The Visible College of International Lawyers and the HCCH 2019 Judgments Convention – Conference in Bonn

The HCCH 2019 Judgments Convention has been the subject of an ever-growing body of academic research and discussion ever since it was signed; but due to the pandemic, almost all of it had to happen in writing. Just in time for its entry into force, though, and thus perfectly timed, the first international conference on the HCCH 2019 Judgments Convention Cornerstones – Prospects – Outlook took place a week ago at the University of Bonn, hosted by **Matthias Weller** together with **Moritz Brinkmann** and **Nina Dethloff**, in cooperation with the Permanent Bureau of the HCCH, and with the support of the German Federal Ministry of Justice.

The conference brought together much of the aforementioned discussion between a range of academics, practitioners and policymakers, including the contributors to the book of the same title, edited by **Matthias Weller**, **João Ribeiro-Bidaoui**, **Moritz Brinkmann**, and **Nina Dethloff**, for which the conference doubled as a launch event. It accordingly followed the same structure, organized into seven panels overall that were split into three larger blocks.

The first of those ("Cornerstones") focused on some of the core concepts underpinning the Convention. **Wolfgang Hau** (LMU Munich) discussed the meaning of 'judgments', 'recognition', and 'enforcement'; **Pietro Franzina** (Catholic University of Milan) focused on the jurisdictional filters (with an emphasis on contractual obligations, i.e. Art. 5(1)(g)); and **Marcos Dotta Salgueiro** (University of the Republic of Montevideo) discussed the grounds for refusal. After some lively discussion, the block continued with papers on the Convention's much-discussed Art. 29 (**Cristina Mariottini** (Luxembourg)) and on its interplay with the 2005 Choice of Court Convention (**Paul Beaumont** (University of Stirling)).

Also in light of some less nuanced recent interventions, Cristina Mariottini's paper was particularly welcome to dispel some myths surrounding Art. 29. The speaker rightly pointed out that the mechanism is not only very different from the much-criticized bilateralization requirement of the 1971 Convention but can also be found, in one form or another, in a range of other instruments, including the rather successful 1970 Evidence and 1980 Child Abduction Conventions.

A much wider angle was then taken in the second block ("Prospects for the

World"), which brought together perspectives from the European Union (**Andreas Stein** (European Commission)), the US (**Linda Silberman** (NYU)), Canada (**Geneviève Saumier** (McGill University)), the Balkan Peninsula (**Ilja Rumenov** (Skopje University)), Arab countries (Béligh Elbalti (University of Osaka)), Africa (**Abubakri Yekini** (University of Manchester) and **Chukwuma Okoli** (University of Birmingham)), the MERCOSUR Region (**Verónica Ruiz Abou-Nigm** (University of Edinburgh)), the ASEAN countries (**Adeline Chong** (SMU)), and China (**Zheng (Sophia) Tang** (Wuhan University)) in four consecutive panels. While the first block had already highlighted some of the compromises that had to be made during the drafting of the Convention and at the diplomatic conference, it became even clearer that the Convention (or, more precisely, the prospect of its ratification) may be subject to vastly different obstacles and objections in different parts of the globe. While some countries may not consider the Convention to be ambitious enough, others may consider it too much of an intrusion into their right to refuse the recognition and enforcement of foreign judgments – or raise even more fundamental concerns regarding the implementation of the Convention, its interplay with existing bilateral treaties (seemingly a particularly pertinent problem for Arab countries), or with multilateralism in recognition and enforcement more generally. The conference gave room to all of those concerns and provided important context through some truly impressive comparative research, e.g. on the complex landscape of bilateral agreements in and between most Arab states.

The different threads of discussion that had been started throughout the event were finally put together in a closing panel ("Outlook"). **Ning Zhao** (HCCH) recounted the complicated genesis of the Convention and reflected on the lessons that could be learned from them, emphasizing the need for bridging differences through narrowing down the scope of projects and offering opt-out mechanisms, and for enhancing mutual trust, including through post-convention work. She also provided an update on the ongoing jurisdiction project; **José Angelo Estrella Faria** (UNIDROIT) advocated a holistic approach to judicial cooperation and international commercial arbitration; and **Hans van Loon** (HCCH) finally summarized the conference as a whole, putting the emphasis both on the significant achievement that the convention constitutes and the need to put further work into its promotion.

The conference had set out to identify the cornerstones of the 2019 Convention,

to discuss its prospects, and to provide an outlook into the future of the Convention. It has clearly achieved all three of these goals. It included a wide range of perspectives on the Convention, highlighted its achievements without shying away from discussing its present and future obstacles, and thus provided ample food for thought and discussion for both the proponents and the critics of the Convention.

At the end of the first day, **Burkhard Hess** (MPI Luxembourg) gave a dinner speech and reflected on the current shape of the notorious 'invisible college of international lawyers' in private international law. As evidenced by the picture above, the college certainly was rather visible in Bonn.

Review of Choice of Law in International Commercial Contracts

While doing research on a choice of law article, I found it necessary to consult a book generally co-edited by Professors Daniel Girsberger, Thomas Graziano, Jan Neels on *Choice of Law in International Commercial Contracts* ('Girsberger et al'). The book was officially published on 22 March 2021. I began reading sections of the book related to tacit choice of law sometime in December 2022 and found the work truly global and compelling. At the beginning of June this year, I decided to read the whole book and finished reading it today. It is 1376 pages long!

To cut the whole story short, the book is the bible on choice of law in international commercial contracts. It covers over 60 countries, including regional and supranational bodies' rules on choice of law. Professor Symoen Symeonides had previously written a single authored award winning book on *Codifying Choice of*

Law Around the World, but that work did not cover as much as Girsberger et al's book in terms of the number of countries, and regional and supranational instruments (or principles) covered.

The book arose from the drafting of the Hague Principles on Choice of Law in International Commercial Contracts, headed by Professor Girsberger and commissioned by Professor Marta Partegas. The central aim of the Hague Principles is to promote party autonomy, as the Hague Principles does not touch on the law applicable in the absence of choice.

The book starts with a general comparative outline of choice of law around the world and its comparison to the Hague Principles. This outline is derived from the works of many other scholars that contributed to the book. In other preliminary chapters, there are discussions devoted to party autonomy, provenance of the Hague Principles, roadmap to promoting the Hague Principles, international commercial arbitration, and perspectives from UNIDROIT and UNCITRAL.

The essential part of the book focuses on regional and national reports of countries around the world, with a focus on comparison to the Hague Principles. The format used is consistent, and easy to follow for all the reports in this order: introduction and preamble, scope of the principles, freedom of choice, rules of law, express and tacit choice of law, formal validity of the choice of law, agreement on the choice of law and battle of forms, severability, exclusion of renvoi, scope of the chosen law, assignment, overriding mandatory rules and public policy, establishment, law applicable in the absence of choice, and international commercial arbitration.

The Hague Principles has been successful so far given the regional or supranational bodies such as Asia,[1] and Latin America[2] that have endorsed it.

From 31st May to 3 June 2023, the Research Centre for Private International Law in Emerging Countries in University of Johannesburg held a truly Pan-African Conference on the African Principles on Choice of Law in International Commercial Contracts.[3] Many African scholars (including myself) and some South African government officials were present and spoke in this very successful conference. The African Principles also draws some inspiration from the Hague Principles, which involved the participation of African scholars like Professors Jan Neels and Richard Frimpong Oppong.

Girsberger et al's book and the Hague Principles success so far may be due to the more inclusive approach it took, rather than other Hague Conventions that are not fully representative of countries around the world, especially African stakeholders.

More please.

[1] Asian Principles on Private International Law 2018.

[2] Guide of the Organization of American States on the Applicable Law to International Commercial Contracts 2019

[3] See generally JL Neels and EA Fredericks, "An Introduction to the African Principles of Commercial Private International Law"(2018) 29 Stellenbosch Law Review 347; JL Neels, 'The African Principles on the Law Applicable to International Commercial Contracts – A First Drafting Experiment' (2021) 25 Uniform Law Review 426, 431; JL Neels and EA Fredericks, 'The African Principles of Commercial Private International Law and the Hague Principles' in Girsberger et al paras 8.09-8.11.

