Commission’s Timetable for 2010-2014

The Commission has just published its Action Plan implementing the Stockholm Programme. It contains a timetable of the Commission’s actions until 2014. Here are those regarding conflict issues (if I did not miss any):

Legislative Proposals

2010

– Legislative Proposal for the revision of Regulation (EC) No 44/2001 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters (Brussels I)
– Proposal for a Regulation on the conflicts of laws in matters concerning matrimonial property rights, including the question of jurisdiction and mutual recognition, and for Regulation on the property consequences of the separation of couples from other types of unions
– Proposal for a Regulation on improving the efficiency of the enforcement of judgements in the European Union: the attachment of bank accounts

2011

– Proposal for a Regulation amending Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, including establishment of common minimum standards in relation to the recognition of decisions on parental responsibility, following a report on its application (2011-2013)
– Regulation on limitation periods on cross border road traffic accidents

2012

– Proposal for Regulation amending Regulation (EC) No 1346/2000 on insolvency proceedings, following a report on its application (2012-2013)

2013

– Legislative proposal on mutual recognition of the effects of certain civil status

documents (e.g. relating to birth, affiliation, adoption, name)
– Proposal for a Regulation on improving the efficiency of the enforcement of judgements in the European Union: transparency of debtor's assets
– Legislative proposal for dispensing with the formalities for the legalisation of documents between the Member States

2014

– Legislative proposal aimed at improving the consistency of existing Union legislation in the field of civil procedural law

Green Papers and Reports

2010

– Green paper on the free circulation of the documents: civil status documents, authentic acts and the simplification of legalisation
– Report on the assignment of claims under Regulation (EC) No 593/2008 on the law applicable to contractual relations (Rome I)

2011

– Report on application of Regulation (EC) No 1393/2007 on service of documents in civil and commercial matters, if necessary followed by a proposal for revision which could include the establishment of common minimum standards (2011-2012)
– Report on the application of Regulation (EC) No 805/2008 on the European Enforcement Order for uncontested claims

2012

– Report on application of Regulation (EC) No 1206/2001 on the taking of evidence in civil and commercial matters, if necessary followed by a proposal for revision which could include the establishment of common minimum standards (2012-2013)
– Report on the application of Regulation (EC) No 804/2007 on the applicable law on noncontractual obligations (Rome II)
– Report on the functioning of the present EU regime on civil procedural law across borders

2013

– Report on application of Regulation (EC) No 861/2007 establishing a European Small Claims Procedure
– Report on application of Regulation (EC) No 1896/2006 creating a European order for payment procedure
– Report on the applicable law on insurance contracts under Regulation (EC) No 593/2008 on the law applicable to contractual relations (Rome I)
– Green paper on the minimum standards for civil procedures and necessary follow up

2014

– Report on the application of the 2000 Hague Convention on the International Protection of Adults, assessing also the need for additional proposals as regards vulnerable adults
– Green paper on private international law aspects, including applicable law, relating to companies, associations and other legal persons

The Action Plan also provides for other acts such as Practice Guides, Fact Sheets and Compendia, some of which deal with conflict issues.

Conferences: Organized by ERA Spring/Summer 2008

The Academy of European Law (ERA) organizes a number of private international law related conferences, seminars and courses during the spring and summer of 2008:

3rd European Forum for In-house Counsel, *Brussels, 24-25 Apr 2008*

- Description from the ERA website: For the third consecutive year, ERA and ECLA are organising the European Forum for In-House Counsel, combining the pragmatism of an in-house lawyer association with the

expertise of a first-class European training institute. The European Forum for In-House Counsel provides a forum for the exchange of practical experience, knowledge and views between all in-house counsel and other lawyers involved in business affairs. The aim is to provide in-house counsel, through expert input, with a comprehensive overview of and a practical insight into issues of European Community law with which an in-house counsel is confronted. The latest developments and the recent relevant case law of the Community courts in areas such as European competition law, European company law, European private law, as well as the topic of legal privilege, will be analysed during the forum. Interaction among participants will be encouraged through periods of discussion and case studies.

- Target audience: In-house counsel and lawyers specialised in business affairs

Cross-Border Debt Recovery, *Trier, 15-16 May 2008*

- Description from the ERA website: Dr Angelika Fuchs (ERA) and Professor Burkhard Hess (University of Heidelberg) are organizing a conference on Cross-Border Debt Recovery. Freezing or "attaching" a debtor's bank account(s) is a very effective way for creditors to recover the amount owed to them. Most Member States have legislation, which provides for the attachment of bank accounts. Debtors can, however, transfer funds very quickly to other accounts that the creditor may not know about. The creditor is often not able to block such movements of funds as quickly and therefore loses a powerful weapon against recalcitrant debtors. The European Commission feels that problems of cross-border debt recovery are an obstacle to the free movement of payment orders within the European Union and to the proper functioning of the internal market. Late payment and non-payment are a risk for businesses and consumers alike. The Commission therefore proposes the creation of a European system for the attachment of bank accounts. The consultation process initiated by the Green Paper on the attachment of bank accounts has inspired a vivid debate among practitioners, governments and academics. Furthermore, a second Green Paper on measures enhancing the transparency of the debtor's assets will be published soon.

- Target audience: Lawyers in private practice, in-house lawyers, stakeholders, representatives of national authorities and academics specialised in civil procedure and banking law

Recent Developments in Private International Law and Business Law, *Trier, 5-6 Jun 2008*

- Description from the ERA website: Dr Angelika Fuchs, ERA, organizes a seminar on recent developments in private international law and business law. Private international law and business law continue to be characterised by growing Europeanisation. The purpose of this seminar will be to present the latest developments in both legislation and jurisprudence in the following areas: Brussels I Regulation and anti-suit injunctions; Intellectual property and conflict of laws; New Regulation (EC) No. 1393/2007 on the service of documents; New Directive on certain aspects of mediation in civil and commercial matters; New Regulation (EC) on the law applicable to contractual obligations ("Rome I"); New Regulation (EC) No. 864/2007 on the law applicable to non?contractual obligations ("Rome II"); Trends in European company law: from Daily Mail to Sevic and Cartesio; Major decisions on cross-border insolvency.
- Target audience: Lawyers in private practice, in-house counsel in companies, associations, ministries and other public authorities, judges, notaries, academics

Summer Course: European Company Law, *Trier, 18-20 Jun 2008*

- Description from the ERA website: Tomasz Kramer, ERA, organizes a summer course on European company law. For the second time European company law will feature in ERA's series of summer courses in Trier. The impact of enlargement and globalisation on the internal market creates a special context for individuals and companies that operate across borders. The European Commission has launched a wide-ranging strategy to adapt and harmonise European company law to meet these new challenges. European law has considerably influenced the shape of modern company law in EU member states. Directives and the case law of the European Court of Justice have helped to harmonise national laws and regulations have introduced new legal forms for businesses. The 'Europeanisation' of

company law continues apace. This course will offer an introduction to the principles and framework of European company law. It will provide a comprehensive overview of subjects including the formation of different types of companies, corporate governance and management options, capital requirements, shareholders' rights and insolvency. In addition, topics such as corporate restructuring and mobility as well as the characteristics of transnational financial vehicles will be addressed, albeit taking into consideration national particularities. The course will address current challenges and the latest legislative proposals. The analysis of ECJ case law will be an essential element of the course. Participants will have the opportunity to take a preparatory online e-learning module.

