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.]

Polish Constitutional Court about to review the constitutionality of the jurisdictional immunity of a foreign State?

Written by Zuzanna Nowicka, lawyer at the Helsinki Foundation for Human Rights and lecturer at Department of Logic and Legal Argumentation at University of Warsaw

In the aftermath of the judgment of the ICJ of 2012 in the case of the Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening) that needs no presentation here (for details see, in particular, the post by Burkhard Hess), by its judgment of 2014, the Italian Constitutional Court recognized the duty of Italy to comply with the ICJ judgment of 2012 but subjected that duty to the "fundamental principle of judicial protection of fundamental rights" under Italian constitutional law (for a more detailed account of those developments see this post on EAPIL by Pietro Franzina and further references detailed there). In a nutshell, according to the Italian Constitutional Court, the fundamental human rights cannot be automatically and unconditionally sacrificed in each and every case in order to uphold the jurisdiction immunity of a foreign State allegedly responsible for serious international crimes.

Since then, the Italian courts have reasserted their jurisdiction in such cases, in

some even going so far as to decide on the substance and award compensation from Germany. The saga continues, as Germany took Italy to the ICJ again in 2022 (for the status of the case pending before the ICJ see here). It even seems not to end there as it can be provocatively argued that this saga has its spin-off currently taking place before the Polish courts.

A. Setting the scene…

In 2020, a group of members of the Sejm, lower chamber of the Polish Parliament, brought a request for a constitutional review that, in essence, concerns the application of the jurisdictional immunity of the State in the cases pertaining to liability for war crimes, genocide and crimes against humanity. The request has been registered under the case number K 25/20 (for details of the, in Polish, see here; the request is available here). This application is identical to an application previously brought by a group of members of the lower chamber of the Parliament in the case K 12/17. This request led to no outcome due to the principle according to which the proceedings not finalized during a given term of the Sejm shall be closed upon the expiration of that term.

This time, however, the Polish Constitutional Court has even set the date of the hearing in the case K 25/20. It is supposed to take place on May 23, 2023.

The present post is not drafted with the ambition of comprehensively evaluating the request for a constitutional review brought before the Polish Constitutional Court. Nor it is intended to speculate on the future decision of that Court and its ramifications. By contrast, while the case is still pending, it seems interesting to provide a brief overview of the request for a constitutional review and present the arguments put forward by the applicants.

Under Polish law, a request for a constitutional review, such as the one in the case K 25/20, can be brought before the Polish Constitutional Court by selected privileged applicants, with no connection to a case pending before Polish courts.

Such a request has to identify the legislation that raise concerns as to its conformity with the Polish constitutional law (“subject of the review”, see point B below) and the relevant provisions of the Polish Constitution of 1997 against which that legislation is to be benchmarked against (“standard of constitutional review”, see point C). Furthermore, the applicant shall identify the issues of

constitutional concern that are raised by the said legislation and substantiate its objections by arguments and/or evidence (see point D).

B. Subject of constitutional review in question

By the request for a constitutional review of 2020, the Polish Constitutional Court is asked to benchmark two provisions of Polish Code of Civil Procedure (hereinafter: "PL CCP") against the Polish constitutional law, namely Article 1103[7](2) PL CCP and Article 1113 PL CCP.

i) Article 1103[7](2) PL CCP

The first provision, Article 1103[7] PL CCP lays down rules of direct jurisdiction that, in practice, can be of application solely in the cases not falling within the ambit of the rules of direct jurisdiction of the Brussels I bis Regulation. In particular, pursuant to Article 1103[7](2) PL CCP, the Polish courts have jurisdiction with regard to the cases pertaining to the extra-contractual obligations that arose in Poland.

In the request for a constitutional review of 2020, the applicants argue that, according to the settled case law of the Polish Supreme Court, Article 1103[7](2) PL CCP does not cover the torts committed by a foreign State to the detriment of Poland and its nationals. For the purposes of their request, the applicants do focus on the non-contractual liability of a foreign State resulting from war crimes, genocide and crimes against humanity. The applicants claim that, according to the case law of the Polish Supreme Court, such a liability is excluded from the scope of Article 1103[7](2) PL CCP.