Denial of Natural Justice as a Defence to Enforcement of a Chinese Judgment in Australia

In *Yin v Wu* [2023] VSCA 130, the Court of Appeal of the Supreme Court of Victoria set aside a judgment[1] which had affirmed the enforcement a Chinese judgment by an Associate Justice of the Supreme Court.[2] This was a rare instance of an Australian court considering the defence to enforcement of a foreign judgment on the basis that the judgment debtor was denied natural justice—or procedural fairness—before the foreign court.

Background

The dispute concerned a payment made by a Chinese national living in China, Di Wu, to a Chinese national living in Australia, Ke Yin. The payment was made pursuant to a foreign exchange agreement: Yin had promised to pay Wu a sum of US Dollars in exchange for Wu's Chinese RMB.

The arrangement was made unusually through a series of Telegram and WhatsApp messages, from accounts with different numbers and aliases. (In Australia, we would say that the arrangement sounded 'suss'.) The agreement was seemingly contrary to Chinese law, which may have contributed to the clandestine character of communications underlying the agreement; see [30].

After Wu transferred the funds—RMB ¥3,966,000—Yin denied that the full sum was received and did not transfer any sum of US Dollars to Wu. Yin eventually returned RMB ¥496,005 but not the balance of what Wu had paid. Wu went to the police on the basis he had been 'defrauded'; they refused to act. Meanwhile, while broadcasting video under a pseudonym on Twitter, Yin suggested that his accounts had been frozen at the instigation of Wu's cousin and with the participation of 'communists'.

On 13 October 2017, Wu commenced a proceeding against Yin in the Ningbo People's Court. The Court characterised the foreign exchange agreement as 'invalidated and unenforceable', but nonetheless provided judgment and costs to Wu for RMB ¥3,510,015 ('Chinese Judgment').

The Chinese Judgment recorded that: *'[t]he defendant [Yin] failed to attend despite having been legally summoned to attend. As such, the court shall enter default judgment according to the law. … Any party dissatisfied with this judgment may, within 15 days from the date of service of the written judgment, file an appeal …'*: [27].

Wu commenced enforcement proceedings in China. An affidavit in those proceedings recounted that Yin's whereabouts were then unknown, but Yin had been served according to relevant procedure of the Chinese forum, which allowed service 'by way of public announcement': [31]. The 'Public Notice' provided as follows (see [32]):

> *'In relation to the private loan dispute between the plaintiff Wu Di and defendant Yin Ke, you are now, by way of public notice, served with the Complaint and a copy of the evidence, notice to attend, notice to adduce evidence, risk reminder, summons to attend court, notice of change of procedure, civil ruling and the letter of notice. You are deemed to have been served with the said documents after sixty days from the date of this public notice.'*

Recognition and enforcement sought in Australia

Wu filed an originating motion in the Supreme Court of Victoria, seeking an order for enforcement of the Chinese Judgment, or alternatively, reimbursement of the sum paid to Yin.

The latter and alternative order may be understood in terms of an order seeking the *recognition* of the obligation created by the Chinese Judgment, to be given effect through the remedial powers of the Australian forum: see *Kingdom of Spain v Infrasructure Services Luxembourg S.À.R.L.* (2023) 97 ALJR 276; [2023] HCA 11, [43]–[46]; *Schibsby v Westenholz* (1870) LR 6 QB 155, 159.

Australia has a fragmented regime for recognition and enforcement of foreign judgments; see generally Michael Douglas, Mary Keyes, Sarah McKibbin and Reid Mortensen, 'The HCCH Judgments Convention in Australian Law' (2019) 47(3) *Federal Law Review* 420. New Zealand judgments are treated with deference under the *Trans-Tasman Proceedings Act 2010* (Cth); judgments of various other jurisdictions are easily registered under the *Foreign Judgments Act 1991* (Cth), where the relevant court is identified in the *Foreign Judgments Regulations 1992* (Cth) on the basis of reciprocal treatment of Australian judgments in the relevant foreign jurisdiction. For other *in personam* money judgments, recognition and enforcement may occur pursuant to common law principles.

At common law, a foreign judgment may be recognised and enforced if four conditions are satisfied—subject to defences:

‘(a) the foreign court must have exercised jurisdiction that Australian courts will recognise;

(b) the foreign judgment must be final and conclusive;

(c) there must be an identity of the parties; and

(d) the judgment must be for a fixed sum or debt’: *Doe v Howard* [2015] VSC 75, [56].

Here, the Chinese Judgment was assessed according to the common law principles.

In his defence, Yin pleaded (among other things) that he was not served with the documents commencing the foreign proceeding which produced the Chinese Judgment, or any other documents relevant to the foreign proceeding while it was on foot. He also pleaded that he was unaware of the existence of the Chinese Judgment until the Australian proceeding was commenced. As an extension of that plea, Yin said that enforcement of the Chinese Judgment should be refused on the basis of public policy, or because there was a failure by the Chinese court to accord Yin natural justice: [6].

Wu sought summary judgment on the basis that Yin’s defence had no prospects of success. On 22 October 2021, summary judgment was entered in favour of Wu by an Associate Justice of the Supreme Court: *Wu v Yin* (Supreme Court of Victoria, Efthrim AsJ, 22 October 2021); see *Wu v Yin* [2022] VSC 729, [5].

The Associate Justice referred (at [33]) to *Boele v Norsemeter Holding AS* [2002] NSWCA 363, [28], where Giles JA of the New South Wales Court of Appeal held as follows:

> *‘In determining whether due notice has been given regard will be had to the notice provisions of the foreign court: for example, notification not by personal service but in accordance with the rules of the foreign court may be held to be consistent with affording natural justice even if not in accord with notice provisions of the forum (see Jeannot v Fuerst (1909) 25 TLR 424; Igra v Igra (1951) P 404; Terrell v Terrell (1971) VR 155).’*

Efthrim AsJ considered that the statement in the Chinese Judgment that Yin had

'been legally summoned to attend' was enough to defeat the natural justice defence: [2022] VSC 729, [74]–[79]. Although the 'public notice' service underlying the Chinese Judgment would generally be insufficient for service within Australia under Australian law, it was considered sufficient for the purposes of overcoming the defence.

Yin appealed to the Supreme Court's trial division on the ground (among others) that Efthrim AsJ erred in holding that Yin's defence that he was not accorded natural justice in the Chinese proceeding had no prospect of success. Tsalamandris J rejected this ground, and Yin's appeal: [2022] VSC 729, [124], [133]. Yin applied for leave to appeal the decision of Tsalamandris J to the Court of Appeal.

Before the Court of Appeal

The Court of Appeal overturned the decision of Tsalamandris J, granting leave to appeal and allowing the appeal on the following ground (see [79]):

> *Ground 1: the judge erred in upholding the associate justice's conclusion that the defence to the enforcement claim had no real prospect of success, and in doing so erred by imposing an onus on Yin to adduce evidence about applicable Chinese law relating to service by public announcement and why that method of service had not been properly invoked in this case. Further, the judge erred by relying on the Wang affidavit [the affidavit in the Chinese enforcement proceeding, mentioned above] which was not in evidence, or not relied on by Wu, on the hearings before either the associate justice or the judge.*

The Court of Appeal's decision turned on the available evidence. Yin deposed that he was not served with any documents in connection with the Chinese proceedings. That evidence was uncontradicted: [90]. In these circumstances, 'the associate justice and the judge erred in placing the onus on Yin to establish that there was no valid service on him by alternative means permitted by Chinese law': [84]. Yin's evidence raised a prima facie case that he had been denied natural justice in the Chinese proceedings: [91].

In *obiter*, the Court of Appeal also considered that even if it were assumed 'that the evidence was sufficient to establish that Yin had been "legally summoned",

the evidence as a whole [did] not establish that the public notice procedure apparently adopted complied with the requirements of natural justice in the circumstances of the case': [84]; [95].

The Court of Appeal cited (at [96]–[99])) *Terrell v Terrell* [1971] VR 155, which was also cited in *Boele*, [28]. *Terrell* was about a petition for divorce by an American husband who had left his wife in Australia and returned to the US. The husband obtained a decree of divorce in the US. The Australian court considered a forum statute that would give effect to foreign decrees if they would be recognised under the law of the domicile. But the statute provided that a foreign decree would not be recognised 'where, under the common law rules of private international law, recognition of it[s] validity would be refused on the ground that a party to the marriage had been denied natural justice'; see [96].