- Target audience: Young lawyers in private practice, public administration or in-house counsel, as well as advanced or postgraduate students, academics, economists or auditors seeking a detailed introduction to European company law

Summer Course: European Private Law, *Trier, 30 Jun-4 Jul 2008*

- Description from the ERA website: Nuno Epifânio, ERA, organizes a summer course on European private law. The purpose of this course is to introduce lawyers to European private law. Among the areas covered during the seminar will be: European Civil Procedure; Private International Law; Contract Law; Insolvency Law; Financial Services; Consumer Protection. This course should prove of particular interest to lawyers who wish to specialise in or acquire an in-depth knowledge of European private law. A general knowledge of EU law is suitable but no previous knowledge or experience in European Private Law is required to attend this course. Participants will be able to deepen their knowledge through case-studies and workshops. The course includes a visit to the European Court of Justice in Luxembourg. Participants will have the opportunity to take a preparatory onlinee-learning module.

- Target audience: Lawyers in private practice, in-house counsel, representatives of national authorities and academics

Conference in Germany: Recent Developments in Private International Law

From 9th to 10th November a conference will take place at the Academy of European Law (ERA) in Trier, Germany where recent developments in private international law will be presented.

Here are the areas which will be discussed:

- Legal and Practical Consequences of Landmark ECJ Decisions (e.g. Lugano Convention Opinion (1/03); Owusu)
- The European Enforcement Order in Judicial Practice
- (The Revision of) the Regulation on Service of Documents
- Cross-border Attachment of Bank Accounts
- International Insolvency Law
- Hague Convention of 30 June 2005 on Choice of Court Agreements
- European Payment Order
- Towards a European Small Claims Procedure – The State of Play
- Future Developments in European Private International Law: Rome I & Rome II

See for the full programme, the list of speakers and further information the website of ERA.

Montenegro’s legislative

implementation of the EAPO Regulation: setting the stage in civil judicial cooperation

Carlos Santaló Goris, Lecturer at the European Institute of Public Administration in Luxembourg, offers an analysis of an upcoming legislative reform in Montenegro concerning the European Account Preservation Order

In 2010, Montenegro formally became a candidate country to join the European Union. To reach that objective, Montenegro has been adopting several reforms to incorporate within its national legal system the *acquis communautaire*. These legislative reforms have also addressed civil judicial cooperation on civil matters within the EU. The Montenegrin Code of Civil Procedure (*Zakon o parni?nom postupku*) now includes specific provisions on the 2007 Service Regulation, the 2001 Evidence Regulation, the European Payment Order ('EPO'), and the European Small Claims Procedure ('ESCP'). Furthermore, the Act on Enforcement and Securing of Claims (*Zakon o izvršenju I obezbe?enju*) also contains provisions on the EPO, the ESCP, and the European Enforcement Order ('EEO'). While none of the referred EU instruments require formal transposition into national law, the fact that it is now embedded within national legislation can facilitate its application and understanding in the context of the national civil procedural system.

Currently, the Montenegrin legislator is about to approve another amendment of the Act on Enforcement and Securing of Claims, this time concerning the European Account Preservation Order Regulation ('EAPO Regulation'). This instrument, which entered into force in 2017, allows the provisional attachment of debtors' bank accounts in cross-border civil and commercial claims. It also allows creditors with a title at the time of application to apply for an EAPO. According to the Montenegrin legislator, the purpose of this reform is to harmonize the national legislation with the EAPO, as well as creating 'the necessary conditions for its smooth application'.

In terms of substance, the specific provisions on the EAPO focus primarily on identifying the different authorities involved in the EAPO procedure from the

moment it is granted to its enforcement. In broad terms, the content of the provisions corresponds to the information that Member States were required to provide to the Commission by 18 July 2016, and that can be found in Article 50. One provision establishes which are the competent courts to issue the EAPO and to decide on the appeal against a rejected EAPO application. Regarding the appeal procedure, it establishes that creditors have to submit their appeal within the five following days of the date the decision dismissing the EAPO application is rendered. Such a deadline contradicts the text of the EAPO Regulation, which sets a 30-day deadline to submit the appeal, which cannot be shortened by national legislation. This is an aspect that has been uniformly established by the EU legislator, thus it does not depend on national law (Article 46(1)).

Regarding the debtors' remedies to revoke, modify or terminate the enforcement of an EAPO contained Articles 33, 34 and 35, the reform contains a specific provision to determine which are the competent courts. Interestingly, it also establishes a 5-day deadline to appeal the decision resulting from the request for a remedy. In this case, the EAPO Regulation does not establish any deadline, giving Member States discretion to establish such deadline. The short deadline chosen contrasts with the 15 days established in Luxembourg (Article 685-5(6) *Nouveau Code de Procedure Civile*), the one-month deadline chosen by the German legislator (Section 956 *Zivilprozessordnung*).

Concerning the enforcement phase of the EAPO, it determines which are the authorities responsible for the enforcement. It also acknowledges that there are certain amounts exempted from attachment of an EAPO under Montenegrin law.

Last but not least, the reform also tackles the information mechanism to trace the debtors' bank accounts. The information authority will be Montenegro's Central Bank (*Centralna Banka*). The method that will be employed to trace the debtors' bank accounts consists of asking banks to disclose whether they hold the bank accounts. This method corresponds to the first of the methods listed in Article 14(5) that information authorities can use to trace the debtors' bank accounts.

The entry into force of these new EAPO provisions is postponed until Montenegro joins the EU. While these provisions might seem rather generic, they clearly reveal Montenegro's commitment to facilitate the application of the EAPO within its legal system and make it more familiar for national judges and practitioners that will have to deal with it.

China’s Draft Law on Foreign State Immunity—Part II

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

In December 2022, Chinese lawmakers published a draft law on foreign state immunity, an English translation of which is now available. In a prior post, I looked at the draft law’s provisions on immunity from suit. I explained that the law would adopt the restrictive theory of foreign state immunity, bringing China’s position into alignment with most other countries.

In this post, I examine other important provisions of the draft law, including immunity from attachment and execution, service of process, default judgments, and foreign official immunity. These provisions generally follow the U.N. Convention on Jurisdictional Immunities of States and Their Property, which China signed in 2005 but has not yet ratified.

China’s draft provisions on immunity from attachment and execution, service of process, and default judgments make sense. Applying the draft law to foreign officials, however, may have the effect of limiting the immunity that such officials would otherwise enjoy under customary international law. This is probably not what China intends, and lawmakers may wish to revisit those provisions before the law is finally adopted.

Immunity from Attachment and Execution

Articles 13 and 14 of China’s draft law cover the immunity of foreign state property from “judicial compulsory measures,” which the U.N. Convention calls “measures of constraint” and the U.S. Foreign Sovereign Immunities Act (FSIA) refers to as measures of attachment and execution. They include both pre-

judgment measures to preserve assets and post-judgment measures to enforce judgments. Under customary international law, immunity from attachment and execution is separate from and generally broader than immunity from suit. It protects foreign state property located in the forum state, in this case the property of foreign states located in China.

