A strange case of recognition of foreign ecclesiastical decisions in property matters

By Nicolás Zambrana-Tévar, LLM, PhD, KIMEP University

A first instance court in Barbastro (Aragón) has ruled that a great number of valuable works of art presently on display at the museum of the Catholic diocese of Lleida (Catalonia) are the property of parishes of the diocese of Barbastro-Monzón and must be immediately returned. In its reasoning, the court has given a lot of weight to the fact that, in the decades long dispute between the two Spanish ecclesiastical entities, the diocese of Lleida had agreed to comply with a 2007 ruling of the Vatican's Supreme Tribunal of the Apostolic Signatura, the highest administrative court in the Catholic Church, whose decisions may only be overturned by the Pope himself. This case does not only rise the issue of the recognition of "foreign" ecclesiastical decisions or, alternatively, their relevance for state courts but also how indistinguishable is the science of private international law from the study of legal pluralism, i.e. the interaction of various legal systems over the same territory, subjects and subject-matters.

Since the middle ages, a small stripe of land in the Spanish region of Aragón (*La Franja de Aragón*) was under the religious jurisdiction of the bishop of Lleida. Article IX of the 1953 concordat between Spain and the Holy See already manifested the intention of both parties to the treaty to revise the existing territorial ecclesiastical constituencies to avoid dioceses which did not correspond to existing state provinces. In 1995, following a decision of the Spanish bishops' conference, the Holy See decided to transfer all the parishes in *La Franja* to the diocese of Barbastro. Further to this reassignment, the diocese of Barbastro requested that all the works of art which were on display at the diocesan museum of Lleida be returned to the parishes of *La Franja*, to which they

allegedly belonged.

At the beginning of the 20th century, those works of art had been taken to Lleida from the abovementioned parishes, partly due to their state of decay. The basic legal question here was whether the long deceased bishop of Lleida, who had brokered the deal, had *bought* those works of art a century ago or whether they were only *on deposit* at the Catalan diocesan museum.

The return of those pieces of art has been a matter of regional – or national – pride for more than twenty five years. For many, this basically ecclesiastical dispute over religious property must be put in the context of recent nationalist aspirations of the Catalan government because many inhabitants of *La Franja* speak Catalan and this territory is sometimes perceived to be part of Catalonia in much the same way as nationalists refer to other territories in Spain, France or Italy as *països catalans*. What began as a bitter dispute among bishops has ended as a much bitter dispute between neighbouring regions after their autonomous governments espoused the respective claims, including street demonstrations and endless litigation before Church tribunals and state courts, both civil and administrative. The court records by now have more than 30.000 pages.

The dispute should have ended in 2007 when the Supreme Tribunal of the Apostolic Signatura heard the last possible ecclesiastical appeal against previous rulings of lower canon law courts. The text of this decisions is, of course, in Latin. Thus, the Vatican court ordered the immediate return of the art pieces. Further to this decision and probably compelled by it, the two dioceses signed an agreement in 2008, where the Catalan diocese acknowledged that the legitimate owners of the works of art were the abovementioned parishes of Aragón. Soon afterwards, however, the Lleida bishop went back on his word, apparently when more than 300 letters from the beginning of the 20th century resurfaced, allegedly showing that amounts of money had been paid by the former bishop of Lleida to the parishes of *La Franja*, following the removal of the art pieces to the diocesan museum of Lleida. This

money was allegedly the price paid for them, so the Catalan diocese owned them.

The diocese of Barbastro nevertheless sought to have the 2007 Vatican decision recognised but, in 2010, a Spanish court ruled that the only ecclesiastical decisions which could be recognised and enforced in Spain under the new 1979 concordat were those concerning the nullity of marriages (pp. 6-8). The diocese of Barbastro and the Spanish prosecutor present at the proceedings understood that, nevertheless, the 2007 decision may be recognised under those Spanish domestic law provisions for the recognition of foreign court decisions in the absence of a treaty. The "country" of origin of the 2007 decision was, of course, the Holy See.

The Spanish court did refer to the Holy See as a subject of international law at the level of states. Furthermore, the Catholic Church's jurisdiction and autonomy within the Spanish territory and over Spanish Catholics was recognised by the Spanish state by means of an international treaty (i.e. the concordat). Part of this autonomy was – in the eyes of the court – the jurisdiction of ecclesiastical tribunals in religious property matters. Ecclesiastical tribunals had therefore jurisdiction to adjudicate in property disputes and to enforce the ensuing decisions internally. Such jurisdiction was acknowledged and respected by the Spanish state, which should not interfere with it and, therefore, an ecclesiastical entity could not request state courts to enforce ecclesiastical decisions because this would represent such an act of interference. Ecclesiastical entities may alternatively bring their property claims before Spanish state courts in the first place, which have in the past decided similar cases applying canon law but, if the dispute had been heard and decided by a Church tribunal, state courts had to remain aloof.

However, last week, the same court which in 2010 had refused to recognise the 2007 Vatican decision has now ruled in favour of the return of the works of art to the parishes of Aragón. The Barbastro court explains (p. 17) that the ecclesiastical rulings were not enough in themselves, as evidence of the property rights of the Aragonese parishes. However, such rulings may in fact be evidence of the testimony provided by the

parties to the dispute. Additionally, the settlement agreement made by the two dioceses, further to the Vatican ruling of 2007, should indeed be taken as an admission by the diocese of Lleida that the works of art belong in Aragón. Thus, indirectly, the Vatican decision was being respected.

This use made of a "foreign" ecclesiastical court ruling presents some similarities to the theory of vested rights and estoppel *per res iudicattam* in a common law context, whereby foreign court decisions may not be recognised as such but their content may be evidence of a new cause of action in new proceedings commenced in the country where recognition is sought. Even though the Spanish court in 2010 and 2019 was equally unwilling to recognise the effects of the ecclesiastical decision because it had been issued by an ecclesiastical tribunal whose autonomy and jurisdiction would be jeopardised if the Spanish court enforced its contents, the first instance court of Barbastro was now in a position to give a lot of weight at least to the declarations that the parties had made during the proceedings at the Vatican, as well as to the settlement agreement that the Vatican decision had brought about.

The Spanish court also made direct use of canon law as evidence of property rights when it found that, for the transfer of ecclesiastical property to have been valid, a special permit from the Holy See would have been needed, which was never sought nor obtained. That Spanish state courts apply canon law is relatively common in, for instance, employment cases – as a way of demonstrating that the relationship between a priest and a bishop is not of an employment nature – or in clergy sex abuse litigation – in order to demonstrate the degree of organizational or supervisory authority of bishops over priests and parishes.

Consumers' rights strike back! First impressions on C-453/18 and C-494/18 – Bondora

Carlos Santaló Goris,
Researcher at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law and Ph.D. candidate at the University of Luxembourg, *offers a summary and an analysis of the CJEU's judgment in Joined cases* C-453/18 and C-494/18 – *Bondora.*

Introduction

On 19 December 2019, the

Court of Justice of the European Union ("CJEU") rendered its 10th judgment on Regulation
1896/2006 establishing a European Payment Order ("EPO Regulation"). The EPO Regulation introduced the most successful of the uniform civil procedures at European level, allowing creditors the cross-border recovery of pecuniary claims. In this long awaited judgment (particularly by the Spanish tribunals and academia), the CJEU resolved the following inquiry: can tribunals request additional information from the creditor relating to the terms of the agreement in order to examine *ex officio* the
fairness of the terms of the contract invoked as a basis for a European Payment Order ("EPO")?