Barber J considered that 'natural justice' was 'not a term of great exactitude, but in this context probably refers to the need for the defending party to have notice of the proceedings and the opportunity to be heard': *Terrell*, 157. A foreign judgment produced in circumstances where the respondent to the foreign proceedings had no notice of them or an opportunity to be heard would be amenable to a natural justice defence. Barber J considered an exception to that position, which was inapplicable in the circumstances as the husband had withheld the wife's address from the foreign court (see *Terrell*, 157):

> *'To this basic rule there is an exception, that where the foreign court has power to order substituted service or to dispense with service, and that power has been properly exercised upon proper material, even where the respondent was not in fact made aware of the proceedings, such proceedings cannot be held to be unjust, as similar powers are available to our courts. However, there must have been some attempt to effect personal service: Grissom v Grissom, [1949] QWN 52. Moreover, if the order for substituted service is based on a false statement that the petitioner did not know the respondent's whereabouts, or where a false statement is made as to the respondent's address for service, the decree will not be recognized as valid: Norman v Norman (No2) (1968) 12 FLR 39; Grissom v Grissom, supra; Macalpine v Macalpine, [1958] P35; [1957] 3 All ER 134; Brown v Brown (1963) 4 FLR 94; [1963] ALR 817;Middleton v Middleton, [1967] P 62; [1966] 1 All ER 168.*

After considering *Terrell* and other authorities, the Court of Appeal concluded as follows (at [107]):

> *… even if Wu had established by admissible evidence that service of the Chinese proceeding was legally effected on Yin by some form of public notice — albeit one which did not come to Yin's attention — the Court should not have recognised the Chinese judgment on a summary basis. This is because at the time Wu commenced the Chinese proceeding he well knew of a number of alternate means of giving notice of the proceeding to Yin, namely, by Twitter, WhatsApp and Telegram. Indeed, Wu's case in the Chinese proceeding and in this Court was based on money paid under an alleged contract made by these means. In these circumstances, there is a case to be investigated at trial as to whether Wu informed the Chinese court of these alternative means of giving notice of the Chinese proceeding to Yin.*

The Court then provided (at [108]) some helpful dicta on the future application of the natural justice defence to enforcement of foreign judgments, considering the following proposition in *Nygh's Conflict of Laws* (LexisNexis, 10th ed, 2020) at 990 [40.84]:

> *It matters not that the forum would not have dispensed with notice in the same situation, although a line would have to be drawn somewhere as in the case where the rules of a foreign court dispensed with the need of giving a foreign defendant any form of personal notification even in peacetime.*

The Court opined (at [109]):

> *In our view, in considering whether natural justice has been provided, modern courts should move with the times in their assessment of the sufficiency of foreign modes of service which do not aim to give defendants personal notification by the many electronic means now commonly available. Courts should draw the line and look unfavourably on modes of service by foreign courts which do not attempt to give notice by such means where a defendant's physical whereabouts are unknown but electronic notice in some form is possible.*

Yin failed on his other grounds of appeal. As the underlying decision also provided summary judgment for Wu's restitution claim, the Court of Appeal characterised the restitution claim as separate to the enforcement claim: [111]. The Court of Appeal affirmed the decision that Yin's defence that he did not know Wu went 'nowhere': [118]. Wu ultimately succeeded: he obtained summary judgment for the restitution claim, together with interest: [158].

Some takeaways

Yin v Wu provides a few insights for the natural justice defence to recognition and enforcement of foreign judgments in common law courts.

The first concerns the onus of proof. The onus of making out a defence to recognition of a foreign judgment would ordinarily fall on a defendant: *Stern v National Australia Bank* [1999] FCA 1421, [133]. The Court of Appeal's decision demonstrates how burdens may shift in the practical operation of private international law in the context of litigation. (On the difference between legal and evidentiary burdens, and how they may shift, see *Berry v CCL Secure Pty Ltd* (2020) 271 CLR 151; [2020] HCA 27.) Once Yin had produced evidence he was not served, it was up to Wu to contradict that evidence. The omission may be understood on the basis that the underlying decision was one for summary judgment.

Second, the decision is notable for framing enforceability in terms of a natural justice defence rather than in terms of the first criterion for recognition or enforcement: 'the foreign court must have exercised jurisdiction that Australian courts will recognise'. This element is often framed as a requirement of 'international jurisdiction'. Yin was not within the territorial jurisdiction of the Chinese court at any relevant time, and nor did he submit to the foreign court. International jurisdiction was seemingly predicated on Yin's nationality. Arguably, this is insufficient for recognition and enforcement at common law in Australia (but see *Independent Trustee Services Ltd v Morris* (2010) 79 NSWLR 425, cf *Liu v Ma* (2017) 55 VR 104, [7]). The focus on natural justice defence rather than international jurisdiction would be a product of how the parties ran their cases.

Third, although the Court of Appeal allowed the appeal as regards the natural justice defence, the judgment supports the orthodox view that this defence should have a narrow scope of operation. As Kirby P opined in *Bouton v Labiche* (1994)

33 NSWLR 225, 234 (quoted at [73]), courts should not be 'too eager to criticise the standards of the courts and tribunals of another jurisdiction or too reluctant to recognise their orders which are, and remain, valid by the law of the domicile'. Australian courts provide for substituted service in a variety of circumstances; it would be odd if a foreign court's equivalent procedure was held to engage the natural justice defence.

Finally, the case serves as a warning for litigants seeking to enforce a judgment of a Chinese court in Australia: relying purely on the 'public notice' mechanism of the Chinese forum, without taking further steps to bring the proceeding to the attention of the defendant, may present problems for enforcement. The same can be said for transnational litigation in any jurisdiction that does not require 'personal service' in the sense understood by common law courts.

Dr Michael Douglas is Senior Lecturer at the University of Western Australia and a Consultant at Perth litigation firm, Bennett.

[1] *Wu v Yin* [2022] VSC 729 (Tsalamandris J).

[2] *Wu v Yin* (Supreme Court of Victoria, Efthrim AsJ, 22 October 2021).

Change of gender in private international law: a problem arises between Scotland and England

Written by Professor Eric Clive

The Secretary of State for Scotland, a Minister of the United Kingdom government, has made an order under section 35 of the Scotland Act 1998 blocking Royal Assent to the Gender Recognition Reform (Scotland) Bill 2022, a Bill passed by the Scottish Parliament by a large majority. The Scottish

government has challenged the order by means of a petition for judicial review. The case is constitutionally important and may well go to the United Kingdom Supreme court. It also raises interesting questions of private international law.

At present the rules on obtaining a gender recognition certificate, which has the effect of changing the applicant's legal gender, are more or less the same in England and Wales, Scotland and Northern Ireland. The Scottish Bill would replace the rules for Scotland by less restrictive, de-medicalised rules. An unfortunate side effect is that Scottish certificates would no longer have automatic effect by statute in other parts of the United Kingdom. The United Kingdom government could remedy this by legislation but there is no indication that it intends to do so. Its position is that it does not like the Scottish Bill.

One of the reasons given by the Secretary of State for making the order is that having two different systems for issuing gender recognition certificates within the United Kingdom would cause serious problems. A person, he assumes, might be legally of one gender in England and another in Scotland. There would therefore be difficulties for some organisations operating at United Kingdom level – for example, in the fields of tax, benefits and pensions. This immediately strikes a private lawyer as odd. Scotland and England have had different systems in the law of persons for centuries – in the laws on marriage, divorce, legitimacy, incapacity and other matters of personal status – and they have not given rise to serious problems. This is because the rules of private international law, even in the absence of statutory provision, did not allow them to.

In a paper on *Recognition in England of change of gender in Scotland: a note on private international law aspects*[1] I suggest that gender is a personal status, that there is authority for a general rule that a personal status validly acquired in one country will, subject to a few qualifications, be recognised in others and that there is no reason why this rule should not apply to a change of gender under the new Scottish rules.

The general rule is referred to at international level. In article 10 of its Resolution of September 2021 on *Human Rights and Private International Law*, the Institute of International Law says that:

> *Respect for the rights to family and private life requires the recognition of personal status established in a foreign State, provided that the person*

> *concerned has had a sufficient connection with the State of origin … as well as with the State whose law has been applied, and that there is no manifest violation of the international public policy of the requested State ….*

So far as the laws of England and Scotland are concerned, there are authoritative decisions and dicta which clearly support such a general rule. Cases can be found in relation to marriage, divorce, nullity of marriage, legitimacy and legitimation. A significant feature is that the judges have often reasoned from status to particular rules. It cannot be said that there are just isolated rules for particular life events. And the rules were developed at common law, before there were any statutory provisions on the subject.