Against this background, it has to be noted that the account of the case law of the Polish Supreme Court is not too faithful to its original spirit. Contrary to its reading proposed by the applicants, the Polish Supreme Court does not claim that the scope of application of the rule of direct jurisdiction provided for in Article 1103[7](2) PL CPP is, *de lege lata*, circumscribed and does not cover the liability of a foreign State for international crimes. In actuality, this can be only seen as the practical effect of the case law of the Polish Supreme Court quoted in the request for a constitutional review. Pursuant to this case law, also with regard to

liability for international crimes, the foreign States enjoy jurisdiction immunity resulting from international customary law, which prevents claimants from suing those States before the Polish courts.

ii) Article 1113 PL CPP

The second provision subject to constitutional review is Article 1113 PL CPP, according to which jurisdictional immunity shall be considered by the court *ex officio* in every phase of the proceedings. If the defendant can rely on the jurisdictional immunity, the court shall reject the claim. According to the applicants, the Polish courts infer from this provision of the PL CPP the right of the foreign States to rely on the jurisdictional immunity with regard to the cases on liability resulting from war crimes, genocide and crimes against humanity.

C. Standard of constitutional review (relevant provisions of Polish constitutional law)

In the request for a constitutional review of 2020, four provisions of Polish constitutional law are referred to as the standard of constitutional review, namely:

i) Article 9 of the Polish Constitution of 1997 ("Poland shall respect international law binding upon it");

according to the applicants, due to the general nature of Article 9, it cannot be deduced thereof that the rules of international customary law are directly binding in Polish domestic legal order. The applicants contend that the Polish Constitution of 1997 lists the sources of law that are binding in Poland. In particular, Article 87 of the Constitution indicates that the sources of law in Poland are the Constitution, statutes, ratified international agreements, and regulations. No mention is made there to the international customary law. Thus, **international customary law does not constitute a binding part of the domestic legal order and is not directly applicable in Poland. Rather, Article 9 of the Polish Constitution of 1997 must be understood as providing for the obligation to respect international customary law exclusively "in the**

sphere of international law”;

ii) Article 21(1) of the Polish Constitution of 1997: “Poland shall protect ownership and the right of succession”,

here, the applicants contend that Article 21(1) covers not only the property currently owned by the individuals, but also property that was lost as a result of the international crimes committed by a foreign State, which, had it not been lost, would have been the subject of inheritance by Polish nationals;

iii) Article 30 of the Polish Constitution of 1997: “The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities”,

the applicants infer from Article 30 that the respect and protection of dignity is the duty of public authorities. Such a protection can be guaranteed by creating an institutional and procedural framework, which enables the pursuit of justice against the wrongdoers who have taken actions against human dignity. For the applicants, this is particularly relevant in the case of liability for war crimes, genocide and crimes against humanity;

iv) Article 45(1) of the Polish Constitution of 1997: “Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court”,

in short, Article 45(1) enshrines to the right to access to a court; this provision conceptualizes this right as a mean by which the protection of other freedoms and rights guaranteed by the Constitution can be realized; the applicants argue that the jurisdictional immunity of a foreign State is a procedural rule that, in its essence, limits the right to a court. They acknowledge that the right to a court is not an absolute right and it can be subject to some limitations. However, the Constitutional Court should examine whether the limitation resulting from the operation of jurisdiction immunity is proportionate.

D. Issues and arguments raised by the request for a constitutional review

After having presented the subject of the request and the relevant provisions of Polish constitutional law, the applicants identify the issues of constitutional concern that, in their view, are raised by the jurisdictional immunity of a foreign State upheld via the operation of Article 1103[7](2) PL CCP and Article 1113 PL CCP in the cases on the liability resulting from international crimes. The applicants then set out their arguments to substantiate the objection of non-constitutionality directed at Article 1103[7](2) PL CCP and Article 1113 PL CCP.

The main issue and arguments put forward boil down to the objection that the upholding of the jurisdictional immunity results in the lack of access to a court and infringes the right guaranteed in the Polish Constitution of 1997, as well as enshrined in the international agreements on human rights, ratified by Poland,

- in this context, first, the applicants reiterate the contention that **while ratified international agreements constitute a part of the domestic legal order, this is not the case of the rules of international customary law**; furthermore, in order to "reinforce" this contention, a recurring statement appears in the request for a constitutional review, according to which the international customary law is not consistently applied with regard to the jurisdictional immunity of a foreign State;

- second, **a foreign State cannot claim immunity from the jurisdiction of a court of another State in proceedings which relate to the liability for war crimes, genocide or crimes against humanity, if the facts which occasioned damage occurred in the territory of that another State**; there is a link between those international crimes and the territory of the State of the forum and the latter must be authorised to adjudicate on the liability for those acts;

