The problematic exclusivity of the UPC on provisional measures in relation with PMAC arbitrations

Guest post by Danilo Ruggero Di Bella (Bottega Di Bella)

This post delves into the issues stemming from the exclusive jurisdiction of the Unified Patent Court (UPC) on interim relief in relation with the judicial support of the arbitrations administered by the Patent Mediation and Arbitration Centre (PMAC).

Risks of divesting State courts of competence on interim measures

On one hand, article 32(1)(c) UPC Agreement (UPCA) provides for the exclusive jurisdiction of the UPC to issue provisional measures in disputes concerning classical European patents and European patents with unitary effect. Under article 62 UPCA and Rules 206 and 211 of the UPC Rules of Procedure (UPC RoP), the UPC may grant interim injunctions against an alleged infringer or against an intermediary whose services are used by the alleged infringer, intended to prevent any imminent infringement, to prohibit the continuation of the alleged infringement under the threat of recurring penalties, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the patent holder. The UPC may also order the provisional seizure or delivery up of the products suspected of infringing a patent so as to prevent their entry into, or movement, within the channels of commerce. Further, the UPC may order a precautionary seizure of the movable and immovable property of the defendant (such its bank accounts), if an applicant demonstrates circumstances likely to endanger the recovery of damages, as well as an interim award of costs. Additionally, under article 60 UPCA, the UPC may order provisional measures to preserve evidence in respect of the alleged infringement and to inspect premises.

On the other hand, PMAC arbitrations can be seated everywhere in the world (Rule 4 PMAC Rules of Operation) and its arbitral awards can be enforced practically everywhere around the world (under the NY Convention). This means

that the competent State court for the assistance and supervision of the arbitration may not necessarily coincide with a court of a UPC Contracting Member State. Such State courts play three fundamental functions in support of the arbitral proceedings, including – for what matters here – the issuance of provisional measures (the other two functions being the judicial appointment of arbitrators and the taking of evidence). Normally, the competent State court for the issuance of the provisional measures is the State court at the place where the arbitral award will be enforced or the court at the place where the measures are to be executed (e.g., article 8 of Spain's Arbitration law which is largely based on the UNCITRAL Model Law on International Commercial Arbitration).

Hence, it is difficult to reconcile the *exclusive* competence of the UPC on interim measures with the world reach of PMAC arbitrations, since a literal interpretation of article 32(1)(c) UPC Agreement would prevent any State courts from issuing any necessary interim measures. Arguably, while such exclusivity granted to the UPC would not prevent PMAC arbitral tribunals from ordering provisional measures, it does exclude the jurisdiction of other State courts for obtaining interim relief. Thus, this may leave the plaintiff with no protection at the outset of the dispute when the panel of a PMAC arbitration is not already in place to entertain the case yet.

This raises the question whether such exclusivity on provisional measures is desirable, especially, where the interim relief is meant to be executed in a jurisdiction beyond the territory of the UPC, where the UPC provisional measure may not be enforceable at all, and the defendant may object the competence of the State court seized of the application on interim relief because of the UPC exclusivity on such measure.

For instance, in case a dispute arises between two parties who had contractually agreed to solve their differences by way of a PMAC arbitration to be seated in London, it may prove difficult for the plaintiff to apply to English courts for an urgent interim relief to be enforced in the UK (for example, to seize certain products suspected of infringing its patent that have landed at Heathrow airport) pending the constitution of the arbitral tribunal. The defendant may indeed argue that English courts are excluded from ordering any interim relief because of article 32(1)(c) UPC Agreement giving the UPC an exclusive jurisdiction on provisional measures. Therefore, the plaintiff may apply to the UPC for such an interim measure. However, since the UK is not a Contracting Member to the

UPCA, English courts may not be obliged to enforce the interim relief granted by the UPC. Consequently, the plaintiff seeking such an urgent interim measure may find itself in a situation without an effective legal protection.

In this respect, it is interesting to recall the so-called "long-arm jurisdiction" of the UPC established by article 71b(2) of the Regulation (EU) ? 542/2014 of 15 May 2014 amending Regulation (EU) No 1215/2012 as regards the rules to be applied with respect to the UPC and the Benelux Court of Justice. This article equips the UPC with extraterritorial jurisdiction by enabling the UPC to grant provisional measures against a third-State domiciled defendant, even if the courts of a third State have jurisdiction as to the substance of the matter. In other words, article 71b(2) shows that the UPC may attempt to retain jurisdiction with respect to provisional measures even when another court has jurisdiction on a given case. If we transpose the implications of this provision to an arbitration setting where an arbitral tribunal seated in a third State is entrusted with deciding on the merits of the case, the UPC may still seek to retain jurisdiction with respect to provisional measures pending the constitution of the arbitral panel. In essence, Article 71b(2) corroborates that in principle the UPC can grant provisional measures even when the main proceedings are taking place in a third country. The problem arises when a party seeks to enforce the UPC-ordered provisional measures in such a third country. Indeed, it remains doubtful whether the UPC provisional measure can be enforced in the relevant third State.

On this issue, some UPCA provisions on provisional measures are somehow conscious of the territorial limitations of the UPC jurisdiction. For instance, part of article 61 UPCA – dealing with on freezing orders – is expressly directed at ordering a party not to remove from the UPC jurisdiction any assets located therein (precisely, to avoid that the infringer may escape liability by moving its assets beyond the UPC jurisdiction). However, article 61.1 UPC Agreement *in fine* seems to intentionally neglect the territorial limits of the UPC jurisdiction by enabling the UPC to order a party not to deal in any assets, whether located within its jurisdiction *or not*.

Admittedly, article 32 UPCA contains a carve-out to the exclusivity of the UPC competence by providing for the residual competence of the national courts of the Contracting States for any actions which do not fall within the exclusive competence of the UPC. Nevertheless, the various provisional measures available under the UPCA as detailed in its articles 60, 61, 62 (and elaborated further in

Rules 206-211 UPC RoP) do not leave much to the residual competence of the national courts of the Contracting States.

Emergency arbitration as procedural solution

To somehow downsize this procedural issue, the adoption by the PMAC of an emergency arbitrator mechanism would be a welcome amendment in line with the best modern practices of international commercial arbitration. As the need for adopting provisional measures often arises at the outset of the arbitral proceedings, an emergency arbitrator – appointed before the arbitral tribunal is constituted – is in the position to order any interim relief. Further, unlike a State court, the arbitrator would not be prevented from adopting such interim relief by the exclusive competence of the UPC on such measures, since the exclusivity is directed only at excluding other State courts. Moreover, the emergency arbitrator's provisional measure adopted in the form of an interim award may be more likely to be enforced than UPC orders in jurisdictions beyond the territory of the UPC. For example, the Singapore High Court has confirmed in 2022 that a foreign seated emergency arbitrator award was enforceable under the Singapore International Arbitration Act 1994.

This mechanism could be implemented by the PMAC in its arbitration rules. By way of comparison, for instance, article 43 of the WIPO Expedited Arbitration Rules provides for a detailed procedural framework on "Emergency Relief Proceedings." According to such framework a party seeking urgent interim relief prior to the establishment of the arbitral tribunal can submit a request for such emergency relief to the Arbitration Institution, which within two days appoints a sole emergency arbitrator who may in turn order any interim measure it deems necessary.

Final remarks

With the view of resizing this procedural problem – which originates from the exclusive competence of the UPC on interim relief in relation to PMAC arbitrations seated in third countries where UPC provisional measure may not be enforceable – it is important to remark that the UPCA contains already a self-correcting mechanism. Namely, by providing at article 62 UPCA for the payment of a recurring penalty in case of non-compliance with a given provisional measure, the UPCA gives the applicant for an interim relief a pecuniary

alternative that the UPC can order and enforce within its jurisdiction on the assets of the non-compliant defendant. However, the problem may reemerge in case of provisional measures aimed at preserving evidence located in a third country. In this case the payment of a recurring penalty may not serve its purpose and play only a mild deterrent effect. In such cases, the UPC may draw negative inferences from the lack of cooperation of the defendant, although neither the UPCA nor the UPC RoP expressly provide so.

