The Suzhou Court accordingly recognized and enforced the Singapore Judgment.

Commentary

With this decision, the Suzhou Court continues the favorable momentum of the courts of China and Singapore recognizing each other's civil and commercial judgments and affirms the importance and practical application of the MOG despite its non-binding nature.

Further, according to the SPC, this is the first time that a Chinese court has activated the procedure for seeking assistance from a Singapore court to provide

clarifications on relevant Singapore law. Article 19 of the MOG says Singapore courts may seek assistance from the SPC to obtain certification that the Chinese judgment for which enforcement is sought is final and conclusive. This "right" is not provided in the MOG for Chinese courts. According to the SPC, the Suzhou Court sought assistance from the Supreme Court of Singapore based on a separate instrument titled the Memorandum of Understanding on Cooperation between the Supreme People's Court of the People's Republic of China and the Supreme Court of the Republic of Singapore on Information on Foreign Law (**MOU**). This MOU provides a route for referrals between the courts of the two jurisdictions to seek information or clarifications on each other's relevant laws. Under the MOU, if it is necessary for courts in China or Singapore to apply the law of the other jurisdiction in adjudicating international civil and commercial cases, a request may be made to the relevant court in the other jurisdiction to provide information and opinions on its domestic law and judicial practice in civil and commercial matters, or matters relating thereto. The Supreme Court of Singapore and the SPC are the courts designated for transmitting, and for receiving and responding to, such requests in Singapore and China, respectively. Any request should be responded to as soon as possible, with notice to be given to the requesting court if the receiving court is unable to furnish a reply within 60 days. Further requests can also be made for more clarifications.

In Singapore domestic law, Order 29A of the Rules of Court 2021 empowers the Supreme Court of Singapore, on the application of a party or its own motion, to transmit to a specified court in a specific foreign country a request for an opinion on any question relating to the law of that foreign country or to the application of such law in proceedings before it. So far, China and the SPC are the only specified foreign country and specified court under Order 29A. Essentially, Order 29A has formalized the procedures under the MOU for Singapore.

This is different from Order 29 of the Rules of Court 2021 which currently lists New South Wales in Australia, Dubai of the United Arab Emirates and Bermuda as "specified foreign countries" and their relevant courts as "specified courts". Under Order 29, where in any proceedings before the Supreme Court of Singapore there arises any question relating to the law of any of those specified foreign countries or to the application of such law, the Supreme Court of Singapore may, on a party's application or its own motion, order that proceedings be commenced in a specified court in that specified foreign country seeking a

determination of such question. The Supreme Court of Singapore has in place memoranda of understanding on references of questions of law with the Supreme Court of New South Wales, the Supreme Court of Bermuda and the Dubai International Financial Centre Courts. These memoranda of understanding all "direct" parties to take steps to have the contested issue of law determined by the foreign court.

This may explain why Order 29 is titled referrals on issues of law while Order 29A is titled requests for opinions on questions of foreign law. It should be noted that equivalent provisions are in place for referrals involving the Singapore International Commercial Court (SICC) (SICC Rules, Order 15 and Order 15A).

Finally, it may also be interesting to explain SPC's lists of model cases. As a civil law jurisdiction, China does not practice *Stare Decisis*. Nor does it formally recognize the binding effects of precedents. However, the SPC does publish different lists of judgments which it deems of guiding value from time to time. Those judgments can be "guiding cases" which, loosely speaking, are of the highest "precedent value" and are subject to the most stringent selection criteria. They can be "model cases" which are of significant importance but are subject to less stringent selection criteria. They may also be "gazetted cases" which are judgments published on the official SPC newsletter for wider reference (but not guidance). Model cases may also be released for specific subject matter areas, such as intellectual property, financial fraud, etc. The Suzhou Judgment here is among the BRI model cases which mostly concern commercial disputes involving jurisdictions along the route of China's BRI program.

This write-up is adaptation of an earlier post by the Asian Business Law Institute which can be found here.

