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

Written by Professor Eric Clive

The Secretary of State for Scotland, a Minister of the United Kingdom government, has made an order under section 35 of the Scotland Act 1998 blocking Royal Assent to the Gender Recognition Reform (Scotland) Bill 2022, a Bill passed by the Scottish Parliament by a large majority. The Scottish government has challenged the order by means of a petition for judicial review. The case is constitutionally important and may well go to the United Kingdom Supreme court. It also raises interesting questions of private international law.

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

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

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

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

> *Respect for the rights to family and private life requires the recognition of personal status established in a foreign State, provided that the person concerned has had a sufficient connection with the State of origin … as well as with the State whose law has been applied, and that there is no manifest violation of the international public policy of the requested State ….*

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

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

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

the case remains to be seen: both sides have other arguments. It would be extremely interesting if it did.

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

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

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

Judgments Convention – No Thanks?

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

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

Schack comes to this damning conclusion in three steps. First, he argues that the 2005 Choice of Court Convention, the first outcome of the decades-long HCCH Jurisdiction Project, has been of minimal use for the EU and only benefited Singapore and London. Second, he points out the limited scope of the 2019 Convention, which is not only (inherently) unable to limit the exorbitant exercise of jurisdiction or avoid, let alone coordinate parallel proceedings, but also contains a long list of excluded areas of law in its Art. 2 (including, most significantly, the entire field of intellectual property: Art. 2(1)(m)). Schack argues that combined with the equally long list of bases for recognition and enforcement

in Art. 5, the Convention will make recognition and enforcement of foreign judgments significantly more complicated. This effect is exacerbated, third, by a range of options for contracting states to further reduce the scope of application of the Convention, of which Art. 29 is particularly "deadly", according to Schack. The provision allows contracting states to opt out of the effect of the Convention vis-à-vis specific other contracting states, which Schack fears will lead to a 'bilateralisation' similar to what prevented the 1971 Convention from ever getting off the ground, which will reduce the 2019 Convention to a mere model law. All in all, Schack considers the Convention to do more harm than good for the EU, which he fears to also lose an important bargaining chip in view of a potential bilateral agreement with the US.

Leaving his additional criticism of the HCCH's ongoing efforts to address the problem of parallel proceedings aside, Schack certainly has a point in that the 2019 Convention will not be easy to apply for the national courts. Whether it will be more complicated than a myriad of rarely applied bilateral conventions may be subject to debate, though. It also seems worth pointing out that the 1971 Convention contained a significantly more cumbersome mechanism of bilateralisation that required all contracting states to conclude additional (!) bilateral agreements to enter into force between any given pair of them, which is quite different from the opt-out mechanism of Art. 29. In fact, it seems at least arguable that the different ways in which contracting states can tailor their accession to the Convention to their specific needs and concerns, up to the exclusion of any treaty relations with a specific other contracting state, may not be the proverbial nail in the coffin as much as it might be a key to the Convention's success. While it is true that these mechanisms appear to undermine the internationally binding nature of the Convention, bringing it closer to a model law than a binding treaty, they also make it possible to accommodate different degrees of mutual trust within a single legal framework. The fact that the 2005 Convention has preserved some degree of judicial cooperation between the EU Member States and the UK in an area now otherwise devoid of it may be testimony to the important purpose still served by international conventions in the area of international civil procedure despite – but maybe also as a result of – their increasingly limited, tailor-made scope(s).

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

Towards an EU Regulation on the International Protection of Adults

On 31 May 2023, the European Commission presented a proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults (in the following: EU Adult Protection Regulation – EUAPR). This proposal is a response to significant demographic and social changes in the EU: Many Member States face enormous challenges posed by an increasingly aging population. Due to considerable improvements in medical care in recent decades, people grow much older than they used to, and this lengthening of the average lifespan in turn leads to an increase in age-related illnesses such as Alzheimer's disease. This demographic change creates problems for private international law, because the mobility of natural persons has increased within the EU where borders may, in principle, be crossed without restrictions. Many people who have left their state of origin in search for work elsewhere in their youth or middle age do not return to their home state after retirement, but rather spend the last part of their lives where they have established a new habitual residence. Besides, more and more people decide to leave their home state once they have reached the age of retirement. Such processes of migration at a late stage in life may have different reasons: Some old-age movers may want to avoid a heavy taxation of their estates that would put a burden on their heirs, some may wish to circumvent other restrictions of domestic inheritance laws (e.g. the right to a compulsory portion), others may simply wish to spend the remaining parts of their lives in milder climates, e.g. the Mediterranean, or look for a place to stay where the cost of living is lower, e.g. in some parts of Eastern Europe. When these persons begin to suffer from an impairment or an insufficiency of their personal faculties which no longer allows them to protect their interests themselves, however, intricate conflict of laws problems may arise: The authorities or courts of which state shall have jurisdiction to take protective measures concerning vulnerable adults or their property? Which law is to be applied to such measures? Under which conditions may protective measures taken in one state be recognised and

enforced in other states?