Possible exceptions to the general rule – public policy, no sufficient connection, contrary statutory provision, impediment going to a matter of substance rather than procedure – are likely to be of little if any practical importance in relation to the recognition in England of changes of gender established under the proposed new Scottish rules.

If the above arguments are sound then a major part of the Secretary of State's reasons for blocking the Scottish Bill falls away. There would be no significant problem of people being legally male in Scotland but legally female in England, just as there is no significant problem of people being legally married in Scotland but unmarried in England. Private international law would handle the dual system, as it has handled other dual systems in the past. Whether the Supreme Court will get an opportunity to consider the private international law aspects of the case remains to be seen: both sides have other arguments. It would be extremely interesting if it did.

From the point of view of private international law, it would be a pity if the Secretary of State's blocking order were allowed to stand. The rules in the Scottish Bill are more principled than those in the Gender Recognition Act 2004, which contains the existing law. The Scottish Bill has rational rules on sufficient connection (essentially birth registered in Scotland or ordinary residence in Scotland). The 2004 Act has none. The Scottish Bill has a provision on the recognition of changes of gender under the laws of other parts of the United Kingdom which is drafted in readily understandable form. The corresponding provisions in the 2004 Act are over-specific and opaque. The Scottish Bill has a

rule on the recognition of overseas changes of gender which is in accordance with internationally recognised principles.

The 2004 Act has the reverse. It provides in section 21 that: A person's gender is not to be regarded as having changed by reason only that it has changed under the law of a country or territory outside the United Kingdom. This is alleviated by provisions which allow those who have changed gender under the law of an *approved overseas country* to use a simpler procedure for obtaining a certificate under the Act but still seems, quite apart from any human rights aspects, to be unfriendly, insular and likely to produce avoidable difficulties for individuals.

[1] Clive, Eric, Recognition in England of change of gender in Scotland: A note on private international law aspects (May 30, 2023). Edinburgh School of Law Research Paper No. 2023/06, Available at SSRN: https://ssrn.com/abstract=4463935 or http://dx.doi.org/10.2139/ssrn.4463935

Judgments Convention – No Thanks?

On September 1st, 2023, the 2019 Hague Judgments Convention will enter into force for the Member States of the EU and Ukraine. According to the HCCH, the Convention is "a true gamechanger in international dispute resolution", which will "reduce transactional and litigation costs, facilitate rule-based multilateral trade and investment, increase certainty and predictability" and "promote effective justice for all". The international conference taking place in Bonn later this week will likely strike an equally celebratory tone.

This sentiment is not shared universally, though. In a scathing article just published in *Zeitschrift für Europäisches Privatrecht (ZEuP)* entitled 'Judgments Convention: No Thanks!', Haimo Schack (University of Kiel) labels the Convention

as “evidently worthless”.

Schack comes to this damning conclusion in three steps. First, he argues that the 2005 Choice of Court Convention, the first outcome of the decades-long HCCH Jurisdiction Project, has been of minimal use for the EU and only benefited Singapore and London. Second, he points out the limited scope of the 2019 Convention, which is not only (inherently) unable to limit the exorbitant exercise of jurisdiction or avoid, let alone coordinate parallel proceedings, but also contains a long list of excluded areas of law in its Art. 2 (including, most significantly, the entire field of intellectual property: Art. 2(1)(m)). Schack argues that combined with the equally long list of bases for recognition and enforcement in Art. 5, the Convention will make recognition and enforcement of foreign judgments significantly more complicated. This effect is exacerbated, third, by a range of options for contracting states to further reduce the scope of application of the Convention, of which Art. 29 is particularly “deadly”, according to Schack. The provision allows contracting states to opt out of the effect of the Convention vis-à-vis specific other contracting states, which Schack fears will lead to a ‘bilateralisation’ similar to what prevented the 1971 Convention from ever getting off the ground, which will reduce the 2019 Convention to a mere model law. All in all, Schack considers the Convention to do more harm than good for the EU, which he fears to also lose an important bargaining chip in view of a potential bilateral agreement with the US.

Leaving his additional criticism of the HCCH’s ongoing efforts to address the problem of parallel proceedings aside, Schack certainly has a point in that the 2019 Convention will not be easy to apply for the national courts. Whether it will

be more complicated than a myriad of rarely applied bilateral conventions may be subject to debate, though. It also seems worth pointing out that the 1971 Convention contained a significantly more cumbersome mechanism of bilateralisation that required all contracting states to conclude additional (!) bilateral agreements to enter into force between any given pair of them, which is quite different from the opt-out mechanism of Art. 29. In fact, it seems at least arguable that the different ways in which contracting states can tailor their accession to the Convention to their specific needs and concerns, up to the exclusion of any treaty relations with a specific other contracting state, may not be the proverbial nail in the coffin as much as it might be a key to the Convention's success. While it is true that these mechanisms appear to undermine the internationally binding nature of the Convention, bringing it closer to a model law than a binding treaty, they also make it possible to accommodate different degrees of mutual trust within a single legal framework. The fact that the 2005 Convention has preserved some degree of judicial cooperation between the EU Member States and the UK in an area now otherwise devoid of it may be testimony to the important purpose still served by international conventions in the area of international civil procedure despite – but maybe also as a result of – their increasingly limited, tailor-made scope(s).

Postscript: A more sophisticated reaction to the article (written by Holger Jacobs and myself) is forthcoming in ZEuP 1/2024.

Towards an EU Regulation on the International Protection of Adults

On 31 May 2023, the European Commission presented a proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults (in the following: EU Adult Protection Regulation – EUAPR). This proposal is a response to significant demographic and social changes in the EU: Many Member States face enormous challenges posed by an increasingly aging population. Due to considerable

improvements in medical care in recent decades, people grow much older than they used to, and this lengthening of the average lifespan in turn leads to an increase in age-related illnesses such as Alzheimer's disease. This demographic change creates problems for private international law, because the mobility of natural persons has increased within the EU where borders may, in principle, be crossed without restrictions. Many people who have left their state of origin in search for work elsewhere in their youth or middle age do not return to their home state after retirement, but rather spend the last part of their lives where they have established a new habitual residence. Besides, more and more people decide to leave their home state once they have reached the age of retirement. Such processes of migration at a late stage in life may have different reasons: Some old-age movers may want to avoid a heavy taxation of their estates that would put a burden on their heirs, some may wish to circumvent other restrictions of domestic inheritance laws (e.g. the right to a compulsory portion), others may simply wish to spend the remaining parts of their lives in milder climates, e.g. the Mediterranean, or look for a place to stay where the cost of living is lower, e.g. in some parts of Eastern Europe. When these persons begin to suffer from an impairment or an insufficiency of their personal faculties which no longer allows them to protect their interests themselves, however, intricate conflict of laws problems may arise: The authorities or courts of which state shall have jurisdiction to take protective measures concerning vulnerable adults or their property? Which law is to be applied to such measures? Under which conditions may protective measures taken in one state be recognised and enforced in other states?

The EUAPR is meant to solve these problems. It is in many parts based on proposals made by two working groups set up by the European Law Institute and the European Association of Private International Law, respectively. The Regulation will partially supersede and complement the Hague Convention on the International Protection of Adults (in the following: Hague Adult Protection Convention – HAPC), a derogation which is permitted by Art. 49(2) and (3) HAPC. The Hague Convention was concluded on 13 January 2000 and entered into force on 1 January 2009 between France, Germany and the United Kingdom (restricted to Scotland, however). Today, the Convention is in force as well in Switzerland, Finland, Estonia, the Czech Republic, Austria, Monaco, Latvia, Portugal, Cyprus, Belgium, Greece, and Malta. The Netherlands, Ireland, Italy, Luxembourg, and Poland have signed the Convention, but have not ratified it yet. In the

Netherlands, however, the Convention is already applied by the courts as a part of Dutch autonomous law (see Hoge Raad 2 February 2018, ECLI:NL:HR:2018:147). Thus, more than 23 years after the HAPC was concluded, the status of ratifications is rather unsatisfactory, as only 12 EU Member States have ratified the Convention so far. In order to speed up this process, the Regulation shall be accompanied by a Council Decision authorising Member States to become or remain parties, in the interest of the EU, to the HAPC.