- third, the applicant claim that **a foreign State does not enjoy jurisdictional immunity in the cases involving clear violations of universally accepted rules of international law** – a State committing such a violation implicitly waives its immunity;

- fourth, the applicants acknowledge the ICJ judgment of 2012 but claim that it (i) failed to take into account all the relevant precedent on the scope of jurisdictional immunity; (ii) held that the illegal acts constituted *acta iure imperii*, disregarding the conflict between the jurisdictional immunity and the acts violating fundamental human rights; (iii) preferred not to explicitly address the question as to whether the jurisdictional immunity should be enjoyed by a State that violated human dignity or not – doing so, the ICJ left space for the national courts to step in; (iv) the ICJ judgments are biding only to the parties to the proceedings; with regard to the non-parties they have the same binding force as national decisions; (v) due to the evolving nature of the doctrine of jurisdictional immunity and its scope, a national court can settle the matter differently than the ICJ did in 2012.

Subsequent issues of constitutional concern seem to rely on the same or similar arguments and concern:

- violation of international law binding Poland due to the recognition of jurisdictional immunity of a State with regard to the cases on liability for war crimes, genocide or crimes against humanity;
- violation of the human dignity as there is no procedural pathway for claiming the reparation of damages resulting from those international crimes;
- violation of the protection of ownership and other proprietary rights by barring the actions for damages resulting from those international crimes.

E. The controversies regarding the Constitutional Court

The overview of the request for a constitutional review in the case K 25/20 would not be complete without a brief mention of the current state of affairs in the Polish Constitutional Court itself.

In the 2021 judgement in Xero Flor v. Poland, the European Court of Human Rights held, in essence, that the Constitutional Court panel composed in violation of the national constitution (i.e. election of one of the adjudicating judges "vitiated by grave irregularities that impaired the very essence of the right at issue") does

not meet the requirements allowing it to be considered a “tribunal established by law” within the meaning of the Article 6(1) of the European Convention.

One of the judges sitting on the panel adjudicating the case K 25/20 was elected under the same conditions as those considered by the ECHR in its 2021 judgment. The other four were elected during the various stages of the constitutional crisis ongoing since 2015. In practice, and most regretfully, the case K 25/20 that revolves around the alleged violation of the right to a court provided for in Polish constitutional law risks to be deliberated in the circumstances that, on their own, raise concerns as to the respect of an equivalent right enshrined in the European Convention.

The Greek Supreme Court has decided: Relatives of persons killed in accidents are immediate victims

A groundbreaking judgment was rendered last October by the Greek Supreme Court. Relatives of two Greek crew members killed in Los Llanos Air Base, Spain, initiated proceedings before Athens courts for pain and suffering damages (solatium). Although the action was dismissed by the Athens court of first instance, and the latter decision was confirmed by the Athens court of appeal, the cassation was successful: The Supreme Court held that both the Brussels I bis Regulation and the Lugano Convention are establishing international jurisdiction in the country where the relatives of persons killed are domiciled, because they must be considered as direct victims.

THE FACTS

On 26 January 2015, an F-16D Fighting Falcon jet fighter of the Hellenic Air Force crashed into the flight line at Los Llanos Air Base in Albacete, Spain, killing 11 people: the two crew members and nine on the ground.

The relatives of the Greek crew members filed actions for pain and suffering damages before the Athens court of first instance against a US (manufacturer of the aircraft) and a Swiss (subsidiary of the manufacturer) company. The action was dismissed in 2019 for lack of international jurisdiction. The appeals lodged by the relatives before had the same luck: the Athens court of appeal confirmed in 2020 the first instance ruling. The relatives filed a cassation, which led to the judgment nr. 1658/5.10.2022 of the Supreme Court.

THE JUDGMENT OF THE SUPREME COURT

Out of a number of cassation grounds, the Supreme Court prioritized the examination of the ground referring to the international jurisdiction deriving from Articles 7(2) Brussels I bis Regulation and 5(3) Lugano Convention 2007. Whereas the analysis of the court was initially following the usual path, established by the CJEU and pertinent legal scholarship, namely, that third persons suffering moral (immaterial) damages are classified as indirect victims of torts committed against their relative, when the accident results in the death of the relative, they have to be considered as direct victims, which leads to their right to file a claim for damages (solatium) in the courts of their domicile.