A Plea for Private International Law

A new paper by Michael Green, *A Plea for Private International Law (Conflict of Laws)*, was recently published as an Essay in the *Notre Dame Law Review Reflection*. Michael argues that although private international law is increasingly important in our interconnected world, it has fallen out of favor at top U.S. law schools. To quote from the Essay:

> *Private international law has not lost its jurisprudential import. And ease of travel, communication, and trade have only increased in the last century. But in American law schools (although not abroad), private international law has started dropping out of the curriculum, with the trend accelerating in the last five years or so. We have gone through US News and World Report's fifty top-ranked law schools and, after careful review, it appears that twelve have not offered a course on private international law (or its equivalent) in the last four academic years: Arizona State University, Boston University, Brigham Young University, Fordham University, University of Georgia, University of Minnesota, The Ohio State University, Pepperdine University, Stanford University, University of Southern California, Vanderbilt University, and University of Washington. And even where the course is taught, in some law schools—such as Duke, New York University, and Yale—it is by visitors, adjuncts, or emerita. It is*

no longer a valued subject in faculty hiring.

I could not agree more. Nor am I alone. Although Michael did the bulk of the research and writing for the Essay, he shared credit with a number of scholars who endorse the arguments set forth therein. This list of credited co-authors includes:

Lea Brilmayer (Yale Law School)
John Coyle (University of North Carolina School of Law)
William S. Dodge (George Washington University Law School)
Scott Dodson (UC Law San Francisco)
Peter Hay (Emory School of Law)
Luke Meier (Baylor Law School)
Jeffrey Pojanowski (Notre Dame Law School)
Kermit Roosevelt III (University of Pennsylvania Carey Law School)
Joseph William Singer (Harvard Law School)
Symeon C. Symeonides (Willamette University College of Law)
Carlos M. Vázquez (Georgetown University Law Center)
Christopher A. Whytock (UC Irvine School of Law)
Patrick Woolley (University of Texas School of Law).

In addition to his empirical findings about the declining role of Conflict of Laws in the U.S. law school curricula, Michael seeks to explain precisely why the class matters so much and why it has fallen out of favor. He argues convincingly that part of the decline may be attributed to poor branding:

We suspect that part of the problem is that many American law professors and law school administrators are unaware that conflict of laws is private international law. One of us is an editor of a volume on the philosophical foundations of private international law, and in conversation several law professor friends (we won't name names) told him that they weren't aware that he worked on private international law, even though they knew that he worked on conflicts. Reintroducing conflicts to the law school curriculum might be as simple a matter as rebranding the course to make its connection with international law clear, as Georgetown has done.

He also considers—and rightly rejects—the notion that this is an area about which practicing attorneys can easily educate themselves. To quote again from the Essay:

> *Another argument that the disappearance of conflicts from the law school curriculum is not a problem is that a practitioner can identify a choice-of-law issue and get up to speed on the relevant law in short order. The truth, however, is that one is unlikely to recognize a choice-of-law issue without having taken conflicts. We have often been shocked at how law professors without a conflicts background (again, we are not naming names) will make questionable choice-of-law inferences in the course of an argument, based on nothing more than their a priori intuitions. They appear to be unaware that there is law—and law that differs markedly as one moves from one state or nation to another—on the matter. One can recognize a choice-of-law issue only by knowing what is possible, and someone who has not taken conflicts will not know the universe of possibilities.*

The Essay contains a host of additional insights that will (fingers crossed) help to reinvigorate the field of private international law in the United States. Anyone with an interest in conflicts (or private international law) should read it. It can be downloaded here.

A version of this post also appears at Transnational Litigation Blog.

CJEU's first ruling on the conformity of asymmetric jurisdiction clauses with the

Brussels I recast regulation and the 2007 Lugano Convention

by Guillaume Croisant, Claudia Cavicchioli, Nicole Rölike, Alexia Kaztaridou, and Julie Esquenazi (all Linklaters)

In a nutshell: reinforced legal certainty but questions remain

In its decision of yesterday (27 February 2025) in the *Lastre* case (Case C-537/23), the Court of Justice of the European Union (CJEU) handed down its long-awaited first judgment on the conformity of asymmetric jurisdiction clauses with the Brussels I recast regulation and the 2007 Lugano Convention.

The Court ruled that the validity of asymmetric jurisdiction clauses is assessed in the light of the autonomous rules of Article 25 of the regulation (rather than Member States' national laws) and confirmed their validity where the clause can be interpreted as designating courts of EU or Lugano States.

This decision dispels some of the previous uncertainties, particularly arising from the shifting case law of the French Supreme Court. The details of the decision and any possible impact, in particular the requirement for the clause to be interpreted as designating courts of EU or Lugano States, will need to be analysed more closely, but on the whole the CJEU strengthened foreseeability and consistency regarding unilateral jurisdiction clauses under the Brussels I regulation and the Lugano convention.

Besides other sectors, this decision is of particular relevance in international financing transactions, including syndicated loans and capital markets, where asymmetric jurisdiction clauses in favour of the finance parties have been a long-standing practice.

Background

A so-called asymmetric or unilateral jurisdiction clause allows one party to choose any competent court to bring proceedings, while the other party is restricted to a specific jurisdiction. Such clauses are common in financial agreements, like international syndicated loan transactions, where lenders, bearing most of the financial risk, reserve the right to enforce claims wherever the borrower may have assets.

Article 25 of the Brussels I recast regulation provides autonomous conditions for the formal validity of jurisdiction clauses designating EU courts. By contrast, for the jurisdiction clause's substantive validity, Article 25 refers to the law of the Member State designated by the jurisdiction clause. While one of the Brussels I recast regulation's predecessors, the 1968 Brussels Convention, referred to jurisdiction clauses "*concluded for the benefit of only one of the parties*", the regulation is silent on the validity of asymmetrical jurisdiction clauses. Their precise working under Article 25, particularly in relation to the substantive validity rule, awaited authoritative consideration by the CJEU.

In the absence of relevant national case law in many Member States and diverging approaches in jurisdictions where decisions had been rendered, today's judgment brings welcomed clarity and legal certainty. For instance, in *Commerzbank AG v Liquimar Tankers Management Inc*, the English Commercial Court considered (pre-Brexit, when EU jurisdiction law still applied in the UK) that asymmetric jurisdiction clauses are valid under Article 25, whereas the evolving jurisprudence of the French Supreme Court (discussed below) has led to many debates.

Arbitration is excluded from the scope of application of the Brussels I recast regulation, meaning that the validity of asymmetric *arbitration* clauses generally depends on the law applicable to the arbitration clause (*lex arbitri*). Under some laws, they are accepted if no consent issues, such as duress, arise (see e.g. under English law the *NB Three Shipping* case).

Discussions in France spur crucial CJEU review

In the case at hand, an Italian and a French company entered into a supply agreement including an asymmetric jurisdiction clause, similar to clauses often seen in financial documentation favouring the lenders:

> *"The jurisdiction of the court of Brescia (Italy) shall apply to any dispute arising from this contract or related to it, [the Italian supplier] reserving the right to proceed against the buyer before another competent court in Italy or abroad."*

When a dispute arose, the French company brought proceedings before the French courts. The supplier challenged the competence of French courts on the basis of the unilateral jurisdiction clause. The French courts dismissed this objection, declaring the clause unlawful due to its lack of foreseeability and one-sided nature.

The case was brought before the French Supreme Court (*Cour de cassation*). In the past, its First Civil Chamber had ruled, in its 2012 *Rothschild* decision, that jurisdiction clauses giving one party the right to sue the other before "*any other competent court*" are invalid both under the French civil code and the Brussels I regulation, on the ground that this would be "*potestative*" (i.e. that the execution of the clause would depend on an event that solely one contracting party has the power to control or to prevent).

Although the First Chamber later abandoned any reference to the "*potestativité*" criteria, there now appear to be diverging positions among the chambers of the French Supreme Court regarding the validity of asymmetric jurisdiction clauses. On the one hand, further to several decisions, the latest being in 2018, the First Civil Chamber of the Cour de Cassation appears to hold that asymmetric jurisdiction clauses are invalid if the competent courts are not identifiable through objective criteria or jurisdiction rules within a Member State. On the other hand, the Commercial Chamber of the French Supreme Court ruled in 2017 that such clauses are valid if the parties have agreed to them, regardless of predictability.