For a long time, it was controversial whether the EUAPR could be based on the EU's general competence in PIL matters (Art. 81(2) TFEU) or whether such a measure ought to be classified as concerning family law within the meaning of Art. 81(3) TFEU. On the one hand, adult protection is traditionally codified in the family law sections of many Member States' civil codes (e.g. in Germany), and people will frequently benefit from the protection of family members (see COM(2023) 280 final, p. 4). On the other hand, a guardian, curator or a person endowed with a power of representation does not necessarily have to be a relative of the vulnerable adult. Following the example set by the EU Succession Regulation, the Commission eschews the cumbersome special procedure envisioned for family law matters and bases its proposal on Art. 81(2) TFEU instead.

As far as the spatial scope of the EUAPR is concerned, Art. 59 EUAPR contains detailed rules on the relation between the Regulation and the HAPC. The basic factor that triggers the application of the EUAPR is the vulnerable adult's habitual residence in the territory of a Member State (Art. 59(1)(a) EUAPR). There are some exceptions to this rule, however, in order to ensure a smooth coordination with the Contracting States of the HAPC which are not Member States of the EUAPR (see Art. 59(1)(b) and (2) EUAPR). The substantive scope of the EUAPR is broadly similar to that of the HAPC, although it should be noted that Art. 2(2) EUAPR speaks of "matters" to which the Regulation shall apply, whereas Art. 3 HAPC uses the narrower term "measures". This may allow the inclusion of ex-lege powers of representation which are not directly covered by the HAPC. The Regulation's personal scope is defined in Art. 3(1), which states that, for the purposes of the EUAPR, an adult is a person who has reached the age of 18 years. Although the Regulation is largely a response to problems created by an aging population, it must be borne in mind that its scope is not restricted to elderly people, but encompasses all adults above the age of 18, and, if the exceptional

condition of Art. 2(2) EUAPR is met, even younger people.

With regard to the rules on jurisdiction, the Regulation largely refers to the HAPC, with one significant divergence, though. The Convention does not permit a direct prorogation of jurisdiction, because it was feared that an uncontrolled freedom of prorogating the authorities of another state could be abused to the detriment of the adult concerned. Art. 8(2)(d) HAPC merely gives the authorities of a Contracting State having jurisdiction under Art. 5 or 6 HAPC the possibility of requesting the authorities of another Contracting State designated by the adult concerned to take protective measures. Contrary to this restrictive approach, Art. 6(1) EUAPR provides that the authorities of a Member State other than the Member State in which the adult is habitually resident shall have jurisdiction where all of the following conditions are met:

- the adult chose the authorities of that Member State, when he or she was still in a position to protect his or her interest;
- the exercise of jurisdiction is in the interest of the adult;
- the authorities of a Member State having jurisdiction under Art. 5 to 8 HAPC have not exercised their jurisdiction.

The following paragraphs 2 to 3 of Art. 6 EUAPR concern formal requirements and the integration of the adult's choice of court into the HAPC's jurisdictional framework. The possibility of choosing the competent authorities is a welcome addition to the choice-of-law provision on powers of representation in Art. 15 HAPC.

In order to determine the applicable law, Art. 8 EUAPR refers to Chapter III of the HAPC. As in the HAPC, there are no specific conflicts rules for ex-lege powers of representation. Moreover, advance medical directives that are not combined with a power of representation (Art. 15 HAPC) are neither covered by the HAPC nor the EUAPR. Since the authorities exercising their jurisdiction under the HAPC usually apply their own law pursuant to Art. 13(1) HAPC, the spatial scope of the Convention's jurisdictional rules also indirectly determines the reach of its conflicts rules. This will lead to a new round of the debate that we are familiar with in the context of the relationship between the Hague Child Protection Convention and the Brussels IIb Regulation, i.e. whether the intended parallelism only works if at least a hypothetical jurisdiction under the respective Convention's rules can be established, or whether it suffices that jurisdiction is established

according to a provision that is only found in the respective Regulation. Within the framework of the EUAPR, this problem will arise with regard to a choice of court pursuant to Art. 6 EUAPR, an option that is not provided for by the HAPC. Applying Art. 13(1) HAPC in this context as well seems to be the preferable solution, which leads to an indirect choice of law by the vulnerable adult even in cases where no voluntary power of representation is established under Art. 15 HAPC.

The recognition of measures taken in other Member States is governed by Art. 9 and 10 EUAPR. Notwithstanding mutual trust – and, in this particular area of law, with good reason – , the Regulation still contains a public policy clause (Art. 10(b) EUAPR). For the purpose of enforcement, Art. 11 EUAPR abolishes the declaration of enforceability (exequatur) that is still required under Art. 25 HAPC, thus allowing for simplified enforcement procedures within the EU.

A major innovation is found in Chapter VII. The Regulation will introduce a European Certificate of Representation (Art. 34 EUAPR) which will supersede the certificate under Art. 38 HAPC. The Certificate shall be issued for use by representatives, who, in another Member State, need to invoke their powers to represent a vulnerable adult (Art. 35(1) EUAPR). The Certificate may be used to demonstrate that the representative is authorised, on the basis of a measure or confirmed power of representation, to represent the adult in various matters defined in Art. 35(2) EUAPR.

Apart from those substantive achievements, the Regulation contains necessary rules on rather procedural and technical subjects, such as the cooperation between the competent authorities (Chapter VI EUAPR), the establishment and interconnection of protection registers (Chapter VIII EUAPR), digital communication (Chapter IX EUAPR), and data protection (Chapter X EUAPR). These rules will also lead to a major modernisation compared with the older rules of the HAPC.

In sum, the proposal of the EUAPR will considerably strengthen the international protection of vulnerable adults within the EU.

Dubai Courts on the Recognition of Foreign Judgments: "Recognition" or "Enforcement"? – that's the Problem!

"Recognition" and "enforcement" are fundamental concepts when dealing with the international circulation of foreign judgments. Although they are often used interchangeably, it is generally agreed that these two notions have different purposes and, ultimately, different procedures (depending on whether the principle of *de plano* recognition is accepted or not. See Béligh Elbalti, "Spontaneous Harmonization and the Liberalization of the Recognition and Enforcement of Foreign Judgments, *Japanese Yearbook of Private International Law*, Vol. 16, 2014, p. 269).

However, in legal systems where this fundamental distinction is not well established, the amalgamation of the two notions may give rise to unnecessary complications that are likely to jeopardize the legitimate rights of the parties. The following case, very recently decided by the Dubai Supreme Court, is nothing but one of many examples which show how misconceptions and confusion regarding the notion of "recognition" would lead to unpredictable results (*cf.* e.g., Béligh Elbalti, "Perspective of Arab Countries", *in* M. Weller et al. (eds.), *The 2019 HCCH Judgments Convention – Cornerstones, Prospects, Outlook* (Hart, 2023) pp. 1983-184ff).

The case

The parties, in this case, are (1) A British Virgin Islands company (hereinafter 'X1') and its judicial liquidator (hereinafter 'X2', collectively "Xs") and (2) four companies having considerable estates in Dubai (hereinafter 'Y').

In 2021, Xs brought an action before the Dubai Court of First Instance (hereinafter "DCFI") seeking a 'declaration of validity' of a decision of the British Virgin Islands Supreme Court declaring the dissolution of X1 and appointing X2 as its judicial liquidator (hereinafter "the foreign judgment"). Xs justified their

action by stating that they intended to bring legal actions against Y for the recovery of due sums of money that they were entitled to and, eventually, would avoid their actions being dismissed for lack of standing.

The DCFI dismissed the action on the ground that Xs had failed to show that service had been duly effected and that the foreign judgment had become final according to the law of the state of origin (*DCFI, Case No. 338/2021 of 27 October 2021*). Xs appealed to the Dubai Court of Appeal (hereinafter "DCA") arguing, *inter alia*, that legal notification to the X1's creditors had been duly served through two newspapers and that, therefore, the foreign judgment should be given effect. However, without addressing the issue of the recognizability of the foreign judgment, the DCA dismissed the appeal holding that Xs had failed to prove their case (*DCA, Appeal No. 3174/2021 of 27 January 2022*).