**Facts
of the case**

The judicial proceedings,
which led to the preliminary references, were brought before the courts of first instance of Vigo and Barcelona, respectively.

Bondora AS, an Estonian registered company, lodged an application for an EPO before the court of first instance of Vigo. Since the defendant was a consumer, that court requested Bondora to provide "the loan agreement and the determination of the amount of the claim" in order to examine the fairness of the

contractual terms on which the application for an EPO was made. Bondora AS refused to do so. It argued that Article 7(2) EPO Regulation of the EPO does not prescribe to creditors the submission of any documentation to issue an EPO. Furthermore, in accordance with Spanish law, creditors do not have provide any documentation when they apply for an EPO (Final Disposition 23, para. 2 Ley 1/2000 de Enjuiciamiento Civil). Conversely, in the view of the court of first instance of Vigo, courts have the power to make such request. This court took into consideration the CJEU decision, *C-618/10, Banco Español de Crédito*, in which the Court found that the Spanish domestic legislation which precluded the examination of the fairness of the contractual terms during the application for a domestic payment order would "deprive consumers of the benefit of the protection intended by Directive 93/13". This judgment caused a modification of the Spanish payment order legislation. That reform expressly authorised Spanish judges to assess *ex officio* the fairness of the terms of the contract between businesses or professionals and a consumer on which the application for a domestic payment order is based.

In this context, the court
of first instance of Vigo decided to refer the following questions to the CJEU:

- *Is*
  Article 7(1) of [Directive 93/13] and the case-law interpreting that directive,
  to be construed as meaning that that article of the directive precludes a national provision, like the 23rd final provision of [the LEC], which provides
  that it is not necessary to submit documents with the application for a European order for payment and that, where documents are submitted, they will
  be ruled inadmissible?
- *Is Article 7(2)(e) of [Regulation No*
  1896/2006] to be construed as meaning that that provision does not preclude a
  creditor institution from being required to submit documents substantiating its
  claim based on a consumer loan entered into between a seller or a supplier and

a consumer, where the court considers it essential to examine the documents in
order to determine whether there are unfair terms in the contract between the
parties, thereby complying with the provisions of [Directive 93/13] and the
case-law interpreting that directive?

In the same year, Bondora
AS requested another EPO against another debtor (XY) before the court of first instance of Barcelona. This court, confronting the same issue as the court of first instance of Vigo, decided to refer the following questions to the CJEU:

- *Is*
  national legislation such as paragraph [2] of the 23rd final provision of the LEC, which does not permit a contract or an itemisation of the debt to be provided or required in a claim in which the defendant is a consumer and where
  there is evidence that the sums being claimed could be based on unfair terms,
  compatible with Article 38 of the Charter, Article 6(1) [TEU] and Articles 6(1)
  and 7(1) of Directive [93/13]?
- *Is*
  it compatible with Article 7(2)(d) of Regulation [No 1896/2006] to require the
  applicant, in a claim against a consumer, to specify the itemisation of the debt he is claiming in Section 11 of standard form A [in Annex 1 to Regulation
  No 1896/2006]? Is it also compatible with that provision to require that the
  content of the contractual terms on the basis of which the applicant is making a
  claim against a consumer, beyond the principal subject matter of the contract,
  be reproduced in Section 11 in order to assess whether they are unfair?
- *If the answer to the second question is*

negative, is it permissible, under the current wording of Regulation No 1896/2006, to ascertain ex officio, prior to the issue of a European payment order, whether an agreement with a consumer contains unfair terms and if so, on what legal basis may that assessment be carried out?

- *In the event that it is not possible to ascertain ex officio, under the current wording of Regulation No 1896/2006, the existence of unfair terms prior to issuing a European payment order, the Court of Justice is requested to rule* on the validity of that regulation in the light of Article 38 of the Charter and Article 6(1) [TEU].

The CJEU decided to reply jointly to both preliminary references.

The CJEU's Reasoning

After a brief overview of the EPO Regulation as such (paras 34-38), the CJEU proceeded to examine the state-of-the-art of consumer protection against unfair contractual terms under Directive 93/13 (paras 39-44). More specifically, the Court referred to its previous judgement C-176/17, *Profi Credit Polska*. In that decision, the CJEU found that Article 7(1) of Directive 93/13 precludes national legislation permitting the issue of an order for payment where the court hearing an application for an order for payment does not have the power to examine the possible unfairness of the terms of that agreement (para. 44). In the Courts' view, the same logic applies to the EPO Regulation. This means that Spanish domestic legislation (the above mentioned Final Disposition 23, para. 2 *Ley 1/2000 de Enjuiciamiento Civil*), which precludes the submission of documentation by the creditor who applied for an EPO, obstructs the courts' obligation to review the fairness of the terms of the contract. At this point, the question is whether there is any legal basis within the EPO Regulation that would allow courts to request the necessary documentation to examine the fairness of the contractual terms. The CJEU found the solution in Article 9(1) of Regulation No 1896/2006 (para. 49). This provision allows courts to request that the claimant complete or rectify the application for the EPO, and since *Bondora*, courts are also entitled to request,

“the reproduction of the entire agreement or the production of a copy thereof, in order to be able to examine the possible unfairness of the contractual terms” (para. 50).

On the basis of the reasoning set out above, the CJEU concluded that a tribunal “seised in the context of a European order for payment procedure” would be entitled “to request from the creditor additional information relating to the terms of the agreement relied on in support of the claim at issue, in order to carry out an *ex officio* review of the possible unfairness of those terms and, consequently, that they preclude national legislation which declares the additional documents provided for that purpose to be inadmissible” (para. 54).

The three viewpoints of the judgment

Bondora is not only interesting for the reasoning behind the judgment as such. This decision is also a good example of the difficulties that could arise from the application and the implementation of a European uniform procedure, as well as the impact that a CJEU judgment could have on the European uniform civil procedures.

- ### A “very Spanish” preliminary reference

The preliminary reference did not come as a surprise for Spanish courts and academia, which have for a long time debated on this issue. There are certain characteristics of the Spanish legislative framework, which made Spain a more likely jurisdiction to refer these kinds of questions to the CJEU than any other Member State.

The main reason arises from the differences between the EPO and the Spanish national payment order. The latter is a documentary payment order, meaning that with the application for a preservation order, creditors have to provide documentation that provides the justification of the claim at stake. This contrasts with the EPO, in which creditors have merely to describe evidence supporting the claim (Article 7(1)(e) EPO Regulation). There were occasions when Spanish courts

observed EPOs in the light of the rules applicable to domestic law, requesting creditors to provide documentation with the application (e.g. Auto Audiencia Provincial de Barcelona (Sec. 11.a) de 21 de noviembre 2012 (Auto num. 212/2012, ECLI:ES:APB:2012:7729A)). Furthermore, after the above-mentioned CJEU decision in C-618/10, Banco Español de Crédito, and the legislative reform that the judgment provoked, disparities between the EPO procedure and the domestic payment order procedure increased, making it difficult for Spanish courts to reconcile both procedures.