The EUAPR is meant to solve these problems. It is in many parts based on proposals made by two working groups set up by the European Law Institute and the European Association of Private International Law, respectively. The Regulation will partially supersede and complement the Hague Convention on the International Protection of Adults (in the following: Hague Adult Protection Convention – HAPC), a derogation which is permitted by Art. 49(2) and (3) HAPC. The Hague Convention was concluded on 13 January 2000 and entered into force on 1 January 2009 between France, Germany and the United Kingdom (restricted to Scotland, however). Today, the Convention is in force as well in Switzerland, Finland, Estonia, the Czech Republic, Austria, Monaco, Latvia, Portugal, Cyprus, Belgium, Greece, and Malta. The Netherlands, Ireland, Italy, Luxembourg, and Poland have signed the Convention, but have not ratified it yet. In the Netherlands, however, the Convention is already applied by the courts as a part of Dutch autonomous law (see Hoge Raad 2 February 2018, ECLI:NL:HR:2018:147). Thus, more than 23 years after the HAPC was concluded, the status of ratifications is rather unsatisfactory, as only 12 EU Member States have ratified the Convention so far. In order to speed up this process, the Regulation shall be accompanied by a Council Decision authorising Member States to become or remain parties, in the interest of the EU, to the HAPC.

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

As far as the spatial scope of the EUAPR is concerned, Art. 59 EUAPR contains detailed rules on the relation between the Regulation and the HAPC. The basic factor that triggers the application of the EUAPR is the vulnerable adult's habitual

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

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

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

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

In order to determine the applicable law, Art. 8 EUAPR refers to Chapter III of the HAPC. As in the HAPC, there are no specific conflicts rules for ex-lege powers of representation. Moreover, advance medical directives that are not combined with a power of representation (Art. 15 HAPC) are neither covered by the HAPC nor the EUAPR. Since the authorities exercising their jurisdiction under the HAPC usually apply their own law pursuant to Art. 13(1) HAPC, the spatial scope of the Convention's jurisdictional rules also indirectly determines the reach of its conflicts rules. This will lead to a new round of the debate that we are familiar with in the context of the relationship between the Hague Child Protection Convention and the Brussels IIb Regulation, i.e. whether the intended parallelism only works if at least a hypothetical jurisdiction under the respective Convention's rules can be established, or whether it suffices that jurisdiction is established according to a provision that is only found in the respective Regulation. Within the framework of the EUAPR, this problem will arise with regard to a choice of court pursuant to Art. 6 EUAPR, an option that is not provided for by the HAPC. Applying Art. 13(1) HAPC in this context as well seems to be the preferable solution, which leads to an indirect choice of law by the vulnerable adult even in cases where no voluntary power of representation is established under Art. 15 HAPC.

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

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

Apart from those substantive achievements, the Regulation contains necessary rules on rather procedural and technical subjects, such as the cooperation

between the competent authorities (Chapter VI EUAPR), the establishment and interconnection of protection registers (Chapter VIII EUAPR), digital communication (Chapter IX EUAPR), and data protection (Chapter X EUAPR). These rules will also lead to a major modernisation compared with the older rules of the HAPC.

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

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

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

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

1983-184ff).

The case

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

In 2021, Xs brought an action before the Dubai Court of First Instance (hereinafter "DCFI") seeking a 'declaration of validity' of a decision of the British Virgin Islands Supreme Court declaring the dissolution of X1 and appointing X2 as its judicial liquidator (hereinafter "the foreign judgment"). Xs justified their action by stating that they intended to bring legal actions against Y for the recovery of due sums of money that they were entitled to and, eventually, would avoid their actions being dismissed for lack of standing.

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

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

Xs appealed to the DCA before which they argued that the foreign judgment did

not order Y to perform any obligation but simply declared the dissolution of X1 and appointed X2 as judicial liquidator. Xs also argued that the DCFI had erred in characterizing their claim as a request for "enforcement" as they were not seeking to enforce the foreign judgment. Therefore, it would have been inappropriate to pursue their claim following the prescribed procedure for enforcement where the main purpose of their action is to "recognize" the foreign judgment. The DCA dismissed the appeal holding that the Xs' action lacked legal basis. According to the DCA, Xs' request for the foreign judgment to be "declared valid" was not within the jurisdiction of the UAE courts, which was limited to "enforcing" foreign judgments and not declaring them "valid". As for the enforcement procedure, the DCA considered that it was subject to the jurisdiction of the Execution Court in accordance with the procedure prescribed to that effect (*DCA, Appeal No. 2684 of 25 January 2023*). Dissatisfied with the outcome, Xs appealed to the Supreme Court (hereinafter "DSC").