Article 13 provides that the property of a foreign state shall be immune from judicial compulsory measures with three exceptions: (1) when the foreign state has expressly waived such immunity; (2) when the foreign state has specifically designated property for the enforcement of such measures; and (3) to enforce Chinese court judgments when the property is used for commercial activities, relates to the proceedings, and is located in China. Article 13 further states that a waiver of immunity from jurisdiction shall not be deemed a waiver of immunity from judicial compulsory measures.

Article 14 goes on to identify types of property that shall *not* be regarded as used for commercial activities for the purpose of Article 13(3). These include the bank accounts of diplomatic missions, property of a military character, central bank assets, property that is part of the state's cultural heritage, property of scientific, cultural, or historical value used for exhibition, and any other property that a Chinese court thinks should not be regarded as being in commercial use.

Articles 13 and 14 of China's draft law closely parallel Articles 19-21 of the U.N. Convention. The main difference appears in Article 13(3)'s exception for enforcing court judgments, which is expressly limited to Chinese court judgments and requires that the property "relates to the proceedings." Article 19(c) of the U.N. Convention, by contrast, is not limited to judgments of the state where enforcement is sought and does not require that the property relate to the proceedings. On first glance, China's draft law appears to resemble more nearly § 1610(a)(2) of the U.S. FSIA, which is expressly limited to U.S. judgments and requires that the property be used for the commercial activity on which the claim was based.

Upon reflection, however, it appears that China's limitation of draft Article 13(3) to Chinese court judgments sets it apart from the U.S. practice as well as the U.N. Convention. In the United States, a party holding a foreign judgment may seek recognition of that judgment in U.S. courts, thereby converting it into a U.S. judgment. Because the U.S. judgment recognizing the foreign judgment falls

within the scope of § 1610(a), it is possible to attach the property of a foreign state in the United States to enforce a non-U.S. judgment.

It seems that the same is not true in China, which is to say that Article 13(3) cannot be used to enforce foreign judgments. Under Article 289 of China's Civil Procedure Law (numbered Article 282 in this translation of the law prior to its 2022 amendment), the recognition of a foreign judgment results in a "ruling" (??). The text of Article 13(3), however, is limited to "judgments on the merits" (??), which appears to exclude Chinese decisions recognizing foreign judgments. (I am grateful to my students Li Jiayu and Li Yadi for explaining the distinction to me.) In short, Article 13(3) appears *really* to be limited to Chinese court judgments, as neither the U.N. Convention nor the U.S. FSIA are in practice.

There are other differences between the U.S. FSIA and China's draft law. With respect to the property of a foreign state itself, the FSIA requires that the property be used for a commercial activity in the United States by the foreign state—even when the foreign state has waived its immunity—which can be a difficult set of conditions to satisfy. Articles 13(1) and (2) of China's draft law, by contrast, impose no similar conditions. The U.S. FSIA has separate and looser rules for attaching the property of agencies or instrumentalities of foreign states in § 1610(b), rules that do not require the property to be used for a commercial activity in the United States as long as the agency or instrumentality is engaged in a commercial activity in the United States. And § 1611(b) of the FSIA singles out only central bank and military assets as exceptions to the rules allowing post-judgment attachment and execution, whereas the draft law's Article 14 additionally mentions bank accounts of diplomatic missions, property that is part of the state's cultural heritage, and property of scientific, cultural, or historical value used for exhibition.

Service of Process

China's draft law also provides for service of process on a foreign state. Article 16 states that service may be made as provided in treaties between China and the foreign state or "by other means acceptable to the foreign state and not prohibited by the laws of the People's Republic of China." (The United States and China are both parties to the Hague Service Convention, which provides for service through the receiving state's Central Authority.) If neither of these means is possible, then service may be made by sending a diplomatic note. A foreign

state may not object to improper service after it has made a pleading on the merits. Again, this provision closely follows the U.N. Convention, specifically Article 22.

Section 1608 of the FSIA is the U.S. counterpart. It distinguishes between service on a foreign state and service on an agency or instrumentality of a foreign state. For service on a foreign state, § 1608 provides four options that, if applicable, must be attempted in order: (1) in accordance with any special arrangement between the plaintiff and the foreign state; (2) in accordance with an international convention; (3) by mail from the clerk of the court to the ministry of foreign affairs; (4) through diplomatic channels. For service on an agency or instrumentality, § 1608 provides a separate list of means.

Default Judgment

If the foreign state does not appear, Article 17 of China's draft law requires a Chinese court to "take the initiative to ascertain whether the foreign state is immune from … jurisdiction." The court may not enter a default judgment until at least six months after the foreign state has been served. The judgment must then be served on the foreign state, which shall have six months in which to appeal. Article 23 of the U.N. Convention is similar, except that it provides periods of four months between service and default judgment and four months in which to appeal.

U.S. federal courts must similarly ensure that a defaulting foreign state is not entitled to immunity, because the FSIA makes foreign state immunity a question of subject matter jurisdiction, and federal courts must address questions of subject matter jurisdiction even if they are not raised by the parties. Section 1608(e) goes on to state that "[n]o judgment by default shall be entered by a court of the United States or of a State against a foreign state … unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." In other words, courts in the United States are additionally obligated to examine the *substance* of the claim before granting a default judgment. China's draft law does not appear to impose any similar obligation.

Foreign Officials

Article 2 of China's draft law defines "foreign state" to include "natural persons …

authorized … to exercise sovereign powers." Thus, unlike the U.S. FSIA, China's draft law may cover the immunity of some foreign officials.

The impact of the draft law on foreign official immunity is mitigated by Article 19, which says that the law shall not affect diplomatic immunity, consular immunity, special missions immunity, or head of state immunity. Article 3 of the U.N. Convention similarly specifies that these immunities are not affected by the Convention. What is missing from these lists of course, is conduct-based immunity. Under customary international law, foreign officials are entitled to immunity from suit based on acts taken in their official capacities, and such immunity continues after the official leaves office.

It appears that China's draft law would govern the conduct-based immunity of foreign officials in Chinese courts and would give them less immunity than customary international law requires. By including "natural persons" within the definition of "foreign state," the draft law makes the exceptions to immunity for foreign states discussed in my prior post applicable to foreign officials as well. Thus, foreign officials who engage in commercial activity on behalf of a state might be subject to suit in their personal capacities and not just as representatives of the state. This does not make much sense.

Although it appears that China simply copied this quirk from the U.N. Convention, it makes no more sense in Chinese domestic law than it makes in the Convention. Chinese authorities would be wise to reconsider this issue before the law is finalized. They could address the problem by adding conduct-based immunity to Article 19's list of immunities not affected. Or, better still, they could omit "natural persons" from the definition of "foreign state" in Article 2.

Conclusion

Adoption of China's draft law on foreign state immunity would be a major step in the modernization of China's laws affecting transnational litigation. As described in this post and my previous one, the draft law generally follows the provisions of the U.N. Convention and would apply those rules to all states including states that chose not to join the Convention. The provisions of the U.N. Convention are generally sensible, but they are not perfect. In those instances where the U.N. Convention rules are defective—for example, with respect to the conduct-based immunity of foreign officials—China should not follow them blindly.