Instead of appealing to the Supreme Court, Xs returned to the DCFI to try again to have the foreign judgment be given effect. Having learned from their first unsuccessful attempt, Xs this time ensured that they had all the necessary evidence to show that service had been duly effected, that the foreign judgment had been rendered following regular procedure, and that it had become final and no longer subject to appeal. The DCFI, however, dismissed the action considering that its subject matter concerned, in fact, the "enforcement" of the foreign judgment and, therefore, applications for enforcement should be made by filing a petition to the Execution Court and not by initiating an ordinary action before the DCFI (*DCFI, Case No. 329/2022 of 14 November 2022*).

Xs appealed to the DCA before which they argued that the foreign judgment did not order Y to perform any obligation but simply declared the dissolution of X1 and appointed X2 as judicial liquidator. Xs also argued that the DCFI had erred in characterizing their claim as a request for "enforcement" as they were not seeking to enforce the foreign judgment. Therefore, it would have been inappropriate to pursue their claim following the prescribed procedure for enforcement where the main purpose of their action is to "recognize" the foreign judgment. The DCA dismissed the appeal holding that the Xs' action lacked legal basis. According to the DCA, Xs' request for the foreign judgment to be "declared valid" was not within the jurisdiction of the UAE courts, which was limited to "enforcing" foreign judgments and not declaring them "valid". As for the enforcement procedure, the DCA considered that it was subject to the jurisdiction of the Execution Court in accordance with the procedure prescribed to that effect

(*DCA, Appeal No. 2684 of 25 January 2023*). Dissatisfied with the outcome, Xs appealed to the Supreme Court (hereinafter "DSC").

Before the DSC, Xs made the same argument as before the DCA, insisting that the purpose of their action was not to "enforce" the foreign judgment but to "recognize" it so that they could rely on it in subsequent actions against Y. The DSC rejected this argument and dismissed the appeal on the basis that the UAE courts' jurisdiction was limited only to "enforce" foreign judgments in accordance with the prescribed rules of procedure, which were of a public policy nature. The DSC also held that the lower courts were not bound by the legal characterization made by the litigants but should independently give the correct legal characterization to the actions brought before them in accordance with the rules of law in force in the State (*DSC, Appeal No. 375 of 23 May 2023*).

Comments

The case reported here is particularly interesting. It illustrates the difficulty that Dubai courts (and UAE courts in general) have in dealing with some fundamental concepts of private international law.

Unlike the international conventions ratified by the UAE, which generally distinguish between "recognition" and "enforcement" of foreign judgments", UAE domestic law refers mainly to "enforcement" but not "recognition". Moreover, as mentioned in a previous post, the procedure for enforcement has recently undergone an important change, as the former procedure based on bringing an ordinary action before the DCFI has been replaced by a more another procedure consisting of filing a petition for an "order on motion" before the Execution Court (new Art. 222 of the New Federal Civil Procedure Act [FCPA]). However, the current legislation in force says nothing about the "recognition" of foreign judgments.

If one looks at the practice of the courts, one can observe two different tendencies. One tendency, which seems to be prevailing, consists in denying effect (notably *res judicata* effect) to foreign judgments that were not declared enforceable. In some cases, UAE courts considered that foreign judgments could not be relied upon because there was no proof that they had been declared enforceable (See, e.g., *Federal Supreme Court, Appeal No 320/16 of 18 April*

1995; *Appeal No. 326/28 of 27 June 2006*) or that foreign judgments could only have legal authority (*hujjia*) after being declared enforceable and consistent with public policy (*Abu Dhabi Supreme Court, Appeal No. 31/2016 of 7 December 2016*).

Another tendency consist in admitting that foreign judgment could be granted effect. Some cases, indeed, suggest that recognition can be incidentally admitted if certain conditions are met. These include, in particular, the following: (1) that the foreign judgment is final and conclusive according to the law of the rendering state, and (2) the foreign judgment was rendered between the same parties on the same subject matter and cause of action (see, e.g., *Federal Supreme Court, Appeal No. 208/2015 of 7 October 2015*; *DSC, Appeal No. 276/2008 of 7 April 2009*; *Abu Dhabi Supreme Court, Appeal No. 106/2016 of 11 May 2016*; *Appeal No. 536/2019 of 11 December 2019.* In all these cases, recognition was not granted). Only in a few cases have the UAE courts (in particular Dubai courts) exceptionally recognized foreign judgments (*DSC, Appeal No. 16/2009 of 14 April 2009*; *Appeal No. 415/2021 of 30 December 2021* upholding the conclusions of DCFI accepting the *res judicata* effect of a foreign judgment.)

Unlike the cases cited above, the case reported here is one of the rare cases in which the parties sought to recognize a foreign judgment *by way of action*. The arguments of the Xs, in this case, were particularly convincing. According to Xs, since the foreign judgment did not order the defendants to perform any obligation and since Xs merely sought formal recognition of the foreign judgment, there was no need to have the foreign judgment declared "enforceable" in accordance with the enforcement procedure provided for in Art. 222 FCPA.

However, the decisions of the Dubai courts that UAE courts are only entitled to "enforce" foreign judgments are particularly problematic. First, it demonstrates a serious confusion of basic fundamental notions of private international law. The fact that Xs sought to have the foreign judgment "declared valid" does not mean that Dubai courts were required to consider the foreign judgment's validity *as such* but rather to consider whether the foreign judgment could be *given effect in the UAE*, and this is a matter of "recognition". Secondly, the courts seem to have forgotten that – as indicated above – they did consider whether a foreign judgment could be given effect in the UAE, albeit incidentally. The fact that such

an examination is brought before the court by way of action does not change in anything the nature of the problem in any way. Finally, in the absence of any specific provision on the recognition of foreign judgments, particularly where a party seeks to do so by way of action, there would appear to be nothing to prevent the courts from allowing an interested party to proceed by way of an ordinary action before the court of first instance since the ultimate purpose is not to declare the foreign judgment "enforceable", as this, indeed, would require compliance with the special procedure set out in Art. 222 FCPA. (For a discussion of the issue from the 2019 HCCH Judgments Conventions, see Béligh Elbalti, "Perspective of Arab Countries", *op.cit.*, pp. 183, 202, 205).

Van Den Eeckhout on CJEU Case Law in PIL matters

Written by Veerle Van Den Eeckhout, working at the Research and Documentation Directorate of the CJEU

On 29 April 2023, Veerle Van Den Eeckhout gave a presentation on recent case law of the Court of Justice of the European Union. The presentation, now available online, was entitled "CJEU case-law. A Few Observations on Recent CJEU Case Law with Attention for Some Aspects of Logic and Argumentation Theory." The presentation was given during the Dialog Internationales Familienrecht 2023 at the University of Münster. This presentation builds upon a previous presentation of the Author, "Harmonized interpretation of regimes of judicial cooperation in civil matters?", which is now also available online.

CJEU case-law. A Few Observations on Recent CJEU Case Law with Attention for Some Aspects of Logic and Argumentation Theory

The presentation focuses on case law of the CJEU regarding international family law, but adopts a broad view, particularly by taking into account also case law

outside the field of international family law – especially when issues arise both in the context of international family law and in the context of PIL outside the field of international family law – , and by paying attention to case law of the CJEU outside the pure interpretation of PIL regulations – where a national court is not asking in its question referred for a preliminary ruling, as such, for an interpretation of a PIL regulation, but the case might, possibly, affect PIL or interrelate with PIL; thus, for example, a recent judgment such as *Belgische Staat (Réfugiée mineure mariée)*, Case C-230/21, regarding a right to family reunification based on Directive 2003/86 was also considered in the analysis.

While presenting case law of the CJEU in PIL matters, the presentation particularly aimed to explore some aspects of methodology, reasoning, deductions and "consistency". The research thus presents some aspects of methodology of interpretation of European law by the CJEU – regarding methods the CJEU is using to interpret European law -, as well as some issues of analysis of case law of the CJEU – whereby a case of the CJEU subsequently raises questions regarding its content and reasoning -, and some questions regarding possible further deductions based on the case law of the CJEU. The presentation does not pretend any exhaustiveness in this regard, but rather explores and presents some of these aspects, looking at recent cases of the CJEU.

The PowerPoint of the presentation is available here. A version of this PowerPoint including also an extended version thereof is available here.

Harmonized interpretation of regimes of judicial cooperation in civil matters?

The presentation of 29 April 2023 continued on some aspects that were presented in a discussion of case law of the CJEU at the "Lugano Experts Meeting" in June 2022. The Lugano Experts Meeting 2022 was organised in Bern. The previous Lugano Experts Meeting had taken place in 2017.