In this case, the *Cour de cassation* sought guidance from the CJEU through a preliminary ruling reference. The *Cour de cassation* requested the CJEU's position on:

- whether the lawfulness of asymmetric jurisdiction clauses should be evaluated under (i) the autonomous principles of the Brussels I recast regulation or (ii) the applicable national law;
- if the Brussels I recast regulation applies, whether this regulation permits such asymmetric clauses;

- if national law is applicable, how to determine which Member State's law should take precedence.

After the hearing, the Court deemed a prior opinion from the Advocate General not necessary.

CJEU upholds asymmetric clauses… under conditions

On the first question, the CJEU ruled that, in the context of the assessment of the validity of a jurisdiction clause, complaints alleging the imprecision or asymmetry of that agreement must be examined in the light of autonomous criteria which are derived from Article 25 of the Brussels I recast regulation. Matters of substantive validity, for which the law of the relevant Member States shall apply, only concern causes which vitiate consent, such as error, deceit, fraud or violence, and incapacity to contract.

Turning to the interpretation of these autonomous criteria under Article 25, the Court confirmed the validity of asymmetric jurisdiction clauses designating courts of EU Member States or States that are parties to the Lugano Convention.

The Court first confirmed that parties are free to designate several courts in their jurisdiction clauses, and that a clause referring to "any other competent court" meets the requirements of foreseeability, transparency and legal certainty of the Brussels I recast regulation and the Lugano Convention since it refers to the general rules of jurisdiction provided for by these instruments.

However, the Court importantly held that these requirements are met only insofar as the jurisdiction clause can be interpreted as conferring jurisdiction to the court designated in the clause (in the case at hand, Brescia) and the competent courts of the EU/Lugano States to hear disputes between the parties. EU law alone would not make it possible to confer jurisdiction to a court of third countries, as this designation would depend on the application of their own private international law rules. The exact implications of this requirement will require careful assessment, in particular where non-EU/Lugano parties are involved.

With respect to the alleged "unbalanced" nature of such clause, the Court stressed that the Brussels I recast regulation and the Lugano Convention are based on the principle of contractual autonomy and thus allow asymmetric clauses, as long as they respect the exceptions foreseen by these instruments, in

particular with respect to exclusive jurisdiction (Art. 24 Brussels I recast regulation) as well as the protective rules in insurance, consumer and employment contracts (Arts. 15, 19 and 23 Brussels I recast regulation).

Going International: The SICC in Frontier Holdings

By Sanjitha Ravi, Jindal Global Law School, OP Jindal Global University, Sonipat, India

The Singapore International Commercial Court ("SICC") in *Frontier Holdings Ltd v. Petroleum Exploration (Pvt) Ltd* overturned a jurisdictional ruling by an International Chamber of Commerce ("ICC") arbitral tribunal, holding that the tribunal did, in fact, have jurisdiction to hear the dispute. The SICC's decision focused on interpreting the arbitration provisions in the Petroleum Concession Agreements ("PCAs") and Joint Operating Agreements ("JOAs"), which had created ambiguity regarding whether disputes between foreign parties, i.e., Foreign Working Interest Owners ("FWIOs"), and Pakistan parties, i.e., Pakistani Working Interest Owners ("PWIOs"), were subject to international arbitration. The arbitral tribunal, by majority, had concluded the PCAs restricted ICC arbitration to disputes between FWIOs *inter se* or between FWIOs and the President of Pakistan, thereby excluding disputes between FWIOs and PWIOs. The SICC rejected this reasoning and concluded that the provisions should be applied with necessary modifications to fit the JOAs' context by conducting an in-depth construction of the dispute resolution provisions of the different agreements involved. The court found that a reasonable interpretation of these provisions indicated an intention to submit FWIO-PWIO disputes to ICC arbitration rather than Pakistani domestic arbitration.

The (Un)Complicated Fact Pattern

The dispute arose from an oil and gas exploration agreement in Pakistan, where Frontier Holdings Limited ("FHL"), a company incorporated in Bermuda, sought

to challenge a jurisdictional ruling made by an arbitral tribunal under the auspices of the ICC. FHL's claim was based on JOAs and PCAs signed in 2006 between PEL and the President of Pakistan, which governed oil exploration and production in the Badin South and Badin North Blocks. These agreements contained provisions regarding arbitration and dispute resolution, specifically Article 28, which stipulated that disputes that the International Centre for Settlement of Investment Disputes did not take jurisdiction over were to be resolved by arbitration under the ICC. Article 28.3 clearly stated that Article 28 was only applicable to a dispute between FWIOs *inter se* or between the FWIOs and the President of Pakistan. The JOAs, which were annexed to the PCAs, further stated under Article 17 that any dispute arising out of the JOAs was to be dealt with *mutatis mutandis* in accordance with Article 28 of the PCAs. Furthermore, Article 29.6 stated that where matters were not specifically dealt with in the PCAs, the matters would be governed by, among other things, the Pakistan Petroleum (Exploration and Production) Rules 2001 ("Rules"). These Rules, as per Rule 74 required that any dispute regarding a petroleum right or anything connected to such right was to be resolved by arbitration in Pakistan under Pakistani law. Article 18.1 and 1 of the PCAs stipulated that in case of a conflict between the JOA and PCA, the JOA would be regarded as modified to conform to the PCA, and in case of inconsistency or difference in such terms, the terms of the PCAs would prevail, respectively. FHL acquired a 50% working interest in the Blocks through a Farm In Agreement ("FIA") and Deed of Assignment. In 2022 and 2023, PEL, as the operator, sought to forfeit FHL's interest due to non-compliance with cash calls. FHL initiated arbitration under ICC rules, but PEL contended that the arbitral tribunal lacked jurisdiction, arguing that the applicable arbitration provisions under the PCAs and JOAs did not cover disputes between FWIOs and PWIOs. The arbitral tribunal, by majority, ruled that it had no jurisdiction. This led to FHL challenging the tribunal's ruling before the SICC.

Judicial Analysis by the SICC

At the outset, there was no dispute between the parties on two aspects: first, that Pakistani law was the proper law of the contract, and second, that the incorporation of Article 28 of the PCAs into the JOAs by Article 17 of the latter agreements demonstrated that each of FHL and PEL consented to resolve disputes arising out of the JOAs by arbitration *per se* to the exclusion of litigation before domestic courts (hence, an agreement to arbitrate *per se* existed). The

core issue before the court was whether the tribunal had jurisdiction to hear the dispute between FHL and PHL. To do this, the SICC engaged in the interpretation of Article 28 of the PCAs and Article 17 of the JOAs. The court analysed the textual ambiguities and how the provisions should be construed in light of the overall intent of the agreements.

Pakistan is a partial integration jurisdiction, meaning that the court could go beyond the words of the agreement to construe its meaning only when such words were ambiguous. In the event of ambiguity, the court could consider the contract's commercial purpose and the factual background against which that contract was made. If the words of the agreement on their plain and ordinary meaning led to inconsistency within the document or absurdity, the plain and ordinary meaning of those words could be reasonably modified to avoid absurdity and inconsistency and reflect the parties' intention.