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

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1/2023: Abstracts

The latest issue of the „Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)“ features the following articles:

(These abstracts can also be found at the IPRax-website under the following link: https://www.iprax.de/en/contents/)

R. Wagner: **European account preservation orders and titles from provisional measures with subsequent account attachments**

The enforcement of a claim, even in cross-border situations, must not be jeopardised by the debtor transferring or debiting funds from his account. A creditor domiciled in State A has various options for having bank accounts of his debtor in State B seized. Thus, he can apply for an interim measure in State A according to national law and may have this measure enforced under the Brussels Ibis Regulation in State B by way of attachment of accounts. Alternatively, he may proceed in accordance with the European Account Preservation Order Regulation (hereinafter: EAPOR). This means that he must obtain a European account preservation order in State A which must be enforced in State B. By comparing these two options the author deals with the legal nature of the European account preservation order and with the subtleties of enforcement under the EAPOR.

H. Roth: **The „relevance (to the initial legal dispute)“ of the reference for a preliminary ruling pursuant to Article 267 TFEU**

The preliminary ruling procedure under Article 267 of the Treaty on the Functioning of the European Union (TFEU) exists to ensure the uniform interpretation and application of EU law. The conditions under which national courts may seek a preliminary ruling are based on the established jurisdiction of the European Court of Justice (CJEU) and are summarised in Article 94 of the Rules of Procedure of the CJEU. One such condition is that the question referred to the court must be applicable to the decision in the initial legal dispute. Any future judgement by the referring court must thereafter be dependant on the interpretation of Union law. When cases are obviously not applicable, the European Court dismisses the reference for a preliminary ruling as inadmissible. The judgement of the CJEU at hand concerns one of these rare cases in the decision-making process. The sought-after interpretation of Union law was not materially related to the matter of the initial legal dispute being overseen by the referring Bulgarian court.

S. Mock/C. Illetschko: **The General International Jurisdiction for Legal Actions against Board Members of International Corporations – Comment on OLG Innsbruck, 14 October 2021 – 2 R 113/21s, IPRax (in this issue)**

In the present decision, the Higher Regional Court of Innsbruck (Austria) held that (also) Austrian courts have jurisdiction for investors lawsuits against the former CEO of the German Wirecard AG, Markus Braun. The decision illustrates that the relevance of the domicile of natural persons for the jurisdiction in direct actions for damages against board members (Art 4, 62 Brussels Ia Regulation) can lead to the fact that courts of different member states have to decide on crucial aspects of complex investor litigation at the same time. This article examines the decision, focusing on the challenges resulting from multiple residences of natural persons under the Brussels Ia Regulation.

C. Kohler: **Lost in error: The ECJ insists on the "mosaic solution" in determining jurisdiction in the case of dissemination of infringing content on the internet**

In case C-251/20, Gtflix Tv, the ECJ ruled that, according to Article 7(2) of Regulation No 1215/2012, a person, considering that his or her rights have been

infringed by the dissemination of disparaging comments on the internet, may claim, before the courts of each Member State in which those comments are or were accessible, compensation for the damage suffered in the Member State of the court seized, even though those courts do not have jurisdiction to rule on an application for rectification and removal of the content placed online. The ECJ thus confirms the "mosaic solution" developed in case C-509/09 and C-161/10, eDate Advertising, and continued in case C-194/16, Bolagsupplysningen, for actions for damages for the dissemination of infringing contents on the internet. The author criticises this solution because it overrides the interests of the sound administration of justice by favouring multiple jurisdictions for the same event and making it difficult for the defendant reasonably to foresee before which court he may be sued. Since a change in this internationally isolated case law is unlikely, a correction can only be expected from the Union legislator.

T. Lutzi: **Art 7 No 2 Brussels Ia as a Rule on International and Local Jurisdiction for Cartel Damage Claims**

Once again, the so-called "trucks cartel" has provided the CJEU with an opportunity to clarify the interpretation of Art. 7 No. 2 Brussels Ia in cases of cartel damage claims. The Court confirmed its previous case law, according to which the place of damage is to be located at the place where the distortion of competition has affected the market and where the injured party has at the same time been individually affected. In the case of goods purchased at a price inflated by the cartel agreement, this is the place of purchase, provided that all goods have been purchased there; otherwise it is the place where the injured party has its seat. In the present case, both places were in Spain; thus, a decision between them was only necessary to answer the question of local jurisdiction, which is also governed by Art. 7 No. 2 Brussels Ia. Against this background, the Court also made a number of helpful observations regarding the relationship between national and European rules on local jurisdiction.

C. Danda: **The concept of the weaker party in direct actions against the insurer**

In its decision T.B. and D. sp. z. o. o. ./. G.I. A/S the CJEU iterates on the principle

expressed in Recital 18 Brussels I bis Regulation that in cross-border insurance contracts only the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules. In the original proceedings – a joint case – the professional claimants had acquired insurance claims from individuals initially injured in car accidents in Poland. The referring court asked the CJEU (1) if such entities could be granted the forum actoris jurisdiction under Chapter II section 3 on insurance litigation against the insurer of the damaging party and (2) if the forum loci delicti jurisdiction under Art. 7(2) or 12 Brussels I bis Regulation applies under these conditions. Considering previous decisions, the CJEU clarified that professional claimants who regularly receive payment for their services in form of claim assignment cannot be considered the weaker party in the sense of the insurance section and therefore cannot rely on its beneficial jurisdictions. Moreover, the court upheld that such claimants may still rely on the special jurisdiction under Art. 7(2) Brussels I bis Regulation.

C. Reibetanz: **Procedural Consumer Protection under Brussels Ibis Regulation and Determination of Jurisdiction under German Procedural Law (Sec. 36 (1) No. 3 ZPO)**

German procedural law does not provide for a place of jurisdiction comparable to Article 8 (1) Brussels Ibis Regulation, the European jurisdiction for joinder of parties. However, according to Sec. 36 ZPO, German courts can determine a court that is jointly competent for claims against two or more parties. In contrast to Art. 8 (1) Brussels Ibis Regulation, under which the plaintiff has to choose between the courts that are competent, the determination of a common place of jurisdiction for joint procedure under German law is under the discretion of the courts. Since EU law takes precedence in its application over contrary national law, German courts must be very vigilant before determining a court at their discretion. The case is further complicated by the fact that the prospective plaintiff can be characterised as a consumer under Art. 17 et seq. Brussels Ibis Regulation. The article critically discusses the decision of the BayObLG and points out how German judges should approach cross-border cases before applying Sec. 36 ZPO.

M.F. Müller: **Requirements as to the „document which instituted the proceedings“ within the ground for refusal of recognition according to Art 34 (2) Brussels I Regulation**

The German Federal Court of Justice dealt with the question which requirements a document has to comply with to qualify as the “document which instituted the proceedings” within the ground for refusal of recognition provided for in Art 34 (2) Brussels I Regulation regarding a judgment passed in an adhesion procedure. Such requirements concern the subject-matter of the claim and the cause of action as well as the status quo of the procedure. The respective information must be sufficient to guarantee the defendant’s right to a fair hearing. According to the Court, both a certain notification by a preliminary judge and another notification by the public prosecutor were not sufficiently specific as to the cause of action and the status quo of the procedure. Thus, concerning the subject matter of the claim, the question whether the “document which instituted the proceedings” in an adhesion procedure must include information about asserting civil claims remained unanswered. While the author approves of the outcome of the case, he argues that the Court would have had the chance to follow a line of reasoning that would have enabled the Court to submit the respective question to the ECJ. The author suggests that the document which institutes the proceedings should contain a motion, not necessarily quantified, concerning the civil claim.

