The Dubai Supreme Court — Again — on the Enforcement of Canadian (Ontario) Enforcement Judgment

I. Introduction

The decision presented in this post was rendered in the context of a case previously reported here. All of the comments I made there, particularly regarding the possibility of enforcing a foreign enforcement judgment and other related issues, remain particularly relevant. However, as I have learned more about the procedural history preceding the decisions of the Dubai Supreme Court ("DSC"), which was not available to me when I posted my previous comment, greater emphasis will be placed on the general factual background of the case. The decision presented here raises a number of fundamental questions related to the proper understanding of foreign legal concepts and procedures and how they should be integrated within the framework of domestic law. Therefore, it deserves special attention.

I would like to thank Ed Morgan (Toronto, ON Canada) who, at the time when my previous comment was posted, brought to my attention the text of the Ontario judgment whose enforcement was sought in Dubai in the present case.

II. Facts:

1. Background (based on the outline provided by the DSC's decisions)

X (appellant) obtained a judgment in the United States against Y (appellee), which then sought to enforce it in Canada (Ontario) via a motion for summary judgment. After the Ontario court ordered enforcement of the American judgment, X sought enforcement of the Canadian judgment in Dubai by filing an application with the Execution Court of the Dubai Court of First Instance.

2. First Appeal: DSC, Appeal No. 1556 of 16 January 2024

The lower courts in Dubai admitted the enforceability of the Canadian judgment. Unsatisfied, Y appealed to the DSC. The DSC admitted the appeal and overturned the appealed decision, remanding the case for further review.

According to the DSC, the arguments raised by Y to resist the enforcement of the Canadian judgment – i.e. that the Court of Appeal erred in not addressing his argument that the foreign judgment was a "*summary judgment [hukm musta'jil]*[i] *declaring enforceable a rehabilitation order (hukm rad i'tibar)*[ii] *and an obligation to pay a sum of money rendered in the United States of America that cannot be enforced in the country [Dubai]*" – was a sound argument that, if true, might change the outcome of the case.

3. Second Appeal: DSC, Appeal No. 392/2024 of 4 June 2024

The case was sent back before the court of remand, which, in light of the decision of the DSC, decided to overturn the order declaring enforceable the Ontario judgment. Subsequently, X appealed to the DSC.

Before the DSC, X challenged the remand court's decision arguing that (i) the rules governing the enforcement of foreign judgments do not differentiate by types or nature of foreign judgments; (ii) that under Canadian law, "summary judgment" means a "substantive judgment on the merits"; and that (iii) Y actively participated in the proceedings and the lack of a full trial did not violate Y's rights of defense.

III. The Ruling

The DSC admitted the appeal and confirmed the order declaring enforceable the Canadian judgment.

After stating the general principles governing the enforcement of foreign judgments in the UAE and recalling some general principles of legal interpretation (such as the prohibition of personal interpretation in the presence of an absolutely unambiguous text, and the principle that legal provisions expressed in broad terms should not be interpreted restrictively), the DSC ruled as follows (all quotations inside the text below are added by the author):

"[it appears from the wording of the applicable legal provision[iii] that] *exequatur* decrees are not limited to "judgments" (*ahkam*) rendered in foreign countries but extends to foreign "orders" (*awamir*) provided that they meet the requirements for their enforcement. Furthermore, the [applicable legal provision][iv] has been put in broad terms (*'aman wa mutlaqan*), encompassing all "judgments" (*ahkam*) and "orders" (*awamir*) rendered in a foreign country without specifying their type (*naw'*) or nature (*wasf*) as long as the other requirements for their enforcement are satisfied. Moreover, there is no evidence that any other legal text pertaining to the same subject specifies limitations on the aforementioned [the applicable legal provision]. To the contrary, and unlike the situation [under the previously applicable rules],[v] the Legislator has expanded the concept of enforceable titles (*al-sanadat al-tanfidhiyya*),[vi] which now includes criminal judgments involving restitution (*radd*), compensations (*ta'widhat*), fines (*gharamat*) and other civil rights (*huquq madaniyyah*). […]

Given this, and considering that the appealed decision overturned the *exequatur* decree of the judgment in question on the ground that the [Canadian] judgment, which recognized a judgment from the United States, was a "summary judgment" (*hukm musta'jil*) enforceable only in the rendering State, despite the broad wording of [the applicable provisions],[vii] which covers all judgments (*kul al-ahkam*) rendered in a foreign State without specifying their type (*naw'*) or nature (*wasf*) provided that the other requirements are met. In the absence of any other specification by any other legal text pertaining to the same subject, the interpretation made by the appealed decision restricts the generality of [the applicable rules] and limits its scope [thereby] introducing a different rule not stipulated therein.

Moreover, the appealed decision did not clarify the basis for its conclusion that the [foreign] judgment was a "summary judgment" (*hukm musta'jil*) enforceable only in the rendering State. [This is more so], especially since the submitted documents on the Canadian civil procedure law and the Regulation No. 194 on [the Rules of Civil Procedure] show that Canadian law recognizes the system of "*Summary judgment*"[viii] for issuing judgments through expedited procedures, and that the [foreign] judgment was indeed rendered following expedited procedures after Y's participation by submitting rebuttal memoranda and hearing of the witnesses.[…]

Considering the foregoing, and upon reviewing the [Canadian] judgment…

rendered in favor of the appellant as officially authenticated, it is established that the parties (X and Y) appeared before the [Canadian] court, [where] Y presented his arguments … and the witnesses were heard. Based on these proceedings [before the Canadian court], the court decided to issue the aforementioned "summary judgment" (al-*hukm al-musta'jil*) whose enforcement is sought in [this] country. [In addition, the appellant presented] an officially authenticated certificate attesting the legal authority (*hujjiyat*) [and the finality][ix] of the [Canadian] judgment. Therefore, the requirements stipulated [in the applicable provisions][x] for its enforcement have been satisfied. In addition, it has not been established that the courts [of the UAE] have exclusive jurisdiction over the dispute subject of the foreign judgment, nor that the [foreign] judgment is [rendered] in violation of the law of the State of origin or the public policy [in the UAE], or that it is inconsistent with a judgment issued by the UAE courts. Therefore, the [Canadian] judgment is valid as a an "enforceable title" (*sanad tanfidhi*) based on which execution can be pursued.

IV Comments

The decision presented here has both positive and negative aspects. On the positive side, the DSC provides a welcome clarification regarding the meaning of "foreign judgment" for the purposes of recognition and enforcement. In this respect, the DSC aligns itself with the general principle that "foreign judgments" are entitled to enforcement regardless of their designation, as long as they qualify as a "substantive judgment on the merits". This principle has numerous explicit endorsements in international conventions dealing with the recognition and enforcement of foreign judgments[xi] and is widely recognized in national laws and practices.[xii]

However, the DSC's understanding of the Canadian proceedings and the nature of the summary judgment granted by the Canadian court, as well as its attempt to align common law concepts with those of UAE law are rather questionable. In this respect, the DSC's decision shows a degree of remarkable confusion in the using the appropriate legal terminology and understanding fundamental legal concepts. These include (i) the treatment of foreign summary enforcement judgments as ordinary "enforceable titles" (*sanadat tanfidhiyya – titres exécutoires*) under domestic law including domestic judgments rendered in criminal matters; (ii) the

assimilation between summary judgment in common law jurisdictions and *hukm musta'jil* ("summary interlocutory proceedings order" – "*jugement en référé*"); and (iii) the confusion between summary judgment based on substantive legal issues and summary judgment to enforce foreign judgments.

For the sake of brevity, only the third point will be addressed here for its relevant importance. However, before doing so, some light should be shed on the proceedings before the Canadian court.

1. The proceedings before the Canadian Court and the nature of the Canadian Judgment

The unfamiliarity with DSC with the proceedings in Canada and underlying facts is rather surprising for two reasons: i) the proceedings were initiated by the American government in the context of a bilateral cooperation in criminal matters; and ii) the Canadian proceedings was a proceeding to *enforce* a foreign judgment rendered in criminal matters and was not simply a proceeding dealing with substantive legal issues. Therefore, a detailed review of the proceedings before the Ontario is necessary to better understand the peculiarities of the case commented here.

i) Proceedings in the context of mutual cooperation in criminal matters. The case originated in Ontario-Canada as a motion brought by the United States of America represented by the Department of Justice as plaintiff for summary judgment to recognize and enforce a "Restitution Order"[xiii] made against Y (defendant). The Restitution Order was part of Y's sentence in the USA for securities fraud and money laundering. It "*included terms as to payment and listed the victims and amounts to which they were entitled under the order*" [para. 16].