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

Comments

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

Unlike the international conventions ratified by the UAE, which generally distinguish between "recognition" and "enforcement" of foreign judgments", UAE domestic law refers mainly to "enforcement" but not "recognition". Moreover, as mentioned in a previous post, the procedure for enforcement has recently

undergone an important change, as the former procedure based on bringing an ordinary action before the DCFI has been replaced by a more another procedure consisting of filing a petition for an "order on motion" before the Execution Court (new Art. 222 of the New Federal Civil Procedure Act [FCPA]). However, the current legislation in force says nothing about the "recognition" of foreign judgments.

If one looks at the practice of the courts, one can observe two different tendencies. One tendency, which seems to be prevailing, consists in denying effect (notably *res judicata* effect) to foreign judgments that were not declared enforceable. In some cases, UAE courts considered that foreign judgments could not be relied upon because there was no proof that they had been declared enforceable (See, e.g., *Federal Supreme Court, Appeal No 320/16 of 18 April 1995*; *Appeal No. 326/28 of 27 June 2006*) or that foreign judgments could only have legal authority (*hujjia*) after being declared enforceable and consistent with public policy (*Abu Dhabi Supreme Court, Appeal No. 31/2016 of 7 December 2016*).

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

Unlike the cases cited above, the case reported here is one of the rare cases in which the parties sought to recognize a foreign judgment *by way of action*. The arguments of the Xs, in this case, were particularly convincing. According to Xs, since the foreign judgment did not order the defendants to perform any obligation

and since Xs merely sought formal recognition of the foreign judgment, there was no need to have the foreign judgment declared "enforceable" in accordance with the enforcement procedure provided for in Art. 222 FCPA.

However, the decisions of the Dubai courts that UAE courts are only entitled to "enforce" foreign judgments are particularly problematic. First, it demonstrates a serious confusion of basic fundamental notions of private international law. The fact that Xs sought to have the foreign judgment "declared valid" does not mean that Dubai courts were required to consider the foreign judgment's validity *as such* but rather to consider whether the foreign judgment could be *given effect in the UAE*, and this is a matter of "recognition". Secondly, the courts seem to have forgotten that – as indicated above – they did consider whether a foreign judgment could be given effect in the UAE, albeit incidentally. The fact that such an examination is brought before the court by way of action does not change in anything the nature of the problem in any way. Finally, in the absence of any specific provision on the recognition of foreign judgments, particularly where a party seeks to do so by way of action, there would appear to be nothing to prevent the courts from allowing an interested party to proceed by way of an ordinary action before the court of first instance since the ultimate purpose is not to declare the foreign judgment "enforceable", as this, indeed, would require compliance with the special procedure set out in Art. 222 FCPA. (For a discussion of the issue from the 2019 HCCH Judgments Conventions, see Béligh Elbalti, "Perspective of Arab Countries", *op.cit.*, pp. 183, 202, 205).

Van Den Eeckhout on CJEU Case Law in PIL matters

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

On 29 April 2023, Veerle Van Den Eeckhout gave a presentation on recent case law of the Court of Justice of the European Union. The presentation, now available

online, was entitled “CJEU case-law. A Few Observations on Recent CJEU Case Law with Attention for Some Aspects of Logic and Argumentation Theory.” The presentation was given during the Dialog Internationales Familienrecht 2023 at the University of Münster. This presentation builds upon a previous presentation of the Author, “Harmonized interpretation of regimes of judicial cooperation in civil matters?”, which is now also available online.

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

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

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

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

Harmonized interpretation of regimes of judicial cooperation in civil matters?

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

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

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

The PowerPoint of this presentation is available here.

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

English Court Judgment refused (again) enforcement by Dubai Courts

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

The case

1) Facts

The case's underlying facts show that a dispute arose out of a contractual relationship concerning the investment and subscription of shares in the purchase of a site located in London for development and resale. The original English decision shows that the parties were, on the one hand, two Saudi nationals (defendants in the UAE proceedings; hereinafter, "Y1 and 2"), and, on the other hand, six companies incorporated in Saudi Arabia, Anguilla, and England

(plaintiffs in the UAE proceedings, hereinafter "X *et al.*"). The English decision also indicates that it was Y1 and 2 who brought the action against X *et al.* but lost the case. According to the Emirati records, in 2013, X *et al.* were successful in obtaining (1) a judgment from the English High Court ordering Y1 and 2 to pay a certain amount of money, including interests and litigation costs, and, in 2015, (2) an order from the same court ordering the payment of the some additional accumulated interests (hereinafter collectively "English judgment"). In 2017, X *et al*. sought the enforcement of the English judgment in Dubai.

2) The Enforcement Odyssey…

a) First Failed Attempt

i) Dubai Court of First Instance (DCFI)

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

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

ii) Dubai Court of Appeal (DCA)

Before the DCA, X *et al*. sought to establish reciprocity with the UK by submitting

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

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

iii) Dubai Supreme Court (DSC)

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

b) Second Failed Attempt

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

fundamentally modify the existing enforcement regime but introduced two important changes.