B. Steinbrück/J.F. Krahé: **Section 1032 (2) German Civil Procedural Code, the ICSID Convention and Achmea – one collision or two collisions of legal regimes?**

While the ECJ in Achmea and Komstroy took a firm stance against investor-State arbitration clauses within the European Union, the question of whether this will also apply to arbitration under the ICSID Convention, which is often framed as a “self-contained” system, remains as yet formally undecided. On an application by the Federal Republic of Germany, the Berlin Higher Regional Court has now ruled that § 1032 (2) Civil Procedural Code, under which a request may be filed with the court to have it determine the admissibility or inadmissibility of arbitral proceedings, cannot be applied to proceedings under the ICSID Convention. The article discusses this judgment, highlighting in particular that the Higher Regional Court chooses an interpretation of the ICSID Convention which creates

a (presumed) conflict between the ICSID Convention and German law, all the while ignoring the already existing conflict between the ICSID Convention and EU law.

L. Kuschel: **Copyright Law on the High Seas**

The high seas, outer space, the deep seabed, and the Antarctic are extraterritorial – no state may claim sovereignty or jurisdiction. Intellectual property rights, on the other side, are traditionally territorial in nature – they exist and can be protected only within the boundaries of a regulating state. How, then, can copyright be violated aboard a cruise ship on the high seas and which law, if any, ought to be applied? In a recent decision, the LG Hamburg was confronted with this quandary in a dispute between a cruise line and the holder of broadcasting rights to the Football World Cup 2018 and 2019. Unconvincingly, the court decided to circumnavigate the fundamental questions at hand and instead followed the choice of law agreement between the parties, in spite of Art. 8(3) Rome II Regulation and opting against the application of the flag state's copyright law.

T. Helms: **Validity of Marriage as Preliminary Question for the Filiation and the Name of a Child born to Greek Nationals in Germany in 1966**

The Higher Regional Court of Nuremberg has ruled on the effects of a marriage on the filiation and the name of a child born to two Greek nationals whose marriage before a Greek-orthodox priest in Germany was invalid from the German point of view but legally binding from the point of view of Greek law. The court is of the opinion that – in principle – the question of whether a child's parents are married has to be decided independently applies the law which is applicable to the main question, according to the conflict of law rules applicable in the forum. But under the circumstances of the case at hand, this would lead to a result which would be contrary to the jurisprudence of the Court of Justice on names lawfully acquired in one Member State. Therefore – as an exception – the preliminary question in the context of the law of names has to be solved according to the same law which is applicable to the main question (i.e. Greek law).

K. Duden: **PIL in Uncertainty – failure to determine a foreign law, application of a substitute law and leaving the applicable law open**

A fundamental concern of private international law is to apply the law most closely connected to a case at hand – regardless of whether this is one's own or a foreign law. The present decision of the Hanseatic Higher Regional Court as well as the proceedings of the lower court show how difficult the implementation of this objective can become when the content of the applicable law is difficult to ascertain. The case note therefore first addresses the question of when a court should assume that the content of the applicable law cannot be determined. It examines how far the court's duty to investigate the applicable law extends and argues that this duty does not seem to be limited by disproportionate costs of the investigative measures. However, the disproportionate duration of such measures should limit the duty to investigate. The comment then discusses which law should be applied as a substitute for a law whose content cannot be ascertained. Here the present decision and the proceedings in the lower court highlight the advantages of applying the lex fori as a substitute – not as an ideal solution, but as the most convincing amongst a variety of less-than-ideal solutions. Finally, the note discusses why it is permissible as a matter of exception for the decision to leave open whether German or foreign law is applicable.

M. Weller: **Kollisionsrecht und NS-Raubkunst: U.S. Supreme Court, Entscheidung vom 21. April 2022, 596 U.S. ____ (2022) – Cassirer et al. ./. Thyssen-Bornemisza Collection Foundation**

In proceedings on Nazi-looted art the claimed objects typically find themselves at the end of a long chain of transfers with a number of foreign elements. Litigations in state courts for recovery thus regularly challenge the applicable rules and doctrines on choice of law – as it was the case in the latest decision of the U.S. Supreme Court in Cassirer. In this decision, a very technical point was submitted to the Court for review: which choice-of-law rules are applicable to the claim in proceedings against foreign states if U.S. courts ground their jurisdiction on the expropriation exception in § 1605(3)(a) Federal Sovereign Immunities Act (FSIA). The lower court had opted for a choice-of -aw rule under federal common law, the

U.S. Supreme Court, however, decided that, in light of Erie and Klaxon, the choice-of-law rules of the state where the lower federal courts are sitting in diversity should apply.

A reform seeking to speed up the functioning of the EAPO information mechanism in Luxembourg

Carlos Santaló Goris, Research Fellow at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law and Ph.D. candidate at the University of Luxembourg, offers an analysis of the reform recently approved in Luxembourg concerning the functioning of the information mechanism of the Regulation No 655/2014, establishing a European Account Preservation Order ("EAPO Regulation"). The EAPO Regulation and other EU civil procedural instruments are the object of study in the ongoing EFFORTS project, with the financial support of the European Commission.

The EAPO Regulation introduced the first European civil interim measure that permits, as its name indicates, the provisional attachment of the debtors' bank accounts in cross-border civil and commercial claims. Besides the temporary attachment of debtors' funds, it also contains a special tool to search for the bank accounts containing those funds. This information mechanism is perhaps one of the main appeals of the EAPO. It has even inspired some national legislatures, for instance, the French one, to improve their domestic mechanisms to trace debtors' assets in civil proceedings. Nonetheless, access to the EAPO's information mechanism is more limited than access to the EAPO itself. Whereas creditors without a title can apply for an EAPO, they cannot submit a request to search for debtors' bank accounts. This option is limited to creditors with a title, whether the title is enforceable or not.

Article 14 of the EAPO Regulation sets up the basic structure of the information mechanism. Provided creditors satisfy the necessary prerequisites to ask for the investigation of the debtors' bank accounts, the court which examines the EAPO application sends a request for information to the Member State where the bank accounts are located. There, an information authority would be in charge of searching for debtors' bank accounts and giving an answer to the requesting court.

The EAPO Regulation gives the Member States broad discretion in implementing the mechanism to investigate the debtors' bank accounts. Article 14 only suggests three different methods that the Member States can choose to search the information about the debtors' bank accounts. The first one consists of asking all the banks in the territory of the requested Member State to disclose whether they have the debtors' bank accounts (Art. 14(5)(a) EAPO Regulation). According to the second method, the information about the debtors' bank accounts is retrieved from the registries held by public administrations (Art. 14(5)(b) EAPO Regulation). Finally, according to the third method, courts may "oblige the debtor to disclose with which bank or banks in its territory he holds one or more accounts" (Art. 14(5)(c) EAPO Regulation). The request to disclose the information is "accompanied by an *in personam* order by the court prohibiting the withdrawal or transfer" by the debtor "of funds held in his account or accounts up to the amount to be preserved by the Preservation Order" (Art. 14(5)(c) EAPO Regulation). This list of methods is not exhaustive, and the Member States are allowed to opt for any other method as long as it is "effective and efficient" and "not disproportionately costly or time-consuming" (Art. 14(5)(d) EAPO Regulation).