The general procedural context of the Canadian judgment is of utmost relevance. Indeed, the USA sought the enforcement of the Restitution Order on the basis of the Mutual Legal Assistance in Criminal Matters Act. The Act, as it describes itself, aims "*to provide for the implementation of treaties for mutual legal assistance in criminal matters*". According to the Ontario Court, The Act is a "*Canadian domestic legislation enacted to meet Canada's treaty obligations for reciprocal enforcement in criminal matters*" [para. 6]. These treaty obligations are based on the Canada-USA Treaty on Mutual Legal Assistance in Criminal Matters

of 1990 [para. 6].

This is why, before the Canadian Court, one of the main questions [para. 25] was whether the "Restitution Order" could be regarded as "fine" within the meaning of the Act [para. 26]. If this is the case, then the Restitution Order could be enforced as a "*pecuniary penalty* determined by a court of criminal jurisdiction" in the meaning of article 9 of the Act.

On the basis of a "*broad, purposive interpretation of "fine" … aligned with Canada's*" international obligation under the Treaty, the Ontario court considered that "*proceeds of crimes, restitution to the victims of crime and the collection of fines imposed as a sentence in a criminal prosecution*" can be regarded as "fine" for the purpose of the case [para. 30]. In addition, the court characterized the restitution order as "*a pecuniary penalty determined by a court of criminal jurisdiction*" [para. 35], and also described it as an "*order made to repay the individual members of the public who were encouraged to purchase stock at an inflated price by virtue the criminal activity*" [para. 39]. The court ultimately, concluded that "*the Restitution Order made against [Y] is a "fine" within the meaning of… the Act*" [para. 41].

From a conflicts of laws perspective, the question of whether the "Restitution Order" is of a penal nature is crucial. Indeed, it is generally accepted that penal judgments are not eligible to recognition and enforcement. However, nothing prevents derogating from this principle by concluding international conventions or enforcing the civil law component of foreign judgments rendered by criminal courts in criminal proceedings, which orders the payment of civil compensation.[xiv]

Interestingly, before the Canadian court, Y argued that the "Restitution Order" made against him *was not* a "fine" because it was a "*compensatory-type*" order [para. 27]. However, it is clear that it was an attempt to exclude the enforcement of Restitution Order from the scope of application of the Mutual Legal Assistance in Criminal Matters Act. In any event, despite the crucial theoretical and practical importance of the issue, this is not the place to discuss whether the "Restitution Order" was penal or civil in nature. What matters here is the nature of the proceeding brought before the Canadian court which is a summary proceeding to recognize and enforce a foreign judgment. This leads us to the next point.

ii) Nature of the Canadian judgment. It is clear from the very beginning of the case that the USA did not bring an action on the merits but sought "an order for summary judgment *recognizing and enforcing a judgment a Restitution Order made against [Y] as part of his sentence in [the USA] for securities fraud and money laundering*" [para. 1]. Therefore, the case was about a motion for a summary judgment to *enforce a foreign judgment*. In this respect, one of the interesting aspects of the case is that Y also relied on the enforcement of foreign judgments framework and raised, *inter alia*, "a defence of public policy" at common law [para. 79] citing *Beals v, Saldanha* (2003), a leading Canadian Supreme Court judgment on the *recognition and enforcement of foreign judgments* in civil and commercial matters.[xv] The court however dismissed the argument considering that there was "*no genuine issue for trial on the question of a public policy defence against the enforcement in Canada of the Restitution Order*" [para. 82].

Accordingly, if one puts aside the question of enforceability of foreign penal judgments, it is clear that the Canadian judgment was a judgment declaring enforceable a foreign judgment. The very conclusion of the Canadian court makes it even clearer when the court granted USA's motion for summary judgment by *ordering the enforcement in Canada of the Restitution Order* [para. 84]. Accordingly, as discussed in my previous comment on this case, and taking into account the nature of the Canadian judgment, it can be safely said that the Canadian enforcement judgment cannot be eligible to recognition and enforcement elsewhere based on the adage "*exequatur sur exequatur ne vaut*".

2. No… a summary judgment to enforce a foreign judgment is not a summary judgment based on substantive legal issues!

It is widely known that the procedural aspects of the enforcement of foreign judgments largely differ across the globe. However, it is fair to say that there are, at least, two main models (although other enforcement modalities do also exist). Generally speaking, civil law jurisdictions adopt the so-called "*exequatur*" proceeding the main purpose of which is to confer executory power to the foreign judgment and transforms it into a local "enforceable title". On the other hand, in common law jurisdictions, and in the absence of applicable special regimes, the enforcement of foreign judgments is carried out by initiating a new and original

action brought before local court on the foreign judgment.[xvi] The purpose of this action is to obtain an enforceable local judgment that, while recognizing and enforcing the foreign judgment, is rendered as if it were a judgment originally issued by the local court.[xvii] Both procedures result in similar outcome:[xviii] what has been decided by the foreign court will be granted effect in the form. However, *technically*, in civil law jurisdiction it is the foreign judgment itself that is permitted to be enforced in the forum,[xix] while in common law jurisdictions, it is the local judgement alone which is enforceable in the forum.[xx]

Such an enforcement in common law jurisdictions is usually carried out by way of *summary judgment procedure*.[xxi] However, this procedure *should not* be confused with the standard summary judgment procedure used to resolve disputes on the merits within an ongoing case. In fact, it is a distinct process aimed specifically at recognizing and enforcing foreign judgments,[xxii] which is the functionally equivalent counterpart in common law jurisdictions to the *exequatur* procedure.

This is precisely the confusion that the DSC encountered. The Court regarded the Canadian summary judgment as "a civil substantive judgment on the merits", although it was not. Therefore, – and as already explained – the summary judgment rendered in result of this proceeding *cannot* be regarded as "foreign judgment" eligible for recognition and enforcement abroad in application of the principle *"exequatur sur exequatur ne vaut*".

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[i] In my previous post, I translated the term "*hukm musta'jil*" as "summary judgment to highlight the nature of the Canadian procedure. However, from the purpose of UAE law, I think it is better that this word be translated as "summary interlocutory judgment – *jugement en référé*". This being said, for the purpose of this post the terms "summary judgment" will be used to highlight the terminological confusion committed by the DSC.

[ii] In my previous post, I was misled by the inappropriate terminology used in the DSC's decision which referred to this American order as "Rehabilitation order"

(*hukm rad i'tibar*). The term "rehabilitation order" is maintained here as this is the term used by the DSC.

[iii] The DSC made reference to article 85 of Cabinet Resolution No. 57/2018 on the Executive Regulations of Law No. 11/1992 on Civil Procedure Act (hereafter "2018 Executive Regulation"), which was subsequently replaced by article 222 of New Federal Act on Civil Procedure (Legislative Decree No. 42/2022 of 3 October 2022) (hereafter "New 2022 FACP").

[iv] Ibid.

[v] The DSC referred the former Federal Act on Civil Procedure of 1992 (Federal Act No. 11/1992 of 24 February 1992)

[vi] The DSC referred to article 75(2) of the 2018 Executive Regulation as subsequently supplanted by article 212(2) of the New 2022 FACP.

[vii] *Supra* n (3).

[viii] In the original. Italic added.

[ix] In the words of the DSC, the foreign judgment "was not subject to appeal".

[x] *Supra* n (3).

[xi] See Article 3(1)(b) of the HCCH 2019 Judgments Convention; article 4(1) of the HCCH 2005 Choice of Court Convention; article 25(a) of the 1983 Riyadh Convention.

[xii] See eg. the Japanese Supreme Court Judgment of 28 April 1998 defining foreign judgment as "a final judgment rendered by a foreign court on private law relations… regardless of the name, procedure, or form of judgment" "[e]ven if the judgment is called a decision or order".

[xiii] *Supra* n (2).

[xiv] On UAE law on this issue, see my previous post here and the authorities cited therein.

[xv] On this case see, Janet Walker, "*Beals v. Saldanha:* Striking the Comity Balance Anew" 5 *Canadian International Lawyer* (2002) 28; *idem*, "The Great

Canadian Comity Experiment Continues" 120 *LQR* (2004) 365; Stephen G.A. Pitel, "Enforcement of Foreign Judgments: Where *Morguard* Stand After *Beals*" 40 *Canadian Business Law Journal* (2004) 189.

[xvi] Trevor C. Hartley, *International Commercial Litigation* (3rd ed. 2020) 435.

[xvii] Adrian Briggs, "Recognition of Foreign Judgments: A Matter of Obligation" 129 LQR (2013) 89.

[xviii] Briggs, *ibid*.