In particular, the analysis of the Supreme Court is the following:

1. Articles 7(2) Brussels I bis Regulation and 5(3) Lugano Convention 2007

'*With regard to the mental suffering caused by the incident as a result of the tort, after his death, the relative can no longer be subject to rights (and obligations) and, therefore, have claims against the wrongdoer.*

In this case, the relatives of the deceased have by law a personal claim against the defendants, since the infliction of mental suffering is a primary and direct damage to their person; therefore, the place of its occurrence is important for the establishment of the court's international jurisdiction in the court which this place is located, for the adjudication of their respective claim.

In other words, the infliction of mental suffering is a direct injury to the persons

close to the deceased; it is separate and independent from the primary injury suffered by the latter, without this mental suffering being considered, due to the previous injury of the deceased, as indirect damage. The wrongdoer's behavior, considered independently, also constitutes an independent reason for an obligation towards them for monetary satisfaction (and compensation), without the mental suffering caused presupposing any other damage to the above persons, so that it could be characterized as a consequence of it, and, consequently , as indirect with respect to this damage.

The place where the mental suffering comes from is not the place, where by chance the person was informed of the death of his relative and felt the mental pain, but the place of his main residence, where he mainly and permanently suffers this pain, which certainly has a duration of time and, therefore, burdens him not all at once, but for a long, as a rule, period of time.

It should be noted that, according to Greek law, in the case of tortious acts, a claim for compensation and monetary satisfaction due to moral damage is only available to the person immediately harmed by the act or omission, and not by the third party indirectly injured. Hence, where Article 932 of the Civil Code states that, in the event of the death of a person, monetary compensation may be awarded to the victim's family due to mental distress, it clearly considers the relatives of the deceased as immediately damaged and, in any case, fully equates them with their primary affected relative.

In view of the above, articles 7(2) of Regulation 1215/2012 and 5(3) of the Lugano Convention, have the meaning that the mental suffering, which is connected to the death of a person as a result of a tort committed in a member state, and which is suffered by the relatives of this victim, who reside in another member state, constitutes direct damage in the place of their main residence. Therefore, the court, in whose district the person, who suffered mental anguish due to the death of his relative, has his residence, has territorial competence and international jurisdiction to adjudicate the claim arising from the mental suffering caused for the payment of damages.

The above conclusion also results from the grammatical interpretation of the above provisions, given that they do not make any distinction as to whether the damage concerns the primary sufferer or other persons, but only require that the damage caused to the plaintiff may be characterized as direct.

An opposite opinion would necessarily lead in this case to the international jurisdiction only of the court of the place where the damaging event occurred, a solution, however, that is not in accordance with the interpretation of the above rules by the CJEU, which accepts, without distinction or limitation, equally and simultaneously, the international jurisdiction of the place where the direct damage occurred.

2. The interdependence of Brussels I bis Regulation and Rome II Regulation

It is true that in the interpretation of Article 4(1) Regulation 864/2007 on the law applicable to non-contractual obligations, the CJEU ruled that, damages connected with the death of a person due to such an accident within the Member State of the trial court, suffered by the victim's relatives residing in another Member State, must be characterized as "indirect results" of the said accident, under the meaning of the provision in question (case Florin Lazar v Allianz SpA, C-350/14).

However, in addition to the fact that this judgment concerned the choice of applicable law, the same court has accepted that, according to recital 7 Regulation 864/2007, the intention of the EU legislator was to ensure consistency between Regulation 44/2001 (already 1215/2012), and the material scope as well as the provisions of Regulation 864/2007; however, "it does not follow in any way that the provisions of Regulation 44/2001 must, for this reason, be interpreted in the light of the provisions of Regulation 864/2007. In no case can the intended consequence result in an interpretation of the provisions of Regulation 44/2001, inconsistent with the system and its purposes.

And the Supreme Court concluded:

According to all of the above, pursuant to the provision of article 35 of the Civil Code, as interpreted in the light of articles 7(2) Regulation 1215/2012 and 5(3) Lugano Convention, the Greek courts have international and local jurisdiction to adjudicate claims for payment of reasonable monetary satisfaction due to mental anguish, as a result of the death of a relative of the claimants, committed in another Member State, if the claimants reside in the court's district.