In understanding the parties' intention, the SICC concluded that upon reading Article 28 of the PCAs as a whole, the intention that disputes involving FWIOs were to be dealt with in a manner other than by Pakistani arbitration (which was specifically stipulated for disputes between PWIOs *inter se* or between PWIOs and the President) even though it did not specifically deal with FWIO-PWIO disputes. Furthermore, because the JOA was annexed to each of the PCAs which were in turn envisaging assignments of interests, there existed an understanding that parties other than the original Pakistani parties could become parties to the JOAs and become subject to the dispute resolution provision in Article 17 of the JOAs. The SICC concluded that FHL became a party to the PCAs and JOAs when it acquired its interest and noted that in the Assignment Agreement between FHL, PEL and the President, there was an ICC arbitration clause. Reading Article 28 of the PCAs and Article 17 of the JOAs with Article 29.6 of the PCAs sand Rule 74 of the Rules, the court concluded that to say that FWIO-PWIO fell under Article 29.6 would render the words "mutatis mutandis" in Article 17 otiose. The court concluded that Article 28.3 of the PCAs applied, moulded by the use of the words "*mutatis mutandis*," by substituting "Pakistan Working Interest Owner" for "THE PRESIDENT" in Article 28.3. This was the approach which commended itself to the England and Wales Court of Appeal ("EWCA") in *Hashwani and others v. OMV Maurice Energy* [2015] EWCA Civ 1171 wherein a similar fact pattern was examined. The SICC further noted that there was a clear intention that disputes involving FWIOs were to be resolved by arbitration outside Pakistan because the

expression could not be given effect otherwise. There was no inconsistency with Article 18 and Article 1 and this as per the SICC. Article 29.6 and Rule 75 of the Rules were default provisions and did not alter the meaning of Article 28 of the PCAs and Article 17 of the JOAs.

The contention that FHL was not a party to the original PCAs was irrelevant, and the SICC held that PEL was incorrect in drawing a parallel to the factual matrix in *Hashwani* in this regard. In *Hashwani*, the EWCA had allowed the party which sought to invoke ICC arbitration even though they were not a party to the original contract. Furthermore, it was a strained construction of Article 17 to say that despite its express incorporation of Article 28, the resolution of the dispute was not governed by Article 28 of the PCAs but by a default provision. Finally, that the FIAs contained an ICC arbitration clause provided support for the contention that the parties' intention at the time FHL entered into the PCAs and became a party to the JOAs was for FWIO-PWIO disputes under the JOAs to be governed by international arbitration. In the circumstances, the SICC held that the majority of the tribunal was incorrect in contending that the tribunal had no jurisdiction to hear or determine the dispute and that FHL was entitled to pursue its claim.

The Ruling's Implications on Commercial Contracts

The court emphasised that reading the arbitration clauses in a restrictive manner, as the tribunal's majority had done, undermined commercial certainty and the purpose of arbitration in cross-border energy contracts. By setting aside the tribunal's ruling, the SICC reinforced the principle that arbitration agreements should be interpreted in a manner that upholds international commercial arbitration, particularly when foreign investors are involved in contracts with state-linked entities. The decision provides clarity on jurisdictional disputes in international contracts, ensuring that parties engaging in cross-border investments can rely on neutral arbitration forums rather than being subjected to domestic dispute resolution mechanisms.

The SICC's ruling in *Frontier Holdings* carries significant implications for commercial contracts, particularly in international energy and infrastructure agreements. It underscores the necessity for clarity in arbitration agreements, emphasising that parties must explicitly define jurisdictional provisions to avoid ambiguity. The ruling highlights the careful use of terms like "*mutatis mutandis*", which, if not properly drafted, can lead to interpretational disputes. This becomes

so much more of a zone of ambiguity because of other provisions in the contract which provide for other means of dispute resolution in a different set of circumstances, such as between a combination of specific parties in a multi-party agreement or based on the subject matter of the dispute. India, another partial integration jurisdiction, has faced similar challenges regarding arbitral jurisdiction in cross-border commercial disputes. Several key cases illustrate how Indian courts have approached arbitration agreements in international contracts. For instance, in *Enercon (India) Ltd v. Enercon GmbH* (2014) 5 SCC 1, the Supreme Court of India ruled that arbitration agreements must be interpreted in a way that ensures disputes are effectively resolved through arbitration. Similarly, in *Cairn India Ltd v. Union of India* (2019 SCC OnLine Del 10792), the Delhi High Court emphasised that arbitration clauses should be construed in favour of international arbitration, especially in contracts involving foreign investment. The implications of the SICC's approach, as seen in *Frontier Holdings*, suggest that partial integration courts could adopt similar reasoning in cases involving foreign and Indian entities in commercial contracts. That said, parties would be in a much better position if they drafted provisions, especially those as pertinent as the dispute resolution terms, in clear terms.

Additionally, the decision reinforces the importance of international arbitration, affirming the preference for neutral forums in resolving cross-border commercial disputes, especially where foreign investors are involved. By setting aside the arbitral tribunal's restrictive interpretation, the judgement further strengthens protections for foreign investments, ensuring that foreign investors are not subjected to domestic arbitration in host states, particularly in cases where state-owned entities are parties to the dispute.

Enforcing Foreign Judgments in Egypt: A Critical Examination of

Two Recent Egyptian Supreme Court Cases

I. Introduction

The recognition and enforcement of foreign judgments in the MENA region can sometimes be challenging, as it often involves navigating complex legal frameworks (domestic law v. conventions). In addition, case law in this field has encountered difficulties in articulating the applicable guiding principles and is sometimes ambiguous, inconsistent, or even contradictory. Two recent decisions rendered by the Egyptian Supreme Court highlight this issue, alhoutgh – it must be admitted – the Court did provide some welcome clarifications. In any event, the cases reported here highlight some key issues in the recognition and enforcement of foreign judgment and offer valuable insights into the evolving landscape of this area of law in Egypt.

II. The Cases

1. Case 1: Ruling No. 12196 of 22 November 2024

a. Facts

The first case concerns the enforcement of a court-approved settlement deed (*saqq*) issued by a Saudi court. While the underlying facts of the case are not entirely clear, it appears that the parties involved seem to be Egyptian nationals. The original case, initiated in Saudi Arabia, concerns a claim for maintenance to be paid by the husband, 'Y' (defendant/respondent), to his wife and children, 'Xs' (plaintiffs/appellants). Before the Saudi court, the parties reached a settlement, which was recorded in a court-issued deed (*saqq*). Under this agreement, Y was obligated to pay a monthly alimony to Xs, with payment to be made by way of bank transfer to the wife's account from November 2009. However, as Y failed to make the payment and returned to Egypt, Xs filed an action before Egyptian courts in 2019 to enforce the Saudi court's settlement deed in Egypt (however, it remains unclear when Y stopped making the alimony payment or when he returned to Egypt).

The Court of first instance ruled in favor of Xs. However, the decision was overturned on appeal. Xs then appealed to the Supreme Court. According to Xs, the court of appeal refused to enforce the Saudi court's settlement deed on the grounds that it violated Islamic sharia and the Constitution. This was based on the fact that Xs continued to reside in Saudi Arabia, the children had obtained university degrees and were employed—along with their mother—in Saudi Arabia, while Y had left the country after his retirement. Xs argued that, in doing so, the Court of Appeal went beyond a formal examination of the enforcement requirements and instead engaged into re-examining the substantive merits of the case.

b. The Court's Ruling (summary):

The Supreme Court accepted the arguments made by Xs on the following grounds:

First the Supreme Court recalled the general principles governing the recognition and enforcement of foreign judgments in Egypt. It made a clear distinction between the "recognition" of foreign judgments and their "enforcement" and determined their respective legal regimes.

Regarding the enforcement of the Saudi court-approved settlement deed, the Supreme Court considered that the deed in question was "*a final judicial decision*

rendered by a competent judicial authority, in the presence of both parties and after they were given the opportunity to present their defense". Accordingly, such a judgment should be given effect in accordance with the conditions and procedures specified by Egyptian law (Arts. 296~298 of the Code of Civil Procedure (CCP)). If these conditions are met, Egyptian courts are required to declare the foreign judgment enforceable; otherwise the courts' role is limited to rejecting enforcement, without reassessing the substantive reasoning of the foreign judgment. The Court concluded that Court of appeal had gone beyond its authority by failing to adhere to the above principles and instead re-examined the judgment's reasoning.

2. Case 2: Ruling No. 2871 of 5 December 2024

a. Facts

The second case concerns the enforcement of a Kuwaiti money judgment. Here, too, the underlying facts of the case are not entirely clear. However, it appears that the dispute involved a Kuwaiti company, 'X' (plaintiff/respondent), and an Egyptian national 'Y' (defendant/appellant).

X initiated a lawsuit against Y in Kuwait, seeking the payment of a certain amount of money. Based on the arguments submitted by Y, it seems that by the time the lawsuit was filed, Y had already left Kuwait to return to Egypt. X prevailed in the Kuwaiti lawsuit and then sought to enforce the Kuwaiti judgment in Egypt.