[xix] Peter Hay, *Advance Introduction to Private International Law and Procedure* (2018) 110.

[xx] Briggs, *supra* n (17).

[xxi] Adeline Chong, *Asian Principles for the Recognition and Enforcement of Foreign Judgments* (2021)13.

[xxii] Cf. Hartley, *supra* n (16) 435 pointing out that "*Procedurally*, therefore, a new action is brought; in *substance*, however, the foreign judgment in recognized and enforced" (italic in the original).

European Legal Forum 1/2024: Comments on the Proposal for a Council Regulation on Parenthood

The latest issue (1/2024) of *The European Legal Forum* features a series of comments on the Proposal for a Council Regulation on Parenthood by Ilaria Queirolo on *The Proposed EU Regulation on Parenthood: A critical Overview of the Rules on Jurisdiction*; Francesco Pesce on, *The Law Applicable to Parenthood in the European Commission's Regulation Proposal*; Stefano Dominelli on *Recognition of Decisions and Acceptance of Authentic Instruments in Matters of*

Parenthood under the Commission's 2022 Proposal; Francesca Maoli on *The European Certificate of Parenthood in the European Commission's Regulation Proposal: on the 'Legacy' of the European Certificate of Succession and Open Issues*, and Laura Carpaneto on *The Hague Conference of Private International Law's "parentage/surrogacy" project*.

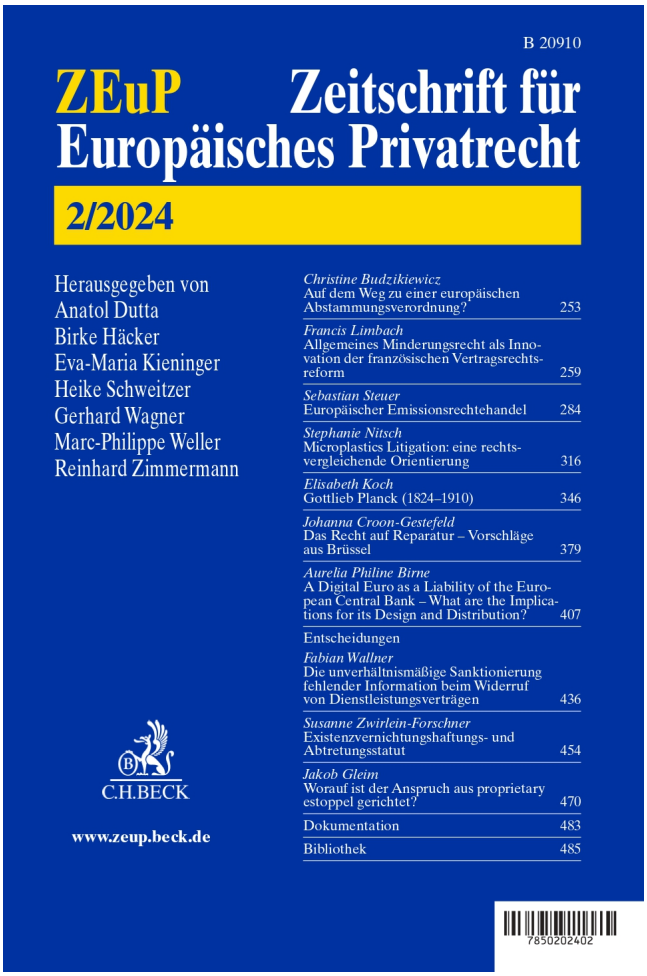
The commentary is a deliverable of the Project *Fluidity in family structures. International and EU law challenges on parentage matters*, financed by the Ministry of University and Research of the Italian Republic and by the European Union – Next Generation EU (prot. n. 2022FR5NNJ – PRIN 2022). The Consortium includes: the University of Pavia as coordinator and the universities of Milano, Genova, and Cagliari.

All publications of the project are available in Open Access here.

ZEuP – Zeitschrift für Europäisches Privatrecht 2/2024

Issue 2/2024 of *ZEuP – Zeitschrift für Europäisches Privatrecht* has just been published. It includes contributions on EU private law, comparative law, legal history, uniform law, and private international law. The full table of content can

be accessed here.



The following contributions might be of particular interest for the readers of this blog:

- **Auf dem Weg zu einer europäischen Abstammungsverordnung? – Licht und Schatten im Vorschlag der Europäischen Kommission**
  Editorial by *Christine Budzikiewicz* on the Commission Proposal for a EU Regulation on Parenthood and the Creation of a European Certificate of Parenthood
- **Europäischer Emissionsrechtehandel – Eine Momentaufnahme nach der Reform durch das „Fit for 55“-Paket**
  Sebastian Steuer on European emissions trading: Carbon pricing according to the “cap and trade” principle plays a key role in European climate policy. As part of the “Fit for 55” package, the Emissions Trading Directive has, once again, undergone comprehensive revisions and has been substantially toughened in certain respects. This article gives a basic overview of the current state of European emissions trading after the recent changes. It explores the chief components of the Emissions Trading Directive, highlights the economic differences between quantity-

and price-based regulation, and discusses the interplay of the EU emissions trading system with international and German climate policy.

- **Microplastics Litigation: eine rechtsvergleichende Orientierung**
  Stephanie Nitsch on Microplastics Litigation: The present paper provides a comparative law analysis of liability for microplastics pollution with a special focus on product liability as well as liability due to deliberate or negligent breaches of statutory duties or duties of care.
- **Bundesgerichtshof, 18 April 2023, II ZR 184/21**
  Susanne Zwirlein-Forschner discusses a decision of the German Federal Court of Justice on the law applicable to liability due to economically destructive actions and to the assignment of claims.

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The Dispute Resolution Interest Group of the American Society of International Law (ASIL) is pleased to announce the third edition of the DRIG Prize for Best Article in International Dispute Resolution. The Prize will be awarded to the author(s) of the article published in 2023 that the Selection Committee considers to be outstanding in the field of international dispute resolution. DRIG is currently accepting submissions for the Prize.

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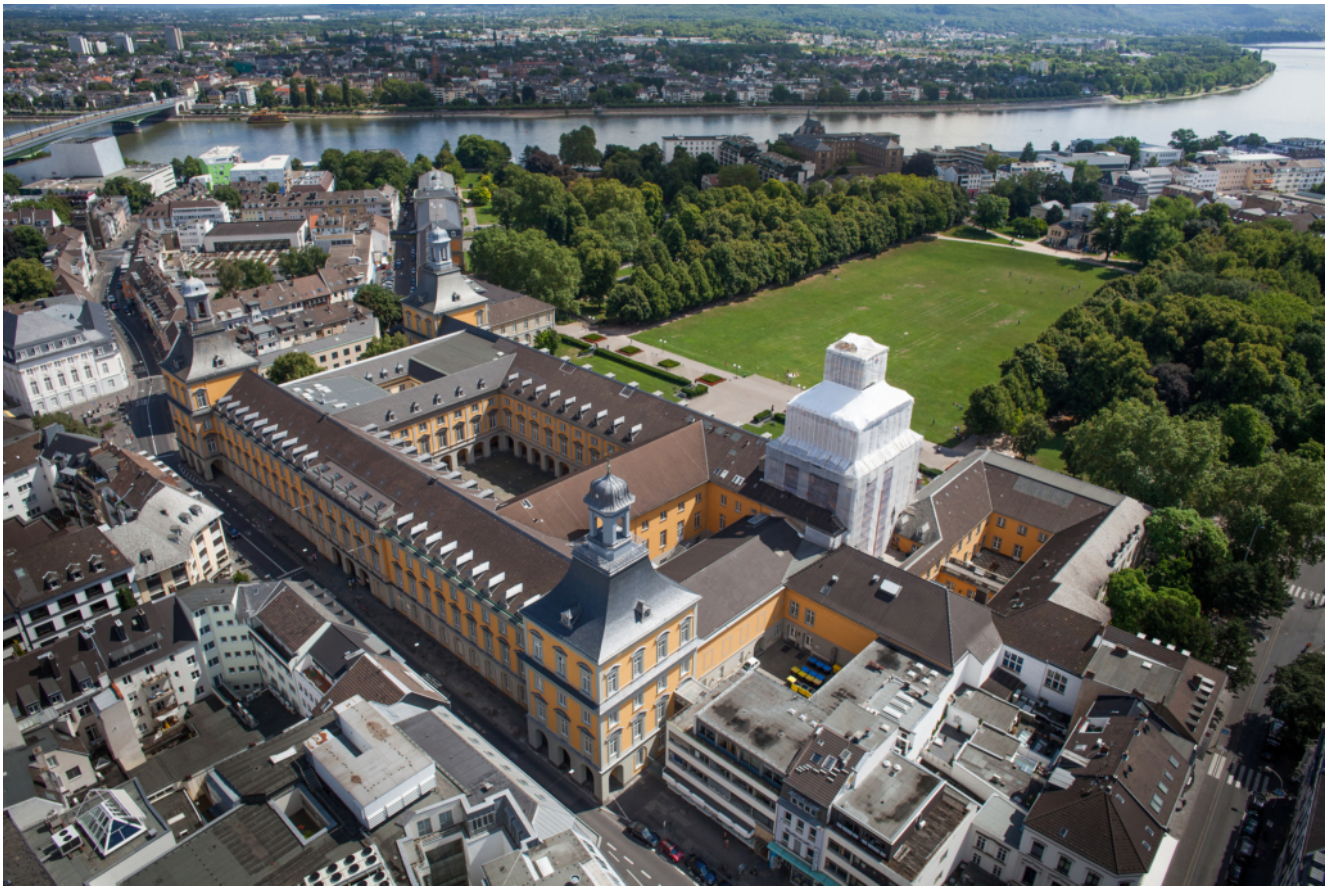