Another aspect that has to be taken into consideration is the way the EPO Regulation had been implemented into the Spanish legal system. In the EPO Regulation, as well as the other so-called second-generation procedures, there are many elements to be "fulfilled" by the domestic law of the Member States where they apply. This leaves ground to domestic legislators to approve reforms to these instruments in their respective systems. Concerning the EPO Regulation, the Spanish legislator went a step further than the letter of the Regulation. The Spanish law states explicitly that creditors "do not need to submit any documentation" when they apply for an EPO. This unfortunate wording was one of the grounds on which the creditor, Bondora AS, relied on to avoid submitting the documentation requested by the Spanish courts (para. 22).

All these specific circumstances eventually triggered the preliminary references of this case.

- **Balancing opposing interests**

Concerning the Court's reasoning itself, the CJEU tries to find a compromise between the creditors' and defendants' interests. As the Court states, one of the purposes of the EPO is "to simplify, accelerate and reduce costs in cross-border disputes concerning uncontested pecuniary claims" (para. 36). Nonetheless, the pursuit of those goals cannot be to the detriment of defendants' rights. Particularly, in this case, "the nature and significance of the public interest constituted by the protection of consumers" (para. 42) prevails over creditors' interests.

It appears that the CJEU

tries to mitigate the imbalance favouring creditors that a literal reading of the EPO Regulation could provoke. Indeed, if we strictly observe Article 7 of the EPO Regulation, no documentation might be needed to obtain an EPO. Nonetheless, as it was demostrated, that would undermine the position of consumers.

From a broader perspective, this search for a balance is not exclusive to the EPO Regulation. We can also find it in CJEU judgments concerning other uniform civil procedures. For instance, the recent decision on Regulation 655/2014, establishing a European Account Preservation Order (C-555/18, K.H.K. (*Saisie conservatoire des comptes bancaires*)) is a good example. It seems that the CJEU is trying to mitigate the pro-creditor aspects of these proceedings.

- **The EPO procedure post-*Bondora***

How does *Bondora* affect the EPO procedure? In the conclusion of the judgment, the CJEU merely acknowledged that courts *can* request additional documentation in order to assess the fairness of the terms of the contract which serves as a basis of the EPO (para. 56). Nonetheless, observing the whole of the Court's reasoning, it follows that domestic courts might also be *obliged* to perform a further examination in order to safeguard consumers' rights against unfair contractual terms. The CJEU stated that "the national court is required to assess of its own motion whether a contractual term falling within the scope of Directive 93/13 is unfair" (para. 43). Does it mean that every time a creditor indicates in the standard form of the EPO application that the defendant is a consumer, the Court has to examine the fairness of the terms of the agreement between the creditor and the consumer? It seems so. The EPO Regulation only requires creditors the description of the "circumstances invoked as the basis of the claim" and the "description of evidence supporting the claim" (Article 7(1) EPO Regulation). This might not be enough for a court to make a proper assessment of the fairness of the contractual terms. AG Sharpston was of the same view. In the Opinion of this case, she affirmed that "the court's examination of the merits of the claim based solely on the information included in form A is, on the face of it, rather superficial, which is hardly likely to ensure effective protection of the consumer concerned" (para. 93). Therefore, unless creditors provide the contractual terms by their own motion in an application for an EPO, domestic courts would have to request them on the basis of Article 9(1) of the EPO Regulation. Only in this way would courts

be able to assure whether the terms of the agreement are fair or not.

As a consequence of the above, the EPO Regulation, although initially a non-documentary procedure largely inspired by the German payment order, might have turned into something resembling a documentary payment order in those cases when there is involved a contract concluded with a consumer. Whereas Spanish courts might welcome this new approach, in other Member States where payment orders are granted in a more automatic manner, Bondora might be a turning point.

In any case, Bondora has already become a key reference for a proper understanding of the EPO Regulation, a procedure on which the CJEU might still have more to say.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1/2020: Abstracts

The latest issue of the „Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)“ features the following articles:

H. Schack: **The new Hague Judgment Convention**

This contribution presents the new Hague Convention on the recognition and enforcement of foreign judgments in civil or commercial matters adopted on 2 July 2019 by the Hague Conference on Private International Law. This Convention simple with a positive list of accepted bases for recognition and enforcement supplements the 2005 Hague Convention on choice of court agreements. The benefit of the 2019 Convention, however, is marginal, as its scope of application is in many ways limited. In addition, it permits

declarations like the “bilatéralisation” in Art. 29 further reducing the Convention to a mere model for bilateral treaties. If at all, the EU should ratify the 2019 Convention only after the US have done so.

F. Eichel: **The Role of a Foreign Intervener in Establishing a Cross-Border Case as a Requirement for the Application of European Legislation on Civil Procedure**

The Small-Claims Regulation (No. 861/2007) is only applicable in crossborder cases. The European Court of Justice (ECJ) in its judgment in ZSE Energia has decided that the foreign seat of an intervener does not turn an otherwise purely domestic case into a cross-border case. The IPRax article agrees with this decision, but criticizes the reasons given by the ECJ. Without specific need, the ECJ stated that the participation of an intervener would be inconsistent with the Small-Claims Regulation at all, although general procedural issues are governed by the procedural law of the lex fori (cf. article 19 Small-Claims Regulation). In addition, the article analyses the impact of the ECJ’s ruling on other European legal acts such as the European Order for Payment Regulation (No. 1896/2006), the European Account Preservation
Order Regulation (No. 655/2014), the Directive on the right to legal aid (RL 2002/8/EC), and the Mediation Directive (RL 2008/52/EC).

C.A. Kern/C. Uhlmann: **When is a court deemed to be seised under the Brussels Ia Regulation? Requirements to be met by the claimant and pre-action correspondence**

In the aftermath of the VW-Porsche takeover battle, an investor based on the Cayman Islands announced to sue Porsche SE in the High Court of England and
Wales. Probably in an attempt to secure a German forum, Porsche initiated a negative declaratory action in the Landgericht Stuttgart. However, the complaint could not be served on the investor for lack of a correct address. The German Federal Supreme Court held that Porsche had not met the requirements
of Art. 32 no. 1 lit. a of the recast Brussels I Regulation and asked the lower court to determine whether the „letter before claim“ sent by the investor had already initiated proceedings in England so that parallel proceedings in

Germany were barred. The authors agree that Art. 32 no. 1 must be interpreted strictly, but doubt that a „letter before claim“ is sufficient to vest English courts with priority under the Brussels Regulation.

C. Thomale: **Treating apartment-owner associations at Private International Law**

In its recent Brian Andrew Kerr ./. Pavlo Postnov and Natalia Postnova decision, the CJEU has taken a position on how to handle apartment owners' obligations to contribute to their association in terms of international jurisdiction and choice of law. The casenote analyses the decision, notably assessing the relationship of international jurisdiction and choice of law, the concept of "services" as contained in the Brussels I Regulation and the Rome I Regulation respectively, as well as the company law exception according to Art. 1 (2) (f) Rome I Regulation.