THE MINORITY OPINION

One member of the Supreme Court distanced himself from the panel, and submitted a minority opinion, which was founded on the prevailing opinion followed by the CJEU and legal scholarship. In particular, according to the minority report, the damage caused to the claimants due to the death of their relative remains an indirect one, given that the damage caused was of a reflective and not of a direct nature. The minority opinion emphasized also on the predictability factor, which was not elaborated by the panel.

COMMENTS

The judgment of the Supreme Court opens the Pandora's box in a matter well settled so far. An earlier judgment rendered by the Italian Supreme Court followed the prevailing view [*see Corte di Cassazione (IT) 11.02.2003 – 2060 – Staltari e altre ./. GAN IA Compagnie française SA ed altri*, available in: unalex Case law Case IT-19].

In matters where national courts wish to deviate from the prevalent, if not unanimous view taken by the CJEU and European legal scholarship, the most prudent solution would be to address the matter to the Court, by filing a request for a preliminary ruling. The latter applies to both international jurisdiction, and interdependence between the Brussels I bis and the Rome II Regulation.

Standard (and burden) of proof for jurisdiction agreements

Courts are often required to determine the existence or validity of jurisdiction agreements. This can raise the question of the applicable standard of proof. In common law jurisdictions, the question is not free from controversy. In particular, Stephen Pitel has argued on this very blog that jurisdiction clauses

should be assessed on the balance of probabilities, as opposed to the "good arguable case" standard that is commonly applied (see, in more detail, Stephen Pitel and Jonathan de Vries "The Standard of Proof for Jurisdiction Clauses" (2008) 46 Canadian Business Law Journal 66). That is because the court's determination on this question will ordinarily be final – it will not be revisited at trial.

In this post, I do not wish to contribute to the general debate about whether the "good arguable case" standard is appropriate when determining the existence and validity of jurisdiction agreements. Rather, I want to draw attention to a particular feature of the English "good arguable case" standard that can cause problems when applied to jurisdiction agreements. The feature is that, in cases where the court is unable to say who has "the better argument", it will proceed on the basis of plausibility (*Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10, [2019] WLR 3514 at [79]-[80]). Application of this lower standard may lead to unfairness in the treatment of jurisdiction agreements. The party who bears the burden of proof will get the benefit of the doubt that is inherent in the test. However, there is no principled way to allocate the burden. Should it be the party seeking to rely on the agreement, with the result that there is a kind of bias in favour of upholding jurisdiction agreements, or should it be the plaintiff, as was the approach taken recently by the New Zealand High Court in *Kea Investments Ltd v Wikeley Family Trustee Limited* [2023] NZHC 466?

The High Court in that case had granted an interim anti-enforcement injunction in relation to a default judgment from Kentucky (see *Kea Investments Ltd v Wikeley Family Trustee Limited* [2022] NZHC 2881, and my earlier post here). Kea Investments Ltd (Kea), a British Virgin Islands company, alleged that the US default judgment was based on fabricated claims intended to defraud Kea. It claimed that the defendants – a New Zealand company, an Australian resident with a long business history in New Zealand, and a New Zealand citizen – had committed a tortious conspiracy against it and sought a declaration that the Kentucky judgment would not be recognised or enforceable in New Zealand. Two of the defendants – Wikeley Family Trustee Limited and Mr Wikeley – protested the Court's jurisdiction.

The Court set aside the protest to jurisdiction, dismissing an argument that Kea

was bound by a US jurisdiction clause. One of the reasons for this was that the jurisdiction clause was unenforceable by virtue of Kea's allegations of fraud and conspiracy (see here for a more extensive case note). The Court applied the "good arguable case" standard to determine the relevance of the allegations. It relied on the test in *Four Seasons Holding Inc v Brownlie* [2017] UKSC 80, which sets out the good arguable case standard applicable to "jurisdictional facts" that form the basis for an application to serve proceedings outside of the forum. Gault J considered that, even though the test in *Four Seasons* was concerned with the different scenario of a plaintiff seeking to establish jurisdictional facts to support an assumption of jurisdiction by the forum court, it was appropriate to apply the test by analogy to the defendants' application for a stay or dismissal of the New Zealand proceeding by virtue of the US jurisdiction clause (at [44]).

However, the good arguable case test is especially difficult to apply in cases where the court is unable "to form a decided conclusion on the evidence before it and is therefore unable to say who has the better argument" (at *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10, [2019] WLR 3514 at [79]). In such cases, the good arguable case inquiry is no longer a relative inquiry, and all that is needed is a plausible (albeit contested) evidential basis. It follows that the question of the *burden* of proof may become determinative.