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Advocate General in Case Mirin (C-4/23): Refusal of recognition of a new gender identity legally obtained in another Member State violates the freedom of movement and residence of EU citizens

The following case note has been kindly provided by *Dr. Samuel Vuattoux-Bock*, LL.M. (Kiel), University of Freiburg (Germany).

On May 7, 2024, Advocate General Jean Richard de la Tour delivered his opinion in the case C-4/23, *Mirin*, concerning the recognition in one Member State of a change of gender obtained in another Member State by a citizen of both States. In his opinion, Advocate General de la Tour states that the refusal of such a recognition would violate the right to move and reside freely within the Union (Art. 21 TFEU, Art. 45 EU Charter of Fundamental Rights) and the right of respect for private and family life (Art. 7 EU Charter of Fundamental Rights).

1. Facts

The underlying case is based on the following facts: a Romanian citizen was registered as female at birth in Romania. After moving with his family to the United Kingdom and acquiring British citizenship, he went through the (medically oriented) gender transition process under English law and finally obtained in 2020 a “Gender Recognition Certificate” under the Gender Recognition Act 2004, confirming his transition from female to male and the corresponding change of his forename. As the applicant retained his Romanian nationality, he requested

the competent Romanian authorities (Cluj Civil Status Service) to record the change on his birth certificate, as provided for by Romanian law (Art. 43 of Law No. 119/1996 on Civil Status Documents). As the competent authority refused to recognize the change of name and gender (as well as the Romanian personal numerical code based on gender) obtained in the United Kingdom, the applicant filed an action before the Court of First Instance, Sector 6, Bucharest. The court referred the case to the CJEU for a preliminary ruling on the compatibility with European law (Art. 21 TFEU, Art. 1, 20, 21, 45 of the Charter of Fundamental Rights) of such a refusal based on Romanian law. In particular, the focus is on the Cluj Civil Status Office's demand that the plaintiff initiates a new judicial procedure for the change of gender in Romania. The plaintiff sees in this request the risk of a contrary outcome to the British decision, as the European Court of Human Rights ruled that the Romanian procedure lacks clarity and predictability (ECHR, *X. and Y. v. Romania*). In addition, the Romanian court asked whether Brexit had any impact on the case (the UK proceedings were initiated before Brexit and concluded during the transition period).

2. Opinion of the Advocate General

Advocate General de la Tour gave his opinion on these two questions. Regarding the possible consequences of Brexit, de la Tour drew two sets of conclusions from the fact that the applicant still holds Romanian nationality. First, an EU citizen can rely on the right to move freely within the European Union with an identity document issued by his or her Member State of origin (a fortiori after Brexit). Second, the United Kingdom was still a Member State when the applicant exercised his freedom of movement and residence. As the change of gender and first name was acquired, the United Kingdom was also still a Member State. EU law is therefore still applicable as the claimant seeks to enforce in one Member State the consequence of a change lawfully made in another (now former) Member State.

On the question of the recognition of a change of first name and gender made in another Member State, Advocate General de la Tour argues that these issues should be treated differently. The fact that the first name may be sociologically associated with a different sex from the one registered should not be taken into account as a preliminary consideration for recognition (no. 61). He therefore answers the two questions separately. Already at this point, de la Tour specifies

that the relevant underpinning logic for this type of case should not be the classical recognition rules of private international law, but rather the implementation and effectiveness of the freedom of movement and residence of EU citizens (nos. 53-55).

a) Change of first name

With regard to the change of the first name, de la Tour states (with reference to the *Bogendorff* case) that the refusal to recognize the change of the first name legally acquired in another Member State would constitute a violation of the freedoms of Art. 21 TFEU (no. 58). Since the Romanian Government does not give any reason why recognition should not be granted, there should be no obstacle to automatic recognition. The Advocate General considers that the scope of such recognition should not be limited to birth certificates but should be extended to all entries in a civil register, since a change of first name, unlike a change of surname, does not have the same consequences for other family members (nos. 63-64).

b) Change of gender

With regard to gender change, Advocate General de la Tour argues for an analogy with the Court's case-law on the automatic recognition of name changes, in particular the *Freitag* decision. Gender, like the name, is an essential element of the personality and therefore protected by Art. 7 of the Charter of Fundamental Rights and Art. 8 ECHR. The jurisprudence on names (in particular *Grunkin and Paul*) shows that the fact that a Member State does not have its own procedure for such changes (according to de la Tour, this concerns only 2 Member States for gender changes) does not constitute an obstacle to the recognition of a change lawfully made in another Member State (nos. 73-74). Consequently, de la Tour sees the refusal of recognition as a violation of the freedoms of Art. 21 TFEU, because the existence of a national procedure is not sufficient for such a refusal (no. 81). Furthermore, the Romanian procedure cannot be considered compatible with EU law, as the judgment of the European Court of Human Rights *X. and Y. v. Romania* shows that it makes the implementation of the freedoms of Art. 21 TFEU impossible or excessively difficult (No. 80). Nevertheless, there is nothing to prevent Member States from introducing measures to exclude the risk of fraudulent circumvention of national rules, for example by making the existence

of a close connection with the other Member State (e.g. nationality or residence) a condition (nos. 75-78).

Unlike the change of first name, the change of gender affects other aspects of personal status and may have consequences for other members of the family (e.g. the gender of the parent on a child's birth certificate before the transition) or even for the exercise of other rights based on gender differentiation (e.g. marriage in States that do not recognize same-sex unions, health care, retirement, sports competition). Imposing rules on the Member States in these areas (in particular same-sex marriage) would not be within the competence of the Union (no. 94), so Advocate General de la Tour proposes a limitation to the effect of recognition in the Member State of origin. If the change of gender would have an effect on other documents, the recognition should only have an effect on the person's birth certificate and the documents derived from it which are used for the movement of the person within the Union, such as identity cards or passports. The Advocate General himself points out that this solution would lead to unsatisfactory consequences in the event of the return of the person concerned to his or her State of origin (no. 96), but considers that the solution leads to a "fair balance" between the public interest of the Member States and the rights of the transgender person.

3. Conclusion

In conclusion, Advocate General de la Tour considers that the refusal to recognize in one Member State a change of first name and gender legally obtained in another Member State violates the freedoms of Art. 21 TFEU. The existence of an own national procedure could not justify the refusal. Drawing an analogy with the Court's case-law on change of name, the Advocate General recommends that the change of first name should have full effect in the Member State of origin, while the change of gender should be limited to birth certificates and derived documents used for travel (identity card, passport).

Although the proposed solution may not be entirely satisfactory for the persons concerned, as it could still cause difficulties in the Member State of origin, the recognition in one Member State of a change of first name and sex made in another Member State should bring greater security and would underline the mutual trust between Member States within the Union, as opposed to third

countries, as demonstrated by the recent decision of the Swiss Federal Tribunal concerning the removal of gender markers under German law

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The European Parliament's last plenary session & Private International Law

This post was written by Begüm Kilimcio?lu (PhD researcher), Thalia Kruger (Professor) and Tine Van Hof (Guest professor and postdoctoral researcher), all of the University of Antwerp.

During the last plenary meeting of the current composition of the European Parliament (before the elections of June 2024), which took place from Monday 22 until Thursday 24 April, **several proposals relevant to private international law** were put to a vote (see the full agenda of votes and debates). All of the regulations discussed here still have to be formally approved by the Council of the European Union before they become binding law, in accordance with the ordinary legislative procedure.