CJEU, Case C-540/24, Cabris Investment: Jurisdiction Clause in Favour of EU Court is Subject to Art. 25 Brussels Ia even if both Parties are Domiciled in the Same Third State



By Salih Okur, University of Augsburg

On 9 October 2025, the CJEU, in Case C-540/24 (*Cabris Investment*), had to decide whether Art. 25 Brussels Ia applies to "an agreement conferring jurisdiction in which the contracting parties, who are domiciled in the United Kingdom and therefore (now) in a third State, agree that the courts of a Member State of the European Union are to have jurisdiction over disputes arising under that contract, falls within the scope of that provision, even if the underlying contract has no further connection with that Member State chosen as the place of jurisdiction."

Unsurprisingly, the Court held that it does.

Facts

The case concerned a consultancy contract entered into by Cabris Investments and Revetas Capital Advisors in May 2020, both established in the United Kingdom, accompanied by a jurisdiction clause in favour of the *Handelsgericht Wien* in Austria. In June 2023 Cabris Investments brought proceedings against Revetas Capital Advisors before the *Handelsgericht Wien* seeking payment of EUR 360,000 in order to fulfil a contractual obligation relating to the role of Chief Financial Officer.

A similar case had already been referred to the CJEU in Case C-566/22 (*Inkreal*). The only (relevant) difference to the case at hand is the fact that the parties in *Inkreal* had both been established in the European Union when proceedings were brought against the defendant, which (due to the United Kingdom having left the European Union) was not the case here.

This seemingly significant difference to the case in *Inkreal* prompted Revetas Capital Advisors to challenge the international jurisdiction of the Vienna court, arguing that,

> ***(Para. 25)*** *"since the [Brussels Ia Regulation] has not been applicable in respect of legal relationships involving the [United Kingdom] since the end of the transition period provided for in the Withdrawal Agreement of 31 December 2020"*

the jurisdiction clause should not be subject to Art. 25 Brussels Ia as the action had been brought only after the end of said transition period in June 2023.

The Court's decision

As a preliminary point, the Court clarifies that

> ***(Para. 31****) "it must be borne in mind that since a jurisdiction clause is, by its very nature, a choice of jurisdiction which has no legal effect for so long as no judicial proceedings have been commenced and which takes effect only on the date on which the judicial action is set in motion, such a clause must be assessed as at the date on which the legal proceedings are brought."*

At first glance, this clarification seems important, given that the contract had been entered into in May 2020, but the action was only brought before the *Handelsgericht Wien* in June 2023 after the transition period between the United Kingdom and the European Union had ended on 31 December 2020.

Actually, though, these facts would only be relevant if the action were brought before the courts of the United Kingdom, which is not the case here. If Art. 25 Brussel Ia's requirements are met, the Austrian courts must subject the jurisdiction clause to Art. 25 Ia Brussel Ia, regardless of whether or not the Brussel Ia Regulation is still applicable in the United Kingdom.

With regard to the international scope of the Brussels Ia Regulation, the question of whether the United Kingdom is a Member State or a third State is irrelevant, as the CJEU has of course already famously clarified, in Case C-281/02 (*Owusu*), that the required international element need not necessarily derive from the involvement of more than one Member State.

The Court then establishes the following:

> ***(Para. 32**) "Therefore, in order to answer the question referred, it is necessary to determine whether a dispute between two parties to a contract who are domiciled in the same third State, such as the United Kingdom since 1 February 2020, and have designated a court of a Member State to hear and determine that dispute, falls within the scope of the [Brussels Ia Regulation] and Article 25(1) thereof."*

As to the provision's applicability (which the Court only considers at later point, hence the confusing paragraph numbers), the Court holds:

> ***(Para. 40)** "Third, according to the case-law of the Court, in order for the situation at issue to come within the scope of the [Brussels Ia Regulation], it must have an international element. That international element may result both from the location of the defendant's domicile in the territory of a Member State other than the Member State of the court seised and from other factors linked, in particular, to the substance of the dispute, which may be situated even in a third State."*

This is in line with the Court's decision in *Owusu*, as laid out above.