The presentation at the Lugano Experts Meeting 2022, on 1 June 2022, essentially concerns case law of the CJEU between 2017 and 2022. It discusses issues of harmonised interpretation of regimes of judicial cooperation in civil matters. It includes some notes on case law of the CJEU regarding the Lugano convention 2007, the Brussels 1 bis regulation, and several second generation regulations

such as the European Enforcement Order Regulation, the European Order for Payment Procedure Regulation, and the European Small Claims Procedure Regulation.

As a matter of fact, one may observe a wide range of instruments that are indicated as instruments of "Judicial cooperation in civil matters" (Chapter 3 of Title V of the Treaty on the Functioning on the European Union), interpreted in a continuous stream of decisions (judgments and orders) by the CJEU. The presentation of case law of the CJEU at the Lugano experts meeting offers, inter alia, a discussion of issues of (in)consistency and influence/interaction between regimes, of giving or not a harmonised interpretation, of making possible deductions from a judgment in one context to another context. The relevance thereof is presented particularly in light of preliminary questions to the CJEU, with attention for article 53, paragraph 2, and article 99 of the Rules of Procedure of the Court. Issues and questions arising thereby include, inter alia, the following: what are national judges "supposed to know already" when reflecting about asking a preliminary question to the CJEU; how wide should the CJEU's field of vision be when assessing whether a question should be answered by order of by judgment, and when deciding about the content of the judgment – taking thereby or not into account the interpretation that has already been given in the context of another instrument.

The PowerPoint of this presentation is available here.

**Any view expressed in these presentations is the personal opinion of the author.*

English Court Judgment refused (again) enforcement by Dubai

Courts

In a recent decision, the Dubai Supreme Court (DSC) confirmed that enforcing foreign judgments in the Emirate could be particularly challenging. In this case, the DSC ruled against the enforcement of an English judgment on the ground that the case had already been decided by Dubai courts by a judgment that became final and conclusive (*DSC, Appeal No. 419/2023 of 17 May 2023*). The case presents many peculiarities and deserves a closer look as it reinforces the general sentiment that enforcing foreign judgments – especially those rendered in non-treaty jurisdictions – is fraught with many challenges that render the enforcement process very long … and uncertain. One needs also to consider whether some of the recent legal developments are likely to have an impact on the enforcement practice in Dubai and the UAE in general.

The case

1) Facts

The case's underlying facts show that a dispute arose out of a contractual relationship concerning the investment and subscription of shares in the purchase of a site located in London for development and resale. The original English decision shows that the parties were, on the one hand, two Saudi nationals (defendants in the UAE proceedings; hereinafter, "Y1 and 2"), and, on the other hand, six companies incorporated in Saudi Arabia, Anguilla, and England (plaintiffs in the UAE proceedings, hereinafter "X *et al.*"). The English decision also indicates that it was Y1 and 2 who brought the action against X *et al.* but lost the case. According to the Emirati records, in 2013, X *et al.* were successful in obtaining (1) a judgment from the English High Court ordering Y1 and 2 to pay a certain amount of money, including interests and litigation costs, and, in 2015, (2) an order from the same court ordering the payment of the some additional accumulated interests (hereinafter collectively "English judgment"). In 2017, X *et al*. sought the enforcement of the English judgment in Dubai.

2) The Enforcement Odyssey…

a) First Failed Attempt

i) Dubai Court of First Instance (DCFI)

First, X *et al.* brought an action to enforce the English judgment before the DCFI in accordance with the applicable rules in force at the time of the action (former art. 235 of the 1992 Federal Civil Procedure Act ["1992 FCPA"]). Based on well-established case law, the DCFI rules as follows: (i) in the absence of an applicable treaty, reciprocity should be established (interestingly, *in casu*, the DCFI considered that the UAE-UK bilateral convention on judicial assistance could not serve as a basis for enforcement since it lacked provisions on mutual recognition and enforcement); (ii) reciprocity can be established by showing that the enforcement requirements in the rendering State are "the same (identical) or less restrictive" compared to those found in the UAE; (iii) it was incumbent on the party seeking enforcement to submit proof of the content of the foreign law pursuant to the methods of proof admitted in the UAE so that the court addressed could compare the enforcement requirements in both countries. Considering that X *et al*. had failed to establish reciprocity with the United Kingdom (UK), the DCFI refused the enforcement of the English judgment (*DCFI, Case No. 574/2017 of 28 November 2017*).

X *et al*. appealed to the Dubai Court of Appeal.

ii) Dubai Court of Appeal (DCA)

Before the DCA, X *et al*. sought to establish reciprocity with the UK by submitting evidence on the procedural rules applicable in England. However, the DCA dismissed the appeal on the ground that the English court did not have jurisdiction. The DCA started first by confirming a longstanding position of Dubai courts, according to which the foreign court's jurisdiction should be denied if it is established that the UAE courts had international jurisdiction, even when the jurisdiction of the rendering court could be justified based on its own rules; and that any agreement to the contrary should be declared null and void. Applying these principles to the case, the DCA found that Y1 and 2 were domiciled in Dubai. Therefore, since the international jurisdiction of Dubai courts was established, the DCA found that the English court lacked indirect jurisdiction (*DCA, Appeal No. 10/2018 of 27 November 2018*).

Dissatisfied with the result, X et al. appealed to the Supreme Court.

iii) Dubai Supreme Court (DSC)

Before the DSC, X *et al.* argued that English courts had jurisdiction since the contractual relationship originated in England; the case concerned contracts entered into and performed in England; the parties had agreed on the exclusive jurisdiction of English court and that it was Y1 and 2 who initially brought the action against them in England. However, the DSC, particularly insensitive to the arguments put forward by X *et al.*, reiterated its longstanding position that the rendering court's indirect jurisdiction would be denied whenever the direct jurisdiction of UAE courts could be justified on any ground admitted under UAE law (*DSC, Appeal No. 52/2019 of 18 April 2019*).

b) Second Failed Attempt

The disappointing outcome of the case did not discourage X *et al.* from trying their luck again, knowing that the enforcement regime had since been (slightly) amended. Indeed, in 2018, the applicable rules – originally found in the 1992 FCPA – were moved to the 2018 Executive Regulation No. 57 of the 1992 FCPA (as subsequently amended notably by the 2021 Cabinet Decision No. 75. Later, the enforcement rules were reintroduced in the new FCPA enacted in 2022 and entered into effect in January 2023 ["2022 FCPA"]). The new rules did not fundamentally modify the existing enforcement regime but introduced two important changes.

The first concerns the enforcement procedure. According to old rules (former Art. 235 of the 1992 FCPA), the party seeking to enforce a foreign judgment needed to bring an ordinary action before the DCFI. This procedure was replaced by a more expeditious one consisting in filing a petition for an "order on motion" to the newly created Execution Court (Art. 85(2) of the 2018 Executive Regulation, now the new Art. 222(2) of the 2022 FCPA).

The second concerns indirect jurisdiction. According to the old rules (former Art. 235 of the 1992 FCPA), the enforcement of a foreign judgment should be denied if

(1) UAE courts had *international jurisdiction* over the dispute; and (2) the rendering court did not have jurisdiction according to (a) its own rules of international jurisdiction *and* (b) its rules on domestic/internal jurisdiction. Now, Art. 85(2)(a) of the 2018 Executive Regulation (new Art. 222(2)(a) of the 2022 FCPA) explicitly provides that the enforcement of the foreign judgment will be refused if the UAE courts have "exclusive" jurisdiction.

Based on these new rules, X *et al.* applied in 2022 to the Execution Court for an order to enforce the English judgment, but the application was rejected. X *et al.* appealed before the DCA. However, unexpectedly, the DCA ruled in their favour and declared the English judgment enforceable. Eventually, Y1 and 2 appealed to DSC. They argued, *inter alia*, that X *et al.* had already brought an enforcement action that was dismissed by a judgment that is no longer subject to any form of appeal. The DSC agreed. It considered that X *et al.* had already brought the same action against the same parties and having the same object and that the said action was dismissed by an irrevocable judgment. Therefore, X *et al.* should be prevented from bringing a new action, the purpose of which was the re-examination of what had already been decided (*DSC, Appeal No. 419/2023 of 17 May 2023*).