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

The second concerns indirect jurisdiction. According to the old rules (former Art. 235 of the 1992 FCPA), the enforcement of a foreign judgment should be denied if (1) UAE courts had *international jurisdiction* over the dispute; and (2) the rendering court did not have jurisdiction according to (a) its own rules of international jurisdiction *and* (b) its rules on domestic/internal jurisdiction. Now, Art. 85(2)(a) of the 2018 Executive Regulation (new Art. 222(2)(a) of the 2022 FCPA) explicitly provides that the enforcement of the foreign judgment will be refused if the UAE courts have "exclusive" jurisdiction.

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

Comments

1) The case is interesting in many regards. *First,* it demonstrates the difficulty of enforcing foreign judgments in the UAE in general and Dubai in particular. Indeed, UAE courts (notably Dubai courts) have often refused to enforce foreign

judgments, in particular those rendered in non-treaty jurisdictions, based on the following grounds:

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

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

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

Second, the case shows that the enforcement process in the UAE, in general, and in Dubai, in particular, is challenging, and the outcome is unpredictable. This can be confirmed by comparing this case with some other similar cases. For example, in one case, the party seeking enforcement (hereinafter "X") unsuccessfully sought the enforcement of an American (Nevada) judgment against the judgment debtor (hereinafter "Y"). The DCFI first refused to enforce the American judgment for lack of jurisdiction (Y's domicile was in Dubai). The decision was confirmed on

appeal, but on the ground that X failed to establish reciprocity. Instead of appealing to the DSC, X decided to bring a new action on the merits based on the foreign judgment. The lower courts (DCFI and DCA) dismissed the action on the ground that it was, in fact, an action for the enforcement of a foreign judgment that had already been rejected by an irrevocable judgment. However, DSC quashed the appealed decision with remand, considering that the object of the two actions was different. Insisting on its position, the DCA (as a court of remand) dismissed the action again. However, on a second appeal, the DSC overturned the contested decision, holding that the foreign judgment was sufficient proof of the existence of Y's debt. The DSC finally ordered Y to pay the full amount indicated in the foreign judgment with interests (*DSC, Appeal No. 125/2017 of 27 April 2017*).

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

2) From a different perspective, one would wonder whether the recent

developments observed in the UAE could alleviate the rigor of the existing practice. These developments concern, in particular, (i) the standard based on which the jurisdiction of the foreign should be examined and (ii) reciprocity.

(i) Regarding the jurisdiction of the foreign court, the new article 222(2)(a) of the 2022 FCPA (which reproduces the formulation of article 85(2)(a) of the 2018 Executive Regulation introduced in 2018) explicitly states that foreign judgments should be refused enforcement if UAE courts "have *exclusive* jurisdiction over the dispute in which the foreign judgment was rendered" (emphasis added). The new wording suggests that the foreign court's indirect jurisdiction would be denied only if UAE courts claim "exclusive" jurisdiction over the dispute. Whether this change would have any impact on the enforcement practice remains to be seen. But one can be quite sceptical since, traditionally, UAE law ignores the distinction between "exclusive" and "concurrent" jurisdiction. In addition, UAE courts have traditionally considered the jurisdiction conferred to them as "mandatory", thus rendering virtually all grounds of international jurisdiction "exclusive" in nature. (See, e.g., the decision of the *Abu Dhabi Supreme Court, Appeal No. 71/2019 of 15 April 2019,* in which the Court interpreted the word "exclusive" in a traditional fashion and rejected the recognition of a foreign judgment despite the fact that the rendering court's jurisdiction was justified based on the treaty applicable to the case. But see *contra. DCFI, Case No. 968/2020 of 7 April 2021 op. cit*. which announces that a change can be expected in the future).

(ii) Regarding reciprocity, it has been widely reported that on 13 September 2022, the UAE Ministry of Justice (MOJ) sent a letter to Dubai Courts (i.e. the department responsible for the judiciary in the Emirate of Dubai) concerning the application of the reciprocity rule. According to this letter, the MOJ considered that reciprocity with the UK could be admitted since English courts had accepted to enforce UAE judgments (*de facto* reciprocity). Although this letter – which lacks legal force – has been widely hailed as announcing a turning point for the enforcement of foreign judgments in general and English judgments in particular, its practical values remain to be seen. Indeed, one should not lose sight that, according to the traditional position of Dubai courts, reciprocity can be established if the party seeking enforcement shows that the rendering State's enforcement rules are identical to those found in the UAE or less restrictive (see *DSC, Appeal No. 517/2015 of 28 August 2016, op. cit.*). For this, the party seeking enforcement needs to prove the content of the rendering Stat's law on the

enforcement of foreign judgments so that the court can compare the enforcement requirement in the state of origin and in the UAE. Dubai courts usually require the submission of a complete copy of the foreign provisions applicable in the State of origin duly certified and authenticated. The submission of expert opinions (e.g., King's Counsel opinion) or other documents showing that the enforcement of UAE judgments is possible was considered insufficient to establish reciprocity (see *DSC, Appeal No. 269/2005 of 26 February 2006, op. cit.*). The fact that the courts of the rendering State accepted to enforce a UAE judgment does not seem to be relevant as the courts usually do not mention it as a possible way to establish reciprocity. Future developments will show whether Dubai courts will admit *de facto* reciprocity and under which conditions.