> ***(Para. 41)** "Furthermore, the Court has already clarified that a situation in which the parties to a contract, who are established in the same Member State, agree on the jurisdiction of the courts of another Member State to settle disputes arising out of that contract, has an international element, even if that contract has no further connection to the other Member State. In such a situation, the existence of an agreement conferring jurisdiction on the courts of a Member State other than that in which the parties are established in itself demonstrates the international nature of the situation at issue."*

Strictly speaking, this is irrelevant, as neither Cabris Investments nor Revetas Capital Advisors are domiciled in Austria. Just like in its earlier decision in *Inkreal*, to which the Court refers, this fact alone establishes the required international element.

With the applicability of the Brussels Ia Regulation established, the scope of Art. 25 Brussels Ia needs to be examined:

> ***(Para. 35)*** *"It is clear from the very wording of that provision ["regardless of their domicile"] that the rule which it lays down applies regardless of the domicile of the parties. More particularly, the application of that rule shall not be subject to any condition relating to the domicile of the parties, or of one of them, in the territory of a Member State."*
>
> ***(Para. 36)****"In the second place, as regards the context of Article 25(1) of the [Brussels Ia Regulation], it is important, first, to point out that that provision differs from the one which preceded it, namely Article 23(1) of the Brussels I Regulation, which, for its part, required, for the application of the rule of jurisdiction based on an agreement conferring jurisdiction, that at least one of the parties to that agreement be domiciled in a Member State."*

This is also confirmed by Art. 6(1) Brussels Ia (see **para. 39**).

These arguments (and some ancillary considerations) lead the Court to the answer that

> ***(Para. 49)*** *"Article 25(1) [Brussels Ia Regulation] must be interpreted as meaning that that provision covers a situation in which two parties to a contract domiciled in the United Kingdom agree, by an agreement conferring jurisdiction concluded during the transition period, on the jurisdiction of a court of a Member State to settle disputes arising from that contract, even where that court was seised of a dispute between those parties after the end of that period."*

Commentary

Overall, the Court's decision is hardly surprising. In fact, the decisions in *Owusu* and *Inkreal* could well have allowed the *Handelsgericht Wien* to consider its

question *acte eclairé* and assume its international jurisdiction on the basis of the unambiguous wording of Art. 25(1) Brussels Ia.

What is surprising, though, is that the Court did not address the relationship between Art. 25(1) Brussels Ia and the Hague Convention on Choice of Court Agreements (HCCCA) at all. According to Art. 71(1) Brussels Ia, the latter takes precedent where it is applicable. For this, at least one of the parties must be a resident of a Contracting State of the Hague Convention that is not a Member State of the European Union, Art. 26(6) lit. a) HCCCA. This seems debatable given that the jurisdiction clause in question was entered into during the transition period. However, even if the Hague Convention were applicable, its application would be precluded as the case does not fall within its international scope of application (Art. 1(1) HCCCA). As set out in Art. 1(2) HCCCA, contrary to the Brussels Ia Regulation's international scope as established in *Inkreal*, a case is considered international under the Hague Convention unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.

Accordingly, the Court's decision is consistent with its previous rulings on international jurisdiction clauses and does not conflict with other international instruments on the subject. To put it in the words of Geert Van Calster: "A very open door kicked open by the CJEU".

Pre-print article on SSRN on "Mirin" and the Future of Cross-Border Gender Recognition

I recently published the pre-print version of an article on SSRN that was accepted by the *International Journal of Law, Policy and the Family*. The article is called "**"Mirin" and Beyond: Gender Identity and Private International Law in**

the EU“. The article is part of a special issue dealing with questions of gender identity that (probably) will come out at the beginning of 2026.

As it deals with matters of private international law (regarding gender identity) and the CJEU decision **“Mirin”**, I thought it might be interesting for the readers of this blog to get a short summary of the article. If it sparks your interest, of course, I would be glad if you consider reading the whole text – and to receive feedback and further thoughts on this topic.