The court of first instance ruled in favor of X and this decision was upheld on appeal. Y then appealed to the Egyptian Supreme Court. Before the Supreme Court, Y contested the lower courts' rulings on the ground that he was not properly summoned in the original Kuwaiti case, as the notification was served to the Public Prosecution in Kuwait, despite his having already left Kuwait before the lawsuit was filed.

b. The Court's Ruling (summary):

The Supreme Court accepted Y's argument on the following grounds:

The Court first recalled that proper notification of the parties is a fundamental requirement for recognizing and enforcing a foreign judgment, that is explicitly stated in Article 298(2) of the Egyptian CCP and Article 27(3) of the 2017 Judicial Cooperation Agreement between Egypt and Kuwait. The Court also referred to Article 22 of the Egyptian Civil Code (ECC), according to which procedural matters (including service of process) are governed by the law of the country where the proceedings take place.

The Court then observed that, although Y had already left Kuwait before the lawsuit was filed, the Court of Appeal ruled that the service was valid under Kuwaiti law. However, the Supreme Court emphasized that, according to Kuwaiti CCP, a summons must be served to the defendant's last known address, workplace, or residence, whether in Kuwait or abroad. This law also addresses situations where the defendant has or has not a known domicile abroad. Since Y had left Kuwait, the lower court should have verified whether the notification complied with these requirements. The Supreme Court concluded that the lower courts had incorrectly relied on notification via the Kuwaiti Public Prosecution without confirming whether this method met the requirements established by Kuwaiti law for notifying defendants abroad.

III. Comments

The reading of the two cases leaves a mixed impression.

i. On the hand, one can appreciate the general framework outlined by the Supreme Court in both decisions. Notably, in the first case, the distinction between recognition and enforcement of foreign judgments is noteworthy, as Egyptian courts have reached divergent conclusions on whether the "recognition" of foreign judgments can operate independently from their "enforcement" (for the situation in the UAE, which has a similar legal framework, see here).

Moreover, the Supreme Court's reaffirmation of the principle of prohibition of *révision au fond* is also commendable. Although the principle is generally accepted in Egyptian law, what sets this case apart is that the Court did not merely affirm a general principle, but it actively overturned the appealed decision

for violating it.

In the second case, the Court's correct reference to the applicable convention is particularly noteworthy, given that it has failed to do so in some previous cases (for a general overview, see my previous post here).

ii. On the other hand, the Court's approach in both cases raise certain questions, and even doubts.

a) Regarding the first case, one may question the applicability of the Court's general stance to the specific issue addressed. It should be noted that the case concerned the enforcement of a *court-approved settlement deed*, which is the equivalent to a "judicial settlement" (*sulh qadha'i – transaction judiciaire*) under Egyptian law. While foreign judicial settlements can be declared enforceable in Egypt (Article 300 of the CCP), they do not constitute – contrary to the Court's affirmation – "final judgments" *per se*, and therefore, do not carry *res judicata* effect, which – if recognized – would preclude any review of the "merits". The Court's reasoning appears difficult to justify given the longstanding position of Egyptian courts that judicial settlements lack *res judicata* effect and that the fact that they are approved by the court has no implication on their characterisation as "settlements" (and not decisions). This is because, while judicial settlements involve the intervention of the court, the court's involvement is not based on its adjudicative function but rather serve a probative purpose. The Court's failure to acknowledge this distinction is particularly striking in light of the established case law.

It is also regrettable that the Supreme Court failed to apply the correct legal framework. Indeed, both Saudi Arabia and Egypt are contracting states of the 1983 Riyadh Convention, and the case falls within its scope of application. This is particularly relevant given that the 1983 Riyadh Convention explicitly prohibits any review of the merits (Article 32), and – unlike, for example, the 2019 HCCH judgments Convention (Article 11) – allows for the *"recognition"* of judicial settlements (Article 35).

Finally, doubts remain as to whether the Supreme Court was justified in overturning the appealed decision for allegedly engaging in a prohibited *révision au fond*, or whether the Court of Appeal's approach can be considered a review of

the merits at all. It should be noted that the settlement was reached in 2009, while the enforcement lawsuit was filed as decade later. Moreover, Y argued that his children had already graduated from university and were employed in Saudi Arabia. Taking this significant change of circumstances into account should not necessarily be regarded as a "review of the merits", but rather as a legitimate consideration in assessing whether enforcement remains appropriate. Therefore, such a change in circumstances could reasonably justify at least a partial refusal to enforce the Saudi court-approved settlement deed.

b) With respect to the second case, the Supreme Court's stance to overturn the appealed decision on the ground that the court of appeal failed to confirm whether the service complied with the requirements established by Kuwaiti law for notifying defendants has a number of drawbacks. Two main issues arise from this position:

(1) One might question how Egyptian judges could be more qualified than Kuwaiti judges in applying their own procedural rules, especially if it is admitted that Kuwaiti procedural law is applicable (article 22 of the ECC).

(2) The Court overlooked that the 2017 Egyptian-Kuwaiti Convention, which it explicitly cited, contains a chapter specifically dealing with service of process (Chapter II). Therefore, the validity of the service should not be evaluated based on Kuwaiti procedural law, as the Court declared, but rather in accordance with the rules established by the Convention, as the Supreme Court itself had previously ruled (see the cases cited in my previous post here) . Given that this Convention is in force, there was no need to refer to domestic law, as – according to Egyptian law – when an international convention is applicable, its provisions take precedence over conflicting national laws (Article 301 of the CCP), a principle that has been repeatedly confirmed by the Supreme Court itself on numerous occasions.

Toothless vs. Shark-Teeth: How Anti-Suit Injunctions and Anti-Anti-Suit Orders Collide in the UniCredit Saga

by Faidon Varesis, University of Cambridge

Background

The dispute in the *UniCredit v. RusChem* saga arose from bonds issued by UniCredit to guarantee performance under contracts for Russian construction projects, where RusChem, after terminating the contracts due to EU sanctions, initiated Russian proceedings for payment in breach of an English-law governed arbitration agreement that mandates resolution in Paris under ICC rules.

UniCredit sought an anti-suit injunction in the UK to stop these Russian proceedings, arguing that the arbitration clause must be enforced under English law. Teare J at first instance held that the English court lacked jurisdiction—finding that the arbitration agreements were governed by French substantive rules and that England was not the appropriate forum—whereas the Court of Appeal reversed this decision by granting a final anti-suit injunction requiring RCA to terminate its Russian proceedings.

The November 2024 UK Supreme Court's Decision

The Supreme Court addressed the sole issue of whether the English court had jurisdiction over UniCredit's claim by examining (i) whether the arbitration agreements in the bonds were governed by English law (the Governing Law issue) and (ii) whether England and Wales was the proper place to bring the claim (the Proper Place issue). Ultimately, the Supreme Court upheld the Court of Appeal's decision, reaffirming that the arbitration clause is governed by English law and that England is the proper forum to enforce the parties' agreement, thereby confirming the English courts' willingness to restrain foreign proceedings brought in breach of such arbitration agreements.

Importantly for the present note, the Supreme Court, in the last paragraphs of the November 2024 decision, also considered (as part of its discretion) the availability of similar relief from the arbitral tribunal or the French courts (as courts of the seat). The Court explained that arbitration awards lack the coercive force of court orders—they merely create contractual obligations without enforcement powers such as contempt sanctions—so relying on arbitration to restrain RusChem would be ineffective. Evidence at trial showed that French courts would not have the authority to enforce any arbitral order preventing RusChem from pursuing Russian proceedings. Furthermore, such an award would also be unenforceable in Russia. Consequently, the Court concluded that neither the French courts nor arbitration proceedings would provide an effective remedy, and that England and Wales is the proper forum to enforce UniCredit's contractual rights through an anti-suit injunction.