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

Montenegro's legislative implementation of the EAPO

Regulation: setting the stage in civil judicial cooperation

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

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

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

In terms of substance, the specific provisions on the EAPO focus primarily on identifying the different authorities involved in the EAPO procedure from the moment it is granted to its enforcement. In broad terms, the content of the

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

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

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

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

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

The Supreme Administrative Court of Bulgaria's final decision in the Pancharevo case: Bulgaria is not obliged to issue identity documents for baby S.D.K.A. as she is not Bulgarian (but presumably Spanish)

This post was written bij Helga Luku, PhD researcher at the University of Antwerp.

On 1 March 2023, the Supreme Administrative Court of the Republic of Bulgaria issued its final decision no. 2185, 01.03.2023 (see here an English translation by Nadia Rusinova) in the *Pancharevo* case. After an appeal from the mayor of the Pancharevo district, the Supreme Administrative Court of Bulgaria ruled that the decision of the court of first instance, following the judgment of the Court of Justice of the European Union (CJEU) in this case, is "valid and admissible, but incorrect". It stated that the child is not Bulgarian due to the lack of maternal ties between the child and the Bulgarian mother, and thus there is no obligation for the Bulgarian authorities to issue a birth certificate. Hereafter, I will examine the legal reasoning behind its ruling.

Background

On 2 October 2020, the Administrative Court of the City of Sofia in Bulgaria requested a preliminary ruling from the CJEU in the case C-490/20 V.M.A. v.

Stolichna Obshtina, Rayon '*Pancharevo*'. It sought clarification on the interpretation of several legal provisions. Specifically, the court asked whether a Member State is obliged, under Article 4(2) of the Treaty on European Union (TEU), Articles 20 and 21 of the Treaty on the Functioning of the European Union (TFEU), and Articles 7, 24, and 45 of the Charter of Fundamental Rights of the European Union (the Charter), to issue a birth certificate to a child, who is a national of that Member State, in order to obtain the identity document. This inquiry arose with respect to a child, S.D.K.A., born in Spain, whose birth certificate was issued by Spanish authorities, in accordance with their national law. The birth certificate identifies a Bulgarian national, V.M.A., and her wife, a British national, as the child's mothers, without specifying which of the two women gave birth to the child.

The CJEU decided that Article 4(2) TEU, Articles 20 and 21 TFEU and Articles 7, 24 and 45 of the Charter, read in conjunction with Article 4(3) of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, must be interpreted as meaning that, in the case of a child, being a minor, who is a Union citizen and whose birth certificate, issued by the competent authorities of the host Member State, designates as that child's parents two persons of the same sex, the Member State of which that child is a national is obliged

- to issue to that child an identity card or a passport without requiring a birth certificate to be drawn up beforehand by its national authorities, and
- to recognise, as is any other Member State, the document from the host Member State that permits that child to exercise, with each of those two persons, the child's right to move and reside freely within the territory of the Member States.

The trajectory of the case within the Bulgarian courts

On the basis of the decision of the CJEU in the *Pancharevo* case, the referring court, i.e. the Administrative Court of the City of Sofia obliged the authorities of the *Pancharevo* district to draw up the birth certificate of S.D.K.A., indicating two women as her parents.

The mayor of the Pancharevo district then filed an appeal to the Supreme Administrative Court of Bulgaria, contending that the decision is inadmissible and

incorrect.

Based on its considerations, the Supreme Court held that the decision of the court of first instance is “valid and admissible but incorrect”. Its rationale is premised on several arguments. Firstly, it referred to Article 8 of the Bulgarian Citizenship Law, which provides that a Bulgarian citizen by origin is everybody of whom at least one of the parents is a Bulgarian citizen. In the present case, the Supreme Court deemed it crucial to ascertain the presence of the biological link of the child, S.D.K.A. with the Bulgarian mother, V.M.A. Thus, it referred to Article 60 of the Bulgarian Family Code, according to which the maternal origin shall be established by birth; this means that the child’s mother is the woman who gave birth to the child, including in cases of assisted reproduction. Therefore, the Supreme Court proclaimed in its ruling that the Bulgarian authorities could not determine whether the child was a Bulgarian citizen since the applicant refused to provide information about the child’s biological mother. Consequently, the authorities could not issue a birth certificate and register the child’s civil status. Furthermore, in a written defence presented to the court of first instance by the legal representative of V.M.A., it was provided that S.D.K.A. was born to K.D.K., the British mother, and the British authorities had also refused to issue a passport to the child, as she was not a British citizen.