H. Roth: **The Probative Value of Certificates as per Art 54 Brussels I and Art 53 Brussels Ia**

According to the European rules on recognition and enforcement of judgments in civil and commercial matters, the probative value of both certificates is determined as mere information provided by the court of origin. At the second step of assessing whether there are grounds to refuse recognition (appeal or refusal of enforcement), the court of the member state in which enforcement is sought will have to verify itself the factual and legal requirements for service of process.

M. Brosch: **Public Policy and Conflict of Laws in the Area of International Family and Succession Law**

The public policy-clause is rarely applied in private international law cases. Relevant case law often concerns matters of international family and succession law. This also applies to two recent decisions of the Court of Appeal in Berlin and the Austrian Supreme Court relating, respectively, to the recognition of a Lebanese judgement on the validity of a religious marriage and the applicability of Iranian succession law. Although systemically coherent, the courts' findings give rise to several open questions. Furthermore, it is argued that two opposite tendencies can be identified: On the one hand, the synchronisation between forum and ius as well as the prevalence of the habitual

residence as connecting factor in EU-PIL leave little room for the application of the public policy-clause. On the other hand, its application may be triggered in areas where the nationality principle still prevails, i.e. in non-harmonised national PIL and PIL rules in bilateral treaties.

E.M. Kieninger: **Vedanta v Lungowe: A milestone for human rights litigation in English courts against domestic parent companies and their foreign subsidiary**

In Vedanta v Lungowe, a case involving serious health and environmental damage due to emissions into local rivers from a copper mine in Sambia, the UK Supreme Court has affirmed the jurisdiction of the English courts, in relation to both the English parent company and the subsidiary in Sambia. In the view of the Supreme Court, the claim against the parent company has a real issue to be tried and denying access to the English courts would equal a denial of substantive justice.
The decision is likely to have consequences not only for the appeal against the Court of Appeal's denial of access to the English courts in Okpabi v Royal Dutch Shell, but also for the development of a more general duty of care of parent companies towards employees and people living in the vicinity of mines or industrial plants run by subsidiaries.

B. Lurger: **How to Determine Foreign Legal Rules in Accelerated Proceedings in Austrian Courts**

In a rather lengthy proceeding initiated in 2014 in the district court Vienna Döbling the wife claimed maintenance from her husband. The Austrian Supreme Court (OGH) examined the special conditions of the application of foreign law in accelerated proceedings (motion for injunctive relief). The Court first clarified the construction of Art. 5 Hague Maintenance Protocol in relation to a pending divorce proceeding in which Austrian law applied, whereas the habitual residence of the claimant was situated in the United Kingdom. The OGH held that in accelerated proceedings, the question of whether foreign law had to be applied (the choice of law question) can regularly be answered without considerable effort. As the next step, the determination of the content of the foreign law must be undertaken by the lower courts with reasonable means

and effort. As in ordinary proceedings, the parties do not have any particular duties to assist the court in this determination. Considering the special circumstances of the case, which consisted in the considerable wealth of the parties and the divorce and maintenance proceedings going up and down the instances in Vienna already for years, the Supreme Court arrived at the conclusion
that the application of English law by the Austrian courts was appropriate even in the accelerated proceeding at hand.

The Moçambique Rule in the New Zealand Court of Appeal

Written by Jack Wass, Stout Street Chambers, New Zealand

On 5 December 2019, the New Zealand Court of Appeal released a significant decision on jurisdiction over land in cross-border cases.

In *Christie v Foster* [2019] NZCA 623, the Court overturned the High Court's decision that the *Moçambique* rule (named after *British South Africa Co v Companhia de Moçambique* [1893] AC 602) required that a dispute over New Zealand land be heard in New Zealand (for a case note on the High Court's decision, see here). The plaintiff sought to reverse her late mother's decision to sever their joint tenancy, the effect of which was to deprive the plaintiff of the right to inherit her mother's share by survivorship. The Court found that the in personam exception to the *Moçambique* rule applied, since the crux of the plaintiff's claim was a complaint of undue influence against her sister (for procuring their mother to sever the tenancy), and because any claim in rem arising out of the severance was precluded by New Zealand's rules on indefensibility of title. As a consequence the Court declined jurisdiction and referred the whole case to Ireland, which was otherwise the appropriate forum.

In the course of its
decision, the Court resolved a number of important points of law, some of which

had not been addressed in any Commonwealth decisions:

First, it resolved a dispute that had arisen between High Court authorities about the scope of the in personam exception, resolving it in favour of a broad interpretation. In particular, the Court disagreed with High Court authority (*Burt v Yiannakis* [2015] NZHC 1174) that suggested an institutional constructive trust claim was in rem and thus outside the exception.

Second, it held (reversing the High Court) that the *Moçambique* rule does not have reflexive effect. The rule prevents the New Zealand court from taking jurisdiction over claims in rem involving foreign land out of comity to the foreign court, but does not *require* the New Zealand court to take jurisdiction over cases involving New Zealand land. Although New Zealand will often be the appropriate forum for a case involving New Zealand land, the court is free to send it overseas if the circumstances require, even if the claim asserts legal title in rem.

Third, the Court confirmed that there is a second exception to the *Moçambique* rule – where the claim arises incidentally in the administration of an estate. *Dicey, Morris and Collins* had suggested the existence of this exception for many editions, but it had to be inferred from earlier cases without being properly articulated. The Court expressly found such an exception to exist and that it would have applied in this case.

In the course of its analysis, the Court expressed sympathy for the arguments in favour of abolishing the *Moçambique* rule entirely. Although the Court did not go that far, it reinforced a trend of the courts restricting the application of the rule and suggested that in the right case, the courts might be prepared to abandon it entirely.

Private International Law in Africa: Comparative Lessons

Written by Chukwuma Okoli, TMC Asser Institute, The Hague

About a decade ago, Oppong lamented a "stagnation" in the development of private international law in Africa. That position is no longer as true as it was then – there is progress. Though the African private international law community is small, the scholarship can no longer be described as minimal (see the bibliograhy at the end of this post). There is a growing interest in the study of private international law in Africa. Why is recent interest on the study of private international law [in Africa] important to Africa? What lessons can be learn't from other non-African jurisdictions on the study of private international law?

With increased international business transactions and trade with Africa, private international law is a subject that deserves a special place in the continent. Where disputes arise between international business persons connected with Africa, issues such as what court should have jurisdiction, what law should apply, and whether a foreign judgment can be recognized and enforced are keys aspects of private international law. Thus, private international law is indispensable in regulating international commercial transactions.

Currently, there is no such thing as an "African private international law" or "African Union private international law" that is akin to, for example, "EU private international law". It could, however, be argued that there is such a thing as "private international law in Africa". The current private international law in Africa is complicated as a consequence of a history of foreign rule, and the fact that Africa has diverse legal traditions (common law, Roman-Dutch law, civil law, customary law and religious law). Many countries in Africa still hang on to what they inherited during the period of colonialism. As colonialism breeds dependence, there has not been sufficient conscious intellectual effort to generate a private international law system that responds to the socio-economic, cultural, and political interests of countries in Africa.