Parallel Proceedings in Russia and the Grant of an Anti Anti-Suit Injunction

The English anti-suit injunction was instigated by proceedings brought by RusChem against UniCredit in the Russian courts, seeking €448 million under the bonds. The jurisdiction of the Russian courts was established despite the French-seated arbitration clause, as Russia had enacted a law that confers exclusive jurisdiction on Russian Courts over disputes arising from foreign sanctions. In November 2023, the Russian courts dismissed UniCredit's application to dismiss the claim, ruling that the dispute falls under the exclusive competence of the Russian courts, though the proceedings were stayed pending the outcome of the anti-suit proceedings in England.

Later in 2024, RusChem was successful in getting the Russian courts to seize assets, accounts, and property, as well as shares in two subsidiaries of UniCredit in Russia amounting to €462 million.

RusChem had initially committed to being bound by the final injunctive relief of the English court and to respecting its orders, but following the UK Supreme Court's decision of November 2024, RusChem secured a ruling from the Russian courts on 28 December 2024. This ruling—effectively an anti anti-suit order—restricted UniCredit from initiating arbitrations or court proceedings against RusChem over the bonds outside the Russian courts, and prevented any ongoing proceedings or judgment enforcement outside of Russia, while also

mandating that UniCredit take all necessary steps to cancel the effects of the English court's order within two weeks of the ruling coming into force, failing which UniCredit would have faced a court-imposed penalty of €250 million.

The February 2025 Court of Appeals Decision

UniCredit applied to the English courts, seeking a variation of the order it had finally secured just a few months earlier. The Court of Appeal considered that UniCredit faced a real risk of incurring a substantial financial penalty if the English injunction remained in force, given the Russian court's ruling that could impose a €250 million penalty. In addition, the Court of Appeal examined whether UniCredit had been effectively coerced into making the application by RCA's actions in obtaining a ruling in Russia, and whether that coercion should weigh against granting the application. The Court concluded that, while the declaratory parts affirming the English court's jurisdiction should remain, the injunctive components should be varied. In fact, the Court of Appeals was very cautious in saying in the last paragraph of the decision [44]: *'I have decided that I would vary, not discharge, the CA's Order. It seems to me that it would be unsatisfactory to discharge the parts of the order that reflect the decisions on jurisdiction made by the Court of Appeal and the UKSC. There is no need to do so. Under English law, this court did indeed have jurisdiction to determine what it determined and its final order reflecting that decision must stand'.*

Comment

This case underscores a critical point: the effectiveness of an anti-suit injunction can shift dramatically depending on the defendant's asset base and geographic ties. When the Supreme Court decided to confirm the English courts' jurisdiction in such cases, it considered whether an equivalent remedy from French courts or the arbitral tribunal would be effective (and ruled them ineffective), but it did not consider the effectiveness of the English remedy itself.

Anti-suit injunctions from English courts have long been hailed as a powerful weapon. However, where the defendant has no assets or connections with England, the practical effectiveness—the "bite"—of such remedies is extremely limited, rendering the injunction "toothless." By contrast, when the English applicant has assets in another jurisdiction—especially one where local courts, such as the Russian courts, are prepared to issue countervailing anti anti-suit

injunctions backed by substantial penalties—the balance can swiftly tilt, obliging the applicant to seek the revocation of the order it obtained in the first place.

In a broader sense, this dynamic highlights the interplay between different jurisdictions' willingness to grant anti-suit injunctions, potentially leading to a spiralling effect of competing orders—so-called "injunction wars"—that impose significant strategic and economic burdens on litigants. Ultimately, it is clear that the location of assets and the readiness of local courts to enforce relief with penalties determines just how strong the bite of an anti-suit injunction truly is.

CJEU in Albausy on (in)admissibility of questions for a preliminary ruling under Succession Regulation

In a recent ruling, the CJEU adds another layer to the ongoing discussion on which national authorities can submit questions for preliminary rulings under the Succession Regulation, and its nuanced interpretation of what constitutes a 'court.'

Albausy (Case C-187/23, ECLI:EU:C:2025:34, January 25, 2025) evolves around the question of competence to submit a request for preliminary ruling under the

Succession Regulation (Regulation 650/2012 on matters of succession and the creation of a European Certificate of Succession).

Although the CJEU finds that the request in that case is inadmissible, the decision is noteworthy because it confirms the system of the Succession Regulation. Within the regulation, the competence to submit questions for preliminary ruling is reserved for national courts that act as judicial bodies and are seized with a claim over which they have jurisdiction based on Succession Regulation's rules on jurisdiction.

The opinion of Advocate General Campos Sánchez-Bordona is available here.

Essence

Under the Succession Regulation, national courts resolve disputes by issuing a decision; the decisions circulate in the EU following the regulation's Chapter IV rules on enforcement. Meanwhile, a broader number of national authorities apply the regulation and may have the competence to issue issue a European Certificate of Succession (see primarily Recitals 20 and 70). A European Certificate of Succession circulates in the EU based on the regulation's Chapter VI. It has primarily an evidential authority as one of an authentic act.

In *Albausy,* the CJEU confirms that if a national court's task in a specific case is confined to issuing a European Certificate of Succession, this court (within this task) has no competence to submit questions for preliminary ruling to the CJEU. This is so even if the court has doubts relating to the regulation's interpretation, and this is so despite the fact that a court is, in principle, part of a Member State's judicial system in the sense of art. 267 TFEU.

Facts

The facts of this case are as follows. A French national, last domiciled in Germany, died in 2021. The surviving spouse applied for a European Certificate of Succession. The deceased's son and grandchildren challenged the validity of the will. They questioned the testamentary capacity of the deceased and the

authenticity of their signature. The referring German court (Amtsgericht Lörrach) found these challenges unfounded.

However, given the challenges raised, the court had doubts about the way to proceed. It has submitted four questions to CJEU. The questions have remained unanswered, because the CJEU considered the request inadmissible. Still, several points regarding the Court's considerations are noteworthy.

'Challenge'

In the motivation part of the ruling, the CJEU addresses the concept of 'challenge' under art. 67(1) of the Succession Regulation. The CJEU defines it broadly. It can be a challenge raised during the procedure for issuing a European Certificate of Succession. It can also be a challenge raised in other proceedings. The concept includes even challenges that 'appear to be unfounded or unsubstantiated', as was the case in the view of the referring court. The court warned in particular against frivolous challenges that might impede legal certainty in the application of the regulation.

According to the CJEU, any challenge to the requirements for issuing a European Certificate of Succession raised during the procedure for issuing it precludes the issuance of that certificate. In the event of such a challenge, the authority must not decide on their substance. Instead, the authority should refuse to issue the certificate.

Meanwhile, the CJEU reminds that the concept of 'challenge' within the meaning of art. 67(1) of the Succession Regulation does not cover those that have already been rejected by a final decision given by a judicial authority in (other) court proceedings. If and when a decision to reject a challenge becomes final (in proceedings other than the issuing of a European Certificate of Succession), this challenge does not preclude the issuing of a European Certificate of Succession.

Redress

The CJEU elaborates on one option available in the situation where the issuing of the certificate is refused because of a challenge. One can use the redress

procedure provided for in Article 72 of the Succession Regulation. It allows to dispute the refusal of the issuing authority before a judicial authority in the Member State of the issuing authority. Within the redress procedure, the judicial authority handling the redress procedure may examine the merits of the challenges that prevented the certificate from being issued. If the challenge is rejected through this redress procedure, and the decision becomes final, it no longer precludes the issuance of the European Certificate of Succession.

The ruling and earlier case law

In *Albausy,* the CJEU follows the line of its earlier case law. This is namely not the first time the CJEU has dealt with cognate questions, as reported inter alia here. The Court has already clarified that although various authorities in Member States apply the Succession Regulation, not any authority may submit a question for a preliminary ruling regarding the interpretation of the regulation. For instance, a notary public may in most cases not submit questions for preliminary ruling. Notaries are not part of the judicial system in most Member States within the meaning of the art. 267 TFEU (possible complications or deviations admitted by the Succession Regulation being addressed in Recital 20 of the Succession Regulation).

The Court's reasoning in *Albausy* confirms that this bar also covers requests for preliminary rulings from national courts that act only as 'authority,' not as judicial body in the regulation's application. Thus, a double test is to be performed: the test of the Succession Regulation's system and definitions (authority or judicial body, without forgetting the Recitals 20 and 70, still somewhat puzzling in this context) and the test of art. 267 TFEU.