At the Luxembourgish domestic level, the EAPO information mechanism represented a major innovation. The Luxembourgish civil procedural system lacks an equivalent national tool to investigate debtors' bank accounts. Therefore, the EAPO's mechanism became (and still is) the only tool to trace debtors' bank accounts during a civil procedure in Luxembourg. When a creditor requests a national provisional attachment order (*saisie-arrêt*), but ignores in which bank the debtors' accounts are located, the attachment order must be sent to all the banks where those accounts may be held. The more banks the *saisie-arrêt* is sent to, the higher the chances of freezing the debtors' funds. Such "fishing expeditions' are costly. The *saisie-arrêt* is served to the banks through a bailiff (*huissier*). The

more banks the *saisie-arrêt* is sent to, the higher the fee that the bailiff will charge.

Luxembourg appointed its national financial authority, the *Commission de Surveillance du Secteur Financier* ("CSSF"), as its national information authority for the EAPO information mechanism. In contrast to the costly "fishing expeditions" of the *saisie-arrêt*, the CSSF does not charge any fees for obtaining information about the debtors' bank accounts.

The CSSF searches for the bank accounts by requesting that all the banks or branches of foreign banks operating in Luxembourg disclose if they hold the debtors' accounts (Art. 14(5)(a) EAPO Regulation). Until September 2022, this request was sent by regular mail to all those entities. Banks were given 20 days to reply to the CSSF. Those 20 days, plus the time it takes to send the request by mail to the banks and receive their answers, explain why it takes at least one month until the CSSF can reply to the court which submitted the original information request.

However, from 1 September 2022, the request for information is sent through an online platform, the *Guichet numérique eDesk* (*Circulaire CSSF 22/819*). Banks operating in Luxembourg are required to join this platform. Thanks to this reform, the CSSF will be able to obtain information about the debtors' bank accounts faster. It also ensures better monitoring of the answers provided by the banks. Overall, this reform enhances the functioning of the EAPO's information mechanism at the Luxembourgish level and is in line with the EAPO Regulation, which favours the swift transmission of documents (Recital 24 Regulation).

A Reform of French Law Inspired

by an Inaccurate Interpretation of the EAPO Regulation?

Carlos Santaló Goris, Research Fellow at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law and Ph.D. candidate at the University of Luxembourg, offers an analysis on the recently approved reform of the French Manual on Tax Procedures ("Livre des procédures fiscales") influenced by Regulation No 655/2014, establishing a European Account Preservation Order ("EAPO Regulation"). The EAPO Regulation and other EU civil procedural instruments are the object of study in the ongoing EFFORTS project, with the financial support of the European Commission.

FICOBA ("Fichier national des comptes bancaires et assimilés") is the French national register containing information about all the bank accounts in France. French bailiffs ("huissiers") can rely on FICOBA to to facilitate the enforcement of an enforceable title or upon a request for information in the context of an EAPO proceeding (Article L151 A of the French Manual on Tax Procedures). In January 2021, the Paris Court of Appeal found discriminatory the fact that creditors could obtain FICOBA information in the context of an EAPO proceeding but not in the context of the equivalent French domestic provisional attachment order, the "saisie conservatoire" (for a more extended analysis of the judgment, see here). While an enforceable title is not a necessary precondition to access FICOBA in the context of an EAPO, under French domestic law it is. Against this background, the French court found that creditors who could apply for an EAPO were in a more advantageous position than those who could not. Consequently, it decided to extend access to FICOBA to creditors without an enforceable title who apply for a *saisie conservatoire*.

In December 2021, the judgment rendered by the Paris Court of Appeals was transposed into French law. In fact, the French legislator introduced an amendment to the French Manual on Tax Procedures, allowing bailiffs to collect information about the debtors' bank accounts from FICOBA based on a *saisie conservatoire* (Art. 58 LOI n° 2021-1729 du 22 décembre 2021 pour la confiance dans l'institution judiciaire).

In is nevertheless noteworthy that the judgment of the Paris Court of Appeal that

inspired such reform is based on a misinterpretation of the EAPO Regulation**. Access to the EAPO Regulation's information mechanism is limited to creditors with a title (either enforceable or not enforceable)**. Creditors without a title are barred from accessing the EAPO's information mechanism. From the reasoning of the Paris Court of Appeal, **it appears that the Court interpreted the EAPO Regulation as granting access to the EAPO's information mechanism to all creditors, even to those without a title**. Such an interpretation would have been in accordance with the EAPO Commission Proposal, which gave all creditors access to the information mechanism regardless of whether they had a title or not. However, the Commission's open approach was received with scepticism by the Council and some Member States. Notably, France was the most vocal advocate of limiting the possibilities of relying on the EAPO information mechanism. It considered that only creditors with an enforceable title should have access to it. In particular, the French delegation argued that, under French law, only creditors with an enforceable title could access such sensitive data about the debtor. Eventually the European legislator decided to adopt a mid-way solution between the French position and the EAPO Commission Proposal: namely, in accordance with the Regulation creditors are required to have a title, though this does not have to be enforceable.

The following is an interesting paradox. Whereas France tried to adjust the EAPO's information mechanism to the standards of French law, it was ultimately French law that was amended due to the influence of the EAPO Regulation. An additional paradox is that the imbalance between creditors who can access the EAPO Regulation and those who cannot (as emphasized and criticised by the Paris Court of Appeal) will continue to exist but with the order reversed. Once the French reform enters into force, creditors without a title who apply for a French *saisie conservatoire* of a bank account will be given access to FICOBA. Conversely, creditors who apply for an EAPO will continue to be required to have a title in order to access FICOBA. Only an amendment of the EAPO Regulation can change this.

The moment for considering a reform of the EAPO Regulation is approaching. In accordance with Article 53 of the EAPO Regulation, the European Commission should have sent to the European Parliament and the European Economic and Social Committee "a report on the application of this Regulation" by 18 January 2022. These reports should serve as a foundation to decide whether amendments

to the EAPO Regulation are desirable. Perhaps, as a result of the experience offered with the judgment of the Paris Court of Appeal, the European legislator may consider extending the EAPO's information mechanism beyond creditors with a title.

New Principles of Sovereign Immunity from Enforcement in India: The Good, The Bad, And The Uncertain (Part II)

This post was written by Harshal Morwale, an India-qualified international arbitration lawyer working as an associate with a premier Indian law firm in New Delhi; LLM from the MIDS Geneva Program (2019-2020); alumnus of the Hague Academy of International Law.

Recently, the issue of foreign sovereign immunity became a hot topic in India due to the new judgment of the Delhi High Court ("DHC") in the case of (*KLA Const Tech v. Afghanistan Embassy*). The previous part of the blog post analyzed the decision of the DHC. Further, the post focused on the relevance of the United Nations Convention on Jurisdictional Immunities of States and Their Property. The post also explored the interplay between state immunity and diplomatic immunity.

This part focuses on two further issues which emanate from the decision of the DHC. Firstly, the post deals with the impact of the consent to arbitrate on immunity from enforcement. Then, the post explores the issue of attachment of state's property for satisfying the commercial arbitral award against a diplomatic mission.

Consent to Arbitrate: Waiver Of Immunity From Enforcement?