Drawing from comparative experiences, it is opined that a systematic academic study of private international law might create the required strong political will and institutional support (which is absent at the moment) that is necessary to give private international law its true place in Africa.

There has always been private international law in Africa from time immemorial. Africans, like any other persons, migrated from one territory to another (especially within Africa), where the clash of socio-cultural, political, and economic interests among persons in Africa gave rise to private international law problems as we know them today. Some of these disputes between private parties of different nation states may have likely been resolved through war or diplomacy.

The systematic study of private international law as we know it today has largely been academically developed by the Member States of the European Union (EU) and the United States of America ("USA"). The period of industrialization in the 19th century, and the rise of capitalism gave birth to a variety of solutions that could respond to globalization. Indeed, the firm entrenchment of the principle of party autonomy in international dispute settlement in the 20th century was a way of securing the interest of the international merchant who does their business in many jurisdictions. The *privatization* of international law dispute settlement is what gave birth to the name *private* international law.

In the international scene, the study of private international law is currently dominated by two major powers: the EU and the US, but the EU wields more influence internationally. The EU operates an integrated private international law system with its judicial capital in Luxembourg. The EU can be described as a super-power of private international law in the world, with The Hague as its intellectual capital. Many of the ideas in the Hague instruments (a very important international instrument on private international law) were originally inspired by the thinking of European continental scholars. As a result of colonization, many countries around the world currently apply the private international law methodology of some Member States of the EU. The common law methodology is applied by many Commonwealth countries that were formerly colonized by the United Kingdom; the civil law methodology is applied by many countries (especially in French-speaking parts of Africa) that were formerly colonized by France and Belgium; and the Roman-Dutch law methodology is applied by many countries that were formerly colonized by Netherlands.

Asia appears to have learnt from the EU and USA experience. Since 2015 till date, private international academics from Asia and other regions around the world have held many conferences and meetings with the purpose of drawing up the principles of private international law on civil and commercial matters, known as "Asian Principles of Private International Law"). The purpose of the principles is to serve as a non-binding model that legislators and judges (or decision makers) in the Asian region can use in supplementing or reforming their private international law rules.

It is important to stress that it is the systematic study of private international law by scholars over the years in the US and Member States in the EU and Asia that created the required political will and institutional support to give private international law it's proper place in these countries. In Africa, such systematic study becomes especially important in an environment of growing international transactions both personal and commercial. This is what propels the study of private international. It is seldom an abstract academic endeavor given the nature and objectives of the subject

Professor Oppong – a leading authority on the subject of private international law in Africa – has rightly submitted in some of his works that private international law can play a significant role in Africa in addressing issues such as: "regional economic integration, the promotion of international trade and investment, immigration, globalization and legal pluralism." A systematic study of private international law in Africa will address these some of these challenges that are significant to Africa. Indeed, a solid private international law system in African States can create competition among countries on how to attract litigation and arbitration. This in turn can lead to economic development and the strengthening of the legal systems of such African countries

What should private international law in Africa look like in the future? Is it possible to have a future "African Union private international law" comparable to that of the European Union? Should it operate in an intra-African way to the exclusion of international goals such as conflicts between non-African countries, and the joint membership or ratification of international instruments such as The Hague Conventions? Should it take into account internal conflicts in individual African states, where different applicable customary or religious laws may clash with an enabling statute or the constitution, or different applicable religious or customary laws may clash in cross-border transactions? In the alternative, should

it focus primarily on diverse solutions among countries in Africa, and promote international commercial goals, with less attention placed on African integration?

These questions are not easy to answer. It is opined that private international law in Africa deserves to be systematically studied, and solutions advanced on how the current framework of private international law in Africa can be improved. If such study is devoted to this topic, the required political will and institutional support can be created to give [private international law] proper significance in Africa.

For recent monographs on the subject see generally
CSA Okoli and RF Oppong, *Private International Law in Nigeria* (Hart, 2020-forthcoming)

P Okoli, *Promoting Foreign Judgments; Lessons in Legal Convergence from South Africa and Nigeria* (Wolters Kluwer, Alphen aan den Rijn, 2019)

AJ Moran and AJ Kennedy, *Commercial Litigation in Anglophone Africa: The law relating to civil jurisdiction, enforcement of foreign judgments, and interim remedies* (Juta, Cape Town, 2018)

RF Oppong, *Private International Law in Ghana* (Wolters Kluwer Online, Alphen aan den Rijn, 2017)

M Rossouw, *The Harmonisation of Rules on the Recognition and Enforcment of Foreign Judgments in Southern African Customs Union* (Pretoria University Law Press, Pretoria, 2016)

E Schoeman *et. al.*, *Private International Law in South Africa* (Wolters Kluwer Online, Alphen aan den Rijn, 2014)

RF Oppong, *Private International Law in Commonwealth Africa* (Cambridge University Press, Cambridge, 2013)

C Forsyth, *Private International Law – the Modern Roman Dutch Law including the Jurisdiction of the High Courts* (5th edition, Juta, Landsowne, 2012).

The Work of the HCCH and Australia: The HCCH Judgments Convention in Australian Law

Written by Michael Douglas, Mary Keyes, Sarah McKibbin and Reid Mortensen

Michael Douglas, Mary Keyes, Sarah McKibbin and Reid Mortensen published an article on how the implementation of the HCCH Judgments Convention would impact Australian private international law: 'The HCCH Judgments Convention in Australian Law' (2019) 47(3) Federal Law Review 420. This post briefly considers Australia's engagement with the HCCH, and the value of the Judgments Convention for Australia.

Australia's engagement with the HCCH

Australia has had a longstanding engagement with the work of the Hague Conference since it joined in 1973. In 1975, Dr Peter Nygh, a Dutch-Australian judge and academic, led Australia's first delegation. His legacy with the HCCH continues through the Nygh Internship, which contributes to the regular flow of Aussie interns at the Permanent Bureau, some of whom have gone on to work in the PB. Since Nygh's time, many Australian delegations and experts have contributed to the work of the HCCH. For example, in recent years, Professor Richard Garnett contributed to various expert groups which informed the development of the Judgments Project. Today, Andrew Walter is Chair of the Council on General Affairs and Policy.

Australia has acceded to 11 HCCH instruments, especially in family law where its implementation of HCCH conventions leads the Conference. However, with respect to recent significant instruments, it has lagged behind. For example, in 2016, Australia's Commonwealth Attorney-General's Department ('AGD') recommended accession to the 2005 HCCH Choice of Court Convention through an 'International Civil Law Act'; it also recommended that the proposed legislation should give effect to the HCCH's Principles on Choice of Law in

International Commercial Contracts. In November 2016, the Australian Parliament's Joint Standing Committee on Treaties supported both recommendations. Despite those recommendations, we are yet to see the introduction of a Bill into Parliament. We remain hopeful that 2020 will see progress.

Australia actively participated in the negotiation of the HCCH Judgments Convention and agreed to the final act. However, it is not a signatory. The mood within the Australian private international law community is that Australia will accede—the question is when. When it does, what would that mean? That is the focus of the article by Douglas, Keyes, McKibbin and Mortensen, who argue that accession ought to be welcomed.