The Supreme Administrative Court of Bulgaria ruled that the child is not a Bulgarian citizen, and the conclusion of the CJEU that the child is a Bulgarian citizen and thus falls within the scope of EU law (Articles 20 and 21 TFEU and Article 4 of Directive 2004/38/EC) is inaccurate. According to the Supreme Court’s legal reasoning, these provisions do not establish a right to claim the granting of Bulgarian citizenship, and Union citizenship is a prerequisite for enjoying free movement rights.

In these circumstances, the Supreme Administrative Court of Bulgaria held that the refusal to issue a birth certificate does not result in the deprivation of citizenship or the violation of the child’s best interests. It referred to the law of the host country, Spain. Article 17 of the Spanish Civil Code of July 24, 1889, provides that Spanish citizens by origin are persons born in Spain to parents:

- who are foreigners if at least one of the parents was born in Spain (except for the children of diplomatic or consular officials accredited to Spain),
- who are both stateless, or

- neither of whose national laws confer nationality on the child.

According to this Article, the Supreme Court reasoned that since the national laws of the parents named in the child's birth certificate (i.e. Bulgarian and UK legislation), issued in Spain, do not grant citizenship to the child, baby S.D.K.A. must be considered a Spanish citizen by virtue of this provision.

The applicability of Spanish law was expressly confirmed by the Spanish Government during the hearing at the CJEU, provided in paragraph 53 of Advocate General Kokott's Opinion, stating that if the child could claim neither Bulgarian nor UK nationality, she would be entitled to claim Spanish nationality. Thus, the Supreme Court ruled that the child is Spanish and averted the risk of leaving the child stateless.

Is the decision of the Supreme Administrative Court of Bulgaria in conformity with EU law interpretation?

In light of the ruling of the CJEU on the *Pancharevo* case, certain aspects might have required further scrutiny and more attention from the Supreme Court. Paragraph 68 of the *Pancharevo* judgment provides:

"*A child, being a minor, whose status as a Union citizen is not established and whose birth certificate, issued by the competent authorities of a Member State, designates as her parents two persons of the same-sex, one of whom is a Union citizen,* ***must be considered, by all Member States, a direct descendant of that Union citizen*** *within the meaning of Directive 2004/38 for the purposes of the exercise of the rights conferred in Article 21(1) TFEU and the secondary legislation relating thereto.*"

According to this paragraph, it can be inferred that Bulgaria and other Member States must recognize a child with at least one Union citizen parent as a direct descendant of that Union citizen. This paragraph has important implications as regards the establishment of the parent-child relationship. The CJEU, in its case law (C-129/18 SM v Entry Clearance Officer), has firmly established that the term "direct descendant" should be construed broadly, encompassing both biological and legal parent-child relationships. Hence, as a family member of the Bulgarian mother, according to Article 2 (2)(c) of Directive 2004/38, baby S.D.K.A., should enjoy free movement and residence rights as a family member of a Union citizen. In its decision, however, the Supreme Administrative Court of Bulgaria did not

conform to the CJEU's expansive understanding of the parent-child relationship. Therefore, its persistence in relying on its national law to establish parenthood exclusively on the basis of biological ties appears to contradict the interpretation of EU law by the CJEU.

The Supreme Administrative Court of Bulgaria seems relieved to discover that the child probably has Spanish nationality. It can be doubted, however, at what conclusion the court would have arrived if the child were not recognized as Spanish under Spanish nationality laws, especially considering that the child was not granted nationality under UK legislation either. In such a scenario, the Supreme Court might have explored alternative outcomes to prevent the child from becoming stateless and to ensure that the child's best interests are always protected.

UK Supreme Court in Jalla v Shell: the claim in Bonga spill is time barred

The UK Supreme Court ruled that the cause of action in the aftermath of the 2011 Bonga offshore oil spill accrued at the moment when the oil reached the shore. This was a one-off event and not a continuing nuisance. The Nigerian landowners' claim against Shell was thus barred by the limitation periods under applicable Nigerian law (*Jalla and another* v *Shell International Trading and Shipping Company and another [2023] UKSC 16, on appeal from [2021] EWCA Civ 63*).

On 10 May 2023, the UK Supreme Court has ruled in one of the cases in the series of legal battles started against Shell in the English courts in the aftermath of the Bonga spill. The relevant facts are summarized by the UK Supreme Court as follows at [6] and [7]:

> 6. (…) The Bonga oil field is located approximately 120 km off the coast of

Nigeria. The infrastructure and facilities at the Bonga oil field include a Floating Production Storage and Offloading unit ("FPSO"), which is linked to a Single Point Mooring buoy ("SPM") by three submersible flexible flowlines. The oil is extracted from the seabed via the FPSO, through the flowlines to the SPM, and then on to tankers. The Bonga Spill resulted from a rupture in one of the flexible flowlines connecting the FPSO and the SPM. The leak occurred overnight during a cargo operation when crude oil was being transferred from the Bonga FPSO through the SPM and onwards onto a waiting oil tanker on (…) 20 December 2011. The cargo operation and the leaking were stopped after about six hours.