Gault J considered that it was the plaintiff, Kea, that had to show a plausible evidential basis here. Thus, the Judge considered that Kea had to show "a plausible evidential basis" for its argument that there was no jurisdiction clause: "[t]he test is whether there is a plausible (albeit contested) evidential basis for the claimant's case in relation to the jurisdiction clause (by analogy with the application of the relevant gateway). It is not whether the defendants have a plausible (albeit contested) evidential basis for their position that the Coal Agreement was executed by Kea" (at [60], see also [63]). In other words, it was Kea who was given the benefit of the doubt inherent in the test, and not the defendants.

It is likely that Gault J's approach can at least to some extent be explained by reference to the peculiar facts of the case. However, if his approach were adopted more generally, the result would be that in cases of evidential uncertainty that cannot be resolved, the good arguable case inquiry necessarily favours plaintiffs over defendants, and New Zealand jurisdiction agreements over foreign

jurisdiction agreements. This would not be a desirable outcome.

The alternative is that the burden is on the party seeking to enforce the jurisdiction agreement. This seems to be the view adopted by *Dicey, Morris and Collins on the Conflict of Laws* (16th ed, at [12-093]). However, this approach is problematic too, because it introduces a bias in favour of upholding jurisdiction agreements. In *Kaefer*, the plaintiffs sought to rely on an English jurisdiction agreement under Art 25 of the recast Brussels Regulation. Commenting on the case, Andrew Dickinson argued that the application of the test of plausibility was not consistent with the scheme of the Regulation, which requires that "the defendant, not the claimant, … be given the benefit of the doubt" ("Lax Standards" 135 (2019) LQR 369). Dickinson pointed to the "significant unfairness to the defendant of being required to defend proceedings before a court other than that of his domicile in the absence of conclusive and relevant evidence that the court has jurisdiction under the Regulation". I think that the concern is valid more generally. Why should any party – whether it is the defendant or the claimant – be held to a jurisdiction agreement even though there is only a plausible basis for its existence?

It follows that courts should always try to engage in a relative inquiry when determining the existence and validity of jurisdiction agreements. It is likely that this is already occurring in practice, and so perhaps the concerns raised in this post are more theoretical than real. If so, it is in the interest of legal certainty and accessibility that the test be clarified.

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

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

In December 2022, Chinese lawmakers published a draft law on foreign state

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

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

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

Immunity from Attachment and Execution

Articles 13 and 14 of China's draft law cover the immunity of foreign state property from "judicial compulsory measures," which the U.N. Convention calls "measures of constraint" and the U.S. Foreign Sovereign Immunities Act (FSIA) refers to as measures of attachment and execution. They include both pre-judgment measures to preserve assets and post-judgment measures to enforce judgments. Under customary international law, immunity from attachment and execution is separate from and generally broader than immunity from suit. It protects foreign state property located in the forum state, in this case the property of foreign states located in China.

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

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

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

Upon reflection, however, it appears that China's limitation of draft Article 13(3) to Chinese court judgments sets it apart from the U.S. practice as well as the U.N. Convention. In the United States, a party holding a foreign judgment may seek recognition of that judgment in U.S. courts, thereby converting it into a U.S. judgment. Because the U.S. judgment recognizing the foreign judgment falls within the scope of § 1610(a), it is possible to attach the property of a foreign state in the United States to enforce a non-U.S. judgment.

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

There are other differences between the U.S. FSIA and China's draft law. With respect to the property of a foreign state itself, the FSIA requires that the

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

Service of Process

China's draft law also provides for service of process on a foreign state. Article 16 states that service may be made as provided in treaties between China and the foreign state or "by other means acceptable to the foreign state and not prohibited by the laws of the People's Republic of China." (The United States and China are both parties to the Hague Service Convention, which provides for service through the receiving state's Central Authority.) If neither of these means is possible, then service may be made by sending a diplomatic note. A foreign state may not object to improper service after it has made a pleading on the merits. Again, this provision closely follows the U.N. Convention, specifically Article 22.

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

Default Judgment

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

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

Foreign Officials

Article 2 of China's draft law defines "foreign state" to include "natural persons … authorized … to exercise sovereign powers." Thus, unlike the U.S. FSIA, China's draft law may cover the immunity of some foreign officials.