The value of the HCCH Judgments Convention for Australia

Accession to the Judgments Convention would be a positive development for Australia. The Convention expands the grounds for recognising foreign judgments in Australia, especially in the recognition of foreign courts to exercise special jurisdictions giving rise to an enforceable judgment, and the enforcement of non-money judgments. The proposed grounds for refusal of recognition and enforcement broadly align to the current treatment of the defences to recognition and enforcement, and the bases for setting aside registration of foreign judgments, under Australian law. By harmonising Australia's private international law with that of other Contracting States, the Judgments Convention should provide greater certainty to Australian enterprises engaging in international business transactions with entities from other Contracting States. As an island nation, ensuring certainty for cross-border business is essential to the Australian economy.

For Australia, the primary advantage of the Judgments Convention is the capacity to enforce Australian judgments overseas. A party to cross-border litigation who obtains the benefit of an Australian judgment will have a clearer pathway to obtaining meaningful relief. The ability to enforce an Australian civil or commercial judgment internationally is extremely limited, with the exception of New Zealand. The Judgments Convention, if implemented in Australia, would both expand and reposition the ability to project Australian judicial power beyond New Zealand. Certainly, the Convention would enhance the ability to enforce judgments of the courts of the other Contracting States to the Convention in

Australia. Equally, as a multilateral Convention, the Judgments Convention would enable Australian judgments to circulate among the other Contracting States to the Convention. That would be a most attractive outcome for the Australian judicial system. Non-money judgments, which currently have almost no extraterritorial reach, would become enforceable through the Convention. The recognition of judgments that emerge when Australian courts exercise special jurisdictions dealing with contractual, non-contractual and trust obligations is also a long overdue reform and would see the law relating to the international enforcement of judgments align more closely with the nature of modern commercial litigation. If adopted widely, the Judgments Convention will provide better access to the assets of judgment debtors and to defendants themselves. This will reduce the risks associated with cross-border litigation, and so with it, the risks to cross-border business.

A secondary effect of the implementation of the Judgments Convention is the pressure it may apply to the Australian rules of adjudicative jurisdiction that allow Australian courts to deal with international litigation. There remains a very substantial disparity between the extremely broad adjudicative jurisdictions claimed by Australian courts and the narrow jurisdictions that are allowed to foreign courts by Australian courts considering whether to recognise foreign judgments. The Judgments Convention does not address this disparity, although the recognition of foreign judgments made when courts of origin exercise special jurisdictions somewhat narrows it. Unless the Australian rules of adjudicative jurisdiction are reformed, the enforceability of an Australian judgment in cross-border litigation will require a litigant's consideration of both the Australian rules of adjudicative jurisdiction and the different Judgments Convention rules of indirect jurisdiction. Ultimately, though, to get an internationally enforceable judgment, it would only be compliance with the Judgments Convention that counted.

In short, this article strongly recommends that Australia should accede to the Judgments Convention in order to modernise and improve Australian law, and to provide better outcomes for Australian judgment creditors. It would be timely for Australia also to refocus and continue its efforts on accession to the Choice of Court Convention.

Ssangyong Engineering & Construction Co. Ltd. *v.* National Highways Authority of India (NHAI) 2019 SCC OnLine SC 677

By Mohak Kapoor

The recent decision of the apex court of Ssangyong Engineering & Construction Co. Ltd. v. NHAI, has led to three notable developments: (1) it clarifies the scope of the "public policy" ground for setting aside an award as amended by the Arbitration and Conciliation (Amendment) Act 2015, (2) affirms the prospective applicability of the act and (3) adopts a peculiar approach towards recognition of minority decisions.

FACTS

The dispute arose out of a contract concerning the construction of a four-lane bypass on a National Highway in the State of Madhya Pradesh, that was entered into by the parties. Under the terms of the contract, the appellant, Ssangyong Engineering, was to be compensated for inflation in prices of the materials that were required for the project. The agreed method of compensation for inflated prices was the Wholesale Price Index ("WPI") following 1993 – 1994 as the base year. However, by way of a circular, the National Highways Authority of India ("NHAI") changed the WPI to follow 2004 – 2005 as the base year for calculating the inflated cost to the dismay of Ssangyong. Hence, leading to the said dispute. .

After the issue was not resolved, the dispute was referred to a three member arbitral tribunal. The majority award upheld the revision of WPI as being within the terms of the contract. The minority decision opined otherwise, and held that the revision was out of the scope the said contract. Due to this, Ssangyong challenged the award as being against public policy before Delhi High Court and upon the dismissal of the same, the matter was brought in front of the apex court by way of an appeal.

LEGAL FINDINGS

The Supreme Court ruled on various issues that were discussed during the

proceedings of the matter. The Court held that an award would be against justice and morality when it shocks the conscience of the court. However, the same would be determined on a case to case basis.

The apex court interpreted and discussed the principles stipulated under the New York convention. Under Para 54 of the judgement, the apex court has discussed the necessity of providing the party with the appropriate opportunity to review the evidence against them and the material is taken behind the back of a party, such an instance would lead to arising of grounds under section 34(2)(a)(iii) of the Arbitration and Conciliation (Amendment) Act, 2015. In this case, the SC applied the principles under the New York convention of due process to set aside an award on grounds that one of the parties was not given proper chance of hearing. The court held that if the award suffers from patent illegality, such an award has to be set aside.

However, this ground may be invoked if (a) no reasons are given for an award, (b) the view taken by an arbitrator is an impossible view while construing a contract, (c) an arbitrator decides questions beyond a contract or his terms of reference, and (d) if a perverse finding is arrived at based on no evidence, or overlooking vital evidence, or based on documents taken as evidence without notice of the parties.

Work on possible future Private International Law instruments on legal parentage (incl. legal parentage established as a result

of an international surrogacy arrangement) is making progress

Written by Mayela Celis

The sixth meeting of the Experts' Group on Parentage / Surrogacy took place in late October & early November 2019 in The Hague, the Netherlands, and focused on proposing provisions for developing two HCCH instruments:

- a general private international law instrument (*i.e*. a Convention) on the recognition of foreign judicial decisions on legal parentage; and
- a separate protocol on the recognition of foreign judicial decisions on legal parentage rendered as a result of an international surrogacy arrangement.

As indicated in the HCCH news item, the Experts' Group also discussed the feasibility of making provisions in relation to applicable law rules and public documents.

At the outset, experts underlined "the pressing need for common internationally-agreed solutions to avoid limping legal parentage. The aim of any future instrument would be to provide predictability, certainty and continuity of legal parentage in international situations for all individual concerned, taking into account their rights, the *United Nations Convention on the Rights of the Child* and in particular the best interests of the child."

In relation to the recognition of judgments under the Convention, the Group studied both *indirect grounds of jurisdiction* (such as the child's habitual residence) and *grounds for refusal of recognition* (such as public policy and providing the child with an opportunity to be heard, which seems to me of paramount importance). Due to the fact that in the majority of cases legal parentage is not established by a judgment, other *Private International Law techniques* such as applicable law were also studied. In addition, the presumption of validity of legal parentage recorded in a public instrument issued by a designated competent authority was also considered by the experts. A comprehensive PIL instrument was also discussed.