A Judgment is a Judgment? How

(and Where) to Enforce Third-State Judgments in the EU After Brexit

In the wake of the CJEU's controversial judgment in *H Limited* (Case C-568/22), which appeared to open a wide backdoor into the European Area of Justice through an English enforcement judgments (surprisingly considered a 'judgment' in the sense of Art. 2(a), 39 Brussels Ia by the Court), international law firms had been quick to celebrate the creation of 'a new enforcement mechanism' for non-EU judgments.

As the UK had already completed its withdrawal from the European Union when the decision was rendered, the specific mechanism that the Court seemed to have sanctioned was, of course, short-lived. But crafty judgment creditors may quickly have started to look elsewhere.

In a paper that has just been published in a special issue of the Journal of Private International Law dedicated to the work of Trevor Hartley, I try to identify the jurisdictions to which they might look.

In essence, I make two arguments:

First, I believe that the CJEU's unfortunate decision can best be explained by the particular way in which foreign decision are enforced in England, i.e. through a new action on the judgment debt. Unlike continental exequatur proceedings, this action actually creates a new, enforceable domestic judgment, albeit through proceedings that closely resemble the former. It follows, I argue, that only judgments that result from a new action based on the judgment debt (rather than a mere request to confirm the enforceability of the foreign judgment) can be considered 'judgments' in the sense of Art. 2(a) and the Court's decision *H Limited* (which also requires the decision to result from 'adversarial proceedings'). Among many reasons, I find such a limited reading easier to

reconcile with the Court's earlier decision in *Owens Bank* (Case C-129/92) than a wider understanding of the decision.

Second, I believe that several European jurisdictions still offer enforcement mechanisms through which third-state judgments could realistically be transformed into European judgments (clearing both the requirement of creating a new judgment and resulting from adversarial proceedings). This applies to Ireland and Cyprus (but not Malta) as well as to the Netherlands (through its so-called *verkapte exequatur*) and Sweden.

The full paper is available here; a preprint can also be found on SSRN.

Conference report 'European Account Preservation Order: Practical Challenges and Prospects for Reform' (University of Luxembourg, 3 December 2024)

This report was written by Carlos Santaló Goris, postdoctoral researcher at the University of Luxembourg

Recent developments on the application of the EAPO Regulation

On 3 December 2024, the conference 'European Account Preservation Order: Practical Challenges and Prospects for Reform' took place at the University of Luxembourg, organized by Prof. Gilles Cuniberti (University of Luxembourg). The conference also served as an occasion to present the book 'European Account Preservation Order – A Multi-jurisdictional Guide with Commentary', published by Bruylant/Larcier. The book was co-edited by Dr. Nicolas Kyriakides (University of Nicosia), Dr. Heikki A. Huhtamäki (Huhtamäki Brothers Attorneys Ltd), and Dr.

Nicholas Mouttotos (University of Bremen), and offers a comprehensive overview on the application of the European Account Preservation Order ('EAPO') at the national level. It contains a report for each Member State where the EAPO Regulation applies, addressing specific aspects of the EAPO procedure that depend on domestic law.

The conference was structured into two panel discussions. The first panel focused on the specific issues regarding the application of the EAPO Regulation identified by practitioners with first-hand experience with this instrument. The second panel discussion explored the potential reform of the EAPO Regulation and which specific changes should be implemented to improve its application. This report aims to offer an overview of the main highlights and outputs of the presentations and discussions of the conference.

First panel discussion: the use of the EAPO application in the practice

The first panel was composed of Dr. Laurent Heisten (Moyse & Associates Law Firm, Luxembourg), Alexandra Thépaut (Étude Calvo & Associés, Luxembourg), and Lionel Decotte (SAS Huissiers Réunis, France) and moderated by Dr. Elena Alina Ontanu (University of Tilburg). This first panel aimed to explore specific issues in the application of the EAPO Regulation from the practice perspective. The discussion was opened by Dr. Laurent Heisten, who indicated that the EAPO is way more complex than the Luxembourgish national provisional attachment order, the *saisie-arrêt*. He highlighted that the Luxembourgish *saisie-arrêt* has more lenient prerequisites than the EAPO. In his view, that might explain why creditors often opt for the *saisie-arrêt* instead of the EAPO.

The complexity of the EAPO compared to the Luxembourgish *saisie-arrêt* was also remarked by Ms. Alexandra Thépaut. However, she also acknowledged that the EAPO presents some advantages against the Luxembourgish national equivalent procedure. In particular, she referred to the certificate that banks have to issue immediately after the implementation of an EAPO (Article 28). This is something that does not occur with the Luxembourgish *saisie-arrêt*. Another advantage of the EAPO she referred to is the possibility of obtaining information about the debtors' bank accounts (Article 14). The Luxembourgish *saisie-arrêt* also lacks an equivalent information mechanism.

During the discussion, Prof. Gilles Cuniberti intervened to indicate that using the

EAPO could be less costly than relying on equivalent domestic provisional measures. He refers to a specific case in which the creditor preferred to apply for an EAPO in Luxembourg instead of a domestic provisional attachment order in Germany. The reason was that in Germany, the fee for applying for a national provisional measure would be in proportion to the amount of the claim, while in Luxembourg, there is no fee to obtain an EAPO.

A second recurrent issue identified by the panellists was the use of standard forms. In this regard, Mr. Lionel Decotte highlighted while standard forms can seem practical in a cross-border context, they are rather complicated to fill in. Ms. Alexandra Thépaut mentioned finding particularly complex the section on the interest rates of the EAPO application standard form.

Second panel discussion: the future reform of the EAPO Regulation

The second panel focused on the potential reform of the EAPO Regulation. The panellists were Prof. Gilles Cuniberti, Dr. Carlos Santaló Goris, and Dr. Nicolas Kyriakides, and it was moderated by Dr. Nicholas Mouttotos. Prof. Gilles Cuniberti explored the boundaries of the material scope of the EAPO Regulation. He first advocated suppressing the arbitration exception. He explained that it had been adopted by a political decision which was not submitted to the discussion of the expert group. This was most unfortunate, as the rationale for excluding arbitration from the Brussels I bis and other judgment regulations (the existence of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards) was inexistent concerning a remedy belonging to enforcement per se, which was always outside of the scope of the Brussels I bis Regulation.

Prof. Gilles Cuniberti also defended making available the EAPO Regulation in claims regarding matrimonial and succession matters, both expressly excluded from its scope. In his view, there is no reason for these two subject matters to be excluded as the Succession and Matrimonial Property Regimes Regulations, again, only apply to jurisdiction and enforcement of judgments (and choice of law), but do not offer any remedy to attach bank accounts. Lastly, he advocated expanding the use of the EAPO to provisional attachment of financial instruments. This is a potential reform of the EAPO Regulation expressly foreseen in Article 53.

Dr. Carlos Santaló Goris focused on the reform of the EAPO Regulation from the creditors' perspective. He observed that national case law on the EAPO shows

that creditors with an enforceable title encounter many difficulties satisfying the EAPO's *periculum in mora*. This is due to the strict interpretation that courts have of this prerequisite in light of Recital 14 of the Preamble. He also mentioned that there is a pending preliminary reference on the interpretation of the EAPO's *periculum in mora* before the European Court of Justice (C-198/24, *Mr Green*).

Regarding the creditor's security, he stated that the vague criteria used to calculate the amount of the security is also a source of divergences on how the amount of the security is established from one Member State. He provided the example of Germany, where courts often require 100% of the amount of the claim. This percentage contrasts with other Member States, such as Spain, where the amount of the security represents a much lower percentage of the amount of the claim. Additionally, he also suggested reforming the EAPO to transform it into a true enforcement measure. In his view, creditors with an enforceable title should not only have the possibility of obtaining the provisional attachment of the funds in the debtors' bank accounts but also the garnishment of those funds.