As highlighted in the last post, one of the main arguments of the KLA Const Technologies ("claimant") was that the Embassy of the Islamic Republic of Afghanistan's ("respondent", "Embassy") consent to arbitrate resulted in the waiver of the sovereign immunity. The DHC accepted the argument and ruled that a separate waiver of immunity is not necessary to enforce an arbitral award in India as long as there is consent to arbitrate. The DHC also stated that this position is in consonance with the growing International Law principle of restrictive immunity while referring to the landmark English case (*Trendtex Trading Corp. v. Central Bank of Nigeria*).

However, there's more to the issue than what catches the eye. First of all, the *Trendtex* case was decided before the English Sovereign Immunity Act ("UKSIA") came into effect. Therefore, the DHC could have examined the relevant provisions under UKSIA and the more recent cases to track the jurisprudential trend on sovereign immunity under English law. For example, Section 13(2) of the UKSIA recognizes the difference between jurisdictional immunity and immunity from enforcement and requires an express waiver of immunity from enforcement. Even the ICJ has noted the requirement of an express waiver of immunity from enforcement in the *Jurisdictional Immunities* case. (para 118).

Furthermore, there was an opportunity to undertake a more detailed cross-jurisdictional analysis on the issue. In fact, the issue of arbitral consent as a waiver of immunity from enforcement was dealt with by the Hong Kong Courts in *FG Hemisphere v. Democratic Republic Of The Congo*. Reyes J, sitting in the Court of First Instance, ruled that consent of the state to arbitrate does not in itself imply the waiver of immunity from enforcement. The ruling on the issue was confirmed by the majority decision of the Court of Final Appeal. The position has also been confirmed by scholars.

However, this position is not the settled one. The DHC's decision is in line with the approaches adopted in France (*Creighton v. Qatar*), Switzerland (*United Arab Republic v. Mrs. X*) that no separate waiver of immunity from enforcement would be required in the existence of an arbitration agreement.

However, the decision made no reference to the reasoning of the cases from these jurisdictions. Regardless of the conclusion, the DHC's decision could have

benefited from this comparative analysis, and there would have been a clearer answer as to the possible judicial approaches to the issue in India.

Attachment of State's Property for Satisfying an Award Against A Diplomatic Mission

In the current case, the DHC ordered the respondent to declare not only its assets and bank accounts in India but also all its commercial ventures, state-owned airlines, companies, and undertakings in India, as well as the commercial transactions entered into by the respondent and its state-owned entities with the Indian companies.

It is not entirely clear whether the Islamic Republic of Afghanistan's ("Afghanistan") properties and commercial debts owed by private Indian companies to the state-entities of Afghanistan would be amenable to the attachment for satisfying the award against the Embassy. To resolve the issue of attaching Afghanistan's property to fulfill the liability of the Embassy, a critical question needs to be considered – while entering into the contract with the claimant, was the respondent (Embassy) acting in a commercial capacity or as an agent of the state of Afghanistan?

The contract between the claimant and the respondent was for the rehabilitation of the Afghanistan Embassy. The DHC found that the respondent was acting in a commercial capacity akin to a private individual. Additionally, there's no indication through the facts elaborated in the judgment that the contract was ordered by, or was for the benefit of, or was being paid for by the state of Afghanistan. In line with these findings, it can be concluded that the contract would not be a sovereign act but a diplomatic yet purely commercial act, independent from the state of Afghanistan. Consequently, it is doubtful how the properties of state/state-entities of Afghanistan can be attached for fulfilling the award against the Embassy.

The attachment of the state's property to fulfill the liability of the Embassy would break the privity of contract between the claimant and the respondent (Embassy). According to the privity of contract, a third party cannot be burdened with liability arising out of a contract between the two parties. Therefore, the liability of the Embassy cannot be imposed on the state/state-entities of Afghanistan because they would be strangers to the contract between the claimant and the

respondent.

That said, there are a few well-known exceptions to the principle of privity of contract such as agency, third party beneficiary, and assignment. However, none of these exceptions apply to the case at hand. It is accepted that an embassy is the agent of a foreign state in a receiving state. However, in this case, the contract was entered into by the Embassy, in its commercial capacity, not on behalf of the state but in the exercise of its diplomatic yet commercial function. Afghanistan is also not a third-party beneficiary of the contract as the direct benefits of the contract for the rehabilitation of the Afghanistan Embassy are being reaped by the Embassy itself. Additionally, there is no indication from the facts of the case as to the assignment of a contract between the state of Afghanistan and the Embassy. Therefore, the privity of contract cannot be broken, and the liability of the Embassy will remain confined to its own commercial accounts and ventures.

In addition to the above, there also lacks guidance on the issues such as mixed accounts under Indian law. Regardless, the approach of the DHC remains to be seen when the claimant can identify attachable properties of the respondent. It also remains to be seen if the respondent appears before the DHC and mounts any sort of defence.

Conclusion

There remains room for growth for Indian jurisprudence in terms of dealing with issues such as immunity from the enforcement of arbitral awards. An excellent way to create a more conducive ecosystem for this would be to introduce stand-alone legislation on the topic as recommended by the Law Commission of India in its 176^{th} report. Additionally, the issues such as the use of state's properties to satisfy the commercial liability of diplomatic missions deserve attention not only under Indian law but also internationally.

(*The views expressed by the author are personal and do not represent the views of the organizations he is affiliated with. The author is grateful to Dr. Silvana Çinari for her feedback on an earlier draft.*)

New Principles of Sovereign Immunity from Enforcement in India: The Good, The Bad, And The Uncertain (Part I)

This post was written by Harshal Morwale, an India-qualified international arbitration lawyer working as an associate with a premier Indian law firm in New Delhi; LLM from the MIDS Geneva Program (2019-2020); alumnus of the Hague Academy of International Law.

Sovereign immunity from enforcement would undoubtedly be a topic of interest to all the commercial parties contracting with state or state entities. After all, an award is only worth something when you can enforce it. The topic received considerable attention in India recently, when the Delhi High Court ("DHC") ruled on the question of immunity from enforcement in case of commercial transactions (*KLA Const Tech v. Afghanistan Embassy*). This ruling is noteworthy because India does not have a consolidated sovereign immunity law, and this ruling is one of the first attempts to examine immunity from enforcement.

This post is part I of the two-part blog post. This part examines the decision of the DHC and identifies issues emanating from it. The post also delves into the principles of international law of state immunity and deals with the relevance of diplomatic immunity in the current context. The second part (forthcoming) will explore the issue of consent to the arbitration being construed as a waiver of immunity from enforcement and deal with the problem of whether the state's property can be attached to satisfy the commercial arbitral award against a diplomatic mission.

DHC: No Sovereign Immunity From Enforcement In Case Of Commercial Transactions

In the case of *KLA Const Tech v. Afghanistan Embassy*, KLA Const Technologies

("claimant") and the Embassy of the Islamic Republic of Afghanistan in India ("respondent") entered into a contract containing an arbitration clause for rehabilitation of the Afghanistan Embassy. During the course of the execution of works, a dispute arose between the parties. The claimant initiated the arbitration. An *ex parte* award was passed in favor of the claimant by the Sole Arbitrator. Since the respondent did not challenge the award, the claimant seeks its enforcement in India in line with Section 36(1) of the Arbitration & Conciliation Act 1996, whereby enforcement cannot be sought until the deadline to challenge the award has passed. In the enforcement proceedings, the DHC inter alia focused on immunity from enforcement of the arbitral award arising out of a commercial transaction.