Furthermore, to facilitate the recognition by operation of law of foreign judgments on legal parentage in international surrogacy arrangements, the Group considered possible criteria (*i.e.* minimum standards or safeguards to protect the rights and welfare of the parties involved, in particular the best interests of the child) that would need to be met. The Group also "discussed the possibility of certification (for example, by way of a model form) to verify that conditions under the Protocol have been met."

Given the controversial nature of international surrogacy arrangements, the Group stressed that *any future protocol on this issue should not be understood as supporting or opposing surrogacy*. The question of course remains whether States would be willing to join such an instrument and whether the international act of consenting to be bound by such an instrument on the international plane would signal a positive or negative approach to surrogacy arrangements by a specific State (and possibly result in a potential imbalance between national and international surrogacy arrangements *i.e.* the former being refused effect and the latter being recognised). The issue of domestic surrogacy arrangements still needs to be explored further by the Group (see para No 26 of the Report).

Moreover, an important feature of the work is the future relationship between the two draft instruments. In this regard, the Group noted that "In principle, the Group favoured an approach whereby States could choose to become a party to both instruments or only one of them. Some Experts proposed that consideration be given to possible mechanisms to serve as a bridge between the two instruments. Experts agreed that, at this time, the Group should continue its work by considering the draft instruments in parallel."

The proposal is that the Group continues its work on these issues and that it reports to the governance body of the Hague Conference (HCCH) in **March 2022** so that this body can make a final decision on whether to proceed with this project.

The Report of the Experts' Group is available here.

The HCCH news item is available here.

The CJEU renders its first decision on the EAPO Regulation – Case C-555/18

Carlos Santaló Goris, Researcher at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, and Ph.D. candidate at the University of Luxembourg, offers a summary and an analysis of the CJEU Case C-555/18, K.H.K. v. B.A.C., E.E.K.

Introduction

On 7 November 2019, the CJEU released the very first decision on Regulation 655/2014 establishing a European Account Preservation Order ("EAPO Regulation"). From the perspective of European civil procedure, this instrument is threefold innovative. It is the first uniform provisional measure; it is also the very first *ex parte* piece of European civil procedure (and reverses the *Denilauer* doctrine); and the first one which, though indirectly, tackles civil enforcement of judicial decisions at European level. This preliminary reference made by a Bulgarian court gave the CJEU the opportunity to clarify certain aspects of the EAPO Regulation.

Facts of the case

The main facts of the case were substantiated before the District Court of Sofia.

A creditor requested a Bulgarian payment order to recover certain debts. Simultaneously the creditor decided to request an EAPO in order to attach the defendants' bank accounts in Sweden.

The payment order could not be served on the debtor because his domicile was unknown. In such cases, Bulgarian law prescribes that the debtor must initiate procedures on the substance of the case. If the creditor does not go ahead with such proceedings, the court would repeal/withdraw the payment order. The

District Court of Sofia informed the creditor about this, urging the initiation of the proceedings. At the same time, the District Court of Sofia referred to the President of the District Court of Sofia for the commencement of separate proceedings. The President of the District Court of Sofia considered that, for the purposes of the EAPO Regulation, it was not necessary to initiate secondary proceedings. On the president's view, the payment order, albeit unenforceable, constituted an authentic instrument in the sense of the EAPO Regulation. The District Court of Sofia considered that the payment order had to enforceable to be considered an authentic instrument.

As a result of these opposing views the District Court of Sofia decided to refer the following questions to the CJEU:

- *Is a payment order for a monetary claim under Article 410 of the Grazhdanski protsesualen kodeks (Bulgarian Civil Procedure Code; GPK) which has not yet acquired the force of res judicata an authentic instrument within the meaning of Article 4(10) of Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014?*
- *If a payment order under Article 410 GPK is not an authentic instrument, must separate proceedings in accordance with Article 5(a) of Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 be initiated by application outside the proceedings under Article 410 GPK?*
- *If a payment order under Article 410 GPK is an authentic instrument, must the court issue its decision within the period laid down in Article 18(1) of Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 if a provision of national law states that periods are suspended during judicial vacations?*

The enforceability of the payment order

The answer to the first question constituted the core of the judgment's reasoning. The Court examined if the "enforceability" was a precondition for the payment order to be considered an authentic instrument. As the Court rightly pointed out, the EAPO Regulation does not clearly state if the acts in question (judgments, court settlements, and authentic instruments) have to be enforceable (para. 39). In order to answer this question, the CJEU followed the reasoning of AG Szpunar

in his Opinion which is based on a teleological, systemic and historical interpretation of the EAPO Regulation (para. 41). In its teleological analysis, the Court stated that a broad understanding of the concept of title could undermine the balance between the claimants' and the defendants' interests (para. 40). Creditors with a title do not have to prove, for instance, the likelihood of success on the substance of the claim (*fumus boni iuris*). Consequently, including creditors with a non-enforceable title in the more lenient regime would allow a larger number of creditors to more "easily" access an EAPO; ultimately favouring the claimant's position (para. 40). Concerning the systemic analysis, the CJEU referred to Article 14(1) of the EAPO Regulation. This provision is the only one in the EAPO Regulation which acknowledges certain rights to creditors with a non-enforceable title. In the Court's view, this was just an exception. For the rest of the cases, in which there is no such distinction between creditors with and without enforceable titles, only the former would be considered to fit the concept of title. Lastly, the historical analysis was based on the Commission Proposal of the EAPO Regulation. Unlike in the final text of the regulation, the proposal made a clear and explicit differentiation between the regimes applicable to creditors with an enforceable title, and those without one. Creditors without an enforceable title were subject to further prerequisites (e.g. satisfaction of the *fumus boni iuris*). A reading of the final text in the light of these *travaux préparatoires* might suggest, on the Court's view, that the current differentiation between creditors is also based on the enforceability of title. On this basis, the CJEU concluded that the title necessarily had to be enforceable, in order for an act to be considered an authentic instrument.

Autonomous definition of "substance of the claim"

In the second question, the Bulgarian court asked if, in the event that the payment order were not an authentic instrument, it would be necessary to initiate separate proceedings on the substance of the claim. Preservation orders can be requested before, during, or after proceedings on the substance of the claim. Those creditors who request a preservation order *ante demandam* have a deadline of "30 days of the date on which [they] lodged the application or within 14 days of the date of the issue of the Order, whichever date is the later" (Article 10(1)) in which to initiate proceedings on the substance of the matter. It is not clear what should be understood by "proceedings on the substance of the claim". Recital 13 of the EAPO Regulation, though not a binding provision, states that this

term covers “any proceedings aimed at obtaining an enforceable title”. In the present case, the creditor obtained a payment order. Nevertheless, such order did not become enforceable because it could not be personally notified to the debtor. The only option left to the creditor was to initiate separate proceedings to pursue the claim. In the event that the creditor did not initiate the proceedings, the payment order would be set aside by the court. In the present case, it was not clear whether the first proceedings by which the creditor obtained a payment order, or the secondary proceedings necessary to maintain the payment order were the proceedings on the substance of the matter. The CJEU relied on the “flexible” interpretation contained in Recital 13. The Court considered the “initial” proceedings in which the creditor obtained a payment order to be proceedings on the substance of the claim. Therefore, for the purposes of the EAPO Regulation, it was not necessary to initiate secondary proceedings.