7. As a result of the Bonga Spill, it is estimated that the equivalent of at least 40,000 barrels of crude oil leaked into the ocean. The claimants allege that, following its initial escape, the oil migrated from the offshore Bonga oil field to reach the Nigerian Atlantic shoreline'.

Some 27,830 Nigerian individuals and 457 communities stated that the spill had a devastating effect of the oil on the fishing and farming industries and caused damage to their land. They sued Shell in English courts. The claim was instituted against International Trading and Shipping Co Ltd (an English company, anchor defendant) and Shell Nigeria Exploration and Production Co Ltd (a Nigerian company, co-defendant).

The English courts have accepted jurisdiction, as it had happened in several cases based on a comparable set of facts relevant for establishing jurisdiction, as reported earlier on this blog here, here, here, here, and here. The jurisdiction and applicable law in the specific case of Bonga spill litigation have been closely followed inter alia by Geert van Calster here.

The case at hand is an appeal on a part of an earlier rulings. However, unlike some earlier claims, this is not a representative action, as the UK Supreme Court explicitly states at [8]. The crux of the ruling is the type of tort that the Bonga spill represents under Nigerian law, applicable to that case (on applicable law, see *Jalla & Anor* v *Shell International Trading and Shipping Company Ltd & Anor* [2023] EWHC 424 (TCC), at [348] ff.).

According to the Nigerian party, the spill gave rise to 'a continuing cause of action because there is a continuing nuisance so that the limitation period runs afresh from day to day,' as some oil has not been cleaned up and remained on the

coast. Shell submitted, on the contrary, that the spill was a one-off event, that the cause of action accrued with the coast was flooded, and that the claim was time barred under the relevant limitation statutes. The lower courts and the UK Supreme court agreed with Shell. They rule that the cause of action had accrued at the moment when the spilled oil had reached the shore. This occurred some weeks after the spill. As a result, at the moment of instituting the proceedings, the claim was time barred.

Noteworthy is the detail in which the UK Supreme Court discusses the authorities on the tort of nuisance under the heading '4. Four cases in the House of Lords or Supreme Court' at [17] ff. This degree of detail is certainly not surprising, due to the relevance of English law for the Nigerian legal system. In the meantime, it contrasts with the approach that would be adopted by a civil law tradition's court, if the case was brought under their jurisdiction. Firstly, in the civil law traditions, a claim governed by foreign law reaches the highest judicial authority only in exceptional cases. Secondly, if – as in this case – there were 'no prior case in English law that has decisively rejected or accepted the argument on continuing nuisance put forward by the claimants in this case,' a continental court might have come to the same conclusion, but finding the law would perhaps be much less business as usual for a continental court than for the UK Supreme Court.

The footage of the hearings available on the website of the UK Supreme Court is most enlightening on the Court's approach and reasoning.

Data on Choice-of-Court Clause Enforcement in US

The United States legal system is immensely complex. There are state courts and federal courts, state statutes and federal statutes, state common law and federal common law. When I imagine a foreign lawyer trying to explain this system to a foreign client, my heart fills with pity.

This feeling of pity is compounded when I imagine this same lawyer trying to

advise her client as to whether a choice-of-court clause will be enforced by a court in the United States. The law on this subject is complicated. It is, moreover, not easy to determine how it is applied in practice. Are there differences in clause enforcement rates across the states? Across federal circuits? Do state courts enforce these clauses at the same rate as federal courts? Until recently, there was no data that would allow a foreign lawyer – or a U.S. lawyer, for that matter – to answer any of these questions.

Over the past several years, I have authored or co-authored several empirical articles that seek to answer the questions posed above. This post provides a summary of the data gathered for these articles. All of the cases referenced involve outbound choice-of-court clauses, i.e. clauses that select a jurisdiction other than the one where the suit was filed. Readers interested in the data collection process, the caveats to which the data is subject, or other methodological issues should consult the articles and their appendices. This post first describes state court practice. It then describes federal court practice. It concludes with a brief discussion comparing the two.

State Courts

Most state courts have held that choice-of-court clauses are presumptively enforceable. These courts will not, however, enforce a clause when it is unreasonable or contrary to public policy. A clause may be deemed unreasonable when enforcement would result in duplicative litigation, when the plaintiff cannot obtain relief in the chosen forum, when the plaintiff was never provided with notice of the clause, when the chosen forum lacks any relationship to the parties, or when litigation in the chosen forum would be so gravely difficult and inconvenient that the plaintiff would be deprived of her day in court. A clause is contrary to public policy when a statute or a judicial decision declares that enforcement is inconsistent with the policy of the state.

The chart below lists the enforcement rate in state courts with at least fifteen judicial decisions between 1972 and 2019 and at least ten judicial decisions between 2010 and 2020. These rates were calculated by dividing (1) the total number of cases where a clause was enforced by (2) the total number of cases

where the court considered the issue of enforceability.