Finally, Dr. Nicolas Kyriakides explored how to foster the use of the EAPO Regulation across the EU. In his view, it would be necessary to expand the use of the EAPO Regulation to purely domestic cases. He referred to the case of the European Small Claims Procedure and how this instrument served as an inspiration for some national legislators to introduce equivalent domestic procedures. In his view, when judges and practitioners use these equivalent domestic procedures, indirectly they become familiar with the EU civil proceedings on which the equivalent domestic procedure was modeled. This is a way of integrating the EU civil proceedings into the legal practice. Therefore, when judges and practitioners have to apply the EU civil procedures, they already know how to do it. This can result in a more efficient and effective application of these EU instruments. On a second level, Dr. Nicolas Kyriakides identified the legal basis that the EU legislator might have to adopt such kinds of measures. He considered that the EU could invoke Article 81 (Judicial cooperation in civil and commercial matters), and Article 114 (Harmonization for the Internal Market) of the Treaty on the Functioning of the European Union could serve to harmonize domestic procedural rules within the boundaries of the principles of subsidiarity, proportionality, and procedural autonomy.

The panelists' presentations were followed by an open discussion with the audience. One of the issues that was addressed during this discussion was the use

of the IBAN to determine the location of the bank accounts. Prof. Gilles Cuniberti expressed his concern about the use of the IBAN since nothing prevents a bank from opening an account with an IBAN that does not correspond to the Member State where the account is effectively held.

Waiting for the Commission's report on the EAPO Regulation

Following Article 53(1) of the EAPO Regulation, the Commission should have elaborated a report on the application of the EAPO by 18 January 2024. This conference offers a glimpse into what might eventually appear reflected in that report. The EAPO Regulation seems still far from being an instrument often relied on by creditors who try to recover a cross-border claim. The conference, which combined a practical and academic analysis of the EAPO regulation, served to identify some of the problems that might be preventing the EAPO from being perceived by creditors as an efficient tool to secure cross-border claims. Initiatives like this conference can help prepare the ground for designing a more effective EAPO procedure.

The Art. 2(b) CISG Conundrum: Are Tender Contracts Under the Ambit of an Auction?

By Harddit Bedi* and Akansha Tripathy**

Introduction

It is beyond dispute that *The Convention of International Sales of Goods, 1980* (CISG) has facilitated international trade disputes. However, Courts and tribunals continue to apply their minds in adjudicating the applicability of CISG before advancing into substantive issues. This exercise is not very prolific as it prolongs proceedings. Chapter 1 of the convention lays down the scope and extent of the

CISG. Amongst other things, the CISG application *does not apply* to contracts formed by, inter-alia, auctions under Art. 2(b) of CISG. The word *auction* itself is nowhere defined in the convention.

This led to ambiguity. Courts of different jurisdictions had to adjudicate the definition of the word *auction,* Take, for instance, the *Electronic electricity meter case*. The Swiss Federal Supreme Court had to determine if the bidding process in a tender contract was the same as an auction. The similarities between a bidding process and an auction cannot be understated. However, unlike an auction, in a tender contract, it is the sellers that bid, not the buyers. Hence, a tender contract *may* be construed as a reverse auction, not an auction. This leads to the issue: *Are tender Contracts—by them being reverse auctions— barred by the CISG under Article 2(b)?*

The Exclusion of Auctions in CISG—but Why?

Article 2(b) explicitly reads that the CISG exempts sales by auction. In an auction, sellers invite buyers to bid on goods, with the highest bidder securing the purchase. The process ensures competition among buyers, with the help of the seller or an intermediary, and ends with the auctioneer declaring the winning bid. The reason for this exclusion in the convention is not well-founded but speculated. *First*, it is excluded because auctions are often subject to special rules under the applicable national law, and it is best to not harmonize them. *Second*, there was no need to include an auction since auctions universally, at that time, did not take place across borders in any case. *Third*, in an auction, the seller may not know the details about the buyer, including but not limited to, domicile, nationality, and place of operations. That is why, the applicability of the CISG would be uncertain due to Article 2(b) of the CISG since the aforesaid information determines whether the contract is an international one. These reasons justify exclusion, however, defining the term *auction* would have abated vagueness and ambiguity. Since, in the present context, The exclusion of “sales by auction” can be narrowly interpreted to apply only to traditional auctions, where sellers solicit bids from buyers. However, alternatively, it can be broadly construed to include any competitive bidding process, including reverse auctions.

A Case for CISG Applicability vis-à-vis Tender Contracts

Tender contracts, despite being formed after an auction, do not come under the ambit of Art.2(b). ***First***, *just because tender contracts are formed through a bidding process does not make it an auction.* It is advanced that tender contracts differ from an auction but may be similar to reverse auctions. In a reverse auction, it is the buyer who invites multiple sellers to bid, to secure goods or services at the lowest possible price. This process is common in procurement, particularly in government tenders and large-scale corporate sourcing. Similarly, since *primarily*, a tender involves a buyer inviting potential sellers to submit bids for goods or services; the process can be closely equated with a reverse auction in its characteristics—not auctions. Also, the procurer can also consider several other factors and have the discretion to determine to award the contract. This is unlike how an auction functions. In an auction, the seller typically does not have the discretion to consider other factors besides the highest price quoted. Ulrich G. Schroeter, a member of the CISG advisory council, (2022 paper) advances that CISG is applicable in Tender contracts. He states, *"The CISG furthermore also applies to international sales contracts concluded with a seller which has been selected by way of a call for tender (invitation to tender, call for bids)."* The aforementioned arguments suggest that at the very least it would not be correct to construe tender contracts as auctions. The question that then follows is whether reverse auctions can also be presumed to be included in the ambit of *auction* mentioned in Art.2(b); which is answered in the subsequent point.

Second, *the absence of explicit exclusion extends to implied inclusion.* The UNCITRAL Commentary of Art 2 of the convention advances that all international sale of goods contracts can be governed by CISG besides the following. Art 2 does not refer to contracts formed by bidding process or reverse auctions but just auctions. In addition to this, the World Bank standard tender rules also do not explicitly exclude the application of CISG. From these, there is a reasonable inference that reserving an auction or just contracts formed via bidding are not explicitly included. On the contrary, if anything, the CISG application was included in the New Zealand government as guidance for foreign bidders, although it was later changed to *"Common Law of contracts."* Such an inclusion is also present in an international purchase of equipment, by a Brazilian nuclear power state-owned entity. With this argument in mind, a counter-argument may be taken to advance that a court/tribunal can extend the interpretation of an auction to also include a reverse auction. However, that would be a way too broad interpretation and no coherent argument exists to make such a broad

interpretation.

***Third**, precedents have historically not exempted CISG application in tender contracts*. In 2019, the Swiss Federal Supreme Court dealt with the issue of tender contracts in CISG. It established that contracts initiated through public tenders do not fall under the ambit of Art. 2(b). The test laid is whether or not one party is foreign or not to the tender contract. So long as that element is present in the transaction, tender contracts are just as valid as any other contract with respect to Art 2(b). In another Swiss precedent, while not directly addressing the issue at hand, the tribunal held that an invitation to a tender is a form of invitation to a contract. Hence, a contract formed through just a process of bidding, though not an auction, can be governed by CISG as it so was in the said precedent. Additionally, as stated above, government procurement is done through mostly reverse auctions/Tender contracts/bidding. Such government procurement when faced with an international element has invoked the application of CISG.

Conclusion

This question at hand is pertinent since CISG has proven to be a successful framework, hence, its scope and applicability should not be restricted. Especially with relation to tender contracts since they form a substantial method of procurement of big entities and governments. Not to mention, no valid reason exists for the exclusion. The economic reasons are present and not even touched upon since the article strictly restricted itself to legal arguments. To summarize, the applicability of CISG to tender contracts is ambiguous due to Article 2(b), which excludes “sales by auction” from its ambit. Auctions are usually seller-driven competitive bidding. Whereas, Tender contracts are where buyers ask for bids from sellers. By virtue of this, Tender contracts are different from auctions in certain aspects such as control, procedural formalities, and evaluation criteria which are considered factors beyond price. Since it is a form of reverse auction, it would be incorrect to include reverse auctions as an *auction* under Art.2(b). More importantly, previously, courts and tribunals have not given the word *auction* such a broad interpretation. It has allowed CISG to govern the contract. Hence, in conclusion, tender contracts do not come under the ambit of “*auction*” of Art 2(b) CISG.

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