Time limit to render the decision on the EAPO application

Finally, the CJEU addressed whether a judicial vacation could be considered an “exceptional circumstance” (Article 45), justifying the delivery of the decision on the application of the EAPO outside the due time limit. The first issue concerned the way the question was formulated by the Bulgarian court. The court asks, in the event that the payment order be considered an authentic instrument, whether the time limit of Article 18(1) should be respected. If the payment order is an authentic instrument, the applicable time limit is the one under Article 18(2). This time limit is shorter (five days against the ten days of Article 18(1)), because the court that examines the EAPO applications does not have to evaluate the existence of the *fumus boni iuris* (Article 7(2)). Therefore, it is submitted that Article 18(2) should have been mentioned instead of Article 18(1) in the referring court’s question. Furthermore, taking into account the way in which the question was asked, it would only have had to be answered by the Court in the event that the payment order had been considered an authentic instrument (“If a payment order under (…) is an authentic instrument”). This was not the case, and thus the CJEU was not “obliged” to reply to the question. Despite this, the Court decided to answer. The CJEU considered that judicial vacations were not “exceptional circumstances” in the sense of Article 45. In the Court’s view, an interpretation to the contrary would have opposed the principle of celerity underpinning the EAPO Regulation (para. 55).

Conclusions

From a general perspective, this judgment constitutes a good example of the balances that the CJEU has to make in order to maintain the status quo between the defendant and the claimant. One the hand, ensuring that the EAPO achieves its ultimate objectives in terms of efficiency, on the other, assuring the proper protection of the defendant. This search for an equilibrium between opposing interests also seems to be a general constant in other CJEU decisions concerning European uniform proceedings, especially those regarding the European Payment Order.

Observing the Court's reasoning in detail, we can clearly distinguish these two contrasting approaches. On the other hand, the Court adopts a pro-defendant approach regarding the first question, and a pro-claimant position on the one hand in its approach to the second and third questions.

In the first question, the Court adopted a pro-defendant approach. As the CJEU rightly remarks, the wording employed was unclear in asserting whether the title has to be enforceable or not. Anecdotally, only the Spanish version of the EAPO Regulation mentions that the authentic instrument has to be enforceable. As I already mentioned in my commentary on the AG Opinion in this case, this might be a mistranslation extracted from the Spanish version of Regulation 805/2004 establishing a European Enforcement Order Regulation. From the defendant's perspective, the EAPO Regulation is relatively aggressive. Since the preservation order is granted *ex parte*, defendants can only react once it is already effective. This puts a lot of pressure on the defendants, especially if they are a business requiring liquidity that might prefer to pay than to apply for a remedy and await to the proceedings on the substance of the case. It is for that reason that it was necessary to establish certain "barriers" to impede potential abuses: the preliminary prerequisites (Article 7). In those cases in which the creditor has already an enforceable title, the EAPO is merely the prelude to an incipient enforcement. However, if there is not such a title, or if the title is not yet enforceable, in that it is for instance a payment order, then the issuance of a preservation order must be the object of further prerequisites, since it is not clear if the right that the creditor claims exists. It is for that reason that the prima facie examination of the application includes an evaluation of the likelihood of success on the substance of the claim, and the provision of a security, which might deter abusive claimants from applying for an EAPO. Opening the most lenient regime to those creditors with a non-enforceable title would tip the

balance in favour of the creditors. We might think about how the decision affects creditors who have obtained a title (e.g. judicial decisions) that is not yet enforceable. The existence of a title would serve as evidence of the likelihood of success on the substance of the claim. Regarding the security, judges could except creditors without a title from providing the security "attending to the circumstances of the case" (Article 12(2)). Having a non-enforceable title might be also one of those circumstances. Only, judges might require a later deadline to deliver the decision on the preservation order (Article 10(1)). Therefore, materially, the impact of the decision might not harm the status of creditors with unenforceable titles as much.

For the two remaining (and more technical) questions, the Court stands on the creditors' side. In the second question, the CJEU followed the guidance offered by the Preamble. In this particular case, Recital 13 entails a broad interpretation of "substance of the claim", encompassing summary proceedings. Despite the fact that the recitals of the Preamble are not binding, the Court relied on them. Behind this decision, we might find the CJEU's acknowledgement of the popularity of such proceedings at the domestic level, especially in debt recovery claims, including in regards to the European Payment Order. A decision to the contrary might have discouraged creditors from using the EAPO Regulation. Concerning the third question, the restrictive understanding of "exceptional circumstances" is not surprising. The CJEU usually tends to adopt a restrictive approach to any "exceptions" foreseen in European legislative provisions, which avoids giving domestic judges leeway to abuse them, which would ultimately undermine the objectives of the Regulation.

There are still many *non dites* aspects for which the CJEU might have something to say. Recent domestic case law on the EAPO Regulation is good proof of that. Nonetheless, domestic courts often prefer to find out themselves the solutions for such inquiries, adopting their own interpretive solutions, largely mirroring their national procedural traditions. Hopefully, in the coming future, a court might instead opt for a preliminary reference.

Ensuring quality of ODR platforms: a new (voluntary) certification scheme in France

By Alexandre Biard, Erasmus University Rotterdam (ERC project – Building EU Civil Justice)

In a previous post published in November 2018, we presented policy discussions that were (at that time) going on in France, and aimed at introducing a new regulatory framework for ODR platforms. As also explained in an article published in September 2019 (in French), ODR tends to become a new market in France with a multiplication of players offering services of diverging qualities. Today this market is in need of regulation to ensure the quality of the services provided, and to foster trust among its users.

The Act in question was finally passed on 23 March 2019. Rules on ODR certification were recently detailed in a decree published on 27 October 2019. They establish a new voluntary certification scheme for ODR platforms (after discussions, the scheme was kept non-compulsory). ODR platforms wishing to obtain certification must bring evidence that (among other things) they comply with data protection rules and confidentiality, that they operate in an independent and impartial manner, or that the procedures they used are fair and efficient. ODR platforms will be certified by one of the COFRAC-accredited bodies (*Comité français d'accréditation*). In practice, this means that contrary to what currently exists for the certification of consumer ADR bodies in France for which a single authority is competent (Commission d'Evaluation et de Contrôle de la Médiation de la Consommation) several certification bodies will operate in parallel for ODR platforms (however a certification request can only be directed at one certification body, and not to multiple). Together, certification bodies will be in charge of certifying ODR platforms and will supervise their activities on an on-going basis. Certification is given for three years (renewable). Certified platforms are allowed to display a logo on their websites (practicalities still need to be

further detailed by the Ministry of Justice).

Accredited bodies will have to submit annual reports to the Ministry of Justice in which they will have to specify the number of certifications granted (or withdrew), their surveillance activities, and the systemic problems they faced or identified. The updated list of ODR platforms complying with the certification criteria will be available on the website www.justice.fr.

The future will tell whether ODR platforms are incentivized to seek certification (as it is expected today) or whether they will prefer to keep their regulatory freedom instead. More generally, one will see whether this step can indeed foster trust and ensure high-quality services within the emerging ODR market.