I. Divergence in National Gender Determination Systems as Starting Point

National legal systems display significant divergence in how legal gender is determined and changed. Approaches vary widely, covering systems where the **self-determination** of the individual is largely sufficient, sometimes requiring only a self-declaration (e.g., Germany, Iceland, Ireland, Malta, and Spain). Furthermore, some jurisdictions have adopted non-binary gender options (e.g., Austria, Germany, Iceland, Malta, and the Netherlands).

However, this liberal trend is countered by explicitly restrictive systems. For example, in Spring 2025, Hungary introduced its 25th constitutional amendment, which stipulates that Hungarian citizens are solely male and female.

This fragmented legal landscape is not just a theoretical issue. It is the direct cause of profound practical and legal problems for individuals who live, work, and travel within the supposedly borderless European Union. Thus, questions of PIL become paramount for the individual concerned.

II. The Private International Law Framework: Choice of Law vs. Recognition

In international situations concerning gender determination, PIL distinguishes between two scenarios: determining the **applicable law** (Choice of Law rules) when a person seeks to change or register their legal gender, and addressing the **recognition or acceptance** of a legal situation already created abroad. Both scenarios have in common that the public policy exception can restrict the application or recognition/acceptance of foreign law. The article will deal with all three considerations separately.

A. Applicable Law and Party Autonomy

Legal gender is often categorized as part of a person's **personal status**. In traditional conflict of laws regimes, this translates into a connecting factor referring to the individual's nationality. However, recent legislative developments exhibit a tendency toward **limited party autonomy**. E.g., the Swiss PIL Code, since 2022, applies the law of residence but grants the individual the option to choose the law of their nationality. Similarly, the new German PIL rule on gender identity primarily refers to nationality but allows a choice for German law if the person has their habitual residence in Germany. This incorporation of choice is coherent in systems prioritizing individual self-determination, as the person is viewed as responsible and capable of making decisions regarding their own gender identity, and, subsequently, the law applicable to this question.

B. Recognition/Acceptance and Portability of Status

The recognition or acceptance of a gender status established abroad is crucial for ensuring the **continuity and stability of the status**. Recognition or acceptance, as everybody here will know, generally follows two paths:

1. **Procedural Recognition:** This traditionally applies to foreign judgments but has been extended in some jurisdictions (like Malta) to cover other acts by public authorities, such as a foreign registration of status. Furthermore, in general we can see a tendency to expand the notion of "judgment" due to the decreasing role of judges in status questions and the increasing involvement of registries and notaries.
2. **Non-procedural Recognition:** This involves either reviewing the status using the domestic conflict of laws rules (the "PIL test") or utilizing separate rules designed explicitly to enhance the portability and acceptance of a status established abroad. Such separate rules typically require only minimum standards and a public policy control. There seems to be a general tendency within PIL to enhance the recognition or acceptance of foreign gender determination, as stability and continuity of status are primary interests. It might be feasible that countries using the PIL test reconsider whether this test is necessary or whether the introduction of separate, easier rules might be possible. Private International Law logic does not require such a test.

C. Public Policy Restrictions and the ECHR

Any recognition or acceptance of a legal situation created abroad can be refused in case of a public policy (*ordre public*) violation. Regarding gender identity, public policy issues usually arise either due to radical differences in approach (e.g., self-determination vs. biological focus) or the acceptance of gender options unknown to the forum (non-binary gender in a binary system). The article looks at different national approaches how to handle public policy considerations. It discusses briefly – and very critically – the Swiss Court decision regarding the (non-)recognition of a non-binary gender registration. Since gender forms part of an individual's identity, personality, and dignity, reasons for refusal must be balanced against the individual's interest in the continuity of status and avoiding disadvantages caused by having different genders in different jurisdictions. This reasoning is supported by the case law of the European Court of Human Rights (ECtHR). According to this case law, a refusal based on public policy must remain a **rare exception** and requires a manifest violation. "Mere administrative reasons" or "certain inconveniences" are insufficient to justify the denial of recognition.