It is interesting to note that, while many pieces of new legislation have a clear cross-border impact in civil matters, not all of them explicitly address private international law. While readers of this blog are probably used to the discrepancies this has led to in various fields of the law, it is still worth our consideration.

First, the European Parliament voted on and adopted the proposal for a **Directive on Corporate Sustainability Due Diligence** (CSDDD) with 374 votes in favour, 235 against and 19 abstentions (see also the European Parliament's Press Release). The text adopted is the result of fierce battles between the Commission, Parliament and the Council and also other stakeholders such as civil society, academics and practitioners. This necessitated compromise and resulted in a watered-down version of the Commission's initial proposal of 23 February 2022

and does not go as far as envisaged in the European Parliament's Resolution of 10 March 2021 (see also earlier blog pieces by Jan von Hein, Chris Tomale, Giesela Rühl, Eduardo Álvarez-Armas and Geert van Calster).

The Directive is one of the few instruments worldwide that put legally-binding obligations on multinational enterprises. It lays down obligations for companies regarding their adverse actual and potential human rights and environmental impacts, with respect to their own operation, the operations of their subsidiaries, and the operations carried out by their business partners in the chains of activities. The Directive further stipulates specific measures that companies have to take to prevent, mitigate or bring an end to their actual or potential adverse human rights impacts. Besides national supervisory authorities for the oversight of the implementation of the obligations, the Directive enacts civil liability for victims of corporate harm.

The adopted Directive is more or less **silent on private international law.** The closest it gets to addressing our field of the law is Article 29(7), placing the duty on Member States to ensure the mandatory nature of civil remedies:

Member States shall ensure that the provisions of national law transposing this Article are of overriding mandatory application in cases where the law applicable to claims to that effect is not the national law of a Member State.

and Recital 90, which is more general:

In order to ensure that victims of human rights and environmental harm can bring an action for damages and claim compensation for damage caused when the company intentionally or negligently failed to comply with the due diligence obligations stemming from this Directive, this Directive should require Member States to ensure that the provisions of national law transposing the civil liability regime provided for in this Directive are of overriding mandatory application in cases where the law applicable to such claims is not the national law of a Member State, as could for instance be the case in accordance with international private law rules when the damage occurs in a third country. This means that the Member States should also ensure that the requirements in respect of which natural or legal persons can bring the claim, the statute of limitations and the disclosure of evidence are of overriding mandatory application. When transposing the civil liability regime provided for in this Directive and choosing the methods

to achieve such results, Member States should also be able to take into account all related national rules to the extent they are necessary to ensure the protection of victims and crucial for safeguarding the Member States' public interests, such as its political, social or economic organisation.

While the text contains references to numerous existing Regulations, Brussels I and Rome I are not among them; not even a precursory or confusing reference as in Recital 147 of the GDRP.

Second, the European Parliament voted on two other proposals that build on and implement the objectives of the European Green Deal and the EU Circular Economy Action Plan. The first is a proposal for a **Regulation establishing a framework for setting eco-design requirements for sustainable products** with 455 votes in favour, 99 against and 54 abstentions (see also the European Parliament's Press Release). The Regulation aims to reduce the negative life cycle environmental impacts of products by improving the products' durability, reusability, upgradability, reparability etc. It sets design requirements for products that will be placed on the market, and establishes a digital product certificate to inform consumers.

This Regulation does not contain a private-international-law type connecting factor for contracts or products. Neither does it expressly elevate its provisions to overriding rules of mandatory law (to at least give us some private international law clue). Its scope is determined by the EU's internal market. All products that enter the European market have to be in conformity with the requirements of both regulations, also those that are produced in third countries and subsequently imported on the European market (Art. 3(1)). "Products that enter the market" is the connecting factor, or the basis for applying the Regulation as overriding mandatory law. The Regulation is silent on products that exit the market. Hopefully the result will not be that products that were still in the production cycle at the time of entry into force will simply be exported out of the EU.

The third adopted proposal is the **Regulation on packaging and packaging waste** with 476 votes in favour, 129 against and 24 abstentions (see also the European Parliament's Press Release). This Regulation aims to reduce the amount of packaging placed on the Union market, ensuring the environmental sustainability of the packaging that is placed on the market, preventing the generation of packaging waste, and the collection and treatment of packaging

waste that has been generated. To reach these aims, the regulation's key measures include phasing out certain single-use plastics by 2030, minimizing so called "forever chemicals" chemicals in food packaging, promoting reuse and refill options, and implementing separate collection and recycling systems for beverage containers by 2029.

Like the Eco-design Regulation, no word on Private International Law, no references. The Regulation refers to packaging "placed on the market" in various provisions (most notably Art. 4(1)) and recitals (e.g. Recitals 10 and 14).

Lastly, the European Parliament approved the proposal for a **regulation on prohibiting products made with forced labour** on the Union market with an overwhelming majority of 555 votes in favour, 6 against and 45 abstentions (see also the European Parliament's Press Release). The purpose of this Regulation is to improve the functioning of the internal market while also contributing to the fight against forced labour (including forced child labour). Economic operators are to eliminate forced labour from their operations through the pre-existing due diligence obligations under Union law. It introduces responsible authorities and a database of forced labour risk areas or products.

Just as is the case for the other Regulations, this Regulation does not contain references to private international law instruments, and no explicit reference to instruments in this field, even though the implementation of the Regulation requires vigilance throughout the value chain. It would be correct to assume that this provides overriding mandatory law, as the ban on forced labour is generally accepted to be *jus cogens* even though the extent of this ban is contentious (see Franklin).

Other proposals that are more clearly in the domain of private international law have not (yet?) reached the finish line. First, in the procedure on the dual proposals in the field of the protection of adults of 31 May 2023, the European Parliament could either adopt them or introduce amendments at first reading. However, these proposals have not reached the plenary level before the end of term and it will thus be for the Conference of Presidents to decide at the beginning of the new parliamentary term whether the consideration of this 'unfinished business' can be resumed or continued (Art. 240 Rules of Procedure of the European Parliament).

In the second file, the proposal for a **Regulation in matters of parenthood and on the creation of a European Certificate of Parenthood** of 7 December 2022 the European Parliament was already consulted and submitted its opinion in a Resolution of 14 December 2023. It is now up to the Council of the European Union to decide unanimously (according to the procedure in Art. 81(3) of the Treaty on the Functioning of the European Union). It can either adopt the amended proposal or amend the proposal once again. In the latter case the Council has to notify or consult (in case of substantial amendments) the European Parliament again.

Egyptian Supreme Court on the Enforcement of Foreign Judgments – Special Focus on the Service Requirement

I . Introduction

Egypt and its legal system occupy a unique position within the MENA region. Egyptian law and scholarship exert a significant influence on many countries in the region. Scholars, lawyers, and judges from Egypt are actively involved in teaching and practicing law in many countries in the region, particularly in the Gulf States. Consequently, it is no exaggeration to say that developments in Egyptian law are likely to have a profound impact on neighboring countries and beyond, and warrant special attention.

The cases presented here were recently released by the Egyptian Supreme Court (*mahkamat al-naqdh*). They are of particular interest because they illustrate the complex nature of legal sources, particularly with respect to the enforcement of foreign judgments (on this topic, see Béligh Elbalti, "Perspective of Arab Countries", *in* M. Weller et al. (eds.), *The 2019 HCCH Judgments Convention – Cornerstones, Prospects, Outlook* (Hart, 2023), pp. 195 ff). These cases also

provide a good opportunity to elucidate the basic principles regarding the service requirement, which, as the cases discussed here and the comments that follow show, can pose particular challenges.

II. Facts

Two cases are presented here. Both involve the enforcement of judgments from neighboring countries (Kuwait in the first case and Saudi Arabia in the second) with which Egypt has concluded conventions on the enforcement of foreign judgments. In both cases, enforcement was granted by lower courts. The parties challenging the enforcement then appealed to the Supreme Court. The main grounds of appeal in both cases revolve around the issue of proper service of process. Ultimately, the Supreme Court ruled in favor of the appellants in both cases.

III. Summary of the Rulings

- **Case 1: Appeal No. 2765 of 25 June 2023 (Enforcement of a Kuwaiti Monetary Judgment)**

Proper service is a prerequisite to be verified by the enforcing court before declaring a foreign judgment enforceable, as stipulated in Article 298 of the Code of Civil Procedure (hereinafter CCP). Enforcement should be refused unless it is established that the parties were duly served and represented. This is in line with the provisions of the Convention on the Enforcement of Judgments concluded between States of the Arab League, in particular Article 2(b), as well as Article 30 of the Riyadh Convention on Judicial Cooperation, which was ratified by Egypt by Presidential Decree No. 278 of 2014, and according to which foreign default judgments rendered in a contracting state shall not be recognized if the defendant has not been properly served with the proceedings or the judgment. […] [The record indicates that the appellant challenged the enforcement of the foreign judgment on the basis of insufficient service. The enforcing court admitted the regularity of the service, but without stating the basis for its conclusion. As a result, the appealed decision is flawed and requires reversal with remand].