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

It appears that China's draft law would govern the conduct-based immunity of

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

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

Conclusion

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

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

What is a Judgment (in the context of Reg 655/2014)? – CJEU Case

C-291/21 Starkinvest

Less than half a year after the CJEU's decision in Case C-646/20 *Senatsverwaltung für Inneres* (discussed here by Krzysztof Pacula), the Court had to engage again with the question of what constitutes a "judgment" in the sense of an EU instrument in Case C-291/21 *Starkinvest*.

This time, the question arose in the context of Regulation 655/2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters. The regulation envisages two kinds of situation:

1. The creditor has already obtained a "judgment" (Art. 7(1)): In this case, the creditor only needs to show that there is an urgent need for a protective measure to ensure that the judgment can be effectively enforced against the debtor.
2. The creditor has not yet obtained a "judgment" (Art. 7(2)): In this case, the creditor *also* needs to show "that he is likely to succeed on the substance of his claim against the debtor".

In *Starkinvest*, the claimant had obtained a decision from the Tribunal de commerce de Liège, Belgium, that ordered the debtor to cease seeling certain goods, subject to a penalty payment of EUR 2 500 per breach. On the basis of that decision, they later sought payment of EUR 85 000 in penalties, which they requested the referring court to secure through a European Account Preservation Order. Confronted with the question of how to characterise the initial decision in the context of the above dichotomie, the court referred the case to the CJEU.

The CJEU followed the advice of Advocate General Szpunar, holding that

> *Article 7(2) of [the Regulation] must be interpreted as meaning that a judgment that orders a debtor to make a penalty payment in the event of a future breach of a prohibitory order and that therefore does not definitively set the amount of that penalty payment does not constitute a judgment requiring the debtor to pay the creditor's claim, within the meaning of that provision, such that the creditor who requests a European Account Preservation Order is not exempt from the obligation to provide sufficient evidence to satisfy the court before*

> *which an application for that order is brought that he or she is likely to succeed on the substance of his or her claim against the debtor.*

In reaching that decision, the court emphasised the fact that in a case like this, the precise amount of the debt had not yet been established by a court (see paras. 51–52, 55); accordingly, there was no sufficient justification for exempting the claimant from the requirement to satisfy the court that they are likely to succeed on the merits.

International commercial courts for Germany?

This post is also available via the EAPIL blog.

On 25 April 2023 the German Federal Ministry of Justice *(Bundesministerium der Justiz – BMJ)* has published a bill relating to the establishment of (international) commercial courts in Germany. It sets out to strengthen the German civil justice system for (international) commercial disputes and aims to offer parties an attractive package for the conduct of civil proceedings in Germany. At the same time, it is the aim of the bill to improve Germany's position vis-à-vis recognized litigation and arbitration venues – notably London, Amsterdam, Paris and Singapore. Does this mean that foreign courts and international commercial arbitration tribunals will soon face serious competition from German courts?

English-language proceedings in all instances

Proposals to improve the settlement of international commercial disputes before German courts have been discussed for many years. In 2010, 2014, 2018 and 2021, the upper house of the German Federal Parliament *(Bundesrat)* introduced bills to strengthen German courts in (international) commercial disputes. However, while these bills met with little interest and were not even discussed in the lower house of Parliament *(Bundestag)* things look much brighter this time:

The coalition agreement of the current Federal Government, in office since 2021, promises to introduce English-speaking special chambers for international commercial disputes. The now published bill of the Federal Ministry of Justice can, therefore, be seen as a first step towards realizing this promise. It heavily builds on the various draft laws of the Bundesrat including a slightly expanded version that was submitted to the Bundestag in 2022.

The bill allows the federal states *(Bundesländer)* to establish special commercial chambers at selected regional courts *(Landgerichte)* which shall, if the parties so wish, conduct the proceedings comprehensively in English. Appeals and complaints against decisions of these chambers shall be heard in English before English-language senates at the higher regional courts *(Oberlandesgerichte)*. If the value in dispute exceeds a threshold value of 1 million Euros and if the parties so wish, these special senates may also hear cases in first instance. Finally, the Federal Supreme Court *(Bundesgerichtshof)* shall be allowed to conduct proceedings in English. Should the bill be adopted – which seems more likely than not in light of the coalition agreement – it will, thus, be possible to conduct English-language proceedings in at least two, maybe even three instances. Compared to the status quo, which limits the use of English to the oral hearing (cf. Section 185(2) of the Court Constitution Act) and the presentation of English-language documents (cf. Section 142(3) of the Code of Civil Procedure) this will be a huge step forward. Nonetheless, it seems unlikely that adoption of the bill will make Germany a much more popular forum for the settlement of international commercial disputes.