III. The "Mirin" Effect: EU Law and Human Rights Synergy

After setting the scene, the article now looks at the CJEU decision "Mirin". Crucially, "Mirin" combined EU primary law with the protection afforded by the EU Charter of Fundamental Rights (Article 7), interpreting it in line with the ECtHR's jurisprudence under Article 8 ECHR

As we all probably know, the CJEU has already established a long tradition of using Article 21TFEU to ensure (to a certain limit) status portability within the EU regarding names, marriage, and filiation.

The **"Mirin" ruling** (C-4/23) applied the same logic to gender identity. The case involved a Romanian citizen who obtained a gender reassignment in the UK (then still an EU Member State) but was denied registration in Romania because Romanian law required a new proceeding according to Romanian law.

A. Recognition/Acceptance of a Binary Gender Status

The synthesis of EU Free Movement and Fundamental Rights led the CJEU to conclude that the Romanian State must acknowledge or accept a gender validity established in another Member State. As earlier decided by the ECtHR, the proceedings provided under Romanian law violate Article 8 ECHR, thus, referring

the Romanian citizen to these proceedings cannot be a means to justify the impediment of the right derived from Article 21 TFEU.

What does this mean for other Member States?

Other Member States, which provide different national proceedings to adapt the legal gender, *could* theoretically refer the individual to a quick, transparent, and accessible domestic reassignment procedure. Nevertheless, this is only permitted if it does not place an "excessive burden" on the individual.

Therefore, recognition, in my opinion, can be obligatory also in cases where a national proceeding is less burdensome than the Romanian one. The CJEU indicated that a new domestic proceeding is too burdensome if the lack of immediate recognition jeopardizes the continuity of **other essential statuses**—such as filiation or marriage—that depend on the gender recorded abroad. For instance, if a person is registered as a "mother" in the first state, a requirement to undergo a new gender registration procedure that temporarily destabilizes that parental status might, in my opinion, necessitate **direct recognition** of the status acquired abroad to comply with EU law.

B. Recognition/Acceptance of a Non-binary Gender Status

The situation regarding non-binary gender markers, which the ECtHR has previously stated remain within the discretion of each State to introduce, is more nuanced, as the ECtHR left it to the discretion of the Member States whether to introduce a non-binary gender. However, in my opinion, the "Mirin" principles severely restrict a Member State's ability to invoke *ordre public* to deny recognition of an unknown non-binary status.

Member States can only deny recognition/acceptance if the refusal is based on **fundamental, constitutional-level values** that would be manifestly violated by recognition/acceptance. The state cannot justify denial by citing "mere administrative reasons" or "certain inconveniences" related to their civil status system. In accordance with the ECtHR and CJEU case law, the Member States have to prove that recognition of a non-binary gender would genuinely disrupt their constitutional orders. The Hungarian constitutional amendment limiting citizens to male and female might serve as an attempt to establish such a constitutional value, though its legal scope is restricted to Hungarian citizens

IV. Final Conclusions

My final conclusions read as follows:

1. Applicable law to determine or change the gender in a domestic case with an international element requires a rule different from private international law rules dealing with the recognition/acceptance of a gender determination from abroad. Systems that focus on gender identity and self-determination should allow individuals a choice of law between at least nationality and habitual residence. One might also consider extending that choice to the *lex fori*.
2. If a procedural recognition of a court decision is not possible, jurisdictions should provide a rule allowing acceptance of a gender registered correctly abroad if certain minimum standards are fulfilled.
3. Recognition/acceptance of a gender reassignment or an unknown non-binary gender determination should only be refused for public policy reasons in very exceptional cases, esp. in those of abuse of the law or force against the individual.
4. Following the CJEU's latest decision, "Mirin", EU Member States have to recognise or accept a gender that has been validly established in another Member State within the binary gender system. Under rare circumstances, it might be possible to refer the individuals to a quick and transparent national proceeding.
5. Recognition/acceptance of a non-binary gender in an EU Member State that follows the binary gender system can only be refused for public policy reasons if the recognising Member State provides sufficient proof that the recognition would not only constitute "certain inconveniences" in the recognising Member State.