- **Case 2: Appeal No. 17383 of 14 November 2023 (Enforcement of a Saudi custody judgment)**

According to Article 301 of the CCP, conventions signed by Egypt take precedence over domestic law. Egypt ratified the Convention on the Enforcement of Judgments issued by the Council of the League of Arab States by Law No. 29 of 1954 and deposited the instruments of ratification with the General Secretariat of the League on July 25, 1954. The Kingdom of Saudi Arabia also signed the Convention on May 23, 1953. Consequently, the provisions of this Convention are applicable to the present case. […] The appellant argued that he had not been properly served with the summons because he had left the Kingdom of Saudi Arabia before the trial, which led to the foreign judgment. However, the judgment under appeal did not contain any valid response to the appellant's defense or any indication that the enforcing court had reviewed the procedures for serving the appellant. Furthermore, it did not examine whether the service of the appellant was in accordance with the procedures laid down by the law of the rendering State. Consequently, the appealed decision is vitiated by an error of law which requires it to be quashed.

Comments

The enforcement of foreign judgments in Egypt is regulated by Articles 296 to 301 of the CCP (for an English translation of these provisions, see J. Basedow *et al.* (eds.), *Encyclopedia of Private International Law – Vol. IV* (Elgar Editions, 2017), pages 3163-4). It is also governed by the conventions on the enforcement of foreign judgments ratified by Egypt (for a detailed overview in English of the enforcement of foreign judgments in Egypt under the applicable conventions and domestic law, see Karim El Chazli, "Recognition and Enforcement of Foreign Decisions in Egypt", *Yearbook of Private International Law*, Vol. 15 (2013/2014), pp. 387). The two cases presented above concern enforcement under these conventions.

In this regard, it is noteworthy that Egypt has established an extensive network of bilateral and regional multilateral conventions (for a detailed list, see Elbalti, *op. cit.* pp. 196, 199). With regard to multilateral conventions, Egypt has ratified two

conventions adopted under the auspices of the League of Arab States: (1) The Arab League Convention on the Enforcement of Foreign Judgments and Arbitral Award of 1952 (hereinafter referred to as the "1952 Arab Judgments Convention". On this Convention, see eg, El Chazli, *op. cit.* pp. 395-399) and (2) The Riyadh Convention on Judicial Cooperation of 1983 (hereinafter referred to as the "1983 Riyadh Convention". On this Convention, see eg, Elbalti, *op. cit.* pp. 197-198). It is important to note that the 1983 Riyadh Convention is intended to replace the 1952 Arab Judgments Convention in relations between the States Parties to both Conventions (see Article 72).

Bilateral conventions include a convention concluded with Kuwait in 1977. This convention was replaced by a new one in 2017.

1. With regard to the first case, the following observations can be made:

a. This case appears to be the first case in which the Supreme Court has referred to the 1983 Riyadh Convention since its ratification in 2014. This is noteworthy in light of the numerous missed opportunities for the Court to apply the Convention (see eg., *Supreme Court Appeal No. 5182 of 16 September 2018*. In the *Appeal No. 16894 of June 6, 2015*, the Riyadh Convention was invoked by the parties, but the Court did not refer to it. See also 2(b) below).

b. It is also noteworthy, and somewhat surprising, that the Supreme Court referred to the 1983 Riyadh Convention in a case concerning the enforcement of a Kuwaiti judgment. This is because, contrary to what is widely acknowledged, Kuwait has *only signed* but *did not ratify* the Riyadh Convention (on this point see Elbalti, *op. cit.*, page 197 fn (118)). Since Kuwait is a party only to the 1952 Arab Judgments Convention, the Supreme Court's reference to the 1983 Riyadh Convention was inaccurate. Moreover, if the 1983 Riyadh Convention had been applicable, there would have been no need to refer to the 1952 Arab Judgments Convention, since the former is intended to replace the latter (Article 72 of the Riyadh Convention).

c. Conversely, the Supreme Court completely overlooked the application of the 2017 bilateral convention with Kuwait, which, as noted above, superseded the 1977 bilateral convention between the two countries. This case provided another missed opportunity for the Court to address the so-called problem of conflict of

conventions, as both the 1952 Arab Convention and the 2017 bilateral convention were applicable with overlapping scopes. In the absence of special guidance in the text of the conventions, such a conflict could have been solved on the basis of one of the two generally admitted principles: *lex posteriori derogat priori* or *lex specialis derogat generali* (for an example of a case adopting the latter solution from the UAE, see *Abu Dhabi Supreme Court, Appeal No. 950 of 26 December 2022*).

d. This is not the first time the Egyptian Supreme Court has dealt with the enforcement of Kuwaiti judgments (there are 10 cases, by my count). In all of these cases, the court referred to the 1952 Arab Judgments Convention in addition to domestic law. It is only in two cases that the Court referred to the 1977 Kuwait-Egypt bilateral convention in addition to the 1952 Arab Judgments Convention (*Supreme Court Appeal No. 3804 of 23 June 2010* and *Appeal No. 15207 of 11 April 2017*). In the majority of cases (8 out of 10), the Court refused to enforce Kuwaiti judgments. The main ground of refusal was mainly due to, or including, lack of proper service.

2. With regard to the second case, the following observations can be made:

a. Egypt does not have a bilateral convention with Saudi Arabia. However, both Egypt and Saudi Arabia are parties to the 1952 Arab Judgments Convention and the 1983 Riyadh Convention. As noted above, the 1983 Riyadh Convention replaces the 1952 Arab Judgments Convention for all States that have ratified it (Article 72). Therefore, the Supreme Court's affirmation that "the provisions of the [1952 Arab Judgments] Convention are therefore applicable to the present case" is incorrect. It is also surprising that the court made such a statement, especially considering that the party seeking enforcement relied on the 1983 Riyadh Convention, and given its erroneous application in Case 1.

b. This is not the first time that the Supreme Court has overlooked the application of the 1983 Riyadh Convention in a case involving the enforcement of a Saudi judgment. In a case decided in 2016, almost two years after the Convention entered into force in Egypt, the Supreme Court referred to the 1952 Arab Judgments Convention to reject the enforceability of a Saudi judgment, again citing the lack of proper service (*Supreme Court, Appeal No. 11540 of 24*

February 2016).

3. Enforcement of Foreign Judgments and Service Requirement in Egypt

As a general rule, service of process under Egyptian law is considered a procedural matter that should be governed by the *lex fori* (Article 22 of the Civil Code. For an English translation, see Basedow *et al, op. cit.;* see also El Chazli, pp. 397, 402). In the context of foreign judgments, this means that the service of process or judgment is, in principle, governed by the law of the state of origin, subject, however, to considerations of public policy (see eg., *Supreme Court, Appeal No. 2014 of 20 March 2003*). Based on the case law of the Supreme Court, the following features are noteworthy:

- Service by publication was considered sufficient for enforcement purposes if the court could confirm that it had been duly carried out in accordance with the law of the State of origin (*Supreme Court, Appeal No. 232 of 2 July 1964*).
- However, if it appears that the service by publication did not comply with the requirements of the foreign law, the regularity of the service will be denied (*Supreme Court of, Appeal No. 14777 of 15 December 2016* [service of summons]; *Appeal No. 1441 of 20 April 1999* [notification of judgment]).
- Conversely, the Court held that the service irregularities may be cured if the defendant voluntarily appears before the foreign court and presents arguments on the merits of the case (*Supreme Court, Appeal No. 18249 of April 13, 2008*).
- Merely asserting that service was made in accordance with the law of the country of origin is not sufficient. Egyptian courts are required to verify that the judgment debtor has been properly served in accordance with the law of the country of origin and that such service is not contrary to Egyptian public policy (*Supreme Court of Cassation, Appeal No. 558 of 29 June 1988*). This aspect can be particularly important when it appears that the judgment debtor had permanently left the State of origin at the time when the service was made (*Supreme Court, Appeal No. 8376 of 4 March 2010*; *Appeal No. 14235 of 1 January 2014*; *Appeal No. 1671 of 18 February 2016*).