Comments

1) The case is interesting in many regards. *First,* it demonstrates the difficulty of enforcing foreign judgments in the UAE in general and Dubai in particular. Indeed, UAE courts (notably Dubai courts) have often refused to enforce foreign judgments, in particular those rendered in non-treaty jurisdictions, based on the following grounds:

i) Reciprocity (see, e.g., *DSC, Appeal No. 269/2005 of 26 February 2006* [English judgment]; *DSC, Appeal No. 92/2015 of 9 July 2015* [Dutch judgment (custody)]; *DSC, Appeal No. 279/2015 of 25 February 2016* [English judgment (dissolution of marriage)]; *DSC, Appeal No. 517/2015 of 28 August 2016* [US. Californian judgment]);

ii) Indirect jurisdiction (see, e.g., *DSC, Appeal No. 114/1993 of 26 September 1993* [Hong Kong judgment]; *DSC, Appeal No. 240/2017 of 27 July 2017* [Congo judgment]); and

iii) Public policy, especially in the field of family law, and usually based on the incompatibility of the foreign judgment with Sharia principles (see, e.g., *DSC, Appeal No. 131/2020 of 13 August 2020* [English judgment ordering the distribution of matrimonial property based on the principle of community of property]. See also, *Federal Supreme Court, Appeal No. 193/24 of 10 April 2004* [English judgment conferring the custody of a Muslim child to a non-Muslim mother]; *Abu Dhabi Supreme Court, Appeal No. 764/2011 of 14 December 2011* [English judgment order the payment of life maintenance after divorce]). Outside the field of family law, the issue of public policy was raised in particular with respect to the consistency of interests with Sharia principles, especially in the context of arbitration (see, e.g*., DSC, Appeal No. 132/2012 of 18 September 2012* finding that compound and simple interests awarded by an LCIA arbitral award did not violate Sharia. But, *c.f. Federal Supreme Court, Appeal No. 57/24 of 21 March 2006*, allowing the payment of simple interests only, but not compound interests.).

Second, the case shows that the enforcement process in the UAE, in general, and in Dubai, in particular, is challenging, and the outcome is unpredictable. This can be confirmed by comparing this case with some other similar cases. For example, in one case, the party seeking enforcement (hereinafter "X") unsuccessfully sought the enforcement of an American (Nevada) judgment against the judgment debtor (hereinafter "Y"). The DCFI first refused to enforce the American judgment for lack of jurisdiction (Y's domicile was in Dubai). The decision was confirmed on appeal, but on the ground that X failed to establish reciprocity. Instead of appealing to the DSC, X decided to bring a new action on the merits based on the foreign judgment. The lower courts (DCFI and DCA) dismissed the action on the ground that it was, in fact, an action for the enforcement of a foreign judgment that had already been rejected by an irrevocable judgment. However, DSC quashed the appealed decision with remand, considering that the object of the two actions was different. Insisting on its position, the DCA (as a court of remand) dismissed the action again. However, on a second appeal, the DSC overturned the contested decision, holding that the foreign judgment was sufficient proof of the existence of Y's debt. The DSC finally ordered Y to pay the full amount indicated in the foreign judgment with interests (*DSC, Appeal No. 125/2017 of 27 April 2017*).

However, such an approach is not always easy to pursue, as another case concerning the enforcement of a Singaporean judgment clearly shows. In this case, X (judgment creditor) applied for an enforcement order of a Singaporean judgment. The judgment was rendered in X's favour in a counterclaim to an action brought in Singapore by Y (the judgment debtor). The Execution Court, however, refused to issue the enforcement order on the ground that there was no treaty between Singapore and the UAE. Instead of filing an appeal, X brought a new action on the merits before the DCFI, using the Singaporean judgment as evidence. Not without surprise, DCFI dismissed the action accepting Y's argument that the case had already been decided by a competent court in Singapore and, therefore, the foreign judgment was conclusive (*DCFI, Case No. 968/2020 of 7 April 2021*). Steadfastly determined to obtain satisfaction, X filed a new petition to enforce the Singaporean judgment before the Execution Court, which – this time – was accepted and later upheld on appeal. Y decided to appeal to the DSC. Before the DSC, Y changed strategy and argued that the enforcement of the Singaporean judgment should be refused on the ground that the rendering foreign court lacked jurisdiction! According to Y, Dubai courts had "exclusive" jurisdiction over the subject matter of X's counterclaim because its domicile (place of business) was in Dubai. However, the DSC rejected this argument and ruled in favour of the enforcement of the Singaporean judgment (*DSC, Appeal No. 415/2021 of 30 December 2021*).

2) From a different perspective, one would wonder whether the recent developments observed in the UAE could alleviate the rigor of the existing practice. These developments concern, in particular, (i) the standard based on which the jurisdiction of the foreign should be examined and (ii) reciprocity.

(i) Regarding the jurisdiction of the foreign court, the new article 222(2)(a) of the 2022 FCPA (which reproduces the formulation of article 85(2)(a) of the 2018 Executive Regulation introduced in 2018) explicitly states that foreign judgments should be refused enforcement if UAE courts "have *exclusive* jurisdiction over the dispute in which the foreign judgment was rendered" (emphasis added). The new wording suggests that the foreign court's indirect jurisdiction would be denied only if UAE courts claim "exclusive" jurisdiction over the dispute. Whether this change would have any impact on the enforcement practice remains to be seen. But one can be quite sceptical since, traditionally, UAE law ignores the distinction

between “exclusive” and “concurrent” jurisdiction. In addition, UAE courts have traditionally considered the jurisdiction conferred to them as “mandatory”, thus rendering virtually all grounds of international jurisdiction “exclusive” in nature. (See, e.g., the decision of the *Abu Dhabi Supreme Court, Appeal No. 71/2019 of 15 April 2019,* in which the Court interpreted the word “exclusive” in a traditional fashion and rejected the recognition of a foreign judgment despite the fact that the rendering court’s jurisdiction was justified based on the treaty applicable to the case. But see *contra. DCFI, Case No. 968/2020 of 7 April 2021 op. cit*. which announces that a change can be expected in the future).

(ii) Regarding reciprocity, it has been widely reported that on 13 September 2022, the UAE Ministry of Justice (MOJ) sent a letter to Dubai Courts (i.e. the department responsible for the judiciary in the Emirate of Dubai) concerning the application of the reciprocity rule. According to this letter, the MOJ considered that reciprocity with the UK could be admitted since English courts had accepted to enforce UAE judgments (*de facto* reciprocity). Although this letter – which lacks legal force – has been widely hailed as announcing a turning point for the enforcement of foreign judgments in general and English judgments in particular, its practical values remain to be seen. Indeed, one should not lose sight that, according to the traditional position of Dubai courts, reciprocity can be established if the party seeking enforcement shows that the rendering State’s enforcement rules are identical to those found in the UAE or less restrictive (see *DSC, Appeal No. 517/2015 of 28 August 2016, op. cit.*). For this, the party seeking enforcement needs to prove the content of the rendering Stat’s law on the enforcement of foreign judgments so that the court can compare the enforcement requirement in the state of origin and in the UAE. Dubai courts usually require the submission of a complete copy of the foreign provisions applicable in the State of origin duly certified and authenticated. The submission of expert opinions (e.g., King’s Counsel opinion) or other documents showing that the enforcement of UAE judgments is possible was considered insufficient to establish reciprocity (see *DSC, Appeal No. 269/2005 of 26 February 2006, op. cit.*). The fact that the courts of the rendering State accepted to enforce a UAE judgment does not seem to be relevant as the courts usually do not mention it as a possible way to establish reciprocity. Future developments will show whether Dubai courts will admit *de facto* reciprocity and under which conditions.

Finally, the complexity of the enforcement of foreign judgments in Dubai has led to the emergence of an original practice whereby foreign judgment holders are tempted to commence enforcement proceedings before the DIFC (Dubai International Financial Center) courts (AKA Dubai offshore courts) and then proceed with the execution of that judgment in Dubai (AKA onshore courts). However, this is a different aspect of the problem of enforcing foreign judgments in Dubai, which needs to be addressed in a separate post or paper. (On this issue, see, e.g., Harris Bor, "Conduit Enforcement", in Rupert Reed & Tom Montagu-Smith, *DIFC Courts Practice* (Edward Elgar, 2020), pp. 30 ff; Joseph Chedrawe, "Enforcing Foreign Judgments in the UAE: The Uncertain Future of the DIFC Courts as a Conduit Jurisdiction", *Dispute Resolution International*, Vol. 11(2), 2017, pp. 133 ff.)

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.