The claimant argued that the respondent is not entitled to state immunity because, in its opinion, entering into an arbitration agreement constitutes "waiver of Sovereign Immunity." Further, relying on Articles 10 and 19 of the United Nations Convention on Jurisdictional Immunities of States and Their Property ("UNCJIS"), the claimant argued that the states cannot claim immunity in case of commercial transactions and the UNCJIS expressly restricts a Foreign State from invoking sovereign immunity against post-judgment measures, such as attachment against the property of the State in case of international commercial arbitration.

After analyzing the claimant's arguments and relevant case laws, the DHC reached the following decision:

1. In a contract arising out of a commercial transaction, a foreign state cannot seek sovereign immunity to stall the enforcement of an arbitral award rendered against it.
2. No separate consent for enforcement is necessary, and consent to arbitrate is sufficient to wave the immunity. The DHC opined that this ruling is in "consonance with the growing International Law principle of restrictive immunity."

The DHC ordered the respondent to declare inter alia all its assets, bank accounts in India, etc., by a stipulated date. Since the respondent did not appear and did not make any declaration by that date, the DHC has granted time to the claimant to trace the attachable properties of the respondent.

The decision has been well received in the Indian legal community and has been lauded as a pro-arbitration decision as it promotes prompt enforcement of arbitral awards in India, regardless of the identity of the award-debtor. The decision is also one of the first attempts to define immunity from 'enforcement' in India. The existing law of sovereign immunity in India is limited to section 86 of the Indian Civil Procedure Code, which requires the permission of the Central Government in order to subject the sovereign state to civil proceedings in India. Therefore, the DHC's decision is critical in the development of sovereign immunity jurisprudence in India.

Difference Between Jurisdictional Immunity And Enforcement Immunity Under The UNCJIS

It is worth noting that the DHC did not explicitly address the claimant's argument regarding the UNCJIS. Regardless, it is submitted that the claimant's argument relying on articles 10 and 19 of the UNCJIS is flimsy. This is particularly because the UNCJIS recognizes two different immunities – jurisdiction immunity and enforcement immunity. Article 10 of the UNCJIS, which provides for waiver of immunity in case of commercial transactions, is limited to immunity from jurisdiction and not from enforcement. Further, Article 20 of the UNCJIS clearly states that the state's consent to be subjected to jurisdiction shall not imply consent to enforcement. As argued by the late Professor James Crawford, "waiver of immunity from jurisdiction does not per se entail waiver of immunity from execution."

Notwithstanding the above, even the DHC itself refrained from appreciating the distinction between immunity from jurisdiction and immunity from enforcement. The distinction is critical not only under international law but also under domestic statutes like the English Sovereign Immunity Act ("UKSIA"). It is submitted that Indian jurisprudence, which lacks guidance on this issue, could have benefitted from a more intricate analysis featuring the rationale of different immunities, the standard of waivers, as well as the relevance of Article 20 of UNCJIS.

Curious Framing Of The Question By The DHC

In the current case, the DHC framed the question of sovereign immunity from enforcement as follows: Whether a Foreign State can claim Sovereign Immunity against enforcement of arbitral award arising out of a commercial transaction? On

the face of it, the DHC decided a broad point that the award is enforceable as long as the underlying transaction is commercial. The real struggle for the claimants would be to determine and define which property would be immune from enforcement and which wouldn't.

The framing of the issue is interesting because the sovereign state immunity from enforcement has generally been perceived as a material issue rather than a personal issue. In other words, the question of state immunity from enforcement has been framed as 'what subject matter can be attached' and not 'whether a particular debtor can claim it in a sovereign capacity'. In one of the case laws analyzed by the DHC (*Birch Shipping Corp. v. The Embassy of the United Republic of Tanzania*), the defendant had argued that under the terms of the US Foreign Sovereign Immunities Act, its "property" was "immune from the attachment." Further, in the operative part of the judgment, the US District Court stated, "the property at issue here is not immune from attachment." Unlike the DHC's approach, the question of immunity from enforcement in the *Birch Shipping* case was argued and ruled upon as a material issue rather than a personal one.

While the decision of the DHC could have a far-reaching impact, there is a degree of uncertainty around the decision. The DHC ruled that as long as the transaction subject to arbitration is commercial, the award is enforceable. There remains uncertainty on whether this ruling means that all properties of the sovereign state can be attached when the transaction is commercial. Would this also mean diplomatic property could be attached? The DHC still has the opportunity to clarify this as the specific properties of the respondent for the attachment are yet to be determined, and the claimant has been granted time to identify the attachable properties.

Diplomatic Immunity or Sovereign Immunity: Which One Would Apply?

While state immunity and diplomatic immunity both provide protection against proceedings and enforcements in the foreign court or forum, the subjects of both immunities are different. While sovereign immunity aims to protect the sovereign states and their instrumentalities, diplomatic immunity specifically covers the diplomatic missions of the foreign states. The law and state practice on sovereign immunity are not uniform. On the other hand, the law of diplomatic immunity has been codified by the Vienna Convention on Diplomatic Relations ("VCDR"). Unlike

the UNCJIS, the VCDR is in force and has been adopted by over 190 states, including India and Afghanistan.

Since the party to the contract, the arbitration, and the enforcement proceedings in the current case is an embassy, which is independently protected by the diplomatic immunity, the decision of the DHC could have featured analysis on the diplomatic immunity in addition to the state immunity. Like the UNCJIS, the VCDR recognizes the distinction between jurisdictional and enforcement immunities. Under Article 32(4) of the VCDR, the waiver from jurisdictional immunity does not imply consent to enforcement, for which a separate waiver shall be necessary.

Additionally, the DHC had an opportunity to objectively determine whether the act was sovereign or diplomatic. In *Re P (Diplomatic Immunity: Jurisdiction)*, the English Court undertook an objective characterization of the entity's actions to determine whether they were sovereign or diplomatic. The characterization is critical because it determines the kind of immunity the respondent is subject to.

In the current case, the contract for works entered into by the embassy appears to be an act undertaken in a diplomatic capacity. Hence, arguably, the primary analysis of the DHC should have revolved around diplomatic immunity. It is not to argue that the conclusion of the DHC would have been different if the focus was on diplomatic immunity. However, the analysis of diplomatic immunity, either independently or together with the sovereign immunity, would have substantially bolstered the significance of the decision considering that the interplay between sovereign and diplomatic immunities under Indian law deserves more clarity.

One might argue that perhaps the DHC did not deal with diplomatic immunity because it was raised neither by the claimant nor by the non-participating respondent. This raises the question – whether the courts must raise the issue of immunity *proprio motu*? The position of law on this is not entirely clear. While section 1(2) of the UKSIA prescribes a duty of the Court to raise the question of immunity *proprio motu*, the ICJ specifically rejected this approach in the Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France) (para 196). Both of these approaches, however, relate to sovereign immunity, and there lacks clarity on the issue in the context of diplomatic immunity.

Conclusion

As noted above, despite being one of the first Indian decisions to deal with state immunity from an international law perspective, the decision leaves several questions open, such as the determination of attachable properties and the relevance of diplomatic immunity in the current context. It remains to be seen what approach the DHC takes to resolve some of these issues in the upcoming hearings.

The next part of the post explores the issue of consent to the arbitration being construed as a waiver of immunity from enforcement. The next part also deals with the problem – whether the state's property can be attached to satisfy the commercial arbitral award against a diplomatic mission.