- With regard to ensuring that the defendant has been duly served, the courts are not bound by any specific method imposed by Egyptian law; therefore, the conclusions made by the enforcing court as to the regularity of the service based on the findings of the foreign judgment and not disputed by the appellant may be accepted (*Supreme Court, Appeal No. 1136 of 28 November 1990*).
- Where an international convention applies, the rules for service set out in the convention must be complied with, even if they differ from the rules of domestic law. Failure to comply with the methods of service prescribed by the applicable convention would render the foreign judgment unenforceable (*Supreme Court, Appeal No. 137 of 8 March 1952*).
- The rules provided for by the conventions prevail, including the method of determining whether proper service has been made (eg., the submission of a certificate that the parties were duly served with summons to appear before the proper authorities). Therefore, failure to comply with this rule would result in the rejection of the application for enforcement by the party seeking enforcement (*Supreme Court, Appeal No. 5039 of 15 November 2001*; *Appeal No. 3804 of 23 June 2010*).

4. Service under Conventions

Most of the bilateral and regional conventions ratified by Egypt contain provisions on the service of judicial documents. The Riyadh Convention is particularly noteworthy in this regard, as 18 of the 22 members of the League of Arab States are parties to it (see Elbalti, *op. cit.*, pp. 196-197). In addition, Egypt has been a party to the HCCH 1965 Service Convention since 1968.

The proliferation of these international instruments inevitably leads to the problem of conflict of conventions. This problem can be particularly acute in some cases, where as many as three competing instruments may come into play. This scenario often arises with some Arab countries, such as Tunisia or Morocco, with which Egypt is bound by (1) bilateral conventions, (2) a regional convention (namely the Riyadh Convention), and (3) a global convention (namely the HCCH Hague Service Convention).

In this context, the solution adopted by the Hague Convention deserves attention.

Article 25 of the Convention provides that "[…] *this Convention shall not derogate from conventions containing provisions on matters governed by this Convention to which the Contracting States are or will become Parties*". However, the evaluation of this solution deserves a separate comment (for analyses on a similar issue regarding the HCCH 2019 Judgments Convention, see Elbalti, *op. cit.*, p. 206).

An Answer to the Billion-Dollar Choice-of-Law Question

On February 20, 2024, the New York Court of Appeals handed down its opinion in *Petróleos de Venezuela S.A. v. MUFG Union Bank, N.A.* The issue presented—which I described in a previous post as the billion-dollar choice-of-law question—was whether a court sitting in New York should apply the law of New York or the law of Venezuela to determine the validity of certain bonds issued by a state-owned oil company in Venezuela. The bondholders, represented by MUFG Union Bank, argued for New York law. The oil company, Petróleos de Venezuela, S.A. ("PDVSA"), argued for Venezuelan law.

In a victory for PDVSA, the New York Court of Appeals unanimously held that the validity of the bonds was governed by the law of Venezuela. It then sent the case back to the federal courts to determine whether the bonds are, in fact, invalid under Venezuelan law.

Facts

In 2016, PDVSA approved a bond exchange whereby holders of notes with principal due in 2017 (the "2017 Notes") could exchange them for notes with principal due in 2020 (the "2020 Notes"). Unlike the 2017 Notes, the 2020 Notes were secured by a pledge of a 50.1% equity interest in CITGO Holding, Inc. ("CITGO"). CITGO is owned by PDVSA through a series of subsidiaries and is considered by many to be the "crown jewel" of Venezuela's strategic assets

abroad.

The PDVSA board formally approved the exchange of notes in 2016. The exchange was also approved by the company's sole shareholder—the Venezuelan government—and by the boards of the PDVSA's subsidiaries with oversight and control of CITGO.

The National Assembly of Venezuela refused to support the exchange. It passed two resolutions—one in May 2016 and one in September 2016—challenging the power of the executive branch to proceed with the transaction and expressly rejecting the pledge of CITGO assets in the 2020 Notes. The National Assembly took the position that these notes were "contracts of public interest" that required legislative approval pursuant to Article 150 of the Venezuelan Constitution. These legislative objections notwithstanding, PDVSA followed through with the exchange. Creditors holding roughly $2.8 billion in 2017 Notes decided to participate and exchanged their notes for 2020 Notes.

In 2019, the United States recognized Venezuela's Interim President Juan Guaidó as the lawful head of state. Guaidó appointed a new PDVSA board of directors, which was recognized as the legitimate board by the United States even though it does not control the company's operations inside Venezuela. The new board of directors filed a lawsuit in the Southern District of New York (SDNY) against the trustee and the collateral agent for the 2020 Notes. It sought a declaration that the entire bond transaction was void and unenforceable because it was never approved by the National Assembly. It also sought a declaration that the creditors were prohibited from executing against the CITGO collateral.

The choice-of-law issue at the heart of the case related to the validity of the 2020 Notes. Whether the Notes were validly issued depended on whether the court applied New York law or Venezuelan law. The SDNY (Judge Katherine Polk Failla) ruled in favor of the bondholders after concluding that the issue was governed by the laws of New York. On appeal, the Second Circuit certified the choice-of-law question to the New York Court of Appeals. The Court of Appeals reformulated this question to read as follows:

> *Given the presence of New York choice-of-law clauses in the Governing Documents, does UCC 8-110(a)(1), which provides that the validity of securities is determined by the local law of the issuer's jurisdiction, require the*

application of Venezuela's law to determine whether the 2020 Notes are invalid due to a defect in the process by which the securities were issued?

In a decision rendered on February 20, 2024, the Court of Appeals unanimously concluded that the answer was yes.

Section 8-110

The court began with the New York choice-of-law clauses in the Indenture, the Note, and the Pledge Agreement. Under ordinary circumstances, it observed, New York courts will enforce New York choice-of-law clauses by operation of Section 5-1401 of the New York General Obligations Law. That statute provides that the parties to any commercial contract arising out of a transaction worth more than $250,000 may select New York law to govern their agreement even if the transaction has no connection to New York. In this particular case, however, a different part of Section 5-1401 dictated a different result.

Section 5-1401 also states that even when parties choose New York law, that law "shall not apply . . . to the extent provided to the contrary in subsection (c) of section 1-301 of the uniform commercial code." UCC 1-301(c)(6) states, in turn, that if UCC 8-110 "specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted." Finally, UCC 8-110(a)(1) states that "[t]he local law of the issuer's jurisdiction . . . governs . . . the validity of a security."

After following the chain of choice-of-law rules from Section 5-1401 to UCC 1-301(c) to UCC 8-110, the court observed that the validity of a security is governed by the law of the issuer's jurisdiction. The court further observed, based on the statutory text, that Section 8-110 was a mandatory rule that could not be altered by a choice-of-law clause. Against this backdrop, the court held that "because UCC 8-110 is applicable here, any issue of the validity of a security issued pursuant to the Governing Documents is determined by the law of the issuer's jurisdiction. In this case, the issuer is a Venezuelan entity, so the law of Venezuela is determinative of the issue of validity."

Validity

The court next addressed the meaning of "validity" as used in Section 8-110. The bondholders argued that this term did not sweep broadly enough to encompass the requirement in Article 150 of the Venezuelan Constitution, which provides that the National Assembly must approve all "contracts of public interest." They argued that the word encompassed only the usual corporate formalities for issuing a security. PDVSA argued that "validity" could be interpreted to include constitutional provisions that bear on the issue of whether a security was duly authorized. The Court of Appeals agreed.

In reaching this conclusion, the court first observed that the issue of "validity" had to be distinguished from the issue of "enforceability." The first term refers to the "nature of the obligor and its internal processes." The second term refers to "requirements of general applicability as going to the nature of the rights and obligations purportedly created, irrespective of the nature of the obligor and its processes." The court cited usury laws and anti-fraud laws as examples of laws that dealt with enforceability rather than validity. Although these laws may prohibit a court from *enforcing* a contract, they do not bear on the *validity* of that same contract because they do not address the procedures that must be followed for the contract to be duly authorized.

The court then distinguished between (1) validity and (2) the consequences of invalidity. While Section 8-110 stated the controlling choice-of-law rule with respect to the validity, it was not controlling with respect to the consequences stemming from that invalidity. "Even if a court determines that a security is invalid under the local law of the issuer's jurisdiction," the court held, "the effects of that determination will depend on New York law."

With these distinctions in mind, the court held that "Article 150 and its related constitutional provisions could potentially implicate validity because they speak to whether an entity has the power or authority to issue a security, and relatedly, what *procedures* are required to exercise such authority." In particular, the court observed that this constitutional provision required the approval of the National Assembly before certain contracts could be executed. Since Article 150 identified procedural requirements rather than substantive ones, the court reasoned, it spoke to the issue of validity rather than enforceability. In so holding, the court

reasoned that the term "validity," as used in Section 8-110, could implicate constitutional provisions of the issuer's jurisdiction that speak to whether a security is duly authorized.