Remaining disadvantages vis-à-vis international commercial arbitration

To begin with, the bill – like previous draft laws – is still heavily focused on English as the language of the court. Admittedly, the bill – following the draft law of the Bundesrat of March 2022 – also proposes changes that go beyond the language of the proceedings. For example, the parties are to be given the opportunity to request a verbatim record of the oral proceedings. In addition, business secrets are to be better protected. However, these proposals cannot outweigh the numerous disadvantages of German courts vis-à-vis arbitration. For example, unlike in arbitration, the parties have no influence on the personal composition of the court. As a consequence, they have to live with the fact that their – international – legal dispute is decided exclusively by German (national) judges, who rarely have the degree of specialization that parties find before

international arbitration courts. In addition, the digital communication and technical equipment of German courts is far behind what has been standard in arbitration for many years. And finally, one must not forget that there is no uniform legal framework for state judgments that would ensure their uncomplicated worldwide recognition and enforcement.

Weak reputation of German substantive law

However, the bill will also fail to be a resounding success because it ignores the fact that the attractiveness of German courts largely depends on the attractiveness of German law. To be sure, German courts may also apply foreign law. However, their real expertise – and thus their real competitive advantage especially vis-à-vis foreign courts – lies in the application of German law, which, however, enjoys only a moderate reputation in (international) practice. Among the disadvantages repeatedly cited by practitioners are, on the one hand, the numerous general clauses (e.g. §§ 138, 242 of the German Civil Code), which give the courts a great deal of room for interpretation, and, on the other hand, the strict control of general terms and conditions in B2B transactions. In addition – and irrespective of the quality of its content – German law is also not particularly accessible to foreigners. Laws, decisions and literature are only occasionally available in English (or in official English translation).

Disappointing numbers in Amsterdam, Paris and Singapore

Finally, it is also a look at other countries that have set up international commercial courts in recent years that shows that the adoption of the bill will not make German courts a blockbuster. Although some of these courts are procedurally much closer to international commercial arbitration or to the internationally leading London Commercial Court, their track record is – at least so far – rather disappointing.

This applies first and foremost to the Netherlands Commercial Court (NCC), which began its work in Amsterdam in 2019 and offers much more than German courts will after the adoption and implementation of the bill: full English proceedings both in first and second instance, special rules of procedure inspired by English law on the one hand and international commercial arbitration law on the other, a court building equipped with all technical amenities, and its own internet-based communication platform. The advertising drum has also been

sufficiently beaten. And yet, the NCC has not been too popular so far: in fact, only 14 judgments have been rendered in the first four years of its existence (which is significantly less than the 50 to 100 annual cases expected when the court was set up).

The situation in Paris is similar. Here, a new chamber for international commercial matters (chambre commerciale internationale) was established at the Cour d'appel in 2018, which hears cases (at least in parts) in English and which applies procedural rules that are inspired by English law and international arbitration. To be sure, the latter cannot complain about a lack of incoming cases. In fact, more than 180 cases have been brought before the new chamber since 2018. However, the majority of these proceedings are due to the objective competence of the Chamber for international arbitration, which is independent of the intention of the parties. In contrast, it is not known in how many cases the Chamber was independently chosen by the parties. Insiders, however, assume that the numbers are "negligible" and do not exceed the single-digit range.

Finally, the Singapore International Commercial Court (SICC), which was set up in 2015 with similarly great effort and ambitions as the Netherlands Commercial Court, is equally little in demand. Since its establishment, it has been called upon only ten times by the parties themselves. In all other cases in which it has been involved, this has been at the instigation of the Singapore High Court, which can refer international cases to the SICC under certain conditions.

No leading role for German courts in the future

In the light of all this, there is little to suggest that the bill, which is rather cautious in its substance and focuses on the introduction of English as the language of proceedings, will lead to an explosion – or even only to a substantial increase – in international proceedings before German courts. While it will improve – even though only slightly – the framework conditions for the settlement of international disputes, expectations regarding the effect of the bill should not be too high.

Note: Together with Yip Man from Singapore Management University Giesela Rühl is the author of a comparative study on new specialized commercial courts and their role in cross-border litigation. Conducted under the auspices of the

International Academy of Comparative Law (IACL) the study will be published with Intersentia in the course of 2023.