State	Enforcement Rate 1972-2019	Enforcement Rate 2010-2020
California	80%	78%
Connecticut	71%	88%
Delaware	89%	100%
Florida	78%	100%
Georgia	67%	54%
Illinois	74%	83%
Louisiana	78%	70%
Michigan	78%	82%
New Jersey	63%	64%
New York	79%	76%
Ohio	78%	73%
All States	**77%**	**79%**

Between 1972 and 2019, state courts enforced choice-of-court clauses in 77% of cases. Between 2010 and 2020, they enforced them in 79% of cases. The state courts in Florida and Connecticut have become more likely to enforce in recent years. The state courts in Georgia have become less likely to enforce in recent years. The state courts in California, New Jersey, and New York have been relatively consistent in their enforcement practice over time.

These data indicate that while there are significant differences in enforcement rates in state court across the United States, choice-of-court clauses are given effect in most cases.

Federal Courts

Like state courts, federal courts take the position that choice-of-court clauses are presumptively enforceable. Like state courts, federal courts will not enforce these clauses when they are unreasonable or contrary to public policy. Unlike state

courts, federal courts do not apply state law to decide the issue of enforceability. They apply federal common law. This means that the federal courts are free to adopt their own view of whether a clause is unreasonable or contrary to public policy without considering prior state court decisions.

In theory, the fact that the federal courts apply federal common law to this question should produce uniform results across the nation. In fact, there are notable variations in enforcement rates across federal district courts sitting in different circuits, as shown in the chart below.

Circuit	Enforcement Rate All Federal Cases 2014-2020
Eleventh Circuit	95%
Third Circuit	92%
Second Circuit	91%
Sixth Circuit	91%
Fifth Circuit	90%
Fourth Circuit	90%
All Circuits	**88%**
Seventh Circuit	87%
First Circuit	84%
Eighth Circuit	85%
Tenth Circuit	83%
Ninth Circuit	81%

The federal district courts sitting in the Eleventh Circuit, which includes Florida, have the highest enforcement rate. The federal district courts sitting in the Ninth Circuit, which includes California, have the lowest enforcement rate. On the whole, a plaintiff arguing that a choice-of-court clause is unenforceable would rather be in federal court in California than in Florida. Even in California, however, these clauses are still enforced by federal courts in the overwhelming majority of cases.

Comparing State and Federal Courts

Federal courts sitting in diversity enforce choice-of-court clauses at a rate that is equal to or greater than the rate of geographically proximate state courts in every federal circuit. In the Fourth and Eighth Circuits, the enforcement gap is particularly large, as shown in the chart below.

Circuit	Enforcement Rate State Cases (2010-2020)	Enforcement Rate Federal Diversity Cases (2014-2020)	Difference
Fourth Circuit	67%	96%	29%
Eighth Circuit	64%	88%	24%
Sixth Circuit	73%	93%	20%
Third Circuit	76%	95%	19%
Eleventh Circuit	78%	96%	18%
Second Circuit	78%	94%	16%
First Circuit	79%	94%	15%
Overall	**79%**	**90%**	**11%**
Ninth Circuit	78%	85%	7%
Tenth Circuit	86%	91%	5%

Fifth Circuit	90%	90%	0%
Seventh Circuit	85%	85%	0%

These data suggest that a defendant seeking to enforce a choice-of-court clause should try to remove the case to federal court. These courts are, on average, more likely to enforce a clause than their state counterparts. The data further suggest that plaintiffs seeking to invalidate a choice-of-court clause should strive to keep the case in state court. These courts are, on average, less likely to enforce a clause than their federal counterparts. The incentives for forum shopping as between state and federal court when it comes to choice-of-court clauses raise serious concerns under the U.S. Supreme Court's decision in *Erie Railroad Company v. Tompkins,* as discussed at greater length here,

There are two main reasons why the enforcement rate is higher in federal court. First, some federal courts applying federal law refuse to give effect to state statutes that invalidate choice-of-court clauses. When these invalidating statutes are applied by state courts and ignored by federal courts, the result is a sizable enforcement gap. The Supreme Court recently denied cert in a case that would have resolved the question of whether federal courts should give effect to state statutes that invalidate choice-of-court clauses.

Second, federal courts applying federal law are less willing than state courts applying state law to conclude that a clause is unreasonable. Over many cases decided over many years, state court judges have shown themselves to be more sympathetic to plaintiffs seeking to avoid choice-of-court clauses. Federal courts, by comparison, have enforced clauses in a number of instances where state courts probably would have refused on unreasonableness grounds.

Conclusion

The law of choice-of-court clauses in the United States is sprawling and complicated. Until recently, there were no empirical studies addressing how the courts applied this law in practice. The information presented above is the product of hundreds of hours of work reading thousands of state and federal cases in an attempt to identify patterns and trends.

Readers interested in learning more about state court practice should look here and here. Readers interested in learning more about federal court practice should look here. Readers interested in learning more about the differences between state and federal practice – and the *Erie* problems generated by these differences – should look here.

[A version of this post is cross-posted at Transnational Litigation Blog.]