Caveats

After holding that the issue of validity was governed by the law of the issuer's jurisdiction, and that Section 150 of the Venezuelan Constitution might be relevant to the issue of validity, the court went on to announce several important caveats.

First, the court stated that the application of Venezuelan law on these facts must be "narrowly confined." It held that the "exception provided by UCC 8-110 provides no opportunity for the application of foreign laws going to the enforceability of a security, nor does it affect the adjudication of any question under the contract other than whether a security issued by a foreign entity is valid when issued."

Second, the court emphasized that "none of this is to say that plaintiffs will ultimately be victorious." It noted that the federal courts would still have to determine whether the securities were, in fact, invalid under the laws of Venezuela.

Third, the court went out of its way to emphasize the fact that—issues of validity notwithstanding—New York law governs the transaction in all other respects, including the consequences if a security was issued with a defect going to its validity.

Conclusion

This long list of caveats suggests that the Court of Appeals *wanted* to apply to New York law in this case to the maximum extent possible. Enforcing New York choice-of-law clauses, after all, generates business for New York lawyers, and the generation of such business ultimately benefits the State of New York. The Court was, however, unable to find an interpretive path that permitted it to apply New York law in light of the text of Section 8-110.

In the days following the court's decision, several news outlets reported that the

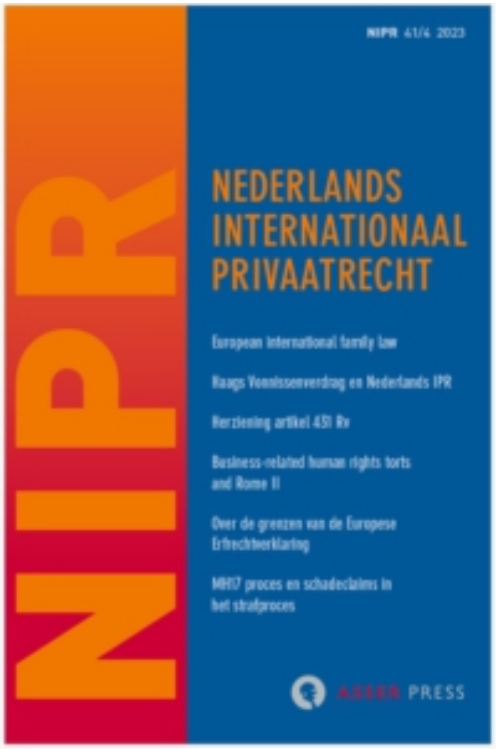
value of the PDVSA bonds at issue had fallen precipitously. This decline in price presumably reflects the market's perception that the bondholders are less likely to gain access to the CITGO assets anytime soon (if at all) if Venezuelan law governs the validity issue. TLB will report on developments in this case going forward.

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

Dutch Journal of PIL (NIPR) – issue 2023/4

The latest issue of the Dutch Journal on Private International Law (NIPR) has just been published

NIPR 2023 issue 4



EDITORIAL

I. Sumner, The next stops on the European international family law train / p. 569-571

Abstract
The European legislature is not yet finished with the Europeanisation of private international family law. This editorial briefly introduces two new proposals, namely the Proposal for a European Parentage Regulation and the Proposal for a European Adult Protection Regulation.

ARTICLES

B. van Houtert, Het Haags Vonnissenverdrag: een game changer in Nederland? Een rechtsvergelijkende analyse tussen het verdrag en het commune IPR / p. 573-596

Abstract
On 1 September 2023, the 2019 Hague Judgments Convention (HJC) entered into force in the Netherlands. This article examines whether the HJC can be considered as a game changer in the Netherlands. Therefore, a legal comparison has been made between the HJC and Dutch Private International Law (PIL) on the recognition and enforcement of non-EU judgments in civil and commercial matters. This article shows that the HJC can promote the recognition and enforcement of judgments rendered by non-EU countries in the Netherlands mainly because of the facultative nature of the grounds for refusal in Article 7 HJC. Furthermore, the complementary effect of Dutch PIL on the basis of Article 15 HJC facilitates recognition as some indirect grounds of jurisdiction are broader or less stringent, and some grounds are lacking in Article 5(1) HJC. Compared to the uncodified Dutch PIL, the HJC provides procedural advantages as well as legal certainty that is beneficial to cross-border trade, mobility and dispute resolution. Moreover, preserving the foreign judgment, instead of replacement by a Dutch judgment, serves to respect the sovereignty of states as well as international comity. Despite the limited scope of application, there is an added value of the HJC in the Netherlands because of its possible application by analogy in the Dutch courts, as a Supreme Court’s ruling shows. The Convention can also be an inspiration for the future codification of the Dutch PIL on the recognition and enforcement of foreign judgments regarding civil matters. Furthermore, the

application of the Convention by analogy will contribute to international legal harmony. Based on the aforementioned (potential) benefits and added value of the HJC, this article concludes that this Convention can be considered as a game changer in the Netherlands.

K.J. Krzeminski, Te goed van vertrouwen? Een kanttekening bij het advies van de Staatscommissie voor het Internationaal Privaatrecht tot herziening van artikel 431 Rv / p. 597-618

Abstract
In February 2023, the Dutch Standing Government Committee for Private International Law rendered its advice on the possible revision of Article 431 Dutch Code of Civil Proceedings (DCCP). This statutory provision concerns the recognition and enforcement of foreign court judgments in civil matters to which no enforcement treaty or EU regulation applies. While paragraph 1 of Article 431 DCCP prohibits the enforcement of such foreign court judgments absent an exequatur regime, paragraph 2 opens up the possibility for new proceedings before the Dutch courts. In such proceedings, the Dutch Courts are free to grant authority to the foreign court's substantive findings, provided that the foreign judgment meets four universal recognition requirements. The Standing Government Committee proposes to fundamentally alter the system under Article 431 DCCP, by inter alia introducing automatic recognition of all foreign court judgments in the Netherlands. In this article, the concept of and the justification for such an automatic recognition are critically reviewed.

B.P.B. Sequeira, The applicable law to business-related human rights torts under the Rome II Regulation / p. 619-640

Abstract
As the momentum for corporate liability for human rights abuses grows, and as corporations are being increasingly brought to justice for human rights harms that they have caused or contributed to in their global value chains through civil legal action based on the law of torts, access to a remedy remains challenging. Indeed, accountability and proper redress rarely occur, namely due to hurdles such as establishing the law that is applicable law to the proceedings. This article aims to analyse the conflict-of-laws rules provided for under the Rome II Regulation, which determines the applicable law to business and human rights tort actions brought before EU Courts against European parent or lead

corporations. In particular, we will focus on their solutions and impact on access to a remedy for victims of corporate human rights abuses, reflecting on the need to adapt these conflict rules or to come up with new solutions to ensure that European corporations are held liable for human rights harms taking place in their value chains in a third country territory.

CASE LAW

M.H. ten Wolde, Over de grenzen van de Europese Erfrechtverklaring. HvJ EU 9 maart 2023, ECLI:EU:C:2023:184, NIPR 2023-753 (R. J. R./Registr? centras V?) / p. 641-648

Abstract
A European Certificate of Succession issued in one Member State proves in another Member State that the person named therein as heir possesses that capacity and may exercise the rights and powers listed in the certificate. On the basis of the European Certificate of Succession, inter alia, foreign property can be registered in the name of the relevant heir. In the Lithuanian case C-354/21 R. J. R. v Registr? centras V?, the question arose whether the receiving country may impose additional requirements for such registration when there is only one heir. The Advocate General answered this question differently from the European Court of Justice. Which view is to be preferred?

SYMPOSIUM REPORT

K. de Bel, Verslag symposium 'Grootschalige (internationale) schadeclaims in het strafproces: beste praktijken en lessen uit het MH 17 proces' / p. 649-662

Abstract
On 17 November 2022, the District Court of The Hague delivered its final verdict in the criminal case against those involved in the downing of flight MH17 over Ukraine. This case was unique in many ways: because of its political and social implications, the large number of victims and its international aspects. The huge number and the international nature of the civil claims for damages exposed several practical bottlenecks and legal obstacles that arise when civil claims are joined to criminal proceedings. These obstacles and bottlenecks, which all process actors had to address, were the focus of the symposium 'Large-scale (international) civil claims for damages in the criminal process: best practices and

questions for the legislator based on the MH17 trial' that took place on 10 October 2023. A summary of the presentations and discussions